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THE ROLE OF ENERGY LAWS IN TACKLING CLIMATE CHANGE

Ugwuanyi Malachy[1]

It is time for a sustainable energy policy and law which puts consumer, the environment, humans, health and peace first.[2]

The major causes of climate change remain the anthropogenic activities of man[3]. The activities include inefficient energy use, like gas flaring and high leveled liberation of carbon through combustion and deforestation. To control this escalation, energy laws are needed, to streamline government policies, bring in element of compulsion and induce resort to better energy options.

Energy laws are expected to deal with this problem of climate change by encouraging peoples access to clean energy, discouraging the flaring of associated gas, curbing oil pollution or spillage and fostering the development of renewable energy.

1- ENERGY ACCESS

Access to clean energy is arguably, one of the major challenges facing the world today. Lack of access to energy affects development, undermines health and encourages resorts to fossil fuel.

Energy access involves the provision of reliable, affordable and clean energy to all persons, irrespective of social class, and geographical location.[4] Provision of energy access is an important weapon for dealing with climate change. It has been noted that geographical areas

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Email: ugwuanyimalachy@gmail.com
[2] Dennis Kucinich on Alternative Energy's
Available at: http://www.notable-quotes.com/a/alternative_energy_quotes.html (*Last accessed on September 26 2014*).
[3] "How do human Activities contribute to climate change"
Available at: http://oceanservice.noaa.gov/education/pd/climate/factsheets/howhuman.pdf (*Last accessed on September 26 2014*).
[4] Aviles, Luis Anibal, Electric Energy Access in European Law: A Human Right? (February 21, 2012). *Columbia Journal of European Law*, Vol. 19, 2012.
Available at SSRN: http://ssrn.com/abstract=2008887 or http://dx.doi.org/10.2139/ssrn.2008887

with low access to energy, engage in arbitrary acts of deforestation, bush burning and man-made desertification.

The lack of energy access has a name in developing countries. It is called energy poverty. Energy poverty arises when considerable numbers of person, who are below the poverty line, spend their little resources searching for energy source to meet their basic need[5]. The reality here is that in the quest for energy source, they usually end up accessing the cheapest and most affordable fossil source, which may be wood, coal or traditional biomass.[6] These energy sources are environmentally hazardous.

In essence, there is a need for energy law across the world, to make provision for energy access to all, be it the rich or poor, specifically the transmission of electricity to many areas. It appears that many countries are now molding their laws, to cater for energy access.

- Section 5 of the south African National Energy Act 2008, Provides for such inter alia. "The minister must adopt measures that provide for the universal access to appropriate forms of energy or energy services for all the people of the republic at affordable prices.[7]

- Arguably, the three main ways of encouraging energy access are rural electrification, liberalization of the energy market and right to energy services. The first two is going in Nigeria, except the latter.

- Section 8 of Nigerian Electric Power Reform Act, 2005, made provisions for rural electrification fund, which will cater for rural electrification programmes. The fund will be fed from fines, surplus and donations of the private electricity operators[8]. The much earlier United States of America's Rural Electrification. Act of 1936 did make provisions for direct federal loans for the provision of energy access in form of electricity to many parts of the federation[9].

In all, if energy laws are not mounded to direct energy to rural areas, the issue of climate change will only get worse. The logic is that availability of energy source, coupled with sustainability is far better than allowing liberation of carbon from dark fumed kitchens and cleared thick forests.

Energy consumers in areas devoid of access to basic energy, like electricity, must have access to such. If they are given better energy options, then they will in turn spare the environment.

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[5] Wikipedia, "Energy Poverty"
Available at: http://en.wikipedia.org/wiki/Energy_poverty (*Last accessed on September 25 2014*).
[6] M.S Agba, "Energy Poverty and the Leadership Question in Nigeria". *Jounal of Public Administration and policy research* vol. 3(2001) pp. 48-51.
[7] Full text of the Act available at: http://www.energy.gov.za/files/policies/NationalEnergyAct_34of2008.pdf (*Last accessed on September 25 2014*).
[8] Law of the Federation of Nigeria, Cap E7 2004
[9] Wikipedia "Rural Electrification Act" Available at: http://en.wikipedia.org/wiki/Rural_Electrification_Act (*Last accessed on September 25 2014*).

2- CURBING GAS FLARING

Gas flaring refers to the burning of natural gas that comes with crude oil. It is the intentional act of burning excess natural gas instead of using flaring or incinerator stack multinational oil companies all over the world flare, over 3.3 trillion cubic feet of natural gas each year[10]. Gas flaring is a cheaper way of disposing off associated or excess gas but it destroys the environment, while contributing heavily to climate change flaring realizes greenhouse gases for instance methane nitrogen dioxide, Sulphur dioxide, benzene and dioxin.

Around the world, ten countries account for 70% of all the flared gas. The top ten contributors include Russia (20 percent), Nigeria (11 percent), Iran (seven percent), Algeria (5 percent), Angola, Kazakhstan, Libya (3 percent), and Venezuela (2 percent). It is widely acknowledged that flaring and venting of natural gas is an abnormality turned normal's due to frequent use in many countries. From the list of top gas flaring nations, it is obvious that Nigeria sits second and most countries there in are developing. Gas flaring is a continuous activity in Nigeria, because of the nonchalance of government and lack of political will to implement laws. The World Bank attempts to sum up the gas flaring phenomena in Nigeria with a statement this way. "The most striking example of environmental neglect has been in the oil sector, where natural gas flaring has contributed more emissions of greenhouse gases than all other sources in sub-Saharan Africa combined"[11].

The hydra head of gas flaring has remained a persistent evil, and little efforts to address it in Nigeria have proven futile. This futility may be better understood from the important case of *Jonas Gbemre v shell Petroleum Development Company*.[12]

The Appellant and his community, Iwherevan in Delta State, having come under the negative ripples or effect of gas flaring in the community by Shell , who are the respondents, sought relief through the federal high court, praying the grant of the following. Inter alia

A. A declaration that the right to life and dignity of human person also covers right to poison, pollution free and health environment.

B. That gas flaring by the respondent is a violation of the fundamental human rights.

C. That the provisions of the Associated Gas Reinjection Act, under which gas flaring may be allowed is inconsistent with right to life and dignity of human person.

D. That the court should grant them perpetual injection, restraining further gas flaring in their Community.

[10] "Energy Access». Available at http://www.access-energy.com/ae_incineration.html (*Last accessed on September 25 2014*).
[11] Worlds Resources Institute. Available at http://www.wri.org/ (*Last accessed on September 25 2014*).
[12] Nigeria: *Gbemre* v *Shell Petroleum Development Company Nigeria Limited and Others* (2005) AHRLR 151 (NgHC 2005).

After the submissions of the two parties, the court gave its judgment. Nwokebia- Justice of the court of Appeal (J.C.A) held that the respondents should stop gas flaring in the appellant's community. Again that the attorney general should set into motion, the process of amending the Associated gas Reinjection Act to bring it to conformity with the constitution.

This judgment is the first major attempt by the court in Nigeria, to deal with climate change, by prohibiting gas flaring. All attempts by the plaintiff to enforce this particular judgment proved abortive. The funny reality is that since 2005, till present the decision has not been respected. Gas flaring keeps rocking the skylines of the community in question, and other surrounding communities in Nigeria. It is arguably true, that the government through the Associated Gas Reinjection Act encourages gas flaring. The act remains a Greek gift. It pretends to prohibit has flaring yet it permits it by providing the option of companies, paying paltry fines as a leeway for evading gas reinjection.

Also, the issue of zero gas flaring in Nigeria is not yet a reality. The government keeps shifting the flare out date to almost impossibility. Flare out date was first fixes in 1974 to 1979, it failed. It was moved to 1984, the government of Olesegun Obasanjo extended it to 2004, and it never worked. Later the year 2006 was preferred to end gas flaring; once again it never came to light. The year 2008 was quickly agreed, surprisingly it persisted. The new date for ending gas flaring in Nigeria is December 2012. Organizations of international repute, like friends of the Earth international expresses doubt on the possibility of reaching zero gas flaring by 2012 in Nigeria. From an examination of the situation, it appears that ideas in Nigeria are always in transit, they never arrive at the bus stop of implementation it is submitted, that instead of extending oil exploration to the Chad basin, Nigeria must first enthrone efficiency through its energy laws by achieving zero gas flaring. They will be a decisive step towards ameliorating the effect of global warming.

3- CURBING OIL POLLUTION/SPILLAGE

Oil pollution or spill involves the release of liquid hydro carbon into the environment, especially marine areas, due to human activity.

Article 1(4) of the law of the sea convection defines pollution as

"*The introduction by man directly or indirectly of substances or energy into the marine environment including estuaries, which results or is likely to result in such deleterious affects as harm to human health, hindrance to marine activities including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities*".[13]

[13] Full Text of the Convocation. Available at http://www.un.org/depts/los/convention_agreements/texts/unclos/part1.htm (*Last accessed on September 25 2014*).

Oil pollution can generally come from tankers, offshore platforms drilling rigs and spill during transport of refined petroleum.

The Ocean and other water bodies represent veritable resource for the sustenance of mankind. The seas and internal waters are sources of hydro carbons from which are petroleum. The use of the oceans and other water bodies by the oil industry for production and transportation, present grave environmental challenge, owing to the risk of pollution from petroleum spill cannot be over emphasized. Instances of this disaster range from *The Torrey Canyon (1967), Argo mere chant (1976), Amalo Cadiz (1978) Exxon Vaulted (1989), The Sea Empress (1966) to the recent Shell/British Petroleum spill in the Gulf of Mexico*.

All these fuel the anthropogenic contribution of man to the pervasive phenomena of climate change. There is a need for energy laws to foster prevention of pollution and serious compensation for victims.

Another point is that, it is easier and better to prevent oil pollution than to manage the spillage itself. From seismic surveys, drilling of wells to full scale production, precaution and adoption of eco-friendly methods should be encouraged. It is a regular practice for multinational, Oil companies to hold and to the defense of Act of God, in the face of oil pollution, but some principles may be used to trap them. One of such is the polluter pays principle, enshrined in the Rio Declaration, as principle 16.

Also, the principle of good neighborliness enshrined in Article 74 of the United Nation Charter can also apply.

Article 28 of the General convention on the law of the sea, mandates states to "take legislative measures to ensure that the owners of a pipeline beneath the high sea bear the cost of the destruction of other pipeline in Nigeria, the energy laws made provisions for prevention of pollution by oil producers, operators and transporters. The issue with the laws is that it has more defenses than the punishment, for defaulting persons or companies.

In all, the oceans and internal waters as common heritage of mankind must be Protected from oil pollution, energy laws must visit such with strict liability, because the issue of climate change is a race against time. If nothing is done, the pollution situation will typify the doomsday adage, between the devil and the deep blue sea.

4- ENERGY SECURITY

There is an old saying that "the stone age did not end because the world ran out of stones and the oil age will not end because the world ran out of oil". This is actually an obvious fact. The era of dependence on fossil fuels will surely come to an end, not because of scarcity of reserves rather, it is based on recent challenges of climate change. The essential question on energy use is now how well? And how long? How to arrive at a post carbon world, without

losing or reducing sustainable energy supply. The need for energy security cannot be over emphasized. Energy security encompasses conservation of sources, reduction in fossil use and sustainability in production. One major way of achieving this is through the development of renewable energy.

4.1-RENEWABLE/ALTERNATIVE ENERGY DEVELOPMENT

In a world, where fossil feedstock hold sway climate change cannot be addressed, without renewable energy. There is a need to reduce, rediscover, reintegrate. Natural resources, backed by reorientation of the populace. The problem is that clean energy technologies are new to consumers and are rivaled by old, cheaper but inefficient ones. The electricity and transport sectors are the highest dependants on fossil fuel. We shall briefly attempt an examination of the steps to renewable energy world.

The first step in renewable energy development is reduction in dependence on fossil fuel. This can be achieved by providing energy access to people, taxing heavy users of fossils, and discouraging deforestation. This first stage is important, in other to reduce such habit.

Secondly, states must legally encourage the rediscovery of sustainable energy source. This rediscovery must be done with due consideration of the environment and comparative implications of those renewable sources. Presently, solar, wind, hydro, biomass, nuclear are in use. The implication of a particular renewable energy source must be carefully weighed. A good example is Biofuel, which is a threat to food availability and security. The United Nations Special Rapporteur Right to food appears to agree as he opined that

"If there were not conscious efforts to ensure that producing befouls does not bring greater hunger in its wave, then the poor and hungry will be the victims of these new fuels. For Fidel Castro, the case is equally clear; it is a sinister idea to transform food into fuel"[14]

Thirdly, another step towards renewable energy development is reintegration. This involves using renewable energy sources alongside fossil fuels. At first, it will be mixed but at the long run, converted to full scale renewable feedstock. This involves using wind and hydro power to generate electricity together, using solar energy at night in homes, with electricity for heavy appliances and encouraging public transportation with electric cars presently, the use of mortar filled plastic bottles for house building in Kano state is a good example.

[14] Olivier De Schutter, "Agroecology and the right to food".
Available at: http://www.srfood.org/images/stories/pdf/officialreports/20110308_a-hrc-16-49_agroecology_en.pdf (*Last accessed on September 25 2014*).

Finally, the need for energy reorientation cannot be over emphasized energy law will now reflect redirection of consumer choices and general education, precisely, orientation on the latest innovation, its uses and applicability. This should apply to both developed and developing countries. The problem with developed nations is addiction to fossil fuels and nonchalance while that of the developing remains poverty and ignorance. Energy laws are expected to create a platform for subsidizing the price of solar panels and other Eco friendly appliances in a bid to tilt consumer behavior to green and better choices.

5 CASE LAW ON CLIMATE CHANGE AND ENERGY

Mitigation, adaptation and liability for climate change cannot firmly stand, without climate justice or litigation. Climate justice is a confluence of energy and environmental laws. Development of case law in these areas has been slow but steady. The problem with climate change and energy litigation is twofold. First, states are reluctant to sacrifice economic incentives on the altar of climate justice. Secondly; the judiciary is yet to fully grasp the technicalities and science of climate change and energy. This little between a judge and a state underscores council this problem. This verbal exchange came up in the case of *Massachusetts v Environmental protection Agency (EPA)*[15]

Justice Scalia - I always thought air pollutant was something different from a stratospheric pollutant and yet you claim it endangers health.

Counsel Mickey - Respectfully, your honor, it is not the stratosphere, it's the troposphere.

Justice Scalia - Troposphere, whatever, I told you before I am not a scientist.

Justice Scalia – That is why I don't want to deal with global warming, to tell you the truth. The fact of the case goes this way. Twelve states several cities and non-governmental organizations. Filed action against the United State of Americas E.P.A, challenging the agency denial of its petition on regulation of greenhouse gas emissions from new motor vehicles under the **clean air Act.** The Supreme Court held for authority to regulate emissions and that the agency must state its reason for action or inaction consequently. The E.P.A published a finding, that greenhouse gases in the atmosphere endanger health.

In *Friends of the Earth v Watson*[16] two non-governmental organizations and the city of Boulder, Colorado sued the overseas private investment corporation and Export Import Bank, contending that the company's failure to conduct an environmental review of the impact of their funding of fossil fuel projects, violates the National Environmental Policy Act. The court held inter Alia per Jeffrey (Justice) that since climate changes causes sufficient injury to persons, then it can be a locus stand for legal remedy.

[15] 549 U.S 497 (2007)
[16] 35 ELR 20179 (2005)

In *State of Connecticut v American Electric power*[17]

The state of New York and other American states sued five major power companies for the public nuisance of global warming, under common law. The case at first instance was dismissed by the district court in 2005, on grounds of locus stand. It was brought back to action, by the second circuit court that held that global warming can come under nuisance. The Barrack Obama administration filed a brief, urging the Supreme Court to dismiss the case as a mere frivolity. The Supreme Court tied four to four (4-4) on the decision to dismiss the case; therefore, the decision of the second circuit court appears to still hold water.

In *State of California v General motors* [18]

The state of California filed an action against six automobile manufactures for public nuisance. They contended that the greenhouse gas emission associated with the defendants industries is harming California's, environment health ecosystem and general well being. They sought monetary damages and declaratory judgment holding each defendant, jointly and severally liable for future damages to occur. The distend court threw out the case, on the grounds that it raised a non-justifiability question of political doctrine. Presently the case is on appeal.

In *Comer v National Mutual Insurance*[19]

Fourteen people sued a group of energy and refining companies for damages sustained by them and their properties as a result of Hurricane Katrina. They argued that greenhouse gas emission of the defendants worsened the damage, by intensifying the hurricane. The court simply dismissed the case on ground of political question doctrine.

Another case is that of green peace *New Zealand V Northland Regional Council* [20]

This involved the application by a power company to a regional council to develop a coal fired facility. The High Court held that under the Resource Management Act of1991, a consent authority. Could take into account whether the proposed project would enable a reduction in greenhouse emissions, by the use and development of renewable energy, in determining whether to grant such application,

Furthermore in *Genesis power V francolin District council*[21]. The New Zealand environment court allowed an appeal brought by the Energy Efficiency and Conservation Authority, against the refusal for permission to build a wind farm, under The Resource Management Act of 1999. The authority cited reduction of emissions of greenhouse gases and climate change; as the reason for the project, the court endorsed the approval of the project. It was subsequently approved.

[17] 265, 273 S.D.N.Y (2005)
[18] 406 F. Supp 2d 265 (2012)
[19] 33121 U.S Dist. (2006)
[20] H.C.A.K C.I.V 494000617 (2006)
[21] N.Z.R.M.A. 541 (2005)

In *Australian Conservation V Latrobe City*[22], The Hazelwood coal fired station; one of the Australian largest producers of greenhouse gas emissions, affined to develop an alternative coal field, Environmental groups sued them in the Victorian civil and Administrative Tribunal Contending that a reviewing panels failure to consider potential greenhouse gas emissions from the project, is a violation of The Victorian Planning And Environmental Act of 1987. The tribunal held that the panel should consider the environmental impacts of greenhouse gas emissions associated with the project.

In Gray V Minister for Planning[23], The court frowned at the defendants failure to take into account; the impacts of greenhouse gas emitted by its project; holding that it is a gross violation of the precautionary principle and intergovernmental equity.

Conclusively, from a conflation of the above cases, it appears that the judiciary is ready to throw out any shaky case on climate change and energy use, using technicalities, locus stand and non-justifiability, but where there is existing energy and environmental law; the court has no other option but to follow the provisions.

In all, the urgency of climate change requires legislative responsiveness, judicial activism and executive pragmatism.

[22] 140 L.C.E.R.A. 100 (2004)
[23] 720 N.S.W.L.E.C. (2006)