

EXAMINATION OF THE LEGAL FRAMEWORK FOR THE PROTECTION OF THE RIGHT TO CLEAN AIR IN NIGERIA

Dairo Anjolaoluwa Lauretta*

Abstract

Despite the importance of clean air and the dependence of the right to life on clean air, Nigeria has failed to enact adequate laws to prevent air pollution. This paper aims to discuss the gaps in the laws which prevent adequate protection of clean air in Nigeria. Therefore, the paper will help policymakers with knowledge of the areas that need reform in the discussed laws. The paper adopted doctrinal approach through the use of primary sources such as statutes, case laws and opinion of scholars as secondary source among others. The paper found that the right to clean air is explicitly contained in a few subsidiary legislations in Nigeria. Nonetheless, this paper concludes that there is a paramount need to upgrade the status of environmental rights in the Nigerian Constitution if the right to clean air is to be effectively protected.

Keywords: Air, Clean air, right to clean air, environmental rights

1.0 Introduction

Simply put, the word "right" comes from the Latin word "rectus, which means that to which a person has a just and valid claim, whether it be land, a thing, or the privilege of doing or saying something. It could also refer to the entitlement of a person or the special title one has to a good.¹ The right to clean air is an important aspect of the right to a healthy environment. Every person has the right to breathe clean air and governments are obliged to establish strategies to guarantee it.

* LL.B (Hons) [IBADAN] [1st Class]. Email: joladairo@gmail.com

¹ Awolowo, O., 2017. Environmental Rights and Sustainable Development in Nigeria. *OIDA International Journal of Sustainable Development* 10.6: 17-24.

Furthermore, the right to clean air is universally recognised as a part of human rights. For years, it has been explicitly and implicitly recognized in international conventions, treaties as well as the constitutions and legislations of several countries. For example, the French Environmental Code recognizes the “right of all to breathe air which is not harmful to their health”.²

Although, the right to clean air does not exist as a separate self-standing right that is constitutionally guaranteed in Nigeria, it can be implied from section 20 of the Constitution of the Federal Republic of Nigeria, 1999 which provides that: “The State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.”³ It can also be implied from other legislations regulating air quality and controlling pollution generally.⁴ Hence, this right is only currently safeguarded in Nigeria through laws that safeguard air quality or prevent air pollution.

Also, the right to clean air is prima facie unenforceable in Nigeria due to the general unenforceability of environmental rights in Nigeria. This is unlike some other countries, such as South Africa, where the right to a healthy environment is articulated in the same chapter as other fundamental human rights, thereby making environmental rights, which includes the right to clean air, an enforceable right. The various laws safeguarding clean air, including federal laws, subsidiary legislations and international conventions to which Nigeria is a party are examined in this paper.

2.0. Legal Framework for Clean Protection in Nigeria

² The International Union for Conservation of Nature Website. Yann Aguila. Oct. 2021. *The right to a healthy environment*. Retrieved Nov.18, 2023 from <https://www.iucn.org/news/world-commission-environmental-law/202110/right-a-healthy-environment>.

³ Constitution of the Federal Republic of Nigeria, 1999.

⁴ Fagbemi, S.A. 2020. Right to clean And unpolluted air In Nigeria. *AJLHR* 4.1:61-71 https://www.academia.edu/89602758/Right_to_Clean_and_Unpolluted_Air_in_Nigeria. 3 November 2023

2.1. The Constitution of the Federal Republic of Nigeria, 1999⁵

Similar to most constitutions worldwide, Nigeria's Constitution is the grund norm and the principal document throughout the Country.⁶ The Supreme Court in *Abacha v Fawehinmi* held that the Constitution is the supreme law of the land, it is the supreme law and its supremacy has never been called into question in ordinary circumstances.⁷ The right to clean air can be inferred from this provision because the right to clean air is also an environmental right.⁸

This provision shows that the Nigerian government recognizes a need to safeguard and improve the environment to make it worth living for the Nigerian people. However, since it falls within the rights provided for in Chapter II of the Constitution which are non-justiciable, environmental rights are not enforceable in Nigeria.⁹ Therefore, the right to clean air, being an environmental right, is also non-justiciable in Nigeria. The foregoing also implies that the problem is not the absence of a right to clean air under the Nigerian Constitution as this right fall within the ambit of environmental rights which is provided in the constitution, but the problem is that of non-justiciability.¹⁰

Due to this barrier to environmental justice under the Nigerian constitution, Nigerian residents have resorted to securing their environmental rights, including the right to clean air by invoking fundamental human rights, particularly the right to life since air pollution is a threat to human life. These fundamental human rights are contained in chapter IV of the 1999 Constitution of the Federal Republic

⁵ Constitution of the Federal Republic of Nigeria, 1999.

⁶Olu-David, O., and Ole, N.C. 2023. Justiciability of environmental rights: whither the Nigerian law? *African Journal of Law, Ethics and Education* 3.1: 50-74.

⁷ (2001) SWLR (pt. 168) 909

⁸ Ezeanokwasa, J.O. 2018. Legal regulations on air pollution control and industrialization in Nigeria. *Unizik Journal of Business* 1.1: 103-118.

⁹ s 6 (6) (c) of the Constitution of the Federal Republic of Nigeria,1999.

¹⁰ Kehinde, A O. 2021. Right to a Clean Environment: the Nigerian Perspective. *KIU Interdisciplinary Journal of Humanities and Social Sciences* 2.2: 154-159.

of Nigeria and enforceable in the Nigerian Courts of law.¹¹ This is resort to fundamental human rights can be described as the human rights-based approach to attaining environmental protection. It allows litigants to argue that the existing legal framework on fundamental human rights can be interpreted to include environmental protection considering that these fundamental human rights cannot be achieved without environmental protection.¹²

This human rights-based approach was recognized in the case of *Jonah Gbemre v. Shell Petroleum and Development Company Ltd*¹³ where the court Court declared gas flaring as illegal and a breach of fundamental human rights.¹⁴ Gas flaring is one of the major causes of air pollution in Nigeria.¹⁵ The Court established that the Acha community and all people living around and beside the Ineh and Aku streams who depend on the two rivers as their source of drinking water, fishing, and other economic activities have a right to a general environment favourable to their development. The court further held that the State and the statutory Corporation (NNPC) owe the community a duty to protect them against noxious and toxicant pollutants and to improve and safeguard the water they drink, the air they breathe among other rights.¹⁶

Another alternative which has been utilized in Nigeria to circumvent the non-justiciability of environmental rights under the Nigerian Constitution is the tort of nuisance under the common law of torts.¹⁷ In legal parlance, nuisance may be described as any source of

¹¹Malemi, E. 2012. Administrative law. 4th ed. Princeton Publishing Co. Lagos.

¹²Olu-David, O and Ole, N C. 2023. Justiciability of environmental rights: whither the Nigerian law? *African Journal of Law, Ethics and Education* 3.1: 50-74.

¹³ [2005] No. FHC/B/CS/53/05

¹⁴Olawuyi, D S. 2015. The principles of Nigerian environmental law. 2nd ed. Ado-Ekiti: Afe Babalola University Press.

¹⁵Olu-David, O and Ole, N C. 2023. Justiciability of Environmental Rights: whither the Nigerian Law? *African Journal of Law, Ethics and Education* 3.1: 50-74.

¹⁶Per EKO, J.S.C. at page 598, paras D- E in *Center for Oil Pollution Watch v Nigerian National Petroleum Corporation* (2019) 5 NWLR (PT. 1666) 518.

¹⁷ Iroaganachi, N. 2012. Environmental nuisance laws in Nigeria: making them effective for sustainable development. *ATBU Journal of Environmental Technology* 5.1: 117-128.

inconvenience or annoyance which is actionable and it includes the emission of noxious fumes from factories, excessive smell, excessive noise and interference with the easement of way.¹⁸

Nuisance may occur in the form of private nuisance or public nuisance. Thus, it can be rightly opined that the right to clean air under the tort of private nuisance is perceived as a property right. In other words, it is a right to protect an individual owner from substantial interference with the enjoyment of his environment.

The case of *Interland Transport Ltd v Adediran and Akintoye*¹⁹ is illustrative. In that case, the court held that being a case of public nuisance, an action cannot be maintained in a representative capacity because there was no evidence of injuries sustained by each member of the association.²⁰

Furthermore, the position of the law changed in the recent case of *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation*²¹ where the supreme court held that private individuals such as non-governmental organizations, pressure groups, and public-spirited individuals can now bring representative actions to protect the environmental rights of individuals in nuisance without showing that they suffered any damage. The Supreme Court departure from the locus standi rule in cases of public interest improves access to justice for the poor when their rights are infringed and for the protection of the public affected.²²

Unlike Nigeria, other countries have gone a step further to not only include environmental rights in their constitution, but have also

¹⁸ Kodilinye, G. & Aluko, O. 2018. Nuisance. *The Nigerian Law of Torts*. 3rd ed, Ibadan: Spectrum Law Publishing. Chapter 5: 80-109.

¹⁹ (1986) 2 NWLR Vol. 1, 146 at 178

²⁰ Iroaganachi, N. 2012. Environmental nuisance laws in Nigeria: making them effective for sustainable development. *ATBU Journal of Environmental Technology* 5.1: 117-128.

²¹ (2019) 5 NWLR (PT. 1666) 518

²² Ibid

amended their constitution to make such rights enforceable in the law courts. Examples of such countries include South Africa, and Ethiopia to name a few. Under the Ethiopian and South African Constitution, environmental protection is a human right which is enforceable in the court of law. This is provided for in Article 44(1) of the Constitution of the Federal Republic of Ethiopia and Section 24 of the 1996 Constitution of South Africa respectively.²³

2.2. The National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007²⁴

The National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007 (hereinafter referred to as the NESREA Act) replaced the Federal Environmental Protection Agency Act (FEPA), 1988.²⁵

Section 27 of the NESREA Act prohibits the discharge of hazardous substances in harmful quantities into the air of Nigeria, without lawful authority. A violation of this section attracts a fine not exceeding one million naira or not more than 5 years imprisonment. If the offender is a legal entity however, the offender shall be liable to a fine not exceeding one million naira and an additional fine of fifty thousand naira for every day the offence subsists.²⁶

Furthermore, section 20 of the NESREA Act provides for air quality and atmospheric protection. However, it does not directly define specific regulations regarding air pollution. Rather, it lays a foundation by granting the National Environmental Standards and Regulations

²³ Ezeanokwasa, J.O. 2018. Legal regulations on air pollution control and industrialization in Nigeria. *Unizik Journal of Business* 1.1: 103-118.

²⁴ The National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007.

²⁵Fagbemi, S.A. 2020. Right to clean and unpolluted air In Nigeria. *AJLHR* 4.1:61-7. Retrieved Nov. 14, 2023, from https://www.academia.edu/89602758/Right_to_Clean_and_Unpolluted_Air_in_Nigeria

²⁶ s 27(1), (2) and (3) of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007.

Enforcement Agency (hereafter referred to as ‘the Agency’) the power to make regulations concerning air quality and atmospheric pollution. Section 20 (1) of the NESREA Act provides that the Agency may make regulations which set standards to protect and enhance the quality of Nigeria’s air resources to promote public health or welfare including: minimum essential air quality standards among others. Pursuant to this section 20(1), the NESREA enacted the National Environmental (Air Quality Control) Regulations, 2021 to address air quality in Nigeria.

Section 20(3) provides that a person who violates the regulations made according to this subsection is liable to a various form of penalties Thus, we opine that the NESREA Act 2007 paved the way for detailed regulations on atmospheric pollution in Nigeria by establishing the NESREA and empowering it to create detailed air quality control regulations.

The severe lacuna of this law is that despite giving the Agency ample powers to control environmental pollution, including air pollution, section 7 of this Act excludes the petroleum industry from the scope of these powers.²⁷ The Petroleum industry is a great contributor to air pollution as it engages in gas flaring. Therefore, there is a need for an amendment that extends these remarkable provisions of the NESREA Act to cover pollution caused by the oil and gas sector, which includes air pollution. Such amendment should also reflect the sector’s current economic reality while stipulating maximum penalties for defaulters.²⁸

Section 8(f) of the NESREA Act empowers the NESREA to collaborate with relevant judicial authorities to establish mobile courts in order to expeditiously dispense cases of breach of environmental regulations. This provision aims to give victims of environmental harm, including air pollution better access to justice for the harm suffered. Although, section 8(f) of the NESREA Act does not expressly state that the public

²⁷Olujobi, OJ., Olarinde, ES. & Yebisi, TE. 2022. The conundrums of Illicit Crude oil refineries in Nigeria and its debilitating effects on Nigeria’s Economy: A Legal Approach. *Energies* 15.6197: 2-15.

²⁸ Ibid. Olujobi, OJ., Olarinde, E.S. & Yebisi, TE

has access to justice in the court of law in cases of environmental violations, the import of this subsection (f) is that victims of environmental harm can still seek redress and obtain justice if the NESREA effectively collaborates with the judiciary to establish mobile courts which will expeditiously dispense cases of violation of environmental regulations.²⁹ However, section 8(f) provides that the establishment of these mobile courts is subject to the provisions of the 1999 constitution of Nigeria and the constitution states that environmental issues are non-justiciable.

Also, section 6(1) of the 1999 Constitution provides that the judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation. Section 6(2)(5) expressly lists the courts to which these judicial powers relates. Since, section 6(6) (c) of the 1999 Constitution further provides that the judicial powers conferred on the listed courts shall not extend to the chapter II rights and the mobile courts adjudicating environmental issues are not one of the listed courts, then it can be rightly submitted that this section 8(f) does not contradict the provisions of the 1999 Constitution.

The NESREA Act was amended in November 2018, by the National Assembly to further empower the National Environmental Standards and Regulations Enforcement Agency (the NESREA) in the protection and development of the environment. Specifically, the Amendment Act seeks to amend the NESREA Act to review the conditions of appointment of some council members, increase penalties and permit the search of premises without warrant and other matters. For example, Section 20 (3) of the NESREA Act prescribes various penalties for contravention of this provision³⁰

²⁹ Enebeli, V.N., & Njoku, D.C. 2023. The legal framework of environmental impact governance in Nigeria. *African Journal of Law & Criminology (AJLC)* 13.1: 135-163.

³⁰ s 7 of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Amendment) Act, 2018

However, these amendments are not without their errors. Section 15 of the Amendment Act, introduced a new section 32A which provides that no execution or attachment of process can be issued against the NESREA in any action or suit without the prior consent of the Attorney General of the Federation.³¹ Securing the consent of the Attorney General of the Federation may be an uphill task. Hence, this requirement would make it almost impossible for successful claimants against the NESREA to secure and enjoy the fruit of their claims.³²

2.3. The Associated Gas Re-Injection Act³³: Section 3 of the Associated Gas Re-injection Act from 1st January 1984 prohibits the flaring of gas without the written permission of the Minister in charge of oil and gas. It should be noted that gas flaring is a major source of air pollution in Nigeria.

A lacuna in this law is that it relies on the Minister to grant exceptions to the flaring of gas. Section 3 (2) of this Act states that where the Minister is satisfied after January 1, 1984, that utilisation or reinjection is not appropriate or feasible in a particular field(s), then he may issue a certificate specifying the terms and conditions for the continued flaring of gas and permit the company to continue the flare of gas in the particular field(s) if the company pays the prescribed fees as the Minister may from time to time prescribe.³⁴ Note that the terms and conditions for gas flaring are entirely at the discretion of the Minister. Entrusting the conditions for the issuance of permission for continued gas flaring to the discretion of the Minister is a grand recipe for corruption. This is because in exchange for cash or kind, the Minister may be pressured to permit an oil company to flare gas which will

³¹ Ibid s 15

³² Olaniwun Ajayi. 2019. Key amendments to the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act. <https://www.olaniwunajayi.net/blog/wp-content/uploads/2019/03/KEY-AMENDMENTS-TO-THE-NATIONAL-ENVIRONMENTAL-STANDARDS-AND-REGULATIONS-ENFORCEMENT-AGENCY-ESTABLISHMENT-ACT.pdf> Accessed March. 7, 2024

³³ Cap A25 LFN, 2004

³⁴ Section 3(2) the Associated Gas Re-Injection Act, Cap A25 LFN, 2004

endanger public health.³⁵ Also by allowing gas to be flared upon payment of prescribed fees, the Act renders little assistance to abolish the flaring of gas.³⁶

This issue was discussed by the court in the case of *Jonah Gbemre v Shell Petroleum and Development Company Ltd*³⁷ when the court held that the provisions of the Associated Gas Re-Injection Act that allows for gas flaring are inconsistent with the constitutionally guaranteed right to life.³⁸ The Punch Newspaper reports that gas has been flared in Nigeria since the 1950s, releasing carbon dioxide and other gases into the atmosphere and it continues to trend in Nigeria. Hence, this Act has not been effective in preventing air pollution caused by gas flaring produced by oil companies in Nigeria.³⁹

2.4. The Harmful Waste (Special Criminal Provision, Etc) Act:⁴⁰ In response to the illegal dumping of toxic wastes in Koko town, Bendel State (now Delta State), the Nigerian Government promulgated the Harmful Wastes Decree 1988 (now the Harmful Wastes Special Criminal Provisions, Etc) Act. It provides the legal framework for the effective control of the disposal of toxic and hazardous waste into any environment within Nigeria.⁴¹

Section 1 of this Act makes it an offence to transport, dispose, or deposit harmful waste in Nigeria's air without a valid permit. Any person found guilty shall on conviction be liable to the criminal penalties imposed by the Act. Section 6 of the decree prescribes life imprisonment for any

³⁵ Ezeanokwasa, J.O. 2018. Legal regulations on air pollution control and industrialization in Nigeria. *Unizik Journal of Business* 1.1: 103-118.

³⁶ Jolaosho, T O. 2020. Adherence to the Rule of Law: From Associated Gas Re-Injection Act 2004 to Flare Gas (Prevention of Waste and Pollution) Regulations 2018. *Elizade University Law Journal* 3.

³⁷ [2005] No. FHC/B/Cs/53/05

³⁸ [2005] No. FHC/B/CS/53/05

³⁹ Olawin, D. 2024. Feb. 8, 2024. Nigeria flared \$2bn gas in four years. The Punch Newspaper, <https://punchng.com/nigeria-flared-2bn-gas-in-four-years-report/>

⁴⁰ 1988, Cap H1, LFN, 2004. Accessed March 7, 2024

⁴¹ Enebeli, V N., & Njoku, D C. 2023. The Legal Framework of Environmental Impact Governance in Nigeria. *African Journal of Law & Criminology* (AJLC) 13.1: 135-163.

person who contravenes this provision. Section 7 provides that a body corporate found in contravention of this section is guilty of a crime and shall be punished accordingly.⁴²

The challenge with this Act is that while this may deter future violators, it should be the last resort because it focuses mainly on criminal prosecution for damage and does not provide compensation to the victim of the damage.⁴³ The clean-up and disposal of the hazardous wastes without undue delay, harm to the surrounding environment and prompt payment of compensation to the affected parties through alternative dispute resolution are preferable to the time-consuming procedure of criminal prosecution.⁴⁴

2.5. The Environmental Impact Assessment Act:⁴⁵ Environmental Impact Assessment can be described as a systematic process to identify, predict and evaluate the environmental effect of a proposed action or project to aid decision-making concerning the significant environmental effect of such action or project.⁴⁶ One of the positive impacts of conducting an environmental impact assessment is that it allows for the detection of activities and projects that are likely hazardous to the environment, including activities that will negatively impact air quality, before it is executed.⁴⁷

The Environmental Impact Assessment Act (EIA) was enacted in 1992 to assess the impact of proposed projects that could potentially have

⁴² s 1, 6 and 7 of the Harmful Waste (Special Criminal Provision, Etc) Act, 1988, Cap H1, Laws of the Federation of Nigeria, 2004

⁴³ Nwifo, C.C. 2010. Legal framework for the regulation of waste in Nigeria. *African Research Review* 4.2:491-501.

⁴⁴ Owolabi, A.A. 2003. An examination of the legal framework for the control and management of pollution in Nigeria. *Journal of the Indian Law Institute* 45: 38-61.

⁴⁵ Environmental Impact Assessment (EIA) Act, No. 86 of 1992, Cap (E12), LFN 2004.

⁴⁶ Abdullateef, A.I., Abbas, S., Ali, M.G., Muhammad, A.I., Mustapha, S.S. & Idris, U Z. 2020. Environmental Impact Assessment in Nigeria- A Review. *World Journal of Advanced Research and Reviews*, 8(3), 330–336.

⁴⁷ Amokaye, O.G. 2014. Environmental law and practice in Nigeria. Lagos: MIJ Professional Publishers Ltd.

adverse effects on the environment, including projects that have the potential to cause air pollution. The Act provides guidelines for such assessment and requires developers to conduct an environmental impact assessment study as well as obtain an environmental permit from the appropriate government authorities before undertaking any project.⁴⁸ In the case of *Helios Towers Nig. Ltd v. NESREA & Anor*⁴⁹, the Court of Appeal per Wambai, J.C.A. noted that the Environmental Impact Assessment Act is the law that requires a prior consideration and assessment of any activity or development intended to be undertaken by any level of Government, its agency, any person or body before allowing such development to take place.⁵⁰ It sets out the general principles, procedures and methods for attaining same. Section 2 and 3 of the EIA makes it mandatory that an assessment be made of the likely environmental impact or effect an activity would have.⁵¹

Unfortunately, projects that are clearly detrimental to the environment still take place. Consequently, the effectiveness, availability, impact and process of environmental assessments in Nigeria have been called into question.⁵²

A problem with this law is that the fines imposed for the violation of its provisions may not compel compliance with the law. Section 62 of the Environmental Impact Assessment Act states that any person who fails to comply with its provisions is liable to various fines. According to the Nigeria Extractive Industries Transparency Initiative (NEITI), revenue from the oil and gas sector in Nigeria amounted to \$394.02 billion from 2011 to 2020.⁵³ Thus, such companies have the resources to

⁴⁸ Enebeli, V N., & Njoku, D.C. 2023. The legal framework of environmental impact governance in Nigeria. *African Journal of Law & Criminology* (AJLC) 13.1: 135-163.

⁴⁹ (2014) LPELR-24624 (CA)

⁵⁰ Per Wambai, J.C.A. (Pp. 35-38 paras. A-A) (2014) LPELR-24624 (CA)

⁵¹ Environmental Impact Assessment (EIA) Act, No. 86 of 1992, Cap (E12) LFN 2004

⁵² Environmental Impact Assessments don't work in Nigeria: here's why. Sept. 1, 2022. Retrieved Mar. 9, 2024 from <https://theconversation.com/environmental-impact-assessments-dont-work-in-nigeria-heres-why-188796>

⁵³ Aduloju, B, May 23, 2022. Report: Nigeria earned \$394bn oil revenue in 10 years. The Cable. Retrieved Mar. 1, 2024 from <https://www.thecable.ng/report-nigeria-earned-394bn-revenue-oil-revenue-in-10-years/amp/>

comfortably pay such fines. This also reveals that the Government seems to place more value on its economic well-being than on the health of the people of the Niger Delta where the industrial activities of these companies release great quantities of air pollutants which cause air pollution.⁵⁴ Also, not only are these fines too low to compel compliance, but they are hardly ever imposed on offenders.⁵⁵ There is provision for public participation in the determination of environmental impact but how efficient the process is, is another challenge. The case of *Baytide (Nig) Ltd. v Aderinokun* illustrates the issue of public participation.⁵⁶

2.6. The Criminal Code Act:⁵⁷ Section 247 of the Criminal Code provides for noxious acts states and subsection (a) states that any person who violates the atmosphere in any place so as to make it noxious to the health of persons is guilty of a misdemeanour and is liable to imprisonment for six months subject to certain exceptions.⁵⁸ By specifying the persons protected, the law clearly delineates who may be affected by the offence. This clarity helps both law enforcement agents and the public understand the scope of the law and who it is intended to protect. Also, the inclusion of persons in general dwelling, persons carrying on business in the neighbourhood, and persons passing along a public way highlight the importance of protecting public health. These individuals are likely to be directly impacted by noxious acts that vitiates the atmosphere, such as noxious fumes, or hazardous substances.

2.7. The Factories Act⁵⁹

This is an Act to provide, inter alia, for the safety of workers in factories to which the Act applies. It deals more with the physical and air

⁵⁴ Enebeli, V N, & Njoku, D C 2023. The legal framework of environmental impact governance in Nigeria. *African Journal of Law & Criminology* (AJLC) 13.1: 135-163.

⁵⁵ Environmental impact assessments don't work in Nigeria: here's why. Sept. 1, 2022. Retrieved Mar. 9, 2024, from <https://theconversation.com/environmental-impact-assessments-dont-work-in-nigeria-heres-why-188796>

⁵⁶ Per Iyizoba, JCA (Pp. 22-29 paras. A) (2013) LPELR- 19956(CA)

⁵⁷ Cap C38 Laws of the Federation of Nigeria 2004.

⁵⁸ s 247, The Criminal Code Act 1990 Cap C38 LFN 2004.

⁵⁹ Cap F1 Laws of the Federation of Nigeria 2004.

cleanliness of the factory environment. Section 8(1) of the Act provides that a factory shall not be overcrowded while in operation. Section 8(3) of the Act stipulates the minimum dimensions of a workroom to prevent overcrowding. A workroom must not be less than nine feet high.⁶⁰ Section 9(1) of the Act provides that there should be effective and suitable circulation of fresh air in each workroom. Since it predates 1988 and was passed in 1987, it was not created with the principles of sustainable development, which aim to advance economic growth while preventing environmental deterioration. Nigeria did not become aware of this idea until after the 1988 Koko toxic waste dump tragedy.⁶¹

2.8. The Minerals and Mining Act 2007⁶²

The Minerals and Mining Act 2007 repealed the Minerals and Mining Act, No. 34 of 1999. It regulates all aspects of the exploration and exploitation of solid minerals in Nigeria and other related purposes. Mining, especially opencast mining, has a high air pollution potential because it releases particulate matter into the atmosphere which has harmful effects on human health. To diversify the country's economy, which is largely dependent on oil, Nigeria is placing more attention on the growth of its mining sector.

Chapter four of the Act (sections 97 to 130) deals with environmental considerations in mining activities.⁶³ Section 118(a) of the Act commits every holder of a mineral title to minimize, manage and mitigate any environmental impact resulting from activities carried out under this act. Although the impact on the air environment is not expressly mentioned, it is reasonably believed to be included in the general concept of environmental impact.

There seems to be high rate of illegal mining activities in Nigeria. Often, illegal miners pay little attention to environmental protection.⁶⁴ Thus,

⁶⁰ S 8 of the Factories Act, Cap F1 Laws of the Federation of Nigeria 2004

⁶¹ Ezeanokwasa, J.O. 2018. Legal regulations on air pollution control and industrialization in Nigeria. *Unizik Journal of Business* 1.1: 103-118.

⁶² Minerals and Mining Act, 2007

⁶³ Cap 4, Minerals and Mining Act, 2007

⁶⁴ Ezeanokwasa, J.O. 2018. Legal regulations on air pollution control and industrialization in Nigeria. *Unizik Journal of Business* 1.1: 103-118.

the high rate of illegal mining, combined with the attitude of the illegal miners to environmental protection reduces the level of compliance to this Act, thereby increasing the level of air pollution in the country caused by mining activities.

2.9. National Policy on the Environment (Revised 2016)⁶⁵

To arrest environmental pollution, the Nigerian government launched its first environmental policy known as the National Policy on Environment in 1989.⁶⁶ The National Policy on the Environment was revised in 2016. One of the goals of the National Policy on Environment is to ensure that the environment is protected from pollution and suitable for the well-being of all Nigerians.⁶⁷

In response to the illegal dumping of toxic wastes in Koko town, Bendel State (now Delta State), the Nigerian Government promulgated the Harmful Wastes Decree 1988. This was immediately followed by the establishment of a regulatory body known as Federal Environment Protection Agency (FEPA) in 1988 but now renamed as NESREA under the NESREA Act. State and local government councils were also encouraged to establish their environmental regulatory bodies to maintain good environmental quality in their local jurisdictions. To put this into action a National Policy on the environment was developed.⁶⁸

Its clean air strategies are contained in part 4.1 and part 5.2 of the Policy. Part 4.1 of the National Policy on the Environment provides policy statements concerning air pollution. Its clean air strategies in part 4.1. involve an imposition of obligations on the government to:

- a. Support the Federal Ministry of Environment to put in place and strengthen institutional arrangements to tackle atmospheric pollution.

⁶⁵The National Policy on the Environment (Revised 2016).

⁶⁶ Izoukumor, N. A. 2019. A critical assessment of the pollution prevention laws and regulations of Nigeria: why they failed to protect the environment of Nigeria. *Journal of Law, Policy and Globalization* 87

⁶⁷ Ibid

⁶⁸ Enebeli, V.N., & Njoku, D.C. 2023. The legal framework of environmental impact governance in Nigeria. *African Journal of Law & Criminology (AJLC)* 13.1: 135-163.

- b. Strengthen existing environmental guidelines and develop new ones where necessary, to counter the increasing level of emissions, particularly in the urban and industrial areas.
- c. Develop or strengthen air standard enforcement capacity.
- d. Improve monitoring of traditional and trace pollutant emissions and concentrations.
- e. Promote efficient non-motorized and mass transport system.
- f. Promote alternative cooking stoves and new technologies that are non-polluting, affordable, available, and adaptable.
- g. The construction of well-ventilated houses.⁶⁹

Undoubtedly, part 4.1 is a remarkable provision, particularly because it covers the issue of enforcement of air quality standards, improving the existing standards on air pollution and making new ones where necessary. Its provision for non-motorized and mass transport system is also remarkable as it will reduce the number of private cars plying the roads, thereby reducing the rate of air pollution caused by vehicular emissions. Promoting alternative cooking stoves and constructing well-ventilated houses reduces congestion and indoor air pollution.

Furthermore, part 5.2. of the Policy recognizes air pollution as one of the dominant types of pollution in Nigeria. Part 5.2. also contains policy statements. These policy statements oblige the Government to:

- a. Develop and implement national strategies on air pollution.
- b. Provide guidelines for the abatement of air pollution.
- c. Strengthen capacity and infrastructure to monitor environmental air pollution.
- d. Designate and map National Air Control Zones and declare air quality objectives for each designated Air Control Zone.
- e. Establish ambient air quality standards and monitoring stations at each designated zone.
- f. Develop and implement a wide range of measures to control emissions from motor vehicles, power plants, and industrial and commercial processes locally.

⁶⁹ Part 4.1 of the National Policy on the Environment (Revised 2016).

- g. Promote regional cooperation to minimize the atmospheric transportation of pollutants across international boundaries.⁷⁰

Despite how beautiful this provision is, it is merely a policy and not enforceable in the courts of law. Thus, there is no certain avenue for the Nigerian government to be held accountable for failing to comply with these policy statements. The enactment of these provisions as a policy statement further reflects the nonchalant attitude of the Nigerian government to the prioritization of environmental protection, including the protection of clean air. The government recognizes this protection by enacting such remarkable provisions but has failed to imbue it with the force of law. It is for this reason that Boyd as mentioned in chapter 2, stated that the human rights perspective to clean air changes everything because governments have a clear and legally enforceable obligation to respect and protect human rights, as opposed to when clean air is treated as a policy objective.

3.0. Subsidiary Legislations and Regulations

The subsidiary legislations discussed herein set air quality standards. Therefore, the subsidiary legislations aim to protect clean air. Unlike the foregoing laws, the legislations under this segment were specifically made to address air pollution. The subsidiary legislations to be discussed in this segment are those created by the NESREA to regulate air quality, as this is the major agency charged with environmental protection in Nigeria.

3.1. National Environmental (Air Quality Control) Regulations, 2021⁷¹:

This was first enacted in 2014, but was amended and reenacted in 2021. The objective of this regulation is to improve Nigeria's air quality to a level that would enhance the protection of human health, flora, fauna and other resources affected by air quality deterioration.⁷²

⁷⁰ Ibid Part 5.2

⁷¹ S.I. No 88, 2021 (Amended)

⁷² s 1 of the National Environmental (Air Quality Control) Regulations, S.I. No 88, 2021 (Amended).

Worthy of note is that it is expressly stated in section 1(2)(a) of this regulation that its objective is to meet basic tenets which provide the right to clean air for all citizens.⁷³ Hence, Nigerians have the right to clean air under this regulation. Also, section 1(3) states that its objective is to meet basic tenets which provide for the right of all Nigerians to enhance the clean-up and rehabilitation of the area that is highly impacted by air pollution.⁷⁴ It also provides maximum permissible levels at which emissions can be released into the atmosphere to prevent harmful levels of such pollutants in the air and measures to improve outdoor air quality.⁷⁵ Section 5 provides that where there is an accidental or unauthorized release of contaminants into the air, the person responsible for such release must inform the Agency (NESREA) within twenty-four hours, in writing, and according to the second schedule to the regulation.⁷⁶ This regulation provides that a person shall install air pollution control device(s) to new equipment, and install or retrofit an existing facility with technology that enables that facility to meet the national air quality emissions standards.⁷⁷

Interestingly, it regulates the use of generators which is one of the main sources of air pollution in Nigeria, due to the erratic power supply in the country which is commonplace. Section 13(1) provides that every power generating set from 10 KVA and above which is in use, or capable of being used must be registered with the NESREA, undergo an emission test at least once a year, be certified by the NESRSEA and be appropriately positioned.⁷⁸

Section 13(2) provides for the way such a generating set should be positioned. It states that a power generating set must be positioned in a way that its flue gas is released out of the building through a suitable stack which must not allow the flue gas to be drawn back into the

⁷³ Ibid s 1(2)(a)

⁷⁴ Ibid s 1(3)

⁷⁵ s 2 of the National Environmental (Air Quality Control) Regulations, S.I. No 88, 2021 (Amended).

⁷⁶ Ibid s 5

⁷⁷ Ibid s 10

⁷⁸ Ibid s 13(1)

building or the building's ventilation system; that the flue gas does not become a nuisance to the residents of any building or the neighbourhood through building downwash effects. In other words, the flue gas from a generating set must not blow down to bother neighbours, thereby preventing outdoor air pollution. It must not also be drawn back into the building within which it is situated, thereby preventing indoor air pollution.⁷⁹

Part IV of this law regulates indoor air pollution in offices, public places and homes. The maximum concentration of indoor air contaminants for offices and public places must conform to the limits provided for in Schedule XI to the regulation, while the maximum concentrations for indoor air contaminants for homes must conform to the limits prescribed in Schedule XII.⁸⁰

Section 21 provides that the ventilation system in a building must facilitate improved air quality, while section 23 provides that every building, particularly homes and offices with cooking facilities must have an exhaust chimney to discharge flue gas out of the home or office.⁸¹ Thus, these sections 21 and 23 prevent indoor air pollution. The regulation also prohibits smoking in public places.⁸²

Interestingly, this regulation protects Nigeria's right to clean air in terms of controlling odours which may cause nuisance, as seen in the aforementioned case of *Abiola v Ijoma*.⁸³ In this respect, section 34 provides that a person shall not emit or allow the emission of noxious and foul odorous substances to reach nuisance levels in the neighbourhood in a way that not more than 5 per cent of the population will face annoyance that is greater than 5 per cent of the time per month,

⁷⁹ Ibid s 13(2)

⁸⁰Section 19 and 20 of the National Environmental (Air Quality Control) Regulations, S.I. No 88, 2021 (Amended).

⁸¹Ibid s 21 and 23

⁸²Ibid s 24

⁸³ *Abiola v Ijoma* op.cit. (n. 45)

for three continuous months.⁸⁴ Section 35 also provides that a person shall not release or cause the release of malodorous substances beyond the detection thresholds prescribed under the regulation.

Section 38 of this Regulation empowers the NESREA, upon obtaining a court order, to seal any facility or premises which contravenes the provisions of this regulation after the operator of such facility or premise has been issued an enforcement notice and such operator has not taken any steps to ensure compliance.⁸⁵ However, the NESREA does not need a court order to seal up a facility or premises where the contravention constitutes an eminent danger to human health and the environment.⁸⁶

The penalties for contravention are provided in section 40 of the Regulation. Section 40 provides that a person who contravenes any of the provisions of this regulation commits an offence and is liable to a fine that is not less than one hundred thousand naira or not less than 6 months imprisonment or both, and an additional fine that is not less than ten thousand naira for every day the offence subsists. Where the offender is a corporate body, it shall be liable to a fine of not less than one million naira and an additional fifty-thousand naira for every day the offence subsists.⁸⁷

3.2. National Environmental (Control of Bush/ Forest Fire and Open Burning) Regulations 2011.⁸⁸ Air pollution arising from agricultural activities in Nigeria is mainly caused by indiscriminate bush burning for farming activities.⁸⁹ The National Environmental (Control of Bush/Forest Fire and Open Burning) Regulations, 2011 aims to prevent and reduce the destruction of the ecosystem due to indiscriminate

⁸⁴ s 34 of the National Environmental (Air Quality Control) Regulations, S.I. No 88, 2021 (Amended).

⁸⁵Ibid s 38 (1)

⁸⁶Ibid s 38 (2)

⁸⁷ s 40 of the National Environmental (Air Quality Control) Regulations, S.I. No 88, 2021 (Amended).

⁸⁸ S.I. No. 15 of 2011.

⁸⁹ Amokaye, O.G. 2014. Environmental law and practice in Nigeria. Lagos: MIJ Professional Publishers Ltd.

burning of materials which may lead to forest burning and emission of hazardous air pollutants.⁹⁰ This regulation came into force on April 28, 2011.

First, it regulates hunting, clearing of farmlands and burning of materials such as dead animals, seized goods and exhibits, electronic wastes, automobile parts, agricultural wastes, municipal waste, waste oil, petroleum treated and related materials, as well as any material that creates dense smoke or noxious odours.⁹¹ It absolutely prohibits the burning of bush and forest for hunting purposes.⁹²

Secondly, it prohibits all open burning except for outdoor cooking, barbecue grills, small cooking and campfires, individual open fires to control plant and animal disease, ceremonial/ celebratory bonfires, as well as open fires necessary to control invasive plants and insects.⁹³ It also empowers the Agency to enter upon any premises and may by notice or direction prohibit or regulate the carrying out of any activity which is likely to cause the spread of a bush/forest fire.⁹⁴

Regulation 3 thereof prevents bush or forest burning without a permit from the Agency (NESREA). Note that several permit regimes are provided for various categories of burning activities under this Regulation. A permit may be issued for open bush/forest burning, burning plant wastes or burning refuse. Although the Agency may consult other relevant authorities before deciding on the issuance of the permit, this power to grant such permit lies exclusively within the jurisdiction of the Agency.⁹⁵ This is a good provision because it prevents the occurrence of another agency issuing such a permit,

⁹⁰ s 1 of the National Environmental (Control of Bush/ Forest Fire and Open Burning) Regulations, S.I. No. 15 of 2011.

⁹¹ *Ibid* s 2

⁹² *Ibid* s 19

⁹³ *Ibid* s 22

⁹³ *Ibid* s 2

⁹⁴ *Ibid* s 6(2)

⁹⁵ s 4(2) of the National Environmental (Control of Bush/ Forest Fire and Open Burning) Regulations, S.I. No. 15 of 2011.

thereby preventing a clash of authority among environmental protection agencies.

Before the issuance of the permit, the Agency may enter the land over which the permit is being sought to investigate whether the burning can be controlled and conducted safely.⁹⁶ A permit already issued may be revoked or refused if the agency is not satisfied after carrying out its inspections on the proposed burning.⁹⁷

It is sufficient notice to the owner or occupier where the permit holder gives direct verbal communication of the notice to him, delivers the notice to the residential or business address, or delivers it by registered post to the last known place of abode or business of the owner or occupier at least eight days before the date of burning.⁹⁸

Furthermore, before setting fire to the bush/forest, the permit holder must arrange and provide appropriate protective measures as may be advised by the relevant authorities. Where a fire spreads or escapes beyond the boundaries allocated for the burning of bush/forest/plant waste and open burning, the permit holder shall immediately notify the nearest fire service, the Agency and also the officer assigned on the permit.⁹⁹

Generally, it is an offence to violate any of the provisions of the Regulation or the conditions upon which a permit is granted. It is an offence to burn or allow any combustible material in an open fire without first obtaining permission from the Agency.¹⁰⁰ It is also an offence to use fireworks on land and in open air unless all inflammable materials on the ground within a reasonable distance of any lit fuse or lit firework have been removed and at least one appropriate fire

⁹⁶ Amokaye, O.G. 2014. Environmental law and practice in Nigeria. Lagos: MIJ Professional Publishers Ltd.

⁹⁷ Ibid

⁹⁸ Ibid s 7(4)

⁹⁹ Ibid s 10

¹⁰⁰ Ibid s 3

extinguisher is provided at the place where the fireworks are being used.¹⁰¹

Any person who contravenes this regulation shall on conviction be liable to pay a fine not exceeding fifty thousand Naira (50,000.00) or imprisonment for a term not exceeding three (3) months or both fine and imprisonment. Where the offender is a corporate body, it shall on conviction be liable to a fine not exceeding One Million Naira (N1,000,000) and an additional fine of twenty thousand Naira (20,000) for everyday the offence.¹⁰²

3.3. National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations 2011:¹⁰³ This regulation was made in 2011.¹⁰⁴ The statutory control of vehicular emissions from petrol and diesel engines which negatively impact ambient air quality and human health is contained in this regulation.¹⁰⁵ As explained in Chapter Two, vehicular emissions also constitute one of the major sources of air pollution in Nigeria.

Section one of this Regulation states the purpose of the Regulation which is to restore, preserve and improve the quality of air. It also states that the standards provided for in this Regulation protect the air from pollutants¹⁰⁶. More significantly, section 1(a) states that these standards consider the citizens' right to access clean air, reducing and preventing air pollution by improving the quality of automobiles operating on the roads, and improving the health of Nigerians in the light of the high

¹⁰¹ Ibid s 18

¹⁰² Ibid s 21

¹⁰³ S.I. No. 20 of 2011.

¹⁰⁴ Fagbemi, S.A. 2020. Right to clean and unpolluted air In Nigeria. *AJLHR* 4.1:61-7. Retrieved Nov. 14, 2023, from [https://www.academia.edu/89602758/Right to Clean and Unpolluted Air in Nigeria](https://www.academia.edu/89602758/Right_to_Clean_and_Unpolluted_Air_in_Nigeria)

¹⁰⁵ Amokaye, O G, 2014. *Environmental Law and Practice in Nigeria*. Lagos: MIJ Professional Publishers Ltd.

¹⁰⁶ s 1 of the National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations, S.I. No. 20 of 2011.

incidence of air pollution caused by an increase in the number of automobiles plying the roads.¹⁰⁷

Consequently, unlike the Bush Burning Regulation explained above, the National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations 2011 expressly and specifically considers the right of access of Nigerians to clean air. Therefore, Nigerians have a right of access to clean air under this regulation and anyone who violates the provisions of this regulation has violated the right to clean air and is guilty of an offence.

Section 30 which provides for the offence and penalties states that any person who contravenes the provisions of the Regulations commits an offence and shall on conviction be liable to a fine not exceeding Fifty Thousand Naira (N50,000) or imprisonment for a term not exceeding one year or both fine and imprisonment and an additional One Thousand Naira (N1,000) for every day the offence subsists. Where the violator is a body corporate it shall be liable to a fine not exceeding five hundred thousand naira (N500,000) and an additional fine of twenty thousand naira (N20,000) for every day the offence subsists.¹⁰⁸

Furthermore, part 1 regulates emissions from petrol engines of new motor vehicles¹⁰⁹ registered after 28th April, 2011. Part 1 also regulates

¹⁰⁷ Ibid s 1(a)

¹⁰⁸s 30 of the National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations, S.I. No. 20 of 2011.

¹⁰⁹ s 31 of the National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations, S.I. No. 20 of 2011, which is the interpretation section, describes new motor vehicles as-

- (a) a motor vehicle imported directly into Nigeria as a completely built-up unit and for the first instant was registered and assigned a registration number by the Directorate for Road Traffic Services Office on or after 28th April, 2011;
- (b) a motor vehicle imported into Nigeria as used or completely knocked down pack and was subsequently manufactured or assembled and for the first instant was registered and assigned a registration number by the Director for Road Traffic Services.

Thus, new motor vehicles under this regulation includes used vehicles which are imported into Nigeria.

motor vehicles which are already registered but "whose engine have been replaced". However, it excludes a motor vehicle used for racing purposes in designated racing circuits or approved racing events.¹¹⁰

Under this Regulation, manufacturers of petrol and diesel engines are compelled to produce new technologies that will reduce or minimise vehicular emissions, through the imposition of strict limits and penalties for pollution by SO₂, NO_x, CO and unburned hydrocarbons, and benzene.¹¹¹ For example, any new model of motor vehicle must comply with the emission standards of pollutants stated in Schedule 3 of the regulation.¹¹² Another example is section 3(4)(b) of this regulation which provides that no manufacturer or importer shall assemble, manufacture or import a motor vehicle that does not have an approved emission reduction technology installed in it.¹¹³ It is unlawful for a person to install or replace the engine unit of any motor vehicle with a petrol engine which emits pollutants that exceed the standard prescribed in Schedule 1 of the Regulation.¹¹⁴

Furthermore, since 1st January, 2015, it has been an offence for an owner, manufacturer or importer of all new models of petrol engines to not comply with the emission standards prescribed in Schedule III to the Regulation.¹¹⁵

To verify that a car meets the exhaust emission standard prescribed under this Regulation, the Agency (NESREA) may require any assembler, manufacturer or importer to conduct an emission test.¹¹⁶ Also, a manufacturer, assembler, or importer of a new or used vehicle

¹¹⁰ Ibid s 2 and 3

¹¹¹ Amokaye, O.G. 2014. *Environmental law and practice in Nigeria*. Lagos: MIJ Professional Publishers Ltd.

¹¹² s 3 (3) of the National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations, S.I. 20 of 2011.

¹¹³ Ibid s 3(4)(b)

¹¹⁴ Ibid s 3

¹¹⁵ s 3(6) of the National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations, S.I. 20 of 2011.

¹¹⁶ Ibid s 5 (1)

is required to issue a certificate to the owner of the car stating that the motor vehicle has been properly inspected, tested and adjusted to meet the emission requirements and standards prescribed under the Regulation.¹¹⁷

Part II of the Regulation controls gaseous emissions from petrol engines. It applies to all motor vehicles notwithstanding whether it is in motion or idling. Section 8 provides that petrol engines which are in use or capable of being used shall not emit gaseous pollutants exceeding the emission standards stated in schedules I and III to this regulation and visible smoke from its exhaust pipe.¹¹⁸

Under this Regulation, it is mandatory for owners of vehicles at their own expense to carry out an emission test once a year in a licensed facility and the result shall be recorded in a test certificate. However, new vehicles would only be required to undergo this test 3 years after operation in Nigeria.¹¹⁹ Where a vehicle fails the emission test, the Agency or any of its officers may issue a prohibition order preventing the further operation of such motor vehicle in Nigeria for three months.¹²⁰

The prohibition order must be attached to a conspicuous spot on the windscreen of the vehicle and until the defects have been remedied to the satisfaction of the Agency, the motor vehicle shall not be operated.¹²¹

Every vehicle owner shall regularly keep and maintain a logbook indicating the motor vehicle's registration number, as well as the date, time and result of any emission test. Similarly, an operator of a fleet of vehicles shall operate and maintain an approved facility which shall carry out regular smoke tests on all his motor vehicles as may be directed by the Agency in writing.

¹¹⁷ Ibid s 6

¹¹⁸ Ibid s 7 and 8

¹¹⁹ Ibid s 9

¹²⁰ Ibid s 10

¹²¹ Ibid s 11

Part III regulates emissions from diesel engines and applies to all new motor vehicles registered after 28th April 2011 and to motor vehicles whose engines have been replaced.¹²² The engine of a motor vehicle shall not be replaced with a diesel engine which emits pollutants exceeding standards permitted under Schedule VII of the Regulation.¹²³

To verify the emission of pollutants from the exhaust of motor vehicles with diesel engines, the Agency may order any assembler, manufacturer or importer to conduct tests and the results of such a test shall be submitted periodically to the Agency. Upon satisfaction, the Agency shall issue An Emission Test Certificate.¹²⁴

It is an offence effective from the 28th of April, 2011, for a manufacturer, assembler, or importer to manufacture, assemble or import a vehicle with a diesel engine without a certified emission reduction technology for the control of emission from such vehicle.¹²⁵ Equally, it is mandatory for a manufacturer, assembler or importer of a diesel engine before the delivery of the vehicle to the owner to issue a certificate to the owner stating that the vehicle has been inspected, tested and adjusted to meet the requirements of the emission standards prescribed under the Regulation.¹²⁶

Every vehicle owner shall have a log book stating the motor vehicle's registration number, the date, time and result of any test conducted.¹²⁷ Also, an operator of a fleet of vehicles shall operate and maintain an

¹²² Section 16 of the National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations, S.I. 20 of 2011.

¹²³ Ibid s 17

¹²⁴ Ibid s 19

¹²⁵ Ibid s 20

¹²⁶ Ibid s 21

¹²⁷ s 28 of the National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations, S.I. 20 of 2011.

approved facility which shall carry out regular smoke test on all his motor vehicles as may be directed by the Agency in writing.¹²⁸

3.4. National Environmental (Ozone Layer Protection and Hydrofluorocarbons Phase Down) Regulations, 2022:¹²⁹

In Nigeria, ozone-depleting substances are regulated by the National Environmental (Ozone Layer Protection and Hydrofluorocarbons Phase Down) Regulations which was made in 2009. It was however amended in 2022. The Regulation seeks to protect the ozone layer by prohibiting certain activities relating to the handling, usage and disposal of ozone-depleting substances (ODS) and materials containing ODS.¹³⁰ For example, Section 21 provides that a person shall not import, manufacture, install, offer for sale, sell, or buy an equipment intended to be used to produce any ODS listed in the second schedule to this regulation, unless for the recovery and recycling of substances already in use.¹³¹

Also, it is an offence to release or permit to be released into the atmosphere an ODS or Hydrofluorocarbons (HFCs) from an equipment, a container used to supply an ODS/ HFCs, or an ODS/HFCs recovery, recycling or reclamation system.¹³² Any person that violates any of the provisions of this regulation commits an offence and is liable to a fine of not less than N200,000.00 or not more than a year's imprisonment or both, and an additional fine of N20,000.00 for every day the offence subsists. Where the offender is a corporate body, it is liable to a fine of N2,000,000.00 and an additional N200,000.00 for every day the offence subsists.¹³³

¹²⁸ Ibid s 29

¹²⁹ S.I. No 40, 2022

¹³⁰ Amokaye, O.G. 2014. Environmental law and practice in Nigeria. Lagos: MIJ Professional Publishers Ltd.

¹³¹ s 21 of the National Environmental (Ozone Layer Protection and Hydrofluorocarbons Phase Down) Regulations, S.I. No 40, 2022

¹³² Ibid s 23

¹³³ Ibid s 38

Hence, it can be seen from the provisions of this subsidiary legislations that there are laws directly aimed at reducing and preventing air pollution in Nigeria and that there is a right to clean air. However, the fact that the provisions of this regulation are being enforced is highly doubtful. In fact, many Nigerians do not even know that such laws exist.

4.0. International Laws Applicable in Nigeria

International law provides a wide range of agreements, principles, rules and frameworks protecting the atmosphere from being polluted.¹³⁴ The international law regime on air pollution comprises several treaties/conventions. However, the international laws on air pollution to be discussed in this section will be limited to only the laws to which Nigeria is a state party. That is, the laws which have been signed or ratified by Nigeria. They include the following:

4.1 The African Charter on Human and People's Rights

This is a regional treaty pertaining to only African countries. The starting point of the substantive laws enacted for the protection of the environment of Nigeria could be traced to the incorporation of Article 24 of the African Charter in 1982.¹³⁵

By virtue of article 24 of the African Charter on Human and People's Rights, Nigeria is under an obligation to provide for all people and citizens an air environment that is not harmful to both human health and the ecosystem. It provides that all Nigerians shall have the right to a general satisfactory environment favourable to their development. This was considered in the popular case of the Social and Economic Rights Action Centre v. Nigeria. In this case, the complainants alleged among other things that the Federal government of Nigeria was involved in the reckless production of crude oil in Ogoni Land (a community in the Niger Delta area of Nigeria) and this had resulted in environmental

¹³⁴ Huck, W., Maab, J., Saprava, S., Benmaghnia, T., Schulte, A., Heb, S.M., & Walter, M. 2021. The right to breathe clean air and access to justice legal state of play in international, European and national law *SSRN Electronic Journal* 13.10: 1-22.

¹³⁵ Izoukumor, N. A. 2019. A critical assessment of the pollution prevention laws and regulations of Nigeria: why they failed to protect the environment of Nigeria. *Journal of Law, Policy and Globalization* 87

degradation, health problems and the poisoning of their land, air and water.¹³⁶ The African Commission held found the Nigerian government to be in grave violation of the rights of the people of the Niger Delta which are guaranteed under this African Charter.¹³⁷

The African Charter was domesticated in Nigeria in 1983 under the African Charter on Human and Peoples' Right (Ratification and Enforcement). Thus, Nigeria is not only a signatory to the Charter and but is also bound by its provisions.¹³⁸ In *Abacha & Ors. v. Fawehinmi*, the Supreme Court held that the Charter now has the force of law within the Federal Republic of Nigeria. Ejiwunmi JSC observed in the case that the African Charter on Human and People's Rights, having been passed into our municipal law, our domestic courts have the jurisdiction to construe or apply the treaty. Hence, anyone who believes that his rights as guaranteed by the Charter have been violated may resort to its provisions to obtain redress in our domestic court.¹³⁹

However, the problem arises when section 20 of the 1999 constitution which provides for non-justiciable environmental rights is considered. With the constitution providing that environmental rights are unenforceable and the African Charter providing otherwise, there is a clash between article 24 of the domesticated African charter and the constitution on the issue of environmental rights, which includes the right to clean air. The Supreme court considered this issue in the aforementioned case of *Sani Abacha v Gani Fawehinmi*¹⁴⁰ and held that although the African Charter is not superior to the Constitution of Nigeria.

¹³⁶ Ibid

¹³⁷United Nations Environment Programme Website. *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*. Retrieved Jan. 10, 2023, from https://leap.unep.org/sites/default/files/court-case/achpr30_155_96_eng.pdf

¹³⁸ Enebeli, V.N., & Njoku, D C., 2023. The legal framework of environmental impact governance in Nigeria. *African Journal of Law & Criminology (AJLC)* 13.1: 135-163.

¹³⁹ Olu-David, O & Ole, N C 2023. Justiciability of environmental rights: whither the Nigerian law? *African Journal of Law, Ethics, and Education* 3.1: 50-74.

¹⁴⁰(2000) vol. 77, Law Reports of Courts of Nigeria p. 1254 -1401.

In support of that, Section 1 of the 1999 constitution provides that the constitution is supreme. It also provides that where any other law is inconsistent with it, the constitution shall prevail and the other law shall be void to the extent of the inconsistency.¹⁴¹ Thus, despite the aforementioned notable decision of the court, environmental rights provided for in article 24 of the African Charter are enforceable in the Nigerian court of law. The African charter is void to the extent that section 24 remains unenforceable. Article 24 is a toothless bulldog, just like section 20 of the 1999 constitution. Thus, like section 20, a person cannot rely on it to enforce the right to clean air in Nigerian courts.¹⁴²

4.2. The Vienna Convention for the Protection of the Ozone Layer 1988: To eliminate the continuous release and use of ozone depleting substances in industrial processes, the world community came together and adopted the 1985 Vienna Convention on the Protection of the Ozone Layer.¹⁴³ Nigeria is a signatory to the Vienna Convention for the Protection of the Ozone Layer. It was adopted on 22nd March, 1985 and took effect on 22nd September 1988.¹⁴⁴ This Convention encourages countries to reduce the use of chlorofluorocarbons (CFCs) and other ozone-depleting substances.¹⁴⁵

The Convention serves as a framework that encourages international efforts to protect the ozone layer. Thus, it does not contain legally binding reduction goals for countries to reduce the use CFCs and other ozone depleting substances, it only encourages countries to act.¹⁴⁶

¹⁴¹Constitution of the Federal Republic of Nigeria, 1999.

¹⁴² Enebeli, V.N., & Njoku, D.C. 2023. The legal framework of environmental impact governance in Nigeria. *African Journal of Law & Criminology* (AJLC) 13.1: 135-163.

¹⁴³Olawuyi, D.S. 2015. *The Principles of Nigerian Environmental Law*. 2nd ed. Ado-Ekiti: Afe Babalola University Press.

¹⁴⁴ Ezeanokwasa, J.O. 2018. Legal Regulations on Air Pollution Control and Industrialization in Nigeria. *Unizik Journal of Business* 1.1: 103-118.

¹⁴⁵Olawuyi, D.S. 2015. *The Principles of Nigerian Environmental Law*. 2nd ed. Ado-Ekiti: Afe Babalola University Press.

¹⁴⁶Ibid

A problem with this convention is that it does not list any substances that modify or are likely to modify the ozone layer, the emission of which should be reduced or prevented. This probably was because at the time it was negotiated and adopted, science was not yet certain about ozone-depleting substances (ODS). However, the Montreal Protocol on Substances that Deplete the Ozone Layer adopted on 26 August 1987 filled this gap in the Vienna Convention by mentioning specific substances that deplete the ozone layer which parties were required to phase out. These include halons and some Chlorofluorocarbons (CFCs). To protect the stratospheric ozone layer, eight revisions have been made on the protocol with the last being the revision in 2016 in Kigali, Rwanda. The Kigali amendment was also agreed to by Nigeria which came into force on 1 January 2019.¹⁴⁷

4.3. The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Waste within Africa: This is another regional treaty made and ratified by only African countries. The obligation of Nigeria and other parties under this convention is to ensure that the generation of hazardous wastes within their jurisdiction is reduced to a minimum. Hazardous waste is defined to include wastes from the production, formulation and use of organic solvents, waste oils/water, hydrocarbons/water mixtures, emulsions, and wastes collected from households. Noteworthy is that hydrocarbons are air pollutants. Organic solvents are carbon-based and so are also air pollutants. Wastes from the production or formulations of these substances are consequently air pollutants.¹⁴⁸ Hence, this convention prevents air pollution through its ban on hazardous waste.

Of all these international laws which have been signed by Nigeria, only the African charter is enforceable in Nigeria. This is because it has failed to domestic such laws as provided in section 12 of the Constitution. The Nigerian 1999 Constitution provides that No treaty between the federation and any other country shall have the binding force of law

¹⁴⁷ Ezeanokwasa, J O, 2018. Legal regulations on air pollution control and industrialization in Nigeria. *Unizik Journal of Business* 1.1: 103-118.

¹⁴⁸ Ibid. Ezeanokwasa, J O

except to the extent to which any such treaty has been enacted into law by the National Assembly.¹⁴⁹ Sadly, even the African charter which has been domesticated is not enforceable due to the superiority of the constitution. Thus, these international laws are a mere paper tiger.

5.0. Conclusion

From the foregoing, it can be seen that apart from the fact that Nigeria does not have an express right to clean air that is constitutionally guaranteed, the laws preventing air pollution are inadequate for safeguarding air quality, which is the first step that needs to be considered before a constitutional right is even considered. The challenge of the laws can be seen from the provisions of the laws earlier examined in this chapter. This challenge majorly revolves around the problem of adequacy and enforceability. The foundation of the problem is the Constitution which prevents environmental rights from being justiciable in the law courts. With the Constitution being the highest law, all other laws which provide for the right to clean air must not contradict the Constitution.

Also, the enactment of air pollution laws as policies, and the non-domestication of the aforementioned international laws show the recurring nature of the problem of enforceability. This is separate from other problems such as the exclusion of the oil and gas sector (a major contributor to air pollution in Nigeria through gas flaring) from the purview of the NESREA Act and the Environmental Impact Assessment Act.

The government enacting such remarkable laws without provisions for its enforceability, coupled with the absence of widespread opposition from Nigerians, underscores the low-level importance that the government and people of Nigeria place on air quality protection. It also shows the level of illiteracy in the country.

¹⁴⁹ s 12(1) of the Constitution of the Federal Republic of Nigeria, 1999, provides that no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

However, a careful perusal of the subsidiary legislations shows that Nigerians have a right to clean air and a contravention of the provisions of those legislations is a breach of the right to clean air. The provisions that prevent enforceability in the laws should be excluded and the aforementioned laws, particularly the subsidiary legislations should be implemented to safeguard the right to clean air of everyone in Nigeria.