

**PAPER TITLE: ENVIRONMENTAL LAW AND CLIMATE CHANGE: IS AFRICA'S  
LEGAL REGIME FOR ITS ENVIRONMENT AND CLIMATE FIT FOR PURPOSE?**

Caleb Adebayo  
LLB(Obafemi Awolowo University) , BL, ChMC  
[calebadebayoc@gmail.com](mailto:calebadebayoc@gmail.com)

**ABSTRACT**

Africa contributes very little to the global scope of greenhouse emissions, yet it will be hit the most by climate change effects and negative environmental impacts, as most of the continent is underdeveloped or developing. Interestingly, one of the seven aspirations of the African Union (AU) in Agenda 2063 is the determination to achieve a prosperous Africa based on inclusive growth and sustainable development. The Brundtland Commission's 1987 Report describes sustainable development as one that meets the needs of the present without compromising the ability of future generations to meet their needs. This concern for sustainable development and combating the effects of climate change is also contained in and prioritized as part of the United Nations Sustainable Development Goals reached in September 2016. Africa's position at the receiving end of climate change effects, foists on her a need to innovate and adapt, as well as provide mitigation techniques for handling the spate of climate disasters, predominantly, seeing as most of our economy is rain-fed. Also, as a cluster of zealously developing economies, climate change could greatly militate against development and take us decades backwards; affecting food security, escalating health challenges and increasing poverty. In all of these, it must not be quickly forgotten that law and policy as well as robust environmental governance play important roles in the continuous development of Africa, and in combating climate change and its effects. This paper starts on a very reflective note, examining the origins of environmental governance globally while seeking to expound on terms like 'sustainable development' and 'climate change'. It goes further to examine the reality of climate change, how it is affecting Africa and how Africa is responding, while paying close attention to the 1.5C emission commitment under the Paris Agreement. It proceeds to analyse the legal regime of environmental law and climate change in Africa, with special focus on power generation, agriculture, health, sanitation, urban cities and general environmental governance. In another part, it deals with

financing challenges for environmental initiatives, and the place of law, both national and regional, in enabling access to finance for climate-related projects. The paper also considers the peculiarity of the African environment in probing its legal regime for environmental law and climate governance; the demanding task of attempting industrialization as a developing continent amidst emission caps and controls. The work attempts too, a didactic posture, by detailing the role of transactional, litigation and policy-based lawyers in advancing the legal regime for environmental law, and tailoring it to be purpose-built for Africa. In addressing this, the paper touches briefly on public interest litigation on the continent. The research employed is both qualitative and quantitative, with extant statistic report from trusted sources, even though in certain instances, data was not readily available.

**Keywords:** climate change, sustainable development, environment, emissions, law, policy, governance, Africa, development

## 1.0 INTRODUCTION

Environmental law has not been touted as African's strongest enterprise. While a few African countries acknowledge the place of environmental law, and have in fact included it in their municipal laws, entrenching it in their various Constitutions and making the right to a healthy environment an enforceable one, a larger number do not recognize environmental laws and/or policies within their *legis*. In the same manner, we lag behind on climate adaptation and mitigation strategies, implementation of climate change and environmental laws and policies is weak, and there are no regional institutions for monitoring or enforcing environmental regulations, data collection and dissemination for policy development and scientific communication. Yet, predictions put Africa as one of the hardest hit continents by the spate of climate change<sup>1</sup> While all African countries are parties to the Paris Agreement (with all 54 countries signing it and over 70 percent ratifying it), their actions, overt or otherwise, by their national laws to keep in stride with the Agreement, particularly in achieving their Nationally Determined Contributions (NDC's) have not been consistent enough to enable them put in place the necessary laws, institutions, implementation and enforcement mechanisms to ensure achievement of these environmental goals, and this for a continent whose population is set to double to 2.4 billion by 2050<sup>2</sup>. And no doubt too, various things have militated against this, including lack of access to finance, sustaining the continent's economic development amidst environmental considerations. These things, sadly, have not been taken seriously and keenly enough into consideration, whether by the international community expecting the continent to establish a sturdy implementation system, or by the African countries themselves in making commitments, putting forward their positions at the climate conferences or putting in place laws and systems that do not take into consideration the peculiarity of their locale. A recent report by

---

<sup>1</sup> African Development Bank, 'Africa and the Challenges of Climate Change' <https://www.afdb.org/en/cop22/focus-africa/implications-for-africa/> Last accessed 8<sup>th</sup> May, 2018

<sup>2</sup> The Telegraph UK, 'Africa's population to double to 2.4 billion by 2050' <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/10305000/Africas-population-to-double-to-2.4-billion-by-2050.html> Last accessed 8<sup>th</sup> May, 2018

the Institute for Security Studies in Africa (ISS) suggests that Africa's challenges are linked to environmental insecurity and the development catastrophe, which includes poverty, water scarcity, degradation and inequitable distribution of natural resources, loss of arable land, food insecurity, coastal degradation and wetlands intrusion.<sup>3</sup> These have posed (and continue to pose) great institutional challenges in Africa. Inevitably, these problems are intricately intertwined and compounded by rapid population growth and migration causing unanticipated pressure on the resource base.<sup>4</sup> Thus, the question that must be asked is, how can the African continent achieve sustainable development, and comply with international environmental standards? Is that even possible? Do we have the capacity to? If we do not, what must be our response? How can we tailor our legal system and institutions to achieve proper environmental governance and aim for sustainable development? How can the value chain of government, corporates and civil society achieve a workable legal and institutional regime both regionally and nationally from country to country? How can the international and regional treaties to which African states are state parties lean in favour of the continent? How can the instrument of law enable access to financing, seeing as this is one of the biggest challenges? Will the continent be able to pursue a sustainable, low-carbon growth strategy at a time of skyrocketing energy needs due to economic, demographic and urban growth? How can law be an instrument of social engineering to outwit the menace of corruption in African Economies? For instance, a recent study by the International Institute of Applied Systems Analysis showed that under current conditions US\$2 trillion would be needed by 2025 for concentrated solar power production in the region.<sup>5</sup> In an economic climate that posed just 5 per cent less risk of corruption and bureaucratic complexity, this figure was projected at US\$750 billion,<sup>6</sup> and that is certainly a modest number when speaking of the African continent. As though a testimony to its notoriety, this year's theme for the African Union Summit was tagged "Winning the Fight Against Corruption. A Sustainable Path to Africa's

---

<sup>3</sup> Connect for Climate, Caroline Anne Amollo 'Environmental Governance in Africa' <https://www.connect4climate.org/learn/article/environmental-governance-in-africa> Last accessed 8th May, 2018

<sup>4</sup> AllAfrica.com, Julia Bello-Schunemann 'Africa's Population Boom; Burden or Opportunity' <http://allafrica.com/stories/201705190853.html>; ThoughtCo., Angela Thompsell 'Is Africa Overpopulated?' <https://www.thoughtco.com/is-africa-overpopulated-3960917> Last accessed 8<sup>th</sup> May, 2018

<sup>5</sup> Transparency International: Climate Governance, 'Making Climate Money Work' [https://www.transparency.org/news/feature/making\\_climate\\_money\\_work](https://www.transparency.org/news/feature/making_climate_money_work) Last accessed 8th May, 2018

<sup>6</sup> *ibid*

Transformation”<sup>7</sup> Experts unanimously agree that after years of fairly slow development Africa is now undergoing rapid growth<sup>8</sup> and the continent has been dubbed the continent of the future, first because it drives world population growth and the youngest human capital, and for many other reasons, including the natural resources it possesses. By 2030, 1 of 5 people in the world will be African<sup>9</sup> By 2050, 40% of all children under five and more than a third of all children under 18 will live in Africa, according to a UNICEF report and Nigeria alone will account for 10% of all births in the world.<sup>10</sup> These statistics, while giving us hope, engender a cause for alarm, if our environmental and climate laws and policies are not standardized to withstand what is coming as a result of more demand on less resources and the rise of global warming.

## 2.0 CONCEPTUALISING TERMS

**2.1 Sustainable Development:** The best definition so far coined for Sustainable Development is that culled from the report of the Brundtland Commission in 1987, thus, “development that meets the needs of the present generation without compromising the ability of future generations to meet their own need”<sup>11</sup>. In 1983, the Commission was set up, originally known as the World Commission on Environment and Development (WCED). Its mission was to unite countries to pursue sustainable development together. At the time, the UN General Assembly realized that there was a heavy deterioration of the human environment and natural resources. To rally countries to work and pursue sustainable development together, the UN decided to establish the Brundtland Commission. Gro Harlem Brundtland was the former Prime Minister of Norway and was chosen due to her strong background in the sciences and public health. The

---

<sup>7</sup> African Union Press Release, ‘President Buhari of Nigeria Launches the AU Theme of The Year 2018 on Fighting Corruption in the Continent’

<https://au.int/en/pressreleases/20180129/president-buhari-nigeria-launches-au-theme-year-2018-fighting-corruption>

<sup>8</sup> The new story of the rising continent came to wide public attention through press articles such as *The Economist*, *The hopeful continent. Africa Rising (2011)*, *Time Magazine*, *Africa Rising (2012)* and *Financial Times*, *Africa Calling (2013)*.

<sup>9</sup> World Economic Forum, ‘Six figures that prove the future is African’

<https://www.weforum.org/agenda/2017/05/africa-is-rising-and-here-are-the-numbers-to-prove-it/> Last accessed 10<sup>th</sup> May, 2018

<sup>10</sup> Ibid

<sup>11</sup> International Institute for Sustainable Development, ‘Sustainable Development’

<http://www.iisd.org/topic/sustainable-development> Last accessed 10<sup>th</sup> May, 2018; Report on the World Commission on Environment and Development: Our Common Future <http://www.un-documents.net/our-common-future.pdf> Last accessed 10<sup>th</sup> May, 2018

Brundtland Commission officially dissolved in December 1987 after releasing 'Our Common Future', also known as the Brundtland Report, in October 1987.<sup>12</sup>

The Brundtland Commission pushed for the idea that while the "environment" was previously perceived as a sphere separate from human emotion or action, and while "development" was a term habitually used to describe political goals or economic progress, it is more comprehensive to understand the two terms in relation to each other<sup>13</sup>. Brundtland argues:

**"...the "environment" is where we live; and "development" is what we all do in attempting to improve our lot within that abode. The two are inseparable." (World Commission on Economic Development)**<sup>14</sup>

According to Financial Times<sup>15</sup>, Sustainable development is about maintaining an equilibrium between human activity and the natural environment over the long term. It involves a fine balance between the economic, social and environmental needs and expectations of various stakeholders.

Essentially, these definitions reveal clearly that sustainable development is development that do not go out of touch with the consistent need to preserve and improve the eco-system in which this development is done. It is balancing the equilibrium of business and rights, of industry and well-being, of profit-making and the environment, of developing and sustaining livelihood. Sustainable development sits at the crux, pith and heart of the conversation on attaining a fit-for-purpose legal regime for Africa's environment and climate, because whatever legal regime results must be in lie with the tenets of sustainable development, understanding that Africa's biggest concern with the climate change agenda is developing amidst a push for a carbon-free economy and commitments to take climate action.

**2.2 Climate Change:** The elementary definition of climate change is 'the change of average weather condition in a particular place over a long period of time'. By the wordings of this definition, there is nothing rueful about the occurrence of climate change, especially not, as the

---

<sup>12</sup> Dr. Md Usangani Ansani, The Ecology and Environment Compendium, p 193

<sup>13</sup> Francis, Environment Magazine - Taylor and. "[Environment Magazine - What Is Sustainable Development? Goals, Indicators, Values, and Practice](http://environmentmagazine.org)". *environmentmagazine.org*

<sup>14</sup> J. Fien at al, Work, Learning and Sustainable Development, Opportunities and Challenges p 22

<sup>15</sup> Financial Times Lexicon, 'Sustainable Development' <http://lexicon.ft.com/Term?term=sustainable-development>  
Last accessed 15<sup>th</sup> May, 2018

earth was designed to experience seasonal changes over long periods, however the meat of this discourse is not the elementary or natural occurrence of climate change, but the anthropogenic one caused by human beings through a process known as global warming. Studies have shown that human activities since the beginning of the industrial revolution – manifested in fossil fuel consumption for power generation, land deforestation for agriculture, and urban expansion – have contributed to an increase in the concentration of carbon dioxide in the atmosphere by as much as 40%,<sup>16</sup>

The difficulty in understanding climate change or any writing, spiel or other conversation on the subject has always been with its scientific nature; the mention of greenhouse gases, the explanations that come with demystifying the connection between a global phenomenon and our daily lives and even worse, the connection, that an environmental mishap has to do with law, or how law can affect it. For instance, this paper to some, might be an overreach, as they try to grasp why exactly law matters to the spate of climate change or climate disasters across the world, and now in focus, Africa. Anthropogenic climate change has been defined as ‘seasonal changes over a long period with respect to the growing accumulation of greenhouse gases in the atmosphere.’ With anthropogenic or man-made climate change, the rate of climate change, expected to happen over long periods have sped up, and in effect altered weather patterns dangerously, resulting in extreme heat or extreme rainfall, the effect of which has been flooding or drought, depending on the country’s distance from the Sahara.

### **2.3 Environmental Law**

This simply refers to the law that regulates the impact of human activities on the environment. It covers a broad range of activities from Animal and plant protection, land development, use and planning, mining, exploration and extractive industries, forestry, pollution, fisheries, agriculture, waste management, climate change, water resource management and marine life<sup>17</sup> The Law Dictionary defines it as a ‘collective body of rules and regulations, orders and statutes,

---

<sup>16</sup> BEEATNA.AE ‘Definition of Climate Change’ <https://beeatna.ae/en/definition-of-climate-change>

<sup>17</sup> Environmental Defenders Office ‘What is Environmental Law?’ [www.edont.org.au/factsheets/what-is-environmental-law/](http://www.edont.org.au/factsheets/what-is-environmental-law/) Last accessed 20<sup>th</sup> May, 2018

constraints and allowances that are concerned with the maintenance and protection of the natural environment of a country.<sup>18</sup>

The Business Dictionary defines it as a ‘Body of rules and regulations, and orders and statutes, concerned with the maintenance and protection of the natural environment of a country’<sup>19</sup>

### **3.0 UNDERSTANDING ENVIRONMENTAL GOVERNANCE**

Environmental governance refers to the socio-political aspects of making participatory decision over the use and management of natural resources. Environmental governance is concerned with the political and legal rights, regulations and responsibilities of every member of the society – civil society, private sector and the government<sup>20</sup> International Union for Conservation of Nature (IUCN), defines environmental governance as the 'multi-level interactions (i.e., local, national, international/global) among, but not limited to, three main actors, i.e., state, market, and civil society, which interact with one another, whether in formal and informal ways; in formulating and implementing policies in response to environment-related demands and inputs from the society; bound by rules, procedures, processes, and widely accepted behavior; possessing characteristics of “good governance”; for the purpose of attaining environmentally-sustainable development’<sup>21</sup>

Repeatedly, certain items have been regarded as the fundamental principles of environmental governance, viz:

- Embedding the environment in all levels of decision-making and action, also known as environmental democracy
- Conceptualizing cities and communities, economic and political life as a subset of the environment, thus understanding how everything is interconnected, and the prevailing importance of the environment to survival
- Emphasizing the connection of people to the ecosystems in which they live

---

<sup>18</sup> The Law Dictionary, ‘What is Environmental Law?’ <https://thelawdictionary.org/environmental-law/> Last accessed 20<sup>th</sup> May, 2018

<sup>19</sup> Business Dictionary, ‘Environmental Law’ [www.businessdictionary.com/definition/environmental-law.html](http://www.businessdictionary.com/definition/environmental-law.html) Last accessed 20<sup>th</sup> May, 2018

<sup>20</sup> Public Policy and Administration Research, Vol 6. No 2, 2016 A. Ikhide, O. Magnus, ‘Environmental Governance in Nigeria: The Community Perspective p. 24

<sup>21</sup> Ibid, 25

Climate (environmental) governance is the measure by which we ensure that the interests of those most affected by climate change are met, that the different parties to the international instruments that govern climate actions live up to their obligations and the relations between them. It has also been described as the manner in which decisions are made and decision makers are held accountable; the policies, plans and measures that the state and its citizens put in place to address climate change and their implementation in a just and effective manner. Climate governance also deals with how inclusive the decision making process is in the exercise of power and responsibilities, that is, whether all stakeholders, including civil society, private sector and governments, have a voice. In short, it is about bringing together the technical, financial, policy and political elements of climate change<sup>22</sup>

#### **4. 0 HISTORY OF GLOBAL ENVIRONMENTAL GOVERNANCE**

The history of environmental governance has pockets of narrations depending on the part of the globe the story is told from. As a result, most of the story told of global environmental governance origins today are fractions of the whole, having chronicles predating them. The commonly recognized starting point for environmental governance in the world today was the 1972 Stockholm Conference on Human Environment which led to a first wave of academic studies on intergovernmental environmental cooperation and organization. It is seen as the birth of the green generation. What is considered today the most relevant precursor of the concept of global governance is the debate on international environmental law regimes of the 1980s.<sup>23</sup> First, in terms of global environmental goals and priorities, Stockholm helped place the environment squarely on its feet in the international political agenda, and entrenched it as part of the United Nations' agenda<sup>24</sup> The debate on the correlation between environmental sustainability and economic development also began at Stockholm, thus even at the start of what is today regarded as global environmental governance, there was already the discussion on the intersection with economic development. Closely following this was the Rio Conference, and the addition of countries in the Global South to the discourse. Between Stockholm and the Johannesburg global

---

<sup>22</sup> K. Makombe, 'Climate Governance in Africa: A Handbook for Journalists' p 1 Heinrich Boll Foundation [https://ke.boell.org/sites/default/files/climategovernancehandbook\\_2.pdf](https://ke.boell.org/sites/default/files/climategovernancehandbook_2.pdf)

<sup>23</sup> Frank Biermann, 'Global Environmental Governance, Conceptualisation and Examples Global Governance Working Paper No 12- November 2004 P.5

<sup>24</sup> Kate O'Neil, 'From Stockholm to Johannesburg and Beyond: the Evolving Meta-Regime for Global Environmental Governance. Paper presented for presentation at the 2007 Amsterdam Conference on Human Dimensions of Global Environmental Change, May 24-26 2007, p15

environmental summit in 2002, there was the Vienna Convention and the Montreal Protocol, the Rio Declaration on Environment and Development, 27 non-binding principles on sustainable development, and Agenda, the Convention on Biological Diversity (CBD), Kyoto Protocol and the United Nations Framework Convention on Climate Change (UNFCCC), the fulcrum of the Annual Conference of Parties, Paris Agreement and the Talanoa Dialogue. The United Nations Commission on Sustainable Development (CSD) was also set up in 1992 to follow through on Agenda 21 commitments.

The United States history of global environmental governance in fact begins much earlier; in 1960 driven by domestic issues like water and air pollution in the locality, strip mining, highway construction, noise pollution, dams, stream channelization, clear-cutting of forests, hazardous waste dumps, nuclear power plants, exposures to toxic chemicals, oil spills, suburban sprawls. These issues garnered concern during the period. The concern led to the US Environmental Policy Act (EPA) in 1969 and the first Earth Day a few months later. Various acts were passed in quick succession within the period.

Whether global or country-based, environmental governance began when communities of people and States began to realise how there was a need to have laws and systems governing environmental protection and sustainability. For Africa, it was a game of catch up, joining the moving train with the rest of the developed world. Seemingly, we are still trying to play catchup today.

## **5. 0 CLIMATE CHANGE, AFRICA AND THE PARIS AGREEMENT**

There is no doubt that at the core of the Paris Agreement and the world's move towards more sustainable systems, certain topics are prevalent, especially for the African continent, viz: adaptation, mitigation and loss and damage; climate finance; deforestation; agriculture; non-national government responses; transparency; technology transfer and capacity building; and most pertinently, the implications for the energy sector.<sup>25</sup> Climate change poses a significant threat to economic, social and environmental development in Africa, as reflected in the fifth

---

<sup>25</sup> King & Spalding: Energy Law Exchange, Alex Blomfield 'The Paris Agreement on Climate Change; Implications for Africa' <https://www.kslaw.com/blog-posts/the-paris-agreement-on-climate-change-implications-for-africa> Last accessed May 25<sup>th</sup>, 2018

assessment report of the Intergovernmental Panel on Climate Change.<sup>26</sup> This report presents strong evidence that warming in Africa has increased significantly over the past 50 to 100 years, with clear effects on the health, livelihoods and food security of people in Africa. Thus, the way and manner by which Africa understands climate change has become more nuanced to cushion the effects it is having within its borders, and particularly on its economy. Climate change is more real than ever before to the continent

With agriculture contributing to a third of Africa's GDP (between 30-40 percent) and 65 percent of its workforce and 80 percent of Africans being dependent on low-yielding, rain-fed agriculture<sup>27</sup>, the effect of climate in Africa includes considerable health and economic challenges for the continent such as increased food insecurity, spread of weather-sensitive diseases, reduced livestock productivity and crop yield and increased water scarcity. There are also iterations based on scientific evidence linking climate change to certain conflict situations or escalation of existing conflict<sup>28</sup>

Extreme weather events like including droughts, floods and heat waves are expected to become more frequent and agricultural yield losses are projected to reach 22% across sub-Saharan Africa, with increases in the frequency and prevalence of failed crop seasons.<sup>29</sup> Also, Africa is at the receiving end of losses like deforestation, desertification, land degradation, drought, air pollution, loss of biodiversity, soil erosion and rising sea levels.

The Paris Agreement was signed in December 2015 and it entered into force on October 5, 2016. A month later, at the (COP22) Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) in Marrakech, Morocco, world leaders formally adopted the Marrakech Action Proclamation which recommitted parties to full implementation of the Paris agreement. The focus on climate change issues appears to be divided among nations, despite the historic agreement signed by 195 countries of the world at the Conference of Parties

---

<sup>26</sup> United Nations Office the Special Adviser on Africa 'Climate Change'  
<http://www.un.org/en/africa/osaa/advocacy/climate.shtml> Last accessed May 25th, 2018

<sup>27</sup> S. Adams et al; World Bank. 2013. *Turn down the heat : climate extremes, regional impacts, and the case for resilience - full report (English)*. Turn down the heat. Washington DC ; World Bank.  
<http://documents.worldbank.org/curated/en/975911468163736818/Turn-down-the-heat-climate-extremes-regional-impacts-and-the-case-for-resilience-full-report>

<sup>28</sup> Solomon M. Hsiang, Marshall Burke, Edward Miguel 'Quantifying the Influence of Climate on Human Conflict' *Science* 13 Sep 2013: Vol. 341, Issue 6151, 1235367 DOI: 10.1126/science.1235367

<sup>29</sup> Supra, note 26

in Paris in 2015 and till date has been ratified by 175 of those countries, 33 of which are from Africa<sup>30</sup>, thus more than 50 percent of the continent has agreed to have the Agreement bind them. However, the divisive focus is not surprising considering that the commitment to reduce emissions, to adapt, mitigate and work for more sustainable economies is a very daunting one, that all nations cannot attain equally, most especially nations in Africa. Thus, while the deleterious and undesirable effects of climate change bears down on the continent, mitigation and adaptation efforts, climate technology, research and development for climate change, proper waste management and recycling mechanisms are all extremely expensive endeavours, and financing development has been a recurring issue in the last few decades for Africa. Financing sustainable development is even more expensive, yet these countries are parties to the Paris Agreement, so what does it mean for us?

### **5.1 The demands of the Paris Agreement vis-à-vis Africa's development**

The Intergovernmental Panel on Climate Change ( IPCC ) stated in its 2014 report that the risks of climate change are unevenly distributed and by 2050, Africa will be the most badly affected continent. An unfair occurrence, but the sad reality of the climate change menace. Seven of the ten countries most at risk from climate change are in Africa (Sierra Leone, South Sudan, Nigeria, Chad, Ethiopia, Central African Republic and Eritrea)<sup>31</sup>. Yet, Africa contributes only four percent of global greenhouse gas emissions, the least whether in absolute or per capita terms<sup>32</sup> compared to China's 23 percent, the U.S.'s 19 percent, and the European Union's 13 percent. To further illustrate the point, the Africa Progress Panel notes that it would take the average Ethiopian 240 years to register the same carbon footprint as the average American.<sup>33</sup> In order to adequately deal with the challenge of climate change in the light of the Paris Agreement, it must be understood that addressing the issue of climate change within the overall development challenges of developing countries, a commingling of which can be found in Africa is no simple task, starting with the challenge of translating commitment to pragmatic actions. Various countries have submitted NDCs with gargantuan commitments, ambitious and intent on doing

---

<sup>30</sup> 'Paris Climate Change Agreement; How Has Nigeria Fared' This Day Newspaper December 28<sup>th</sup>, 2017 <https://www.thisdaylive.com/index.php/2017/12/28/paris-climate-change-agreement-how-has-nigeria-fared/> Last accessed 28<sup>th</sup> May, 2018

<sup>31</sup> Maplecroft, Climate Change Vulnerability Index 2015

<sup>32</sup> International Energy Agency

<sup>33</sup> A. Sy 'Africa: Financing Adaptation and Mitigation in the World's Most Vulnerable Region' Brookings Institution [https://www.brookings.edu/wp-content/uploads/2016/08/global\\_20160818\\_cop21\\_africa.pdf](https://www.brookings.edu/wp-content/uploads/2016/08/global_20160818_cop21_africa.pdf)

good, with all African countries, except Libya commendably submitting their NDCs before the COP21 meeting but when the reality of achieving them faces the countries, how does the instrument of law then work in their favour, whether municipal laws or the Paris Agreement. For instance, Nigeria requires about U\$10 billion per annum to meet her NDC targets, and it only begs the question to begin to ask how such financing will be raised, or if the NDCs get the backburner for more pressing developmental needs to come to the fore. There is opinion in some quarters that African countries should refrain from ratifying the Agreement, and that in fact, they should not have signed in the first place, as the demands are too enervating for countries in Africa. The Paris Agreement set an ambitious target by agreeing to hold the increase in the global average temperature to well below 2 C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 C above pre-industrial levels.<sup>34</sup> The Agreement also aims to achieve a global peaking of greenhouse gas emissions, as soon as possible, aiming that after 2050, countries are to have net-zero emissions, using carbon sinks, such as forests, to offset any emissions they produce.<sup>35</sup>

The Paris Agreement has been maligned for its bottom-up approach, lack of a mandatory requirement for enforcement of domestic policy, self-reporting, peer review and the allowance granted to states to determine their level of ambition.<sup>36</sup> However, others have lauded it, saying that, targets that are locally developed by the countries themselves are more likely to be adhered to than ones that are mandated by an international agreement, taking a cue from various international treaties and conventions and even the history of treaties that preceded the Paris Agreement, including the Kyoto Protocol. With the ongoing work on the Paris rulebook and the showcasing of the top-down rules to promote accountability and shared responsibility, however, critics of the bottom-up approach may now see things differently as the rulebook makes for monitoring, transparency and a more structured approach to achieving the Paris Agreement goals.

## **5.2 Facilitative Dialogue**

---

<sup>34</sup> Article 2(1)(a), Paris Agreement

<sup>35</sup> Article 4(1), Paris Agreement

<sup>36</sup> Article 4(9) and Article 4(11)

The Facilitative Dialogue is expected to ensure the linkage between policies, actions and means. Currently, Africa's development challenges are many. One serious disadvantage is that more than half of its 1.2 billion population lives on less than \$1.25 per day—the standard threshold for absolute poverty. Also, about 60% of Africa's unemployed are youth. Food security is also a problem: a quarter of Africa's population goes to bed hungry, while more than 200 million Africans suffer from severe malnutrition. This is a major concern in fulfilling the requirements of African countries under the Paris Agreement. How do countries cap their emissions when they contribute very little to the global emissions and they have the obligation to develop at the same time. Thus, the dialogue plays an important role in Africa's environmental governance regime. Thus, Africa must first of all have a unifying environmental/climate law/policy which will ensure a united front when it delivers its position at future COP meetings. The goal of Africa is a daunting one; to achieve development, while ensuring environmental sustainability in spite of the litany of challenges, especially economic that pervade the continent.

One of the issues Africa is pushing hardest is the predictability of finance flows. The promise that brought Africa into the Paris deal was a pledge that by 2020, \$100 billion would be flowing to developing countries every year to help them cope with climate change. This so far has not been the case, and is an important part of the global conversation, thus the continent must develop mechanisms by which to encourage the EU and other Annex II countries fulfil their pledges under the Paris Agreement.

## **6.0 LEGAL AND INSTITUTIONAL FRAMEWORK FOR ENVIRONMENTAL AND CLIMATE CHANGE LAW IN AFRICA**

The twin pillars of enabling a fit-for-purpose environmental and climate law regime are standardized institutional frameworks and a sturdy legal framework. This is because the law, no matter how good, cannot have effect if the institutions are not structured and poised to understand, implement and enforce them. Most of Africa's challenges have resulted from weak institutional frameworks. Unarguably, Africa has been bedeviled by many challenges, but on key importance and begging to be addressed is the concern of weak institutions. It might in this instance be good for us to borrow a leaf from the Asian countries, like China, Malaysia, South Korea and Singapore, or the BRIC coalition (Brazil, Russia, India and China). These countries, a few decades ago, were at par with most countries in Africa in terms of development, but by

putting in place strong institutions, they have moved quickly to become almost model economies. The problem of weak institutions needs to be addressed both at the national levels and at the regional levels. The African Union, with the role Africa plays in international trade and development today, should be one of the foremost and cognizable regional blocs to reckon with, but in its 18 years of existence, it has not done much to put African countries at the forefront of the chart. It is not possible to answer with all sense of certainty and accuracy, ‘What makes a good climate law?’ However, certain elements have been identified as good practice and as being able to help lawmakers arrive.

Our laws must also ensure that institutions like the Ministries, Departments and Agencies of Agriculture, Power, Mining, Oil and Gas, Climate Change, Environment and Meteorology work together in making data available to ensure proper climate and environmental legislation. For instance, one of the limiting factors for finalizing the Rulebook of the Paris Agreement has been the inability of developing countries to provide information or data on greenhouse emissions. Thus, the lawmaking bodies should gear their actions towards legislating availability and sharing of data, setting up bodies that work to provide accurate data to aid policies and laws that have basis in facts and figures. Moreover, the higher institutions of learning should be used as nurseries and breeding places for gathering relevant data, organizing white papers and putting together draft policies that can translate into policy statements and laws guiding the environmental space.

It is pertinent to examine the climate and environmental law regime of the African Union in context as well as the countries that make up the union. As we are agreed on the fact that Africa is a peculiar continent whose approach to a climate and environmental legal and policy framework has to be tailor-made, and not one size fits all, we must then understand the workings of the African Union and the role it has played in establishing a legal cum regulatory framework over time. Africa lags dangerously behind on climate adaptation strategies and implementation. Uncoordinated, discursive and garbled climate related policies exist, but without a firm Climate policy for the continent, the war against climate change will be one very unlikely to be won

Africa also suffers the bane of lack of regional institution for monitoring climate change adaptation, policy developments or enforcement of environmental regulations, data collection and dissemination for policy development and scientific communication. In crafting a fit-for-

purpose legal and policy framework for environmental and climate law in Nigeria, it is crucial that the African Union, through the instrumentality of its organs develops a climate adaptation and mitigation policy suited for Africa, as well as a framework for low carbon development technology in the region. Following this closely must be the development of political will and momentum for climate adaptation policy formulation into specific national states. This will mean that at the regional/sub-regional level, there would be a strong policy framework and same would have been adopted by the countries municipally, therefore strengthening regional commitment. Climate change very easily affects and is affected by the national and economic life of African countries, thus things like crop agriculture and animal husbandry feel the direct effects of climate change while energy systems and economic purchasing power affect or contribute to climate change. This direct correlations calls for national development strategies that factor in these key areas.

Environmental governance is the fulcrum of the discourse on a legal and/or policy framework for environmental law and climate change in Africa. Poor governance systems in Africa, not just in the environmental space, have continued to be her bane. African governments should strive to develop robust environmental governance system by building capacity of environmental institutions with clear mandates and power to enforce legislations. The overlapping of functions, proliferation of organisations set up to do the same thing, and lack of a clear mandate for existing institutions has contributed in no mean manner to weak enforcement within the region. For instance in Nigeria, we have the NESREA (National and Environmental Standards Regulations and Enforcement Agency, which is often at loggerheads with the NOSDRA (National Oil Spill Detection and Response Agency) over whose duty it is to enforce environmental standards and regulations in matters relating to oil pollution. Lack of effective environmental governance structures has also largely resulted to the poor national implementation of Agenda 21 and various Multilateral Environmental Agreements (MEA's)<sup>37</sup>

The continent is also, especially in recent time experiencing a lot of inter-African trade, tourism and travel. Only very recently too, there was the African Continental Free Trade Area Agreement

---

<sup>37</sup> Environmental Governance in Africa by Carolin Anne Amollo Nov. 21, 2011  
<https://www.connect4climate.org/learn/article/environmental-governance-in-africa> Last accessed June 12, 2018

signed by 44 out of the 54 African countries.<sup>38</sup> This should be a pressing reason for integrating climate and environmental legislation at regional and national levels to mandate certain compliance in inter-African trade, travel and tourism. Our land management laws, natural resource management and conservation laws, biodiversity and wildlife conservation laws, soil conservation laws, water management laws and forest legislations must be incorporated into National Planning laws and form the body of climate/environmental law municipally.

## **6.1 Regional integration downwards and upwards**

The elephant in the room, which is often unspoken, but is perhaps the biggest obstacle to and reality of the African continent, is the high level of poverty, which indubitably affects every aspect of Africa's life, and which is the more reason why the continent requires a purpose built climate legal and policy regime, adapted to its economic realities. By the end of 2018 in Africa as a whole will have probably about 3.2 million more people living in extreme poverty than there are today. Africa accounts for two-thirds of the world's poor, and if that trend persists, Africa will account for nine-tenths by 2030.<sup>39</sup>

Nigeria only recently overtook India as the world's poverty capital, with the number of people in extreme poverty increasing by six people every minute with 87 million people in extreme poverty. Furthermore, 14 out of the 18 countries of the world- where the number of extreme poor are rising- are in Africa, so law must first drive coherent and comprehensive economic reforms. Needless to say, if law cannot drive economic reforms within the region, then climate and environmental reforms are far-fetched. We must use the instrumentality of law to strengthen our institutional, legal, scientific and infrastructural capacity, especially with regards access to finance. Solving the money problem is one step forward in solving the climate change problem in Africa. It is also very true that we cannot continue to depend of foreign aid or even the Green Climate Fund (GCF) or Global Environment Fund (GEF), because, while these facilities are set up for developing and less developed countries, to cushion the effect of the transition to leaner

---

<sup>38</sup> CNN: Marketplace Africa '44 Countries agree Free Trade Agreement, Nigeria yet to sign' March 23, 2018 <https://edition.cnn.com/2018/03/22/africa/african-trade-agreement-world/index.html> Last accessed June 12<sup>th</sup>, 2018

<sup>39</sup> Business Day Newspaper, June 27, 2018. The Poverty Capital of the World <http://www.businessdayonline.com/opinion/article/poverty-capital-world/>

economies, access to them is a herculean task, and in many cases, the Annex II countries fail to keep up with their financial commitments to this pool.

Africa has the advantage of being one of the fastest growing regions in the world. This has its attendant benefits, one of which is that a large number of investors are looking to invest in the region; this is a good thing for the economy, thus harping on it, business and economic policies that encourage private investment in low emission development by creating risk reduction environment should be put in place. Certain publicists have opined that economic concerns and environmental concerns cannot co-exist side by side

## **6.2 No legally binding climate policy**

An immediate concern that sticks out like a sore thumb within the continent is the lack of a legally binding international climate policy. One must take time to consider how the EU has constantly managed to advance its objectives even though their number is not as much as that of the members of the AU, however they have continued to work with the two-phased strategy that enabled them establish a united front which they push with all determination at the UNFCCC meetings. Since 1990, EU has been pursuing climate mitigation targets with clear goals and ambitions. Africa needs to establish a unifying policy that sets out clear climate/environmental goals for the continent, tailor-made to suit economic and social realities, and that can be consistently pushed at the global negotiations. South Africa and Kenya have done well by developing Climate Change laws, yet that is not a win for the continent yet until we integrate this development across board and upward.

It is alarming, for instance, that the West African sub-region has had the ECOWAS Energy Protocol<sup>40</sup> around for almost two decades and it has not fully exercised the provisions. The Protocol provides for environmental guidelines in Article 19, yet very few countries within the sub-region have referenced it or even utilized it, much less domesticated it into their laws. There also exists an East African Climate Change Policy. These legal and policy documents have operated in fragments and never really been integrated, and in other cases, there has really not been any focused specifically on the environment. Even the existing climate policies are weak

---

<sup>40</sup> ECOWAS Energy Protocol available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5477>

and vague. To organize adaptation efforts, there need to be specific and strong environmental policies at the regional, sub-regional and national levels.

### **6.3 Conflicting legislations**

Another Pandora's Box the continent has to grapple with is that of conflicting legislations and lack of integration. Duplicating legislations eventually lead to conflicting provisions which makes enforcement even more difficult. For instance, South Africa has the White Paper on Promotion of Renewable Energy and Clean Energy Development 2003, the Integrated Clean Household Energy Strategy 2003, the Implementation strategy for the Control of Exhaust Emissions from Road-going Vehicles in South Africa, 2003, the Renewable Energy Policy 2004, the Cleaner Production Strategy 2005, the Energy Efficient Strategy 2005, the Biofuels Industrial Strategy 2007 and the Renewable Energy Feed in Tariffs, 2009.

More importantly, there is a knowledge gap that pervades policy makers in most parts of the continent, part of which stems from very little being invested in Research and Development, and the gaping divide between science and policy, so the science folks know a lot about the science of climate change and environmental waste and nothing about the law, and the legal and policy practitioners understand environmental law and policy and perhaps a bit of climate law, but do not understand the science, or are completely ignorant of climate change entirely. Governments should prioritize on expanded capacity-building programmes and develop stronger commitment and discipline towards environmental policy. There also needs to be marriage between science and policy. Laws should be put in place to ensure and government funding should be geared towards investment into Research and development and institutional capacity development. Africa has to come to that point where it takes environmental protection and climate change seriously. Institutions of learning should have dedicated course modules on environmental law cum climate change, demystifying the concept and making them understand why it so intricately concerns them. If this is done, the average student graduating from secondary education understands climate change and can influence or personally make contributions to the conversation on climate policies and laws and/or climate-friendly policies and laws. The effectiveness of climate mitigation, adaptation and clean technology development in Africa is highly dependent on sound political structure that is keen on poverty alleviation and sustainable development.

## **6.4 Unification of laws**

Perhaps this is another angle to examine critically. The clamour for a fit-for-purpose environmental law regime, while it is advocated that there be one central climate law binding on States within the continent, and that States adopt similar legislations within their borders, it is also strongly advocated that laws guiding various other aspects of economic life be made to sync with the climate/environmental laws. For instance, if the laws on urban housing or animal husbandry encourage practices, construction or importation of animal feed that harms the environment, then it nullifies whatever provision is given in whatever climate law or policy is put in place. Thus has continued to be the bane of African countries in legislating environmental governance, because issues of environmental protection cut across board. Thus, there should be a saturation of environmental knowledge, practitioners in environmental law should be made to sit at the tables where these laws and policies are being decided to give their input. Tax laws too, very importantly, determine whether pollution continues to be done defiantly within a State's borders or not. For instance, the Tax Appeal Tribunal in Nigeria has ruled that the penalty paid on gas flaring by oil companies is tax deductible and is not a fine. While this is extremely ridiculous, it is the law, and so the oil companies suffer little or nothing for flaring gas, because also, by paying the fee, they are spending much less than they will if they do not flare and have to find some alternative use for the gas. Essentially, by the extant laws in Nigeria, environmental pollution by gas flaring is highly encouraged. This is one of the things the continent needs to kick against. Implementation of an environmental tax too, on activities, persons and items violating environmental laws have to be put in place, yet we must first have coherent environmental laws without the usual loopholes that our laws are prone to so as not to create a leeway for protracted cases in court challenging their provisions. India, for instance, has set up national funds to finance climate change activities, and a tax on imported and domestic coal. They also have programmes to encourage the private sector to take action.

## **6.5 AU-NEPAD Plan of Action**

According to the AU-NEPA Plan of Action, Africa contains over 3,000 protected areas including 198 Marine Protected Areas, 50 Biosphere Reserves and 80 Wetlands of International

Importance.<sup>41</sup> Eight of the world's 34 international biodiversity hotspots are in Africa<sup>42</sup> and all of these face the threat of climate change.

The AU-NEPAD Plan of Action is a document put together by the African Union under its NEPAD (New Partnership for Africa's Development) programme which represents the minimum of African priorities for implementation in the short to medium terms and is anchored on Africa's desire to usher in a change of paradigms. One of the sectoral focuses of the plan is in the area of environment and climate change. The plan harps on integration of the framework for environmental protection and lists six programme areas and collaboration with various institutions including the United Nations Environmental Programme and The African Ministerial Conference on the Environment. Another thing the plan advocates is a framework for partnership between African countries and multilateral financial institutions like the GEF. Sub-Saharan Africa receives only 9 percent of the Entire sum mobilized by the six biggest MDB's \$81 billion in 2015<sup>43</sup>

No doubt, African countries should aim at this, but more focus should be on raising indigenous financing even through mobilizing foreign capital. Development of our local capital markets could be a veritable way to do this. The Plan of Action is a fine one, yet the successful implementation leaves much to be desired. It is perhaps, a document that should be considered carefully in framing a purpose built environmental/climate law regime for Africa.

## **6.6 Decentralising decision making**

In 2008, India adopted a National Action Plan on Climate Change that integrated eight national missions in the run up to 2017. In India, each state has to develop a State action plan on climate change indicating buy-in at the highest level and encourages action at the lower levels. That is an example of decentralized decision making for climate/environmental laws. Decentralising decision making in this area will help for more people-centered policies, designed by the very individuals at the grassroots who feel the impact of climate change. The Climate Change Act of

---

<sup>41</sup> AU-NEPAD African Action Plan 2010-2015 Advancing Regional and Continental Integration in Africa

<sup>42</sup> Africa Atlas of our Changing Environment, UNEP

<sup>43</sup>Financial Nigeria, C. Chikwendu 'Closing the Gap in Climate Finance in Sub-Saharan Africa

[www.financialnigeria.com/closing-the-gap-in-climate-finance-in-sub-saharan-africa-sustainable-906.html](http://www.financialnigeria.com/closing-the-gap-in-climate-finance-in-sub-saharan-africa-sustainable-906.html) Last accessed June, 7<sup>th</sup>, 2018

Kenya 2016 had work on it commence as far back as 20017. It was research and evidence based with testimonials from pastoralists in Wajir, farmers from Kakamega, women from the Lakeside City of Kisumu, climate experts from Nairobi, fisher folk from Mombasa, villagers from Mwingi, all commingled to form one robust plan that put into consideration all these perspectives. In many cases, there seems to be a lack of vertical integration between what is happening at national level and in terms of adaptation planning, what s happening at the local level in tiers of district development planning.<sup>44</sup>

### **6.7 Administrative and political will**

National legislation is as critical to combating climate change as a successful international agreement. International commitments have little meaning unless they are underpinned by legislative action at the national level. National legislation can alter the dynamics at the international level. Domestic debate can help advance national positions at the UN negotiations. The necessity of administrative and political will to drive the reality of a unified climate/environmental legal framework will be championed by individual member States, and these States will also champion implementation and domestication in the long run.<sup>45</sup> Putting laws on the statute books is different from implementing them and achieving the targets set therein. Countries may choose to identify flagship legislation. For instance, South Africa has the National Action Plan on Climate Change.

The primary motivation for climate change legislation was often economic for example South Korea's Green Growth Law which include targets for emissions reduction and creates the legislative platform for the over to a low-carbon economy was at least partly driven by the concern to protect Korea's competitiveness against the backdrop of the likely imposition of carbon tariffs in Korea's main export markets. At the same time, South Korea saw the opportunity to kick-start the economy through 'green' fiscal stimulus, investing in low-carbon infrastructure and improving competitiveness by reducing energy costs. The same goes for

---

<sup>44</sup> AllAfrica, Melissa Britz 'Africa: No One-Size-Fits-All Solution for Climate Adaptation in Africa' [www.allafrica.com/stories/201806250842.html](http://www.allafrica.com/stories/201806250842.html) Last accessed June 25th, 2018

<sup>45</sup> Legislating Climate Change on a National Level, T. Townsend, S.Fankhauser, A. C. Feger, Matthews, J. Liu, T. Narciso Sept/Oct 2011 Vol 53 p 5 Can be accessed at [sciencepolicy.colorado.edu/students/envs\\_4100/Townshend\\_2011.pdf](http://sciencepolicy.colorado.edu/students/envs_4100/Townshend_2011.pdf)

Russia, Indonesia and Norway<sup>46</sup> Therefore, regardless of what the motivation is (and I daresay economic reasons are a fine enough motivation as it is encouraging if an economy can grow and still be green), climate change legislation is commendable

The African Development Bank has a 2013-2022 strategy promoting inclusive and green growth in Africa. This also must be tapped into by countries in Africa to ensure economic development while at the same time ensuring green growth. These plans, strategies and statements must evolve into concrete laws that will be implemented.

Perhaps it is also important that Africa takes a cue from Bangladesh. They set up a Climate Change Trust Fund and invested over half a billion dollars in addressing adaptation and mitigation projects. Most African countries have no provision for climate change adaptation or mitigation projects in their budgets.

Sound climate legislations and policies require much research and preparation and priorities and opportunities take very different forms in different parts of the world. There must be distinct approaches to climate change. The pre-existing legal framework, relevant development indicators, population density and so on are all important factors in shaping lawmaking requirements and opportunities and can vary strongly even among neighbouring states

## **7.0 THE ROLE OF LAW IN ENABLING FINANCE FOR CLIMATE-RELATED PROJECTS IN AFRICA**

Financing is a major problem for Africa in achieving its environmental objectives, yet there is a role law and policy can play in making finance more available from within the continent. There is no doubt that indigenous financing is the way to go now, especially with unfavourable lending policies by the World Bank and IMF, increased foreign debts and exposure of African countries and the EU's failure on its commitment to Africa through the various funds. Even aids are reducing in number, availability and sufficiency.

### **7.1 Illicit financial flows**

---

<sup>46</sup> Legislating Climate Change on a National Level, T. Townsend, S.Fankhauser, A. C. Feger, Matthews, J. Liu, T. Narciso Sept/Oct 2011 Vol 53 p 10 Can be accessed at [sciencepolicy.colorado.edu/students/envs\\_4100/Townshend\\_2011.pdf](http://sciencepolicy.colorado.edu/students/envs_4100/Townshend_2011.pdf)

In reality, Africa has what it takes to finance its development, but again, lack of proper environmental and economic governance, excessive funds being lost through illicit money movement and corruption has denied the continent of its own money. The continent is estimated to be losing at least \$50 billion through illicit financial outflows every year, according to the report of the High-Level Panel on Illicit Financial Flows from Africa established by the United Nations Economic Commission for Africa.<sup>47</sup> Recent reports show that Nigeria loses up to \$60 billion every year to illicit financial flows.<sup>48</sup> It is also on record that Nigeria loses \$148 billion to corruption annually.<sup>49</sup> This is money obtained through improper means, not passed through the right channels, and not taxed, which if recovered, can finance major projects on the continent. By putting laws in place to combat such, Africa can utilize its monies efficiently for development and transformation. The Addis Ababa Action Agenda, which sets out a strategy to finance the SDGs, included commitments to combat tax evasion and illicit financial flows, or IFFs, through stronger regulation and international cooperation.<sup>50</sup> This strategy should be followed closely and established as reality by enacting stronger tax laws locally and strengthening institutions for monitoring IFF's and other corrupt money practices. There should be a binding law guiding African countries on anticorruption and illicit financial flows. The law should be holistic and address issues of taxation, transfer pricing, corruption, profit shifting, trade malpractices etc. Illicit financial flows have only succeeded in reducing resources needed for development, contributing to undermining good governance, exacerbating conflict, deepening inequality and weakening international development .cooperation.

## **7.2 Innovative financing**

Africa should aim at unlocking value from diaspora flows and putting in place enabling laws that will make reliable data available. This data will facilitate the marketing of bonds to the diaspora. Law should customize the regulatory framework for creation and sale of bonds in foreign countries at the international level. The World Bank shows that the average cost of sending

---

<sup>47</sup> Report on the High Level Panel of Illicit Financial Flows from Africa, p 13 Available at

[https://www.uneca.org/sites/default/files/PublicationFiles/iff\\_main\\_report\\_26feb\\_en.pdf](https://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf)

<sup>48</sup> Ventures Africa: Africa Loses \$50 Billion to Illicit Financial Flows Annually <http://venturesafrica.com/africa-loses-50-billion-to-illicit-financial-flows-annually/> Accessed 16<sup>th</sup> May, 2018

<sup>49</sup> Vanguard (January 25, 2018) Africa Loses \$148 Billion to Corruption Annually <https://www.vanguardngr.com/2018/01/africa-loses-148b-corruption-annually/> Accessed 16<sup>th</sup> May, 2018

<sup>50</sup> Devex: Curbing Illicit Financial Flows Key to Reaching SDGs in Africa by Sarah Jerving <https://www.devex.com/news/curbing-illicit-financial-flows-key-to-reaching-sdgs-in-africa-91287> last accessed 18th June, 2018

money to a person's home country in Africa is about 9 percent. By reducing this cost, each percentage point of lowered remittance cost could unlock as much as \$3.3 billion per year for developing country recipients<sup>51</sup> Also, stimulation of private capital flows is important as private capital is an enormous source of global wealth that has not been tapped into enough by African countries. The current strong economic growth trends and sound macro fundamentals of Africa present a significant opportunity for debt investors. While the amount of private equity capital raised for Africa totals more than \$25 billion in the past 10 years, there is a significant supply and demand mismatch between the need and availability of debt across Africa.<sup>52</sup> One writer has quipped that private equity, using the appropriate models, has a critically important role to play in Africa's march to prosperity. Much is made of the continent's risk profile, with political and currency risks presently the kinds most often cited. One of private equity's strengths lies in managing and navigating risks<sup>53</sup>

If this can be tackled successfully by the instrument of law, more money can be made available from within the continent for funding its own climate and environmental programs, and developing a legal regime that does not depend on the fulfilment of an Annex II country's obligation or donation of the EU to the GEF.

We cannot achieve a fit-for-purpose law too, when African countries are not on the same page with respect to fossil fuels. With Kenya, South Africa, three core economies in East, Southern and West Africa. With these countries still having a coal agenda, what are the other smaller countries on the countries supposed to aim for or aspire to? There must be a unified front, an agenda that supports uniform policy objectives that can be worked towards.

## **8.0 ROLE OF LAWYERS IN ADVANCING THE LEGAL REGIME FOR ENVIRONMENTAL LAW**

In all of these actions and activity, whether on the right or wrong side of the divide, various professionals are involved; there are lawyers advising clients including the big polluters, there

---

<sup>51</sup> [www.mckisney.com/industries/social-sector/our-insights/innovative-development-financing](http://www.mckisney.com/industries/social-sector/our-insights/innovative-development-financing)

<sup>52</sup> Financial Times: Private debt can help drive African growth [www.ft.com/content/7e049004-fabe-11e7-9b32-d7d59aace167](http://www.ft.com/content/7e049004-fabe-11e7-9b32-d7d59aace167)

<sup>53</sup> The Whitaker Group. Editorial by Rosa Whitaker: How Private Equity Can Make The 'Africa Rising' Model A Reality [www.thewhitakergroup.us/how-private-equity-can-make-the-africa-rising-model-a-reality-stock-news-stock-market-analysis/](http://www.thewhitakergroup.us/how-private-equity-can-make-the-africa-rising-model-a-reality-stock-news-stock-market-analysis/)

are lawyers reviewing and drafting Joint Venture Agreements and Production Sharing Contracts, Power Purchase Agreements, Vesting Contracts, O&M Contracts, EPC Contracts, HSE Policies and there are lawyers making representation in court stalling environmental recovery or remediation suits with technicalities to avoid paying compensation or engaging in cleanup. The laws too, as we have seen are stacked in favour of those choosing to evade it rather than abide by it, because of its many loopholes, technicalities and conflicting provisions. There are also lawyers involved in the legislative process, whether for policy statements or laws. There are lawyers turned judges at the bench, who have, by their unwillingness to craft the new legal regime for environmental law in Africa, continued to tow the path well-travelled, denying well-meaning individuals and organisations environmental justice, because, by the strict wordings of it, the claimants could not identify any environmental/climate law domesticated within their states that gave them locus standi to bring an action, thus while so much is being said and purportedly done at the regional and sub-regional level, individuals and communities cannot take advantage of this at the municipal level because of the failure to trickle down these multi-level overly worded agreements into working, living, breathing laws that can benefit the average African.

It is entirely possible for a valid argument to be made that the African lawyer has no moral obligations, and in fact no obligations at all, but to make his practice thrive as long as what he does is within the ambits of the law. However, to argue that will be to deny his role in ensuring a purpose built climate/environmental law for Africa. Climate change for Africa, more than any other continent, sits at its core, and every other development objective. Thus, the 21<sup>st</sup> century lawyer in Africa should not just be profit-focused, but should be development-focused. There is no gainsaying that Africa is the continent of the future; as in the past decade it has become increasingly attractive to foreign investors<sup>54</sup>, many of which are concerned about the environmental/climate laws and concerns of the States.

Africa has a robust Bar, with lawyers spanning various sectors of the economy with years of experience distinct to their practice, but the law must move beyond courtroom litigation and pushing a client's agenda, to pushing the African development agenda. Lawyers should advocate

---

<sup>54</sup> Forbes: Africa becomes attractive to foreign investors by Mfonobong Nsehe  
<https://www.forbes.com/sites/mfonobongnsehe/2011/06/01/africa-becomes-attractive-to-foreign-investors/#457abfd8114d> Last Accessed 12th June, 2018

for Health Safety and Environment laws to be promulgated and enforced. In transactional advisory, regard should be had utmostly for the environmental hazards, environmental impact assessments should be properly conducted, the use of latest technology to avoid mining or drilling accidents should be encouraged, and the instrument of law should be firmly put in place by lawmakers, and enforced without fear or fervor by the courts of law. The buck stops at the table of lawyers in this quest to develop a purpose-built legal regime for environmental law in Africa. Many law practices in Africa too, sadly, do not have an environmental law practice, or do not consider it lucrative or important. Similarly, many law practices involved in government advisory do not advise on environmental policy. This, perhaps is the time for the continent to begin to explore the regime of environmental law, and for the Bar Associations, together with the African Bar, to promote it. Indeed, Africa can address its environmental challenges, and hold a firm voice at the annual Conference of Parties, but it needs to establish its united environmental position globally, and that can only be done when all the necessary items discussed in this paper are in place, and a more nuanced legal document tailored for the continent by its lawyers and lawmakers, is put in place.

The justice system also needs an overhaul. Some African courts do not largely favour public interest litigation. Public interest litigation (PIL) must be given its day in the sun in all African countries, if indeed the continent wants to build a sturdy environmental regime. Black's Law Dictionary has defined 'Public Interest Litigation' as

**“1) the general welfare of the public that warrants recognition and protection**

**2) Something in which the public as a whole has a stake; especially an interest that justifies governmental regulation”<sup>55</sup>**

Flowing from that, the environment is definitely something in which the public has a stake and should be regarded as such by the courts. PIL has been hampered on many occasions by the strict application of the requirement of locus standi. Admittedly, South Africa, most of Francophone West Africa and East Africa have active PIL regimes, yet there remains much to be said of Anglophone West Africa. While the ECOWAS Court has done considerably well in moving that along, the countries should also work to achieve this. In some countries, like Nigeria, there is a

---

<sup>55</sup> 7<sup>th</sup> Ed. Byran A. Garner.

stringent requirement for international treaties to be domesticated into national laws and passed by the National Assembly before it can have the force of law. Judicial activism too, should be encouraged in courts, and a move away from absolute conservatism where such is allowing environmental harm to continue.

Precisely with respect to environmental litigation, while there has been some increase in the level of plaintiff-favoured environmental litigation, there still remains the preponderance of economic considerations in deciding certain cases, especially when they involve corporations that substantially contribute to the nation's economic life. These will continue to be a stumbling block until they are addressed head-on

## **9.0 CONCLUSION: TOWARDS A PURPOSE BUILT ENVIRONMENTAL LAW**

This paper attempts to address a critical issue for the African continent, and even more precisely, attempts to identify the foibles that the continent faces in addressing this issue. Environmental/climate governance is a significant conversation that has to be had, as it intricately intersects with that of economic development in the region.

The ultimate questions to answer at this point will be, does Africa have a purpose built environmental law? Surely not. The continent has consistently either been riddled with no environmental laws, weak environmental laws, or environmental laws that are non-reflective of the continent's peculiarities. At other times, there have been issues of implementation, of course stemming from the earlier issues mentioned. Africa has also, while in good faith becoming parties to various international environmental agreements, found it difficult to fulfil its obligations under them, due to its development challenges and other constraints discussed in this piece.

What we therefore need are laws and policies tailored for the continent, evidence-based policy statements with research gleaned from the communities directly affected by these challenges, laws that are a result of informed deliberations steered by establishment of local legislations and strengthened at the regional and sub-regional stage by State actors who already have institutions, legal frameworks and governance systems for compliance within their respective countries. It is only then that we can have a law fit-for-purpose, not one bearing down on us from international

meetings at round tables where Africa doesn't have a say or where her decision making power is dwarfed.

Law is a very powerful tool to transform the continent, and indeed it can serve instructive in enabling a sturdy environmental/climate regime/framework for Africa in the comity of nations.