

AN APPRAISAL OF SELECTED LEGAL FRAMEWORKS FOR THE MANAGEMENT OF OIL SPILLAGE IN NIGERIA

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ABSTRACT

The Niger Delta region is one of the major regions in Nigeria where the oil spillage is prevalent. Over the years, several laws have been passed with a view to abating the menace. Despite the existence of these enactments, the problem of oil spillage persists. This paper examines selected legal legislations pertaining to the regulation, control and management of the Nigerian oil industry with a view to identifying inherent gaps for possible amendment and reform. Using the doctrinal method of research, this piece identifies areas in the relevant laws that need to be modified to effectively curb the problem of oil spillage in the Niger Delta region. It is shown that the inability of the relevant laws to abate the problem of oil spillage in Nigeria is a direct consequence of the gaps in the laws which fails take into consideration current realities in terms of imposition of adequate/stiffer penalties for environmental crimes particularly those perpetrated by corporate bodies. To this end, the need to overhaul the relevant laws and bring it up to speed with contemporary challenges is a necessary condition to ensuring that the problem of oil spillage becomes a thing of the past. Among other suggestions therefore, this contribution calls for the amendment of Section 102 of the Petroleum Industry Act to make the provision of an environmental management plan a mandatory requirement for the grant of a license or lease. It is contended also, that the punishment section of the Harmful Waste (Special Criminal Provisions) Act should be more specific with respect to the particular punishment to be meted on violators. The exclusion of the oil and gas sector by Sections 7 and 8 of the National Environmental Standards Regulation Enforcement Agency Act works a great

disservice to the overall utility of the Act and should forthwith be amended to cover these critical sectors which are a major contributor to the menace of oil spillage.

Keywords: Oil Spillage, Nigerian Oil Industry, Environmental Laws, Punishment.

INTRODUCTION

The statutory framework of oil and gas in Nigeria cuts across the ownership, control and operation of oil and gas in Nigeria. There abound several laws bordering on the management, regulation and control of crude oil production and operations in Nigeria. Unfortunately, despite the existence of these laws, the incidences and occurrences of oil spillage persists. These incidences of oil spillage have to a large extent negatively impacted on the environment and the lives of the people of the Niger Delta Region and indirectly on the lives of those in other regions of the country who depend on the food products cultivated in the Niger Delta region. This paper reviews selected laws pertaining to oil exploration in Nigeria with a view to ascertaining if the provisions are expansive enough to take care of the reoccurring incidences and occurrences of oil spillage in Nigeria. It further puts forward practical suggestions in bringing the relevant laws in line with the current realities in the oil and gas industry as touching on oil spillage. Using the doctrinal method of research as well as the opinion of other jurists, the paper assesses the effectiveness and realisation of these laws.

To effectively and critically undertake this task, this paper is divided into nine parts inclusive of the introduction which is the first part. The second part undertakes an overview of the history of environmental legislations in Nigeria while the third part examines relevant parts of the Nigerian Constitution touching on the vexed issue of oil spillage as an environmental challenge. In the fourth to eight segments, in-depth analysis of principal subject specific legislations relevant to the discourse is carried out including the Petroleum Industry Act, the Environmental Impact Assessment Act, the National Oil Spill Detection and Response Agency Act and Regulations made thereunder, the National Environmental Standards Regulation Agency Act and the Harmful Waste (Special Criminal Provisions) Act. The ninth segment is the conclusion.

HISTORY OF ENVIRONMENTAL LEGISLATIONS IN NIGERIA

After Nigeria gained independence in 1960, the nation was basically preoccupied with the provision of social amenities and the advancement of economic development. During the pre-independence era, issues bordering on environmental consideration were never given much attention, as a result of the foregoing, the state of the country's natural resources were neglected. Ifekwe and Ezinwanneⁱ argue that the evolution of Nigerian legal regime for environmental protection effectively commenced in 1988 with the coming into force of the National Policy on Environment. In 1988, Nigeria was confronted with the environmental issue brought about by the dumping of toxic waste at Koko. According to the writers, this incident caused the Nigerian Government to be pressured into reassessing its role on issues bordering on environmental protection. They contend that environmental protection and legislations and initiatives in Nigeria were largely reactive to problems of environment, health and safety and the international obligations.ⁱⁱ

Since independence, Nigeria has been actively involved with other African countries in meetings geared towards environmental promotion, protection and preservation. Most of these meetings have resulted in the signing and ratification of the resultant regulations.ⁱⁱⁱ Ogunba^{iv} categorises the development of Nigeria's legislation into the following:

- Colonial period (1900-1956)
- Petroleum-focused environmental period (1957-early 1970s)
- The rudimentary and perfunctory legislation period (1970s-pre 1987 crisis)
- Contemporary period (post 1987-present)

THE COLONIAL PERIOD (1900-1956)

As at 1900, Nigeria was still under British rule till 1960 when Nigeria gained independence. History has it that during the pre-independence period, European settlers found the city of Lagos to be very conducive for trade possibly because of its proximity to the West African Coastline. The Lagos Island was very ideal for these economic activities.^v This period is known for its dearth of environmental legislation except for the brief provisions in public health legislations and in tort and nuisance law. This period witnessed a general unawareness and disinterest on matters and issues pertaining to environmental protection. The colonial

administrators involved in governance between 1861-1960 did not take issues of environmental protection seriously possibly because they were more preoccupied with their own political and economic interest. The desire to secure complete access to the natural resources of Nigeria was a major driving force for the colonialists. It has been argued that any form of law or legislation that would have appeared to restrict /clog economic activities in the form of environmental protection would have been considered counter-productive and unacceptable. Thus, there were no laws directly targeted at either protecting the environment or the natives from the polluting effects of economic activities.^{vi}

During this period, the very few local legislations particularly those on public health laws had very minute bearing on the protection and preservation of the environment.^{vii} Thus in the absence of specific environmental laws, remedies for environmental violations were sought within the English Common Law torts of negligence, strict liability, public nuisance and trespass. So very typically, claimants relied on negligence and strict liability for redress in respect of personal injuries suffered as a result of environmental pollution whilst resorting to actions in trespass and nuisance to redress environmental harm with respect to property interests. This position was clearly illustrated in the English case of *Rylands v Fletcher*^{viii} which established the doctrine of strict liability. This principle provided a useful precedent in subsequent Nigerian cases particularly the case of *Umudje v Shell British Petroleum*^{ix} wherein the Plaintiffs successfully held the Defendants liable by relying on the principle of strict liability. Similarly, the 1932 English case of *Donoghue v Stevenson*^x also provided a major precedent in negligence that is premised on the duty of care. Unfortunately, these laudable common law principles were not designed to address issues of environmental concerns. Likewise, any form of environmental protection made at that time were considered entirely accidental.

PETROLEUM-FOCUSED ENVIRONMENTAL LEGISLATION PERIOD (1956-EARLY 1970S)

When Nigeria discovered crude oil in commercial quantities in 1956 at Oloibiri, the country's economy which was previously based on agriculture shifted focus to oil exploration. Crude oil became the major source of foreign exchange earnings. The discovery of oil thus gave rise to the birth of some environmental enactments. The law at this time focused mainly on many

facets of petroleum exploration activities and the problems that emanated from the petroleum industry.^{xi}

However, in 1964, a law was promulgated to regulate agricultural imports. This law was specifically targeted at combating the spread of plant diseases and pests. Among other provisions, the law also provided that an authorised officer destroys any imported sand, seeds, soil, containers and straw suspected to be infected with any disease or pest. Apart from this law and the petroleum enactments, the few remaining laws bearing on the environment were merely superficial and varied in subject matter. The laws specifically covered areas such as sanitation, national parks, domestic personal hygiene and wild animals.^{xii}

RUDIMENTARY AND PERFUNCTORY ENVIRONMENTAL LEGISLATION PERIOD (1970S-PRE 1987 CRISES)

Serious environmental legislation fully began after the discovery of oil, although public awareness of the areas of the environment that required development were relatively limited. Issues like effluent limitations, pollution abatement and the overall goals of sustainable development of the natural resources of the country were not really appreciated as most of the laws during this time were not petroleum related and had little or no link to the environment. They were merely incidental legislations. These legislations provided at best rudimentary environmental regulations.

For example, the 1987 Factories Act was made primarily for the registration of factories and for the safety of workers that were exposed to occupational hazards. Despite the very few environmental legislations at this time, a few important laws were birthed during this era. These laws include the 1978 Land Use Act, the 1979 Energy Commission of Nigeria Act, the 1985 Endangered Specie (Control of International Trade and Traffic Act, the Sea Fisheries Act which was later repealed by the Sea Fisheries Decree of 1992 and the River Basins Development Authorities Act.

THE CONTEMPORARY PERIOD (POST 1987-PRESENT)

The dumping of toxic industrial waste at Koko ignited this era. The waste which was dumped by an Italian company leaked into the surrounding environment which resulted in harm to some residents of the community.^{xiii} This incident prompted the Federal Government to enact the

Harmful Waste (Special Criminal Provisions) Act. The Act criminalises activities involving the sale, purchase, transportation, importation, deposit or storage of harmful waste.

In the same year, the then governing Federal Military Government enacted the Federal Environmental Protection Agency (FEPA) Act. The Act established a Federal Protection Agency with wide powers for the management and protection of environmental resources as well as the development of environmental research technology. The Act further empowered states to establish their own respective environmental protection agencies. Based on the authority of this Act, Lagos State established the Lagos State Environmental Protection Agency (LASEPA). FEPA also empowered the Agency to prescribe guidelines and standards for water quality, air quality as well as atmospheric protection *etcetera*. In 1989, FEPA formulated the current National Policy on the Environment. Egunjobi^{xiv} describes the policy as one of the most effective policy ever recorded in the realm of environmental management. The major objective of the policy is the attainment of the goals of sustainable development based on the proper management of the environment. It deliberately aims to secure for all Nigerians a quality of environment adequate for their health and over-all well being.

Since 1999 when the Federal Ministry of the Environment took over the functions of FEPA, the scope of environmental protection in Nigeria has become more progressive and same highlights an increasing awareness of the importance of preservation and protection of the environment. Since the coming into force of FEPA, several other environmental laws have been enacted. For example, The National Agency for Food, Drug Administration and Control Act which has had two (2) amendments and 39 subsidiary regulations, the Merchant Shipping Act which has about sixty (60) subsidiary legislations. In 1992 the Environmental Impact Assessment Act was enacted and in 2007 FEPA was repealed by National Environmental Standards and Regulations Enforcement Agency (NESREA).

THE NIGERIAN CONSTITUTION

Prior to the enactment of the 1979 constitution, the assumption of political liberalism was expressed in the earlier constitutions by the incorporation of negative human rights. However, on matters bordering on economic and social policy, they were relatively neutral except to the extent that they protected existing proprietary rights. The English tradition assumes that socio-economic rights are at best manifestos which should have no place in the constitution.

Obviously, Nigeria inherited this English tradition. Therefore, the inclusion of the chapter pertaining to objectives and directive principles on state policy is a welcomed innovation. These objectives are as provided for in chapter 11 of the Constitution.^{xv} Environmental policies in Nigeria draw essentially from these constitutional provisions. By virtue of Section 20 of the Constitution, States are vested with powers to protect and improve the quality of the environment as well as safeguard the water, air and land, forest as well as wildlife of Nigeria.^{xvi} To this end, States have powers to promulgate laws as well as policies for purposes of environmental protection. Ogbu^{xvii} opines that many countries that have experienced bad governance usually resort to creating a minimum standard of performance for any government that comes into office. Accordingly, the fundamental objectives and directive principles of state policy were made part of the Nigerian political process in 1979 when Nigeria returned to constitutional democracy after several years of military rule.^{xviii}

The intention was so that those who are at the helm of affairs of the state should have some form of modalities and guides with respect to values of normal constitutional democracy. There was the need to have in the constitution some forms of goals and aspirations which the government of the day should strive to achieve. Fundamental objectives mean the ultimate objectives of the Nation whilst the directive principles of state policy indicate the road map which leads to the realisation of these objectives.

Chapter 11 of the Constitution^{xix} contains provisions with respect to the Fundamental Objectives and Directives Principles of State Policy. The implication of the Directive Principles was to emphasize on the nexus between the government and her citizens as well as the affirmation that the primary goal of the government is the security and welfare of her citizens.^{xx} In the opinion of Abdulkadir,^{xxi} despite these laudable provisions, the pertinent question that comes to mind is whether an aggrieved person has the right to approach the courts for the enforcement of these rights? The provisions of section 6(6)c of the Constitution must be examined in order to proffer an answer to the above question. Section 6(6)c provides thus:

The judicial powers vested in accordance with the foregoing provisions of this section shall not except as otherwise provided by this constitution shall otherwise extend to any issue or question as to whether any act or omission by any judicial decision is in conformity with the fundamental objectives and directive principles on state policy set out in chapter 11 of this constitution

This provision of the constitution has been interpreted severally as ousting the powers of the court to adjudicate on matters bothering on the enforcement of section 20 of the constitution. Section 20 falls under the provisions of the fundamental objectives and directive principles of state policy as provided for in chapter 11 of the constitution. The case of *Okogie (Trustees of Roman Catholic Schools) and others v Attorney-General Lagos State*^{xxii} was decided on similar provisions of the 1979 Constitution. The Appellate court whilst considering the constitutional status of the said chapter held that though section 13 makes it a constitutional duty of the judiciary to conform to and apply the provisions of chapter 11, section 6 (6) c of the same constitution also provides that no court has jurisdiction to pronounce on any decision as to whether any organ of government has acted in breach of the provisions of the Fundamental Objectives and Directives Principles on State Policy.

The idea of the directive principles was taken from the Irish Constitution and enumerated in Part IV of the Indian constitution. The concept is basically aimed at creating a welfare state.^{xxiii} There are different schools of thought with respect to the inclusion of the non-justiciable fundamental objectives and directive principles in the constitution. One school of thought argues that there is need for the inclusion of the directives and objectives in the constitution but same should not be justiciable. The second school of thought on the other hand contends that there is need for the inclusion of the directives and the objectives in the constitution and that for them to be meaningful, they must be justiciable. A third school of thought holds the view that objectives and directives are purely matters for political party manifestos and should therefore have no place in the constitution. This third school of thought aligns on all fours with the ancient English tradition. Another school of thought holds the view that matters pertaining to the objectives and directives should have no place in the constitution and same be completely excluded from it.^{xxiv}

The arguments of the first school of thought is premised on the fact that if the objectives and directives are made enforceable, it will occasion serious confrontation between the executive and legislative arms of the government on one hand and the judiciary on the other hand. It has also been argued that it will amount to asking judges to deliver politically motivated rulings and judgements.^{xxv} Ogbu argues further that if the courts are allowed to decide on the government priorities in every circumstance, it will inadvertently amount to determining the plan and action for the executive arm.^{xxvi}

On the other hand, the view that the fundamental objectives and directive principles should not only be contained in the constitutional provisions but should be made enforceable is supported by the argument that, the objectives and directives are the bedrock upon which the states legitimacy is anchored. The non-justiciability of the objectives and directives have also been attributable to class interest. The contention is that, the ruling class are not interested in the laudable ideas enshrined in the objectives and directives. This is possibly because, the enforcement and actualisation of the objectives and directives are in conflict with the political and economic interest of the ruling class.^{xxvii} However, the non-justiciability of the provisions pertaining to the objectives and directives does not in any way affect the justiciability of the socio-economic rights guaranteed in other laws and binding instruments. For instance, the provisions of the African Charter on Human and Peoples Right which has been domesticated by Nigeria is enforceable in Nigerian courts. The provisions of the charter guarantee some socio-economic rights which are enforceable notwithstanding the non-justiciability of the objectives and directives.

This study takes the view that the contention that the justiciability of the fundamental objectives and directive principles will occasion friction between the executive, legislative and judicial arms of government is highly misconceived. The courts have the power to declare any law passed by the legislature or any law that is found to be that repugnant to natural justice, equity and good conscience unconstitutional then the courts should as a matter of course have jurisdiction to hear and pronounce on matters bordering on the objectives and directive principles. Such confrontation are healthy as same will better help to achieve the goals of checks and balances.

IMPORTANCE OF THE FUNDAMENTAL OBJECTIVES AND DIRECTIVE PRINCIPLES OF STATE POLICY

The importance of the fundamental objectives and directive principles of state policy which constitute the national ideology of a just society helps in the promotion of social justice and empowerment which are veritable tools for achieving political participation. It has been argued that the political problem of man is hinged on economic efficiency, social justice and individual liberty. The combination of all three objectives in an acceptable measure is considered the major challenge to modern day government. Economic efficiency refers to the

efficient management of the economy as measured through the increases in the total aggregate quantity of wealth generated and consumed without any real improvement in the standard and quality of life of the people. Although it has been argued that the pursuit of economic efficiency is laudable but same is not the sole objective of government and not an end in itself. It has been held by the Supreme Court of Ghana in *New Patriotic Party V Attorney General*^{xxviii} that though the provisions bordering on the objectives and directives are not by themselves enforceable by any court of law, they can be used as a yardstick by the courts in carrying out their interpretative duty and in that sense attain justiciability and enforceability.

The impact of the objectives and directives will also be felt if public authorities are established to promote and enforce their observance. In the case of *Centre of Oil Pollution Watch v Nigerian National Petroleum Corporation(NNPC)* ,^{xxix} a Non-Governmental organisation known as Centre for Oil Pollution Watch instituted an action at the Lagos State Federal High Court against the Nigerian National Petroleum Corporation(NNPC) over an alleged oil spill incident that occurred in Acha Community of Isukwuato Local Government Area of Abia State. The NGO claimed that the oil spillage had adversely affected the community and the surrounding environment. They alleged that the oil spillage had made the living conditions of the inhabitants of the community deplorable.

They claimed against NNPC restoration and remediation of the contaminated water and environment as well as the provision of medical facilities for the treatment of affected persons in the community. NNPC in their defence, raised a preliminary objection challenging the *locus standi* of the NGO to institute the action. The trial court upheld the contention of NNPC and struck out the matter. Being dissatisfied with the ruling of the trial court, the NGO filed an appeal. The Court of Appeal dismissed the appeal filed by the NGO. Still aggrieved, the NGO approached the Supreme Court.

At the Supreme Court, Appellant's counsel contended that the Appellant had the requisite *locus standi* to sue having shown sufficient interest in the matter. Appellant's counsel argued further that the NGO by virtue of her registration in accordance with part C of the Companies and Allied Matters Act carries the function of ensuring the reinstatement, restoration and remediation of environments impaired by oil spillage/pollution including but not limited to rivers, sea, sea beds ecosystem and aquatic lives. Appellant counsel relied on the cases of *Busari v Oseni*,^{xxx} *Fawehimi v Akilu*^{xxxi} and argued that persons with public-spirited intention

be allowed to institute public interest matters such as the one in the instant case. They contended further that the spillage was as a result of the defendant's negligence to carry out periodic inspections and maintain proper surveillance. The Apex Court relying on the provisions Fundamental Rights (Enforcement Procedure Rules) held that the interest of the NGO is clear and same not prompted by any form of ill motive or mischief. The Court held further, the concept of *locus standi* has grown beyond the usual narrow approach and now encompasses public-spirited individuals and NGOs. In allowing the appeal, the Supreme Court rightly observed that the Appellant has a right to sue and that there is nothing in the Constitution that says only the Attorney-General is the only proper person clothed with standing/power to enforce the performance of a public duty or institute public interest litigation.

Similarly, the Supreme Court in *AG Ondo State v AG Federation*^{xxxii} held that, the Independent Corrupt Practises Commission is an agency established within the meaning of item 60(a) of the constitution for the promotion and enforcement of the Fundamental Objectives and Directive Principles of State Policy. The objectives and directives also help to provide a basis for the emergence of positive law particularly in areas not covered by the constitution. Where the National Assembly or a State House of Assembly has enacted laws for the enforcement of the fundamental objectives and directive principles, then the provisions become enforceable. Similarly, the Supreme court in *AG Ondo State v AG Federation & Ors*^{xxxiii} rightly stated that the courts cannot enforce any of the provisions contained in Chapter II of the constitution save the National Assembly has enacted specific laws for their enforcement. An example of this is clearly seen in section 15(5) of the 1999 constitution through the enactment of the Independent Corrupt Practises and Other Related Offences Act 2002.

The impact of the objectives and directives will also be felt if public authorities are established to promote and enforce their observance. The Supreme Court in *AG Ondo State v AG Federation*^{xxxiv} held that, the Independent Corrupt Practises Commission is an agency established within the meaning of item 60(a) of the constitution for the promotion and enforcement of the Fundamental Objectives and Directive Principles of State Policy. The supreme court also held in *FRN v Anache*^{xxxv} that even section 6(6)(c) of the 1999 constitution does not in anyway entirely foreclose the justiciability of the Chapter II as the subsection provides an escape route by the use of the word 'except as otherwise provided by this

constitution'. This indicates that if the constitution in any section makes a section(s) of Chapter Two justiciable, it will be so interpreted by the courts. From the foregoing, it is very clear that the provisions of section 6 (6) (c) acts as an exclusion clause ousting the jurisdiction of the courts with respect to the justiciability of the provisions of section 20. It would appear from the combined reading of the provisions of section 20 and section 6 (6) c of the Nigerian constitution, that the constitution does not include any express provisions with respect to environmental protection. Thus, the implication is that activities such as oil spillage which causes serious environmental harm cannot be challenged in any court of competent jurisdiction because they have been rendered unenforceable by the constitution. However, there are other views with respect to the fact that alternative pathways could be explored to ensure environmental protection as well as redress for victims of environmental pollution (i.e) oil spillage.^{xxxvi}

The objectives and directives serve as a standard for measuring the justiciability of legislations that affect fundamental rights as they can be employed to give expansive interpretation to the fundamental rights provisions enshrined in the constitution.

THE PETROLEUM INDUSTRY ACT

The enactment of the Petroleum Industry Act^{xxxvii} was a direct response to the need to put in place an adequate regulatory framework for the control and regulation of the Nigeria Petroleum industry.^{xxxviii} The major objectives of the PIA amongst other things includes the enhancement of exploration and exploitation of petroleum resources in Nigeria for the benefit of the people, the establishment of a viable and progressive fiscal framework that encourages further investments in the petroleum industry whilst maximising revenue accruing to the Government, deregulation and liberalisation of the downstream sector, create effective regulatory agencies, protection of the health and safety of the environment in the course of petroleum operations, deepen local content practice in the Nigerian oil and gas industry as well as create a conducive environment for petroleum operations in Nigeria.^{xxxix}

The Act is divided into five (5) chapters, 319 sections and 8 schedules and restates the fact that the ownership and control of petroleum within Nigeria shall be vested in the Government of the Federation of Nigeria.^{xl} The Minister of Petroleum Resources who heads the Petroleum

Industry by virtue of the provisions of Section 3 (1) is amongst other functions empowered to formulate, monitor and administer the government's policy in the petroleum industry. The Act also provides for an environmental management which is carefully aimed at achieving the goals of environmental sustainability. Section 102 of the Act provides that provides that a licensee or lessee who engages in upstream or midstream petroleum resources is required to within six months after the grant of the license or one year of the effective date of the applicable license or lease required to submit for approval an environmental management plan in respect of projects which require environmental impact assessment to the commission or authority. The Act goes further to provide that only when the plan complies with the relevant environmental Acts will it be approved.

The study takes the view that the requirement for an environmental management plan within six months after the grant of the license or one year of the effective date of the applicable license or lease and not before the grant of the license will go a long way in hampering the intendment of the law makers. The licensees or leasors may not readily comply with the said provisions after getting the license or lease sought after. This is moreso in light of the fact that, prospective licensees after getting the license may even decide to buy their way through just to avoid compliance with the provision of the said section. If the Act is amended to make the provision of the environmental management plan a mandatory condition before the grant of the license or lease, prospective licensees or leasors will be willing and compelled to do the needful.

The PIA also introduces the Petroleum Host Communities Development (PHCD).^{xli} The objectives of the PHCD includes nurturing the sustainable prosperity of host communities as it relates to oil prospecting and exploration activities. This includes providing a framework for the support and development of host communities, providing social and economic benefits for the host communities, *etcetera*. The Act goes on to provide for the incorporation of host communities Development Trust for the benefit of host communities.^{xlii} The funds in the trust are to be distributed by the Board of Trustees to host communities using a matrix to be provided by the settler.^{xliii}

The provisions of section 234 of the Act though laudable is not without flaws. The PIA invests on the settlor wide powers^{xliv} to wit;

- i. Determines the selection process with respect to membership of the Board of

Trustees

- ii. Financial procedure and administrative procedures for the board of trustees
- iii. Remuneration, qualification, discipline, disqualification, suspension and removal of members of the board of trustees.
- iv. Handling other matters relating to the operation and activities of the board of trustees.
- v. Appointment of the secretary of the board of trustees to keep the books of the board.
- vi. Provide a matrix of distribution of the trust fund to members of the host communities^{xlv}.

The PIA in the interpretation section defined the settlor as a holder of an interest in a petroleum prospecting license or a petroleum mining license whose area of operation is located in or appurtenant to any community or communities. By implication, the settlor is the oil companies operating in the upstream petroleum exploration. Akpan, also^{xlvi} identified the ‘settlor’ as the oil companies operating in the region. He further buttressed on the fact that the host communities development trust was specifically established to address the developmental needs of the oil producing communities and hence, the settlor should at all times avoid every form of interference from politicians and other government bodies in the region particularly with respect to the appointment of persons into the Board of Trustees of the host communities’ development trust.

This study however takes the view that because of the very wide powers which the PIA bestows on the settlor, the settlor should not be oil companies themselves whose act sometimes occasions environmental damage by way of oil spillage and gas flaring. There is no gainsaying the fact that that absolute power corrupts absolutely hence it is suggested that the powers of the settlor be vested in the Director of the NOSDRA, a representative of the oil company and two members of the host communities with a proven track record of honesty, integrity and discipline.

THE ENVIRONMENTAL IMPACT ASSESSMENT ACT

This Act came into force in 1992.^{xlvii} The essence of the EIA is to assess the possible effects that proposed projects may have on the environment. The EIA also aims at ensuring a healthy

environment through the predictive and preventive measures which the EIA Act brings.^{xlviii} The United Nations Environmental Program (UNEP) describes it as a medium put in place to find the social, economic and environmental impacts of development before their formal acceptance.^{xlix} As desirable as development is to the economy of any nation, the side effect attendant upon same is the sometimes irreversible distortion of the original/natural make giving rise the various forms of environmental pollution around the globe. The EIA thus helps to provide necessary information to decision makers as to the likely environmental harm which proposed projects are likely to occasion to the environment. The EIA is primarily aimed at achieving sustainable development goals. The EIA is a mandatory regulatory procedure that came to light around the 1970s with the promulgation of the National Environmental Policy Act (NEPA) in 1967. Countries such as Australia, Canada and New Zealand took part at the initial stage. The EIA become popular in the mid-1980s around which period the world bank adopted the policy for its major developmental projects.¹ This resulted in the process of countries who intended to borrow funds from the World bank going through the EIA process under the supervision of the bank.^{li} The EIA has been considered as Nigeria's attempt to comply with international best practice on the environment and the inauguration of the principles of sustainable development.^{lii}

The EIA has some measure of international flavour found in a lot of international instrument to which a lot of countries are signatories. For example, the World Charter for Nature provides that when carrying out developmental activities, available technology should be harnessed to minimise their adverse effects on nature.^{liii} There is also the United Nations Environmental Programme Goals and Principles of Environmental Impact Assessment. Another example of international instruments encapsulating international best practise on the environment is the Convention on Biodiversity (CBD) which admonishes parties to endeavour to introduce measures that will minimise the likely adverse effects that proposed projects may have on the environment.^{liv} The Act also makes provision for public participation.

The aim and objectives of the EIA as provided in the Act includes a mandatory EIA to be conducted before projects which are likely to have significant effects on the environment are undertaken. The EIA basically serves three main purposes, to wit, the integration of environmental concerns into planning and decision making, environmental damage limitation through the medium of anticipation minimisation and public participation in decision making.^{lv} The EIA Act makes provision for a seven-step procedure for a proper execution of an EIA. The steps include the following;

- i. Proposal: This stage commences with the submission of a project proposal by the applicant to the Federal Ministry of Environment. Attached to the proposal is a land use map and other useful information. The Federal Ministry of Environment responds to the application by issuing a guideline that will help to facilitate the EIA process.^{lvi}
- ii. Screening:^{lvii} This entails the process of determining whether or not a proposed project requires a full-scale EIA and what should be the level of assessment and the extent of process application. For a screening process to be effective, it must strike a balance between the environment and development. It basically addresses issues such as action(project), by whom(proponent) and to where(environment). This stage of the EIA process helps to determine if an environmental impact is required to be carried out.^{lviii}
- iii. Scoping:^{lix} Scoping helps to determine what area or aspect of the proposed project needs to be covered in the assessment and reported in the EIA report. At this stage of the assessment, issues that are important are identified and examined and the unimportant ones are discarded.
- iv. EIA report draft and review process:^{lx} This report contains a draft copy of what is likely to have significant environmental effects.
- v. EIA final report:^{lxi} This document contains the final report with respect to the effects that the proposed project is likely to occasion to the environment
- vi. Decision making:^{lxii} This stage involves making a decision as to whether the proposed project should be undertaken after a careful assessment of the likely environmental consequences that the project may occasion.
- vii. Project implementation:^{lxiii} This stage has to do with the actual implementation of the project having successfully gone through all the stages of the environmental impact assessment procedure.

The EIA mentions in clear terms the mandatory nature of EIA with respect to the oil and gas sector.

In the opinion of Nwoko,^{lxiv} even though the EIA lays down a comprehensive guideline for proposed projects to undergo, evidence suggests that the EIA is still very much ineffective in terms of realisation of the goals and objectives of the Act. Some of the challenges as including; lack of credibility and transparency, absence of effective sanctions, abuse of the exclusion clause in the EIA Act and the fact that a large percentage of the people of the Niger Delta region are clearly unaware of their right to object to projects which are environmentally unfriendly during the 21 days public notice as provided for in the EIA.^{lxv} Sometimes,

companies which already have EIA approval for projects tend to use the same approval for subsequent projects without subjecting the new projects to an environmental impact assessment. This has gone a long way in occasioning serious environmental pollution as the likely impact of the projects was not foreseen.

THE NATIONAL OIL SPILL DETECTION AND RESPONSE AGENCY (ESTABLISHMENT) ACT

The National Oil Spill Detection and Response Agency (Establishment Act) established the National Oil Spill Detection and Response Agency (NOSDRA).^{lxvi} It was established for the coordination of the implementation of the National Oil Spill Contingency Plan (NOSCP) for Nigeria in accordance with the International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC 90).^{lxvii} The Act also established the advisory, monitoring, evaluating, mediating and co-ordinating arm of NOSDRA known as the National Council and Response Centre (NCRC). The major objectives of NODRA includes:

- i. Safe, timely, effective and appropriate response to major or disastrous oil pollution
- ii. Identify high-risk areas as well as priority areas.
- iii. Establish a mechanism to monitor and assist or where expedient direct the response including the mobilization of necessary resources to save lives, protect threatened environment and clean-up the oil spill impacted site.
- iv. Maximize the effective use of the available facilities and resources of both corporate bodies as well as their international connections and oil spill co-operatives in implementing the spill response.
- v. Ensure funding and prompt provision of pollution combating equipment for effective response to major oil spill incidents.
- vi. Provide a programme for activation, training and drill exercise to ensure readiness to oil pollution preparedness and response.
- vii. Provision of advisory services, technical support and equipment for purposes of responding to major oil spill pollution incident in the West African sub-region upon request by any neighbouring country particularly where a part of the Nigerian territory is threatened.
- viii. Provide support for research and development in the local development of methods, materials and equipment for oil spill detection and response.

- ix. Corporate with the International Maritime Organisation and other national and regional organisation in the promotion and exchange of results of research and development programme relating to the enhancement of the state of the art of the oil pollution preparedness and response, including technologies, techniques for surveillance, containment, recovery, disposal and clean-up to the best practical extent.
- x. Establish agreements with neighbouring countries regarding the rapid movement of equipment, personnel and supplies into and out of the countries for emergency oil spill response activities.
- xi. Determine and reposition vital response combat equipment at most strategic areas for rapid response
- xii. Establish procedures by which the Nigerian Customs and the Nigerian Immigration Services shall ensure rapid importation of extra support response equipment and personnel.
- xiii. Develop and implement an appropriate audit system for the entire plan.
- xiv. Carry such other activities as are necessary or expedient for the full discharge of its function and the execution of the plan under the Act.

By virtue of the provisions of 6 of the Act, the agency is solely responsible for surveillance and ensuring compliance with all existing environmental legislation and detection of oil spills in the petroleum sector. Ezeibe^{lxviii} posits that the rationale for excluding the oil and gas industry from the control of the National Environmental Regulation Enforcement Agency is because same is adequately covered by NOSDRA.

NOSDRA is empowered to play a lead role in ensuring the timely, effective and appropriate response to oil spills as well as ensure clean-up and remediation of oil impacted sites. It also has the duty to identify high risk areas in oil producing regions for protection as well as ensure compliance with all environmental legislation pertaining to oil spill containment. The agency is also empowered to establish systems to monitor as well as assist and where expedient mobilize and direct the response to clean-up areas impacted by oil spill. By virtue of section 58^{lxix} NOSDRA has the responsibility to ensure funding, provision of appropriate pollution combating equipment and materials required for effective response^{lxx} to oil spill incidents.

Pursuant to the powers conferred on NOSDRA by virtue of section 26, two (2) regulations came into force on the 26th day of May 2011. It is pertinent to note that whilst the Act only imposed fine against spillers by way of penalties, the regulations made provisions for

penalties as well as payment of compensation to victims of oil spillage in certain instances. These regulations are the Oil Spill and Oily Waste Management Regulations (OSOWMR) and the Oil Spill Recovery, Clean-up, Remediation and Damage Assessment Regulations (OSRCRDAR).

THE 2011 OIL SPILL AND OILY WASTE MANAGEMENT REGULATIONS

The Oil Spill and Oily Waste Regulation^{lxxi} was made pursuant to the NOSDRA Act No.15 of 2006. This regulation is particularly aimed at regulating on-shore and off-shore petroleum facilities in Nigeria. The regulation places particular focus on regulating facilities used for seismic survey, drilling, producing, gathering, storage, processing, refining, distribution and consuming activities.^{lxxii} Facilities regulated by the OSOWMR includes facilities who due to their location may reasonably be expected to discharge oil or oily waste on land or waterways.^{lxxiii}

Regulation 10 provides that owners or operators of facilities from oily waste are discharged are liable to pay specific damages resulting from the spill. In the same vain, they are also liable for the removal costs incurred in the course of clean-up operations, undertake remediation activities and also ensure environmental restoration. It is pertinent to note that payment of compensation goes directly to the coffers of NOSDRA and not to the victims of the spill. Payments are made to compensate the Agency rather than the individuals.^{lxxiv} Regulations 39 further imposes monetary fines on defaulters. It provides further that in addition to the obligation imposed on defaulters including the obligation the obligation to carry out necessary clean-up operations to furnish a report to the agency be liable for payment of an amount not less than Five Hundred Thousand Naira to the Agency into the account of the Government of the Federation for each day the violation continues. Similar provisions are also contained in Regulations 56,74,93, 113, 132 and 1151 of the OSOWMR. This regulation appears to be more proactive in terms of environmental protection in Nigeria.

A major drawback in this regulation is that a time frame is not given within which the clean-up may be done. This particular section could be attributable to the reason why multinational oil companies take years to carry out clean-up exercise. If a time frame is spelt out in the regulation, multinational oil companies will be constrained to ensure that clean-up exercise is timeously carried out.

OIL SPILL RECOVERY, CLEAN-UP, REMEDIATION AND DAMAGE ASSESSMENT REGULATION^{lxxv} (OSRCRDAR)

This regulation controls the methods, procedures and other requirements for the detection, response, clean-up and remediation of oil spills from on-shore petroleum activities into land or navigable waters. Unlike the OSOWMR, regulation 26 of the OSRCRDAR directly provides for the payment of compensation to victims of oil spill.^{lxxvi} The only exception to this regulation in situations caused by 3rd parties or sabotage.

NATIONAL ENVIRONMENTAL STANDARDS REGULATION ENFORCEMENT AGENCY ACT (NESREA)

The National Environmental Standards Regulation Enforcement Agency Act^{lxxvii} is statutorily saddled with the responsibility of enforcement of environmental standards, regulations, rules, law, guidelines and policy. The agency is responsible for the development and protection of the environment, biodiversity conservation and sustainable development. NESREA is the principal environmental standards enforcement and regulatory agency in Nigeria. This Agency repealed FEPA and they are empowered to implement international environmental standards especially those treaties and conventions that has been domesticated in the country.^{lxxviii}

The NESREA Act is divided into six parts. Part 1 of the Act deals with the establishment and objectives of the Agency and the governing council as well as the tenure of office of its members. Part 11 of the Act deals with the functions and powers of the Agency and Council.^{lxxix}

Worthy of note is section 7 of the NESREA Act which mandates the agency to enforce compliance with regulations on the importation, exportation, production, storage, sale, use, handling and disposal of hazardous chemicals and waste other than in the oil and gas sector. This study argues that the exclusion of the oil and gas sector from the control of NESREA portends ills for the Nigeria oil industry. It is further argued that section NESREA Act establishing NESREA being the principal organ of environmental protection in Nigeria should amended to include the oil and gas sector^{lxxx}.

Another issue that arises is the legal effect that section 7(c) of the NESREA ACT which states that:

The Agency shall—

(c) enforce compliance with the provisions of international agreements, protocols, conventions and treaties on the environment Including climate change, biodiversity conservation, desertification, oil and gas, chemicals, hazardous wastes, ozone depletion, marine and wild life, pollution and sanitation and such other environmental agreements as may from time to time come into force.

In view of the provisions of section 12(1) of the 1999 constitution. Can a treaty without prior constitutional requirement of domestication be applied? It would appear to be so, especially in a situation where Nigeria is a party to the treaty.

The functions of NESREA is primarily for the prevention of pollution and environmental harm rather than remedying the harm that has already occurred. In light of the foregoing, it is suggested that since apart from the Environmental Impact Assessment Act, NESREA is the only body that helps to prevent environmental pollution, NESREA should be overhauled to effectively discharge its functions particularly as it relates to the prevention of oil spillage. NESREA also plays an active role in the enforcement of guidelines and legislations on sustainable management of the ecosystem, biodiversity conservation and the development of natural resources^{lxxxix} The agency is further empowered to establish mobile courts to try and dispose of cases expeditiously particularly cases bordering on environmental infringement. This however has to be done in conjunction with relevant judicial authorities and in accordance with the provisions of the constitution. The Agency has broad enforcement powers for the purpose of enforcing the provisions of the Act. For example an officer of the agency may with a warrant issued by a court enter at all times any premises including land, vehicle, tent, vessel and floating craft, inland water and other structures which the officer reasonably believes carries out activities or stores goods^{lxxxii} which contravenes environmental standards and regulation for the purpose of conducting inspection and search and taking samples for analysis.^{lxxxiii}

LIMITATIONS ON THE POWER OF NESREA

The powers conferred on NESREA are by no means absolute, some of the limitation on the powers include:

- i. The powers conferred on NESREA excludes the oil and gas sector. Section 7 and 8 of the Act. According to Owolabi,^{lxxxiv} the effect of the provisions is to remove all emanating from the exploration and exploitation of petroleum and natural gas from the purview of the authority of NESREA. The limitation placed on the power of NESREA appears to have arisen as a result of the response to the conflict between the Federal Environmental Protection Agency (FEPA) and the Ministry of Petroleum Resources. Before the creation of FEPA, the department had been responsible for monitoring the problem of pollution in the petroleum sector. Several years after the creation of FEPA, controversy arose as to which amongst these two was the appropriate body to set the guidelines and standards for pollution control in the Nigeria oil industry and which of them was to enforce the standards. The NESREA Act has however laid to rest the issue by explicitly making it clear that the mandate and powers of NESREA do not extend to the oil and gas sector.
- ii. The power of an officer of the agency under the Act to search is limited by the need for a warrant which is to be obtained from a court of law before the search can be conducted. This requirement may occasion delay and hinder the effective working of the agency.^{lxxxv}
- iii. The power to enter upon premises for purposes of checking and collecting samples for analysis is limited by the provisions requiring that there must exist a reasonable belief that the premises is being used for activities or storage of goods which contravenes environmental standards and regulation. The courts in a bid to protect the privacy of individuals have interpreted the powers to search restrictively.^{lxxxvi}

THE HARMFUL WASTE (SPECIAL CRIMINAL PROVISIONS) ACT 2004

The Harmful Waste (Special Criminal Provisions) Act was enacted to prohibit the carrying, depositing and dumping of harmful waste on land as well as territorial waters. The Act also makes provision for punishment of life imprisonment for some offences^{lxxxvii}. In some cases, offenders may also be liable to persons who may have suffered one form of injury or another as a result of the prohibited act.^{lxxxviii} The provisions of the Act though very laudable are fraught with some lacunas. For example, Section 7 of the Act which provides that:

Where a crime under this Act has been committed by a body corporate and it is proved that it was committed with the consent or connivance of or is attributable to any neglect on the part of ---

- (a) A director, manager, secretary or other officer of the body corporate; or
- (b) any other person purporting to act in the capacity of a director, manager secretary or other similar officer, he, as well as the body corporate shall be guilty of the crime and shall be liable to be proceeded against and punished accordingly.

It is evident from the express provisions of the Act that the law is very specific as to the type of punishment to be meted out on natural persons when they infringe on the provisions of the Act. Unfortunately, with respect to artificial persons (corporate bodies), the Act appears to be uncertain. There is no doubt that with respect to the problem of oil spillage which this study seeks to address, corporate bodies are the major culprits. The fact that the Act is neither here nor there with respect to the punishment section is perhaps a factor contributing to the problem of oil spillage. In light of the foregoing, this study makes a case for the imposition of stiffer penalties on corporate bodies particularly those involved in oil exploration and exploitation. This study particularly advocates for a regime where the fine/punishment for oil spillage is assessed at the price of a barrel of crude at the time of spillage per the number of barrels spilled. Worthy of note is the fact that unlike the NESREA Act where an officer is required to mandatorily required to obtain a search warrant from the court before conducting a search on any premises suspected to be storing or being used for the prohibited act, the Harmful Waste (Special Criminal Provisions) Act by virtue of section 10 of the Act does away with the requirement with respect to obtaining license.

CONCLUSION

This work examined the legal framework put in place for the abatement of oil spillage in Nigeria and contends that the inability of the relevant laws to abate the problem of oil spillage in Nigeria is a direct consequence of the gaps in the laws and their inability to meet up with the current realities of the present times in terms of imposition of adequate/stiffer penalties for environmental crimes particularly those perpetuated by corporate bodies.

Therefore, to ensure environmental protection and sustainability, the relevant legal framework and regulatory agencies for the control, management and prevention of oil spillage in Nigeria needs to be updated, upgraded and overhauled to ensure that the problem of oil spillage becomes a thing of the past.

This study further suggests that section 102 of the Petroleum Industry Act be amended to make the provision of an environmental management plan a mandatory requirement for the grant of a license or lease. Section 7 and 8 of the NESREA Act which excludes the oil and gas sector should also be amended to include the oil and gas sector in the control of NESREA.

The punishment section as provided for in Section 7 of the Harmful Waste (Special Criminal Provisions) Act should be more definitive and direct with respect to the particular punishment to be meted on violators.

ENDNOTES

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 - iii Some examples of the regulations bothering on environmental protection to which Nigeria is a party include; the International Covenant on Civil and Political Rights, International Covenant on Economic Social and Cultural Rights *etcetera*.
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 - v A.L Mabogunje ‘The Evolution and Analysis of the Retail Structure of Lagos, Nigeria’ [1964] *Journal of Economic Geography*, 40, 304-305.
 - vi Ibid.
 - vii These included the 1916 Criminal Code Law Cap C38 and the Public Health Act of 1917.
 - viii (1868) LR 3HL,330.
 - ix (1975) NSCC.
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 - xiv T.O Egunjobi, ‘Problems of Solid Waste Management in Nigeria’ [1983] *International Journal of Scientific and Technology Research*, 12-13.
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- xxvii Ibid.
- xxviii [2000] WRN,142 at 160.
- xxix [2019] 5NWLR (Pt. 166) 518.
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- xxxix See section 2 (a)-(e).
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- lxxi Hereinafter referred to as OSOWMR
- lxxii See Regulation 2(1) & (2) of OSOWMR.
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- lxxiv See *Utc Nig. Ltd. v Philip* (2012) 6 NWLR (pt. 1295) 136 at 167-168.
- lxxv Hereinafter referred to as OSRCRDAR.
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