AN APPRAISAL OF THE LEGAL AND INSTITUTIONAL FRAMEWORKS FOR ENVIRONMENTAL PROTECTION IN THE OIL AND GAS INDUSTRY IN NIGERIA*

Abstract

The oil and gas industry is notably a pollution-ridden industry. From the initial seismic exploration, to refining and distribution, every stage is associated with negative environmental impacts. The Nigerian government has formulated policies, promulgated laws and established agencies over the years, for the regulation of the industry. Some of these agencies have played the dual role of promoting revenue accruing from the industry as well as regulating its activities, which dual role have been found to lead to the subjugation of the regulatory function in favour of the economic function. This paper aims at critically appraising the legal and institutional framework, as it relates to environmental protection in the oil and gas sector in Nigeria. Its objectives are the evaluation of extant laws regulating the oil and gas industry in Nigeria, with particular attention to the Petroleum Industries Act, as it relates to environmental protection. It appraises the institutions responsible for the enforcement of compliance to the laws and to determine their effectiveness in their statutory responsibility. The paper adopts the doctrinal method and finds that contrary to expectations, the Petroleum Industries Act leaves much to be desired with regard to the regulation of the industry. It recommends that the Petroleum Industry Act be amended to unbundle the conflicting role of the agencies and also strip the office of the minister of some of the numerous powers vested in it.

Keywords: Regulation, compliance, environmental protection

1. Introduction

Fossil fuel has remained the driving force of the world's socioeconomic systems over the years, despite being cited as the major culprit in climate change crisis.[1] The oil is explored, refined produced and distributed the world over by a host of 'industrial giants, giving rise to a colossal business, which leaves in its wake, dangerous emission of Green-House gases in the atmosphere, a situation which they have continued to deny through funding and lobbying.[2] It was Henry Berenger, a former French Minister of Petroleum who stated that '[h]e who owns the oil will own the world, for he will rule the sea by means of the heavy oil, the air by means of the ultra-refined oils, and the land by means of petrol and the illuminating oils…'[3] Since the 1970s when oil became prominent in the Nigerian economy, the federal government has maintained a strong hold on oil and gas resources, and has promulgated laws giving it exclusive rights to the resource.[4] Many laws have also been enacted for the purpose of regulating the activities of the oil and gas industry. This paper critically appraises the extant regulatory laws in the industry, especially those relating to environmental protection, to determine their efficiency or otherwise. It also considers whether the much expected Petroleum Industries Act is the answer to all the regulatory problems of the oil and gas industry.

2. The Regulatory Framework of the Nigerian Oil and Gas Industry

Nigeria's vast oil resources are largely concentrated in the onshore and offshore areas of the Niger Delta, located along the Gulf of Guinea, and home to more than 20 million people from more than 20 ethnic and language groups (in addition to dozens of sub-ethnic groups).[5] With Total proven oil reserves estimated at about 36 billion barrels, while proven natural gas reserves are well over 150 trillion feet, the Niger Delta suffers from severe environmental degradation, due to the industry's history of oil spills, lax environmental regulations, and government complicity, as well as ongoing marine and air pollution.[6] Before the birth of the Nigerian Environmental Policy in 1988, following the Koko toxic waste dump incident, the oil and gas industry could already boast of laws regulating its operations. These laws include the Petroleum Act of 1969, (amended 1973, 76 and 79) being the foremost regulatory law for the industry as well as Associated Gas Reinjection Act of 1979 and that of 1984. This may not be unrelated to the peculiarity of the industry and the issues relating to its operations. Over time, as the negative impacts of the operations of the industry became more glaring and

***By Felicia ANYOGU, PhD,** Professor of Law, Faculty of Law, Nnamdi Azikiwe University, Awka; and
***Gloria OKEY-EMEM, PhD Candidate,** Faculty of Law, Nnamdi Azikiwe University Awka. Tel: 08066856361, Email: gloria.okey76@gmail.com

[1] Marco Grasso, 'Oily Politics: A Critical Assessment of the Oil and Gas Industry's Contribution to Climate Change' [April 2019] Vol.50 *Energy Research and Social Science* 106 www.sciencedirect.com accessed 26 January, 2022
[2] ibid
[3] Andrew Nikiforuk, 'The Energy of Slaves: Oil and the New Servitude'. In Oladimeji Philip, 'Ownership of Oil and Gas in Nigeria', [2020] www.ssrn.com/abstract=3636423 accessed 28 January, 2022.
[4] S.44(3) CFN, 1999 as amended
[5] Kenneth Omeje, 'Oil Conflict and Accumulation Politics in Nigeria', Issue 12 ECSP Report < www.wilsoncentrer.org> accessed 26 January, 2022
[6] ibid

destructive, more laws were enacted with a view to combating them. Nnadozie opined that a general survey of early environmental legislations in the oil and gas sector in Nigeria, clearly depict a lack of environment orientation. Those particularly on environmental protection were either ostensibly unenforceable, or vague and practically irrelevant in addressing the challenges emanating from the operations of the industry.[7] Below is an appraisal of these laws and institutions to determine their effectiveness or otherwise in instilling environmental consciousness and responsibility in the major players in the oil and gas industry.

2.1 Legal Framework on Environmental Protection in the Oil and Gas Industry in Nigeria

Constitution of the Federal Republic of Nigeria 1999 (as amended)

As stated earlier, the constitution vests ownership of oil and gas, including all minerals found within the territory of Nigeria in the federal government. The constitution also makes provision for the protection of the environment. While making the provision however, it makes it an objective of the state, making the provision under the Fundamental Objectives and Directive Principles of State Policy.[8]Section 20 which contains the provision states thus. 'The state shall protect and improve the environment and safeguard the water, air, land, forest and wildlife in Nigeria'. There is no doubting the fact that having the objective of protecting the environment is noble, as it is a prerequisite for the enjoyment of the human rights to life, health, etc. However, the question is whether such provision confers a right thereby enabling an aggrieved person to go to court to seek redress.[9] Section 6 (6) (c) of the constitution answers the question. The section provides thus: 'The judicial powers vested in accordance with the foregoing provisions of this section, Shall not… extend to any issue or question as to whether any act or omission … is in conformity with the Fundamental Objectives and Directive Principles of State Policy, set out in chapter II of this constitution'.

A judicial interpretation was given to this provision in the case of *Okogie (Trustees of Roman Catholic Schools) and others v Attorney-General, Lagos State,*[10]where the Court of Appeal held that by the provision of section 6(6)©, no court can exercise jurisdiction in any question relation to chapter 2 of the constitution. This means that, section 20 of the constitution makes it a duty of the state to ensure that policies are directed towards environmental protection, but section 6 (6) (c) robs the citizens of the legal right to enforce such provisions.[11]

African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights, also known as Banjul Charter, was adopted on June 1, 1981 and came into force in 1986. The charter set standards and established the platform for the promotion and protection of human rights in the continent of Africa.[12] Article 4 of the charter provides for the right to life and integrity of the human person; article 16 provides for the right of every person to 'enjoy the best attainable state of physical and mental health; and article 24 provides that '(a)ll people shall have the right to a general satisfactory environment favourable to their development'. These articles read jointly and severally, provide a legal platform for the enforcement of environmental rights. Article 21 also protects the interest of the people in the disposal of their natural resources. Pursuant to section 12 of the constitution, , Nigeria domesticated the African Charter via the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9 Laws of the Federation of Nigeria 2004. In the case of *General Sani Abacha & Ors v Chief Gani Fawehinmi*,[13] the Supreme Court held that once an international treaty has been enacted into law by the National Assembly, pursuant to section 12 (1) of the constitution, the treaty becomes binding. The court also held that in the event of conflict between the provisions of the treaty and another domestic statute, the treaty will prevail, being a statute with international flavour.[14] There have been a plethora of cases against the oil companies in Nigeria with allegations of pollution from oil related activities, loss of income, property etc., most of them being claims for compensation from the oil companies and not environmental protection.[15] In the case of *Oronto*

[7] Kent Nnadozie, 'Environmental Regulation of the Oil and Gas Industry in Nigeria',[2003] International Environmental Law and Policy in Africa www.academia.eduenvironment> accessed 8, December,2022

[8] See chapter 2 of the 1999 constitution.

[9]Abdulkadir B Abdulkadir,'The Right to a Healthful Environmental Justice in Nigeria' [2014] Vol. 3 (1) ABU: *Journal of Sustainable Development Law & Policy* 118 <www.ajol.infojsdlp>article>viewFile> accessed 6 January, 2020.

[10] (1981) 2 NCLR 337; *Attorney-General, Ondo State v Attorney- General Federation (2000)9 NSC.*

[11] See Hakeem Ijaiya 'Environmental Rights in Nigeria and India' [2012] vol. 9 (2) *International Journal of Environment and Development* 153.www.law.unilorin.edu.ngindex.php> accessed 15 March, 2020.

[12] African Commission on Human and Peoples' Rights, 'African Charter on Human and Peoples' Rights' www.achpr.org accessed 22 January,2023

[13] (2002) 6SC (pt.1) 1.

[14] Mathew Adefi Olong, 'Human Rights, the Environment and Sustainable Development: Nigerian Women's Experiences', [2012] Vol 15 (1) *Journal of Politics and Law* (www.ccsenet.org/jpl.) accessed 27 January, 2019

[15]Oluwatoyin Adejonwo-Osho, 'The Evolution of Human Rights Approaches to Environmental Protection in Nigeria' <www.iucnael.org> accessed 28 January, 2019.

Douglas v Shell Petroleum Development Company Ltd,[16]the plaintiff sued for the protection of the right as guaranteed by article 24 of the African Charter. His contention was the failure of the defendant to carryout Environmental Impact Assessment before the construction of a Liquefied Natural Gas plant as mandated by the Environmental Impact Assessment Act of 1992.[17]The trial court refused jurisdiction over the matter on the grounds of *Locus Standi*, a principle that has since been held to be wrong.[18]

Petroleum Act and the Petroleum (Drilling and Production) Regulations

The Petroleum Act of 1969, amended by Decree Nos. 16 of 1973, 49 of 1976 and 37 of 1977, was the primary law regulating oil and gas exploration activities in Nigeria. The Act in section 1(1&2) vests the ownership and control of all petroleum, whether found in the water or upon any land on the state. This includes land in Nigeria covered by water, whether it be in the continental shelf, territorial waters or exclusive economic zone. Pursuant to the Petroleum Act,[19] the Petroleum (Drilling and Production) Regulations 1979 was enacted. Section 25 of the regulation mandates the licensee or lessee to adopt all practical precautionary measures, including up-to-date equipment, for the prevention of the pollution of land and waters by oil or other fluids. Where such occurs however, the law also mandates the taking of prompt necessary action to control and possibly end it.

Other provisions in the regulations relating to the environment are Sections 40 and 45 that refer to expected practice in 'drainage of waste brine, sludge or refuse to avoid pollution of land and water and expected post-operation activities to ensure satisfactory condition of the environment after operator's activities.' Despite the provision, Oil drilling companies still discharge associated water into the seas in Nigeria unchecked by government officers of the Department of Petroleum Resources, whose responsibility it is to regulate their activities. Allen, quoting an informant described what is happening thus: Government officials only come here to be fed with food and collect money and do nothing to check these companies. Wastes are discharged into the sea recklessly. It is really amazing these things are happening in the face of laws prohibiting them'.[20]

Gas Flaring Regulations

The exploration of crude oil is compulsorily linked with associated gas that of necessity must be separated before the refining process.[21] This can be done in either of three ways – reinjection into the soil pending future need, which requires complex infrastructure; application to domestic and commercial use which entails facilities for liquefaction and transportation; the last and easiest option is flaring the gas.[22] According to a World Bank report, flaring or venting of associated gas contributes largely to the volume of Green House Gas emissions which impact negatively on the health and environment.[23] The World Bank defined the value of gas flaring as 'the lower of the cost of reducing or eliminating CO2 emissions and/or the economic cost of the damage to the physical and/or biological environment caused by the CO2 emission'.[24] It has been reported that Nigeria has the largest proven gas reserves in the whole Africa and the 9th in the world, as at 2018.[25] The above notwithstanding, gas production remains low in Nigeria. The reason being that the IOCs would rather flare the gas at lower financial cost, than re-inject for future production.

Associated Gas Re-injection Act of 1979 (as amended)

The Associated Gas Re-injection Act of 1979 (as amended) was the first anti-gas flaring regulation in Nigeria, made as a statutory response to the environmental impacts of gas flaring, with the intendment of phasing out gas flaring in Nigeria.[26] Section 1 of the Act mandates all companies in oil and gas production to submit to the Minister, not later than April 1, 1980 a 'preliminary programme for(a) schemes for the viable utilisation of all associated gas produced from a field or groups of fields;(b) project or projects to re-inject all gas produced in association with oil, but not utilised in an industrial project'. The Act also placed a duty on the companies to submit detailed programmes and plans for implementation of gas re-injection not later than 1 October, 1980.[27]

[16] (1999) NWLR (Pt591) 466.
[17] S 2.
[18] Centre for Oil Pollution Watch v NNPC (2019) 5NWLR (Pt. 1666) 518
[19] S. 9(1)
[20] Fidelis Allen, (n633)
[21] Mary Agboola and others, 'Gas Flaring in Nigeria: Opportunity for Household Cooking Utilisation' [2011] Vol. 2, (2) *Int. J. of Thermal and Environmental Engineering* 69 www.researchgate.net accessed 31 January, 2022.
[22] ibid
[23] World Bank, 'Regulation of Associated Gas Flaring and Venting: A Global Overview and Lessons from International Experience' Report Number 3 www.worldbank.com accessed 3 February, 2022
[24] 'Assessing the Impact of Gas Flaring on the Nigerian Economy' www.pwc.compdf> accessed 1 February, 2022
[25] ibid
[26] See ibid
[27] S 2(1)

The act in section 3 outlawed gas flaring from January 1 1984, but only subject to the permission of the minister who has the sole discretion to issue such permit. It further gives him power to impose such terms and conditions as he deems fit, to allow the continuous flaring of gas by a company that has declared its inability to engage in utilisation or re-injection of associated gas. It may not be out of place to conclude that the law does not make gas flaring illegal, a position which has been identified as one of the major weaknesses of the said Act.[28] Oluduro and Oluduro noted that close to the end of 1984, there was no evidence that any oil company had complied with the provisions of the Associated Gas Re-Injection Act and no evidence indicated that the Minister had insisted that the oil companies complied.[29]

Associated Gas Re-Injection (Continued Flaring of Gas) Regulations of 1984

Rather than ensure the enforcement of the previous Act, the Minister made the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations of 1984, which provides for exemptions to the earlier general ban on flaring.[30] Unfortunately, the monetary penalty[31] for continued flaring of gas by oil companies in the regulation is so grossly inadequate that it is preferred by the oil companies, rather than complying with the phase-out of gas flaring.[32] In the case of *Johnah Gbemre v Shell Petroleum Development Company of Nigerian Limited*[33] Mr. Gbemre, representing his community and himself filed a suit against Shell, the Nigeria National Petroleum Company (NNPC) and the Attorney-General of the Federation. The plaintiff sought inter alia, a declaration that the constitutionally guaranteed rights to life and dignity of the human person contained in sections 33 (1) and 34 (1) of the constitution and reinforced by articles 14, 16 and 24 of the African charter (Ratification and Enforcement) Act cap A9 LFN 2004, inevitably includes the right to an environment that is clean, pollution and poison-free; a declaration that the said rights have been violated by the defendants and an order of perpetual injunction restraining them from 'further flaring of gas in their community'.[34]

The court declared the defendants liable in violating the rights of the applicants as provided by the *constitution* and the African Charter.[35] The court further held that section 3(2) (a&b) of the Associated Gas Re-injection Act and Section 1 of the Associated Gas Re-injection (Continuing Flaring of Gas) Regulation are null and void for being inconsistent with the Applicants' rights to life and dignity of human person, as enshrined in the constitution The court also restrained the defendants from further flaring of gas in the said community[36] and ordered the Attorney General of the Federation to initiate the process for an Act of the National Assembly for the speedy amendment of the relevant sections of the Associated Gas Re-injection Act and the Regulations made thereunder.

Flare Gas (Prevention of Waste and Pollution) Regulations

In 2018, the federal government made the Flare Gas (Prevention of Waste and Pollution) Regulations, aiming to facilitate the conversion of the flared gas into a marketable product, as well as develop a bidding process that will be competitive for interested persons and organisations. The objectives of the regulation include inter alia, the reduction of the environmental and social impact of gas flaring and prevention of the waste of natural resources, while creating economic benefit from it. It is interesting to note that although the fine for violation has been significantly increased (from N10 per 1000 Standard Cubic Feet to US2$ per 28.317 scf), more interesting is that the minister still reserves the right to issue permits for flaring of gas at his sole discretion. Section 4 of the law requires a producer to provide accurate flared gas data, when such request is made by the DPR, within 30 days of such request. Section 5 criminalises the presentation of inaccurate data, by any person acting on behalf of the producer, punishable with a fine of N50,000.00 or a jail term of not more than 6months, or both. It can be argued that the provisions of the law are observed in the default, as the latest regulation

[28] Udok and Akpan (n662)

[29] OF Oluduro and O Oluduro, 'Oil Exploration and Compliance with International Environmental Standards: The Case of Double Standards in the Niger Delta of Nigeria' [2015] 37, *Journal of Law, Policy and Globalization,* p. 70

[30] Kaniye Ebeku, *Oil and the Niger Delta people in International Law: Resource Rights, Environmental and Equity Issues* in Udok and Akpan (n662)

[31] The Associated Gas Re-Injection (Amendment) Act introduced a penalty of 2 (two) kobo per 1000 standard cubic feet (SCF) of gas flared at any place. This amount was increased to 50 (fifty) kobo per 1000 standard cubic feet of gas in 1990, and the amount was further increased to 10 (ten) Naira per 1000 standard cubic feet of gas in 1998.

[32] Coalitions for Change, Abuja *Existing Laws and Policies in the Nigerian Extractive Industries,* (2010),Nigerian Extractive Industries Transparency Initiative (NEITI), pp. 7-8

[33](2005) AHRLR 151 (NgHC 2005).

[34] Para 2(5).

[35] Para 5(6).

[36] Para 6(5); Abdulkadir B. AbdulKardir, Gas Flaring in the Niger Delta of Nigeria: a Violation of the Right to Life and Comment on the Case of Jonah Gbemre v Shell Petroleum Development Company' [2014] Vol. 22 (1) *IIUM Law Journal* 76 www.journals.iium.edu.my>article> view> accessed 23 March 2020.

notwithstanding, satellite gas flaring data has revealed recently, that Nigeria has been one of the top seven gas flaring states in the world since 2012.[37]

Environmental Impact Assessment Act 1992

The Environmental Impact Assessment law[38] was enacted by the then military government of the Federal Republic of Nigeria, sequel to the formulation of the National Policy on the Environment. The law had for its objectives, the conduct and assessment of the impact or likely impact an activity or undertaking may have or is likely to have on the environment before embarking on such activity, the result of which is made public and memoranda invited from the public. In other words, it is aimed at helping the authorities reach an informed decision regarding public activity or project and its impacts on the environment. According to the law, where it is the opinion of the agency that a project may have a significant adverse impact on the environment, that cannot be mitigated, 'the agency shall not exercise any power or perform any duty or function conferred on it under any enactment that would permit the project to be carried out in whole or in part'.[39] It is worthy of note that paragraph 12 of the schedule to the law which lists the activities for which there is a mandatory impact study/assessment lists the petroleum industry, including oil and gas fields development, construction of pipelines, refineries etc. The oil and gas developers lay claim to having adequate environmental programmes for the implementation of EIAs. A recent study however, shows that while corporations have established internal environmental policies, plans, implementation mechanisms, procedures for monitoring and regular management reviews as well as health, safety and environmental units',[40] they lack either the institutional mechanism or the willingness to implement their environmental policies or even comply with government regulations and still operate in 'severe environmentally unfriendly ways'.[41] The study states that they rarely conduct EIA before the commencement of any project.[42] In most cases, EIAs are carried out to make it appear that the environmental impact of oil and gas and mining projects are carefully evaluated when in reality there is no genuine intent to do so.[43] A case in point is the Nigerian Liquefied Natural Gas (NLNG) project at Bonny, Rivers State. The project commenced without the mandatory EIA. A suit challenging the non-enforcement of the EIA Act with regard to the project, brought by an environmental activist was dismissed for lack of legal standing. Although the striking order was reversed on appeal and the suit sent back for trial, the matter was overtaken by events, as the project had by then been completed, leading to the discontinuation. What followed were protests by the affected communities concerning the project. The federal government responded by initiating and facilitating the conclusion of a memorandum of understanding between the affected communities and the NLNG Company so that the first shipment of natural gas would not be delayed.[44]

Environmental Guidelines and Standards for Petroleum Industry in Nigeria (EGASPIN)

Institutionally, an arm of the federal Ministry of Petroleum Resources, the Department of Petroleum Resources (DPR), plays a key role in the enforcement of environmental laws in the oil and gas industry in Nigeria. In 1992 the DPR issued the 'Environmental Guidelines and Standards for Petroleum Industry in Nigeria' revised in 2002. This forms the basis for most environmental regulations for the oil and gas industry in Nigeria. The guideline provides that before approval is given and permit issued for seismic activities which usually precedes oil exploration, the organization is required to conduct an EIA and the DPR is to impartially review the EIA before allowing the proposed project.[45] However, the DPR's oversight is somewhat problematic because, as discussed above, the DPR may be seen to be favourably disposed towards the oil and gas sector and may not readily take an action that will not favour its development. The document identifies three primary sources of pollution in the oil industry viz oil spills, discharge of effluents, and gas flaring, and sets out express prohibitions and limitations to minimise and eliminate the negative environmental footprint of these categories of pollution. As presented in Appendix 1, EGASPIN's discharge limitation standards, and prescribed testing

[37] According to the NNPC monthly oil and gas reports, Nigeria flared1252.26 trillion cubic feet of natural gas between 2016 and 2020.
[38] Decree No. 86 of 1992
[39] S.22(1)(c)
[40] Fidelis Allen, Implementation of Oil-Related Environmental Policy in Nigeria: Government
Inertia and Conflict in the Niger Delta (A Thesis Submitted in Accordance with the Requirements for the Degree of Doctor of Philosophy in the Subject of Political Science, University of Kwazulu Natal, South Africa, March 2010) in ibid
[41] ibid
[42] ibid
[43] Ingelson and Nwapi (n712)
[44] Engobo Emeseh, 'The Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria' (Paper presented at the Berlin Conference on the Human Dimensions of Global environmental Change, 'Greening of Policies – Interlinkages and Policy Integration', organised by Environmental Policy Research Centre (FFU), Freie Universität Berlin, Berlin, 3-4 December 2004) in ibid
[45] S.3.2

methods mirror international best practices and standards. This shows that EGASPIN, in principle, seeks to adopt international best practices, using methods and guidelines that are consistent with international standards. However, interpretation and implementation remain key issues.[46]

The law grants a significant level of discretion to the Director of DPR to permit discharges even when limitation standards have been exceeded. The phrase 'unless otherwise permitted by the Director of Petroleum Resources' appears in a number of key sections of EGASPIN.[47] Being a licenser and a regulator, it is submitted, as observed from the ineffectiveness of the regulatory system, that the lack of stringency and loose ends occasioned by these provisions and conflict of interest occasioned by the dual role of the agency, underscore the ineffectiveness of the law. In the words of Olawuyi and Tubodenyefa, '(b)alancing the objectives of achieving regulatory effectiveness in enforcing environmental standards, while allowing for economic development, is one of the primary challenges … limiting trust in the ability of the DPR to effectively enforce the provisions of EGASPIN'. This was the position of UNEP when their report concluded that: 'There is clearly a conflict of interest in a ministry which, on one hand, has to maximize revenue by increasing production and, on the other, ensure environmental compliance.'[48]

National Oil Spill Detection and Response Agency (Establishment) Act 2006 (as Amended)

The Act, which was enacted in 2006, established the agency vested with the responsibility of detecting and responding to oil spill incidents in Nigeria.[49] Section 6 of the act outlines the functions of the agency and includes responsibility for surveillance, to ensure compliance with all existing environmental legislations in the petroleum sector. This includes those relating to prevention, detection and general management of oil spills, oily wastes and gas flare; enforcing compliance with the provisions of international agreements, protocols, conventions and treaties, that relate to oil and gas and oil spill response management; receive reports of oil spillages and co-ordinate oil spill response activities throughout Nigeria. The law also provides for penalties for noncompliance with its provisions. These penalties include the sum of N2,000,000 for failure by an oil spiller to report an oil spill to the Agency in writing, by fax or electronic mail not later than 24 hours after the occurrence of an oil spill and a further penalty in the sum of N2,000,000 for each day of failure to report the occurrence; a fine not exceeding N5,000,000 or imprisonment for a term not exceeding 2 years or to both such fine and imprisonment for failure to clean up an impacted site, to all practical extent including action plan for remediation within two weeks of the occurrence of the spill in accordance with the polluter pays principle.[50]

Petroleum Industry Act

The history of the Petroleum Industry Bill (PIB) is traceable to the Oil and Gas sector reform Implementation Committee (OGIC) set up by President Olusegun Obasanjo on the 24th of April, 2000 with the aim of separating the oil and gas regulatory and policy making institutions from the commercial institutions.[51] The committee had the mandate to 'review and streamline all existing petroleum laws and establish an all-inclusive regulatory framework for the industry'.[52] The bill went through numerous revisions and debates, and met with a complex set of obstacles. In July 2012, the then President Goodluck Jonathan's administration presented a new version of the PIB to the National Assembly for consideration and enactment. Partial success was achieved in 2015, with the passage of the bill at the House of Representatives in the 7th Assembly but progress stalled when the bill did not go through the Senate before the dissolution of the 7th Assembly following the change of government in May 2015. Politics, the transition of power from the Jonathan to Buhari administration, venal ambition of different sector stakeholders, and the bulky nature of the PIB have also since stalled the passage of the bill. Following the coming into power in 2015, the Buhari administration proposed passing the PIB in various segments, forming four separate bills (Petroleum Industry Governance Bill, Fiscal Regime Bill, Upstream and Midstream Administration Bill, Petroleum Host Communities Bill). They prioritised the PIGB, as it addresses reforms to the governance of the sector through the establishment of an independent regulatory commission — the Nigerian Petroleum Regulatory Commission, which incorporates the current Department of Petroleum Resources (DPR) and the Petroleum Product Pricing Regulatory Agency (PPPRA); the unbundling of Nigerian

[46]Damilola S. Olawuyi and Zibima Tubodenyefa, ' Review of Environmental Guidelines and Standards for the Petroleum Industry' [2018] Institute for Oil Gas Energy Environment and Sustainable Development (OGEES) www.iucn.orgcontent> accessed 11 February, 2022

[47] S.3.5.7; 3.4.8; 3.3

[48] UNEP (2011) 'Environmental Assessment of Ogoniland', p. 139

[49] S.1 (NOSDRA)

[50] S.6 (3)(4)

[51]Azubuike H. Amadi, Victor D. Ola, and John O. Ayoola, 'Review of Nigeria's Petroleum Industry Bill', [September, 2020] (5/9) European Journal of Engineering, Research and Science EJERS www.researchgate.net accessed 14 February, 2022

[52] Taiwo Amodu and Leon Usman, 'The Politics, History of the Petroleum Industry Bill: How the North Secured Funding for Frontier Basins' [July 5, 2021]Nigerian Tribune www.tribuneonlineng.com accessed 14 February, 2022

National Petroleum Corporation (NNPC) into two limited liability companies, with one holding joint venture assets in the upstream sector and the other holding the production sharing contract assets; and governance and accountability arrangements with respect to the new institutions created.

The PIGM was finally passed by the Senate and the House of Representatives in 2017 and 2018 respectively. On the 16th day of August 2021, the president of the federal Republic of Nigeria, signed into law the Petroleum Industry Act, 2021,[53] which replaces the hitherto foremost act regulating the Oil and gas industry in Nigeria, the Petroleum Act. It also repealed the Associated gas Reinjection Act, 1979, the NNPC Act, among others.[54] The Act confers many powers on the Minister of Petroleum, as provided in section 3 of the act. He is vested with the power to inter alia, formulate, monitor and administer the policies of government in the industry; be the general supervisor over the affairs and operations of the industry; promote an enabling environment for investment in the industry; grant licenses and leases for petroleum operations upon the recommendation of the commission and also suspend same; give policy directives to the Nigerian Upstream Petroleum Regulatory Commission and the Nigerian Midstream and Downstream Petroleum Regulatory Authority established under the Act.

Environmental Protection in the Petroleum Industries Act

Section 102 of the act provides a licensee or lessee who engages in upstream or midstream petroleum operations shall within one year of the effective date or six months after the grant of the applicable licence or lease, submit for approval, an environmental management plan in respect of projects which require environmental impact assessment to the commission or authority, as the case may be.[55] The act also made provision for contribution to an environmental remediation fund, in accordance with the size of operations and the level of risks that may exist.[56] It went on to provide that the licensee or lessee has the responsibility of assessing its liability annually, and increasing its contribution accordingly. It is the view of the researcher that though the act provides that where the commission or authority is not satisfied with the assessment, it would appoint an independent assessor,[57] the arbitrariness and subjectivity made possible by the former provision leaves a lot to be desired as to the stringency of the environmental regime of the PIA. Section 104 of the act penalizes the flaring or venting of natural gas except 'in an emergency; pursuant to an exemption granted by the commission; or as an acceptable safety practice under established regulations.' The Section states that the where there is continuous flaring of gas, the prescribed fees will be paid by the licensee or lessee.

It is at once revealing and baffling when the provision of subsection 2 of section 104 is considered. According to the provision, '(a) fine due under this section shall be paid in the same manner and be subject to the same procedure for the payment of royalties to the Government by companies engaged in the production of petroleum'. This in other words, implies that the fine is considered a positive and regular income to the government, this notwithstanding the provision of the next subsection which states that the fund will be for the purpose of environmental remediation of host communities. It is the view of the researcher that if that were the case, then the right place to pay the fine to would be host communities environment remediation fund that directly caters to the remediation needs of host communities. Section 106 provides that prior to production, a licensee or lessee is required to install a metering device that measures the volume of gas flared or vented and further provides that failure would attract fines as would be stipulated in the regulations sequel to the act. The commission however, has the authority to grant permit for exemption to flare gas where it is perceived as necessary for a specified period of time.[58] Finally, on gas flaring, the act provides that a licensee or lessee shall within 12 months of the coming into effect of the act submit a gas elimination or monetisation plan to the commission, which shall conform to the form prescribed in the regulation made under the act.

2.2 Institutional Framework on Environmental Protection in the Oil and Gas Industry

National Oil Spill Detection and Response Agency (NOSDRA)

The National Oil Spill Detection and Response Agency (NOSDRA), which is under the ministry of environment, was established as the institutional framework for the implementation of the National Oil Spill Contingency Plan (NOSCP).[59] The agency was established as a response to the myriad of incidents of oil spill emanating from the activities of the oil and gas companies and the outcry of the people whose lives and

[53] An Act to Provide Legal Governance, Regulatory and Fiscal Framework for the Nigerian Petroleum Industry, the Development of Host Communities and Other Related Matters
[54] S.310
[55] S. 102 Petroleum Industry Act No. 6 of 2021
[56] S. 103 (1)(2)
[57] S. 103(6)
[58] S. 107
[59] ITOPF, 'Nigeria' www.itopf.org accessed 24 January, 2023

livelihood are adversely affected, especially in the Niger Delta. It was established to, inter alia, to monitor and regulate Tiers one and two oil spills, as well as coordinate, implement and review the National Oil Spill Contingency Plan for Nigeria.[60] This it would achieve by establishing a viable national operational organization that ensures a safe, timely, effective and appropriate response to all oil pollution as well as hazardous and noxious substances in the petroleum sector; identifying high-risk and priority areas for protection and clean up; and establishing the mechanism to monitor and assist, or where necessary, direct the response, including the capability to mobilize the necessary resources to save lives, 'protect threatened environment, and clean up to the best practical extent of the impacted sites'.[61] According to a report from the agency, while working to ensure industrial compliance with extant laws, the agency relies on voluntary engagement and the support of the oil companies under investigation to provide data, logistics, quantity estimates, samples and the proper cleanup operations.[62] In a Business Day news, the Minister of State for Environment, Sharon Ikpeazu was reported as saying that the reason for the continuous incessant cases of oil spill is that the laws dealing with the subject matter are weak. According to her, there is a need to review the act to make the penalties for violation stiffer.[63] In the case of *NOSDRA v Exxon Mobil*,[64] the agency instituted an action against the company, claiming the sum of N10,000,000 as penalty for the oil spill in Nembe community. The company in its defense stated that their response mechanism was activated once the spill was noticed and that the situation was remedied, even to the satisfaction of the agency. The trial court in its ruling, declared that the agency had no powers to impose fines on the company as the law does not confer on them such powers. The decision was upheld by the court of appeal. Pursuant to the act, the Oil Spill Recovery, Clean-up, Remediation and Damage Assessment Regulations, 2011 was enacted. Section 5 of the regulation stipulates that in the event of a spill, a Joint Investigation Visit (JIV) will be made to the site of the said spill. The team, according to the provision, will consist of a representative of the community, the corporation and the officials of the agency. The regulation also imposed on the spilling corporation, the responsibility of providing the means of transportation to the site of the spill for the investigation. It is submitted that having reliance on the culprit to investigate into the act runs contrary to the intendment of the NOADRA Act, which is intended to achieve a speedy and effective response and clean-up of affected spill sites.[65] The report of UNEP on Ogoniland more or less exposed the ineffectiveness of NOSDRA to tackle issues of oil spill due to reliance on the spiller for reporting transporting and equipment, which invariably leads to delay in response and ineffective investigation into the cause of it.[66]

Department of Petroleum Resources (DPR)

The DPR was hitherto, the principal regulator of the oil and gas industry. It was vested with the statutory responsibility of ensuring compliance to all extant laws regulating the industry.[67] The DPR started as a department of the Federal Ministry of Mines and Power with statutory supervisory power over the oil and gas industry. The ministry was later upgraded and renamed the Ministry of Petroleum and Energy, and yet later to Ministry of Petroleum Resources, with the DPR still vested with regulatory powers over the oil and gas industry.[68] The functions of the ministry as vested in the DPR included inter alia, supervision of all licensed and leased operations of the industry; monitoring such operations to ensure that they align with national goals; ensuring accurate and timely payment of rents and royalties as well as other revenue accruing to the government from the industry; processing of applications for licenses and leases; ensuring that regulations on health, safety and environment conform with national and international best practices in the industry; etc[69] When the federal government in 1988 established the Federal Environmental Protection Agency vide the establishment act, the agency became vested with 'responsibility for the protection and development of the environment and biodiversity conservation and sustainable development of Nigeria's natural resources in general …'[70]and also establish standards and guidelines and monitor for compliance with same by the industries. With the establishment of National Environmental Standards Regulation Enforcement Agency, FEPA was repealed and the act divested the power to regulate the industry from NESREA and by implication vested it in the DPR. It has

[60] S.5 NOSDRA Act
[61] Ibid (a-c)
[62] NOSDRA, 'About Oil Spills in Nigeria' www.nosdra.oilspillmonitor.ng accessed 9 February, 2022
[63] Anthony Ailemen, 'Oil Spill: FG Mulls Review of NOSDRA Act, Stiffer Penalties for Perpetrators' [November 25, 2021] Business Day www.businessday.ng accessed 10 February, 2022
[64] *NOSDRA V Mobil Prod. (Nig.) Unltd* (2018) 13NWLR (Pt. 1636) 334
[65] See Noah Afedolorlzou Kumor, 'The Paradox of NOSDRA to Prevent and Quickly Respond to Oil Spills in Nigeria' [2021] (5/1) *American Journal of Humanities and Social Sciences Research* (AJHSSR) pp. 158-167 www.ajhssr.com accessed 10 February, 2022
[66] ibid
[67] Petrol Plaza, 'The Department of Petroleum Resources of Nigeria', [July, 2021] www.petrolplaza.com accessed 14 December, 2022
[68] Nigerian Upstream Regulatory Commission, 'In the Beginning', [2022] www.nuprc.gov.ng accessed 14 December, 2022
[69] Petrol Plaza (n369)
[70] S.5 FEPA Act, 1988

been opined that the dual role of the DPR, that is its economic and environmental protection functions in the industry portends a conflict of interest that more often than not, may be resolved in favour of economic interest.[71] This significantly conflicts with the provision of the EU Directive on Health Safety and Environment which directs that for the maintenance of the independence and objectivity of the regulator, and for the avoidance of conflict of interest, there should be a clear demarcation between regulatory roles with regard to environmental safety and those with regard to economic development. [72] It is arguable that this inherent conflict of interest in the statutory functions of the DPR has been the bane in the regulation of the activities of the major players in the industry in Nigeria.It is noteworthy however, that the new Petroleum Industries Act, signed into law in 2021 has scrapped the DPR and replaced it with two new agencies – the Nigerian Upstream Petroleum Commission and the Nigerian Midstream and Downstream Petroleum Regulatory Commission. This is with the intension to right the wrongs in the regulation of the oil and gas industry.

Nigerian Upstream Petroleum Regulatory Commission and Midstream and Downstream Petroleum Regulatory Commission

The Nigerian Upstream Petroleum Regulatory Commission (NUPRC), as well as the Nigerian Midstream and Downstream Regulatory Authority were established by the new Petroleum Industries Act, 2021 in section 4 and section 29 respectively. Following the scrapping of the hitherto regulatory agencies – the Department of Petroleum Resources, Petroleum Pricing Regulatory Agency, and Petroleum Equalisation Fund, the commissions were established for the purpose of providing the legal and regulatory framework for the industry, including the development of host communities.[73] The of objectives of the NUPRC are inter alia, to 'ensure that upstream petroleum operations are carried out in a manner to minimise waste and achieve optimal government revenues'; 'promote healthy, safe, efficient and effective conduct of upstream petroleum operations in an environmentally and sustainable acceptable manner'; [74] and others. For the NMDP its functions include to 'grant, issue, modify, extend, renew …. council, terminate licences and permits for operations in the mid and down streams; establish, monitor and regulate health, environment and safety measures with regards to the operations in the mid and down streams.[75]

3. Conclusion and Recommendations

It is evident from the provisions of the regulatory laws appraised above that environmental protection goals are subordinate to economic considerations in the Nigerian economy. More worrisome is the fact that the coming into force of the Petroleum Industry Act, which was expected to provide the solution to all the problems emanating from the industry has failed on arrival to do so. First of all, the powers vested in the Minister of Petroleum in the act are not different from that in existence before the act. These far reaching, as well as the discretionary powers vested in one individual whose appointment is at the whims and caprice of the president and ruling party can only create a duty in the holder of that office to cater to the interest of his appointers. The none outright ban and criminalization of gas flaring by the act, as well as the discretionary powers in the minister to permit flaring is only a testimony to there will be no abatement in the flaring of gas, as the political will for the adoption and application of tougher and more stringent measures, or even a strict enforcement of the provisions of the act is lacking. The objectives and functions of the NUPRC, especially those relating to optimising revenue and promoting environmental safety are at variance and would lead to a conflict of interest, the same challenge that lead to the inefficiency of DPR. It is also at variance with the provision of the EU Directive on Health, Safety and Environment, earlier stated and would occasion conflict of interest which will invariably be resolved in favour of economic interest. The sole authority to grant, issue, modify or terminate all licenses, permits and authorisations for midstream and downstream sectors vested in the NMDPRA has the potential of being politicised and/or abused. This is because in the Nigerian setting, the power to grant, modify and terminate, if vested in one individual or entity automatically makes such individual/entity a demigod. It goes without saying therefore, that where such powers are domiciled in one agency, the possibility for checks and balances will be almost non-existent, which invariably leads to unhealthy politicking.

Even though it can be said that the regulatory regime of the sector has improved, it can be rightly argued that as far as environmental protection is concerned, international best practices is still an illusion in the oil and gas sector. The PIA should be amended to unbundle the functions of the regulatory agencies and create another ministry that will be a regulator strictly, while the commissions continue with economic functions. The amended PIA should also ban and criminalise gas flaring without option of fine, if flaring must be abated in Nigeria. The powers vested in the minister should also be reduced for proper checks and balances It is an aberration to have a spiller provide logistics for a regulatory agency to investigate the spill. The agencies must be provided with tools for their work in order to guarantee the integrity of the reports emanating from such investigations.

[71] Eddy Wifa, Chidinma Amaeze and Eze Emem Chioma, 'Potential Conflict of Interest in the Dual Functions of the Nigerian Department of Petroleum Resources as both Economic and Environmental Regulator', [2007] Centre for Energy Economics, Working Paper on National Oil Companies www.academia.edu accessed 14 December, 2022.

[72] Para 20, Directive 2013/30/EU of the European Parliament and of the Council of June 12, 2013 on Safety of Offshore Oil and Gas Operations www.eur-lex.europa.eu accessed 14 December, 2022

[73] NMDPRC, 'Oil and Gas Business in Nigeria' [Agust, 2022] www.aziza.com.ng accessed 23 January,2023

[74] S.6 (c, d,& e) PIA 2021

[75] S.32 (f,bb) PIA 2021