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ENVIRONMENTAL REGULATION OF OIL AND GAS ACTIVITIES IN THE NIGER DELTA OF NIGERIA: AN EVALUATION OF POLICY AND THE LEGAL FRAMEWORKS

By

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Abstract

The detection and mining of crude oil and natural gas deposits in Nigeria over the past four decades has massively boost the prosperity of the state but not devoid of its damaging environmental impacts. Oil industries operate hundreds of producing wells, gas plants, networks of thousands of kilometers where pipelines are constructed to connect from flow stations to the terminal where crude oil is being exported to. Therefore, it requires a solid policy and legal frameworks to ensure adequate regulation of oil and gas activities. It is on this premise that this paper seeks to evaluate the policy and the legal frameworks on the regulation of activities of oil industries in the Niger Delta with a view to ensure the protection of environment. On this note, the paper discovers that while the policy has provided a solid platform to ensure a sustainable oil and gas activities, there are some fundamental gaps in the legal frameworks. Therefore, suitable suggestions are made to ensure adequate regulation of oil and gas activities in the Niger Delta region of Nigeria.

Key words: *environment, oil & gas, regulation, legal frame work, Niger-Delta, Nigeria.*

Introduction

Nigeria is handsomely endowed with crude oil and natural gas deposit that has becomes the foremost source of energy and foreign exchange earnings.¹ Oil exploration activities began in Nigeria as early as 1956 by Shell-BP and Nigeria joined the lists of oil producers in 1958 when its first oil field, Oloibiri field, Started production of about 5,100 barrel per day.² By the late sixties and in the early hours of seventies, the production level had increases to over 2 million barrels of crude oil per day.³ The present synopsis shows that the oil and gas industry's profile has risen to the point that currently there are over 400 production and storage facilities in the oil-bearing

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¹ Ebiri, K. "Behind the Rumbles in the Delta" (2004) *THE GUARDIAN*, Thursday, July 8. 20; Kalio, B. "Okrika National Politics and the Tragedy of Incumbency" (2004) *The MIRROR*. October, 5-11; Kalio, B. "Genesis of Okrika Crisis- The Untold Story" (2004) *The MIRROR*, September, 7-13.

² Peterside, J. S. *Ethnic Associations and Crisis of Human Rights Enforcement in the Niger Delta*. (PhD Thesis, Department of Sociology, University of Port Harcourt, 2001) 66.

³ See UNEP, *Enviormmetal Assessment of Ogoniland*, UNEP, 2011, 1-7

region with a production capacity of about 3.5 million barrel per day.⁴ These deposits are concentrated at the Niger Delta region of the country, which has led to the existence of transnational oil and gas industries in the area. While it is true that oil and gas business has added pace to the economic growth of this country and put Nigeria into the world map of concentrated region of oil deposits; it has brought with it the desolation of the natural environment owing to its unsustainable operation where the oil and gas industries engaging in this activities do not put in place contingency plan to remediate what has been destroyed in the environment.⁵ This practice raised the fundamental question as to whether there exist legal frameworks to regulate oil and gas activities in this perspective. It is on this premise that the author investigates into the adequacy or otherwise of the existing legal frameworks regulating oil and activities with a view to protect the Niger Delta environment. Therefore, this paper is divided into six major parts. This introduction is the first part. The second part examines some major environmental problems resulting from oil and gas operation in the Niger Delta. Here, the discussion will be limited to oil spills, gas flaring, and dredging. The third part is a policy analysis with a view to show whether the Nigerian Environmental Policy contains adequate provisions for the regulation of oil and gas activities. The fourth part assesses the adequacy or otherwise of the existing legal frameworks on oil and gas activities in Nigeria. The fifth part looks into the general challenges affecting the effectiveness of the examined legal frameworks. The last part represents the conclusion.

Environmental Problems Resulting from Oil and Gas Activities in the Niger Delta

One of the newsworthy subjects of this time is environment. Globally, environment is facing some challenges but the situation is such a pitiable one in the Niger Delta owing to the scale of damage on the environment and the multiplicity of challenges. The Niger Delta is metaphorically regarded as Nigeria's mini Middle East because of its oil and ecological abundances. These ecological abundances are gradually being wiped out owing to the environmental problems from oil and gas activities. These problems are briefly discussed below:

⁴ Ibid. see also Frynas J.G. "Corporate and State Response to Anti-Oil Protest in the Niger Delta" (2001) *African Affairs*, 100; MOSOP, *Ogoni Bill of Rights*, Port Harcourt: Saros International Publisher, 1992.

⁵ Victor Ojatorotu "The Internationalization of Oil Violence in the Niger Delta of Nigeria" (Spring, 2008) *Vol. 7 No.1, Alternative Turkish Journal of International Relation*, 92-118

A. Oil Spill

Oil spills simply denotes leakages of petroleum unto the earth surface. It is a common occurrence in the Niger Delta Region.⁶ The Niger Delta has suffered and still suffering from oil spills which occur both on land and off shore. Oil spills on land damage crops and lower the productive quality of soil that community relies on for farming.⁷ It also destroys fisheries and lowers the quality of water that people use for drinking and other domestic activities.⁸ It usually occurred due to the corrosion of oil pipes, poor infrastructural facilities, and leaks during processing at refineries, human errors and even deliberate vandalism.⁹

Since the beginning of oil operation in the Niger Delta, there has been no conclusive empirical data of the total percentage of oil spills in the region.¹⁰ However, in 2006, the United Nations Development Programme declared in their report that a total of 6, 817 oil spills occurred between 1976 and 2001 with loss of approximately three million barrels of oil in the region.¹¹ In contrast, SPDC (Shell Petroleum Development Company) reported that between 1989 and 1994, an average of 221 spills per year occurred with loss of 7, 350 barrels of oil annually into the environment of Niger Delta. Also, in 2006, a group of independent and oil experts visited the Niger Delta and recorded the total amount of oil spills both on shore and off shore to be 9 to 13 million barrels over the past 50 years.¹² This shows that the people of Niger Delta have since the beginning of oil operation over five decades ago being living a shameful life, surrounded by human rights violators and the interest future of generations continue to be threatened by

⁶ Eregha P.B. and Irughe I.R., "Oil Induced Environmental Degradation in the Nigeria's Niger Delta: The Multiplier Effects" (2009) Vol.11 No. 4, *Journal of Sustainable Development in Africa*, 160-175; Frynas G.J., "Legal Change in Africa, Evidence from Oil-Related Litigation in Nigeria" (1999) Vol. 43, No. 2, *Journal of African Law*, 128

⁷ Amnesty international, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta*, Amnesty International Publications, United Kingdom, 2009, 14-17

⁸ *ibid*

⁹ *Id*, i5

¹⁰ Saro-Wiwa, *They are Killing my People in Na'Allah (ed.) Ogoni's Agonies* Trenton, NJ: Africa Press, 329-359.

¹¹ UNDP, *Niger Delta Human Development Report*, UNDP, 2006 Retrieved from http://hdr.undp.org/en/reports/nationalreports/africa/nigeria/nigeria_hdr_report.pdf [accessed on 27th October, 2011]; see also Otive Igbuzor "A Review of Niger Delta Human Development Report" Presented at a Conference on Human Development in the Niger Delta: From Agenda to Action Held at Hotel Presidential, Port Harcourt, River State from 24-25 August, 2006. Also available at <http://www.dawodu.com/igbuzor16.htm> [accessed on 26th October, 2011]

¹² Niger Delta Natural Resources damage Assessment and Restoration Project, Phase 1 Scoping report, May 2006 conducted by Nigerian Conservation Foundation, WWF UK and International Union for Conservation of Nature (IUCN), Commission on Environmental, Economic and Social Policy with the Federal Ministry of Environment.

the day to day activities of the oil industries.¹³ Notable cases of oil spills are: the Ikarama oil spills 2007,¹⁴ the Bata spills 2002, Kira Tai oil spill 2007,¹⁵ Rukpokwu oil spill 2003,¹⁶ Ebubu oil spill 1970, the Ogbodo oil spill 2001, Abudu Pipeline 1982,¹⁷ the idoho oil spill 1998,¹⁸ Funiwa oil spills 1980 to mention but few.¹⁹ All these were accompanied with devastation of property and deprivation to a means of livelihood.

B. Gas Flaring

Gas flaring has been a touchy issue in Nigeria since the commencement of oil exploitation in the country. The gas that is flared is referred to as associated gas.²⁰ Such gases are produced during oil production process. The gas can be separated from the crude oil for use in large quantity for commercial purposes. First, if separated from the oil, it could be used as liquefied natural gas.²¹ Secondly, it could be re-injected into the soil to avoid its environmental impacts. Thirdly, another alternative which is prominent in the developing countries is to burn off or flared such gases.²² Nigeria flared more than 50% of associated gas it produces.²³ This act has been tagged culpable because of its effects and extravagancy.²⁴

¹³ See Viasuyi P.O. and Jim Uwasiae "The Dilemma of Niger-Delta as Oil Producing States of Nigeria" Issue 16, Number 1, *Journal of Peace, Conflict and Development*, 111-126.

¹⁴ See the video clip of the spillage at <http://www.youtube.com/watch?v=TJxNhMXwoqY> [accessed on 27th October, 2011]

¹⁵ Amnesty International "Amnesty International Response to Shell" Available at <http://www.amnesty.org.nz/files/AI-response-to-shell.pdf> [accessed on 27th October, 2011]

¹⁶ See Niger Delta Watch "Report on Environmental Abuse" Available at <http://www.nigerdeltawatch.org/reports?c=14&page=4> accessed on 27th October, 2011]

¹⁷ For more detailed view, see Peter C. Nwilo and Olusegun T. Badejo "Impacts and management of Oil Spill Pollution Along the Nigeria Coastal Areas" Retrieved from http://www.fig.net/pub/figpub/pub36/chapters/chapter_8.pdf [accessed on 27th October, 2011]

¹⁸ *ibid*

¹⁹ *ibid*

²⁰ Torulagha P. S "Onshore/Offshore Dichotomy: Why the Locus of Power Lies in the North" Available at <http://www.unitedijaw.com/torulagha0000109.htm> [accessed on 28th October, 2011]

²¹ *ibid*

²² *ibid*

²³ *ibid*

²⁴ Torulagha P. S "The Niger Delta: Strategic Factors and Options" Available at <http://www.unitedijaw.com/torulagha0000103.htm> [accessed on 28th October, 2011]; Torulagha P. S "The Causes of Conflicts and Instability in Niger" Available at <http://www.unitedijaw.com/torulagha0000104.htm> [accessed on 28th October, 2011]; Torulagha P. S "Onshore/Offshore Dichotomy: Why the Locus of Power Lies in the North" Available at <http://www.unitedijaw.com/torulagha0000109.htm> [accessed on 28th October, 2011]; Torulagha P. S "Niger's Dilemma: Is Petroleum a National Resources or Not" Available at <http://www.unitedijaw.com/torulagha0000110.htm> [accessed on 28th October, 2011]; Torulagha P. S "Political Consolidation and Empowerment: What Ijaws Should Do" Available at <http://www.unitedijaw.com/torulagha0000113.htm> [accessed on 28th October, 2011].

Flaring of associated gas from oil fields as a waste product of crude oil production is a common occurrence in the Niger Delta of Nigeria. It is the most noticeable impact of the oil industries on daily basis.²⁵ Evidence has shown that Nigeria flared gas than anywhere else in the world. At present, there are over 100 locations within the Niger Delta for flaring of associated gases.²⁶ These gases for instance, methane and carbon dioxides when released into the atmosphere in large quantity have negative consequences on the people, environment and the entire ecosystem.²⁷ Since the major occupation of the people of Niger Delta are basically farming and fishing. The flaring of gas not only have a dreadful effect on the environment but also on their means of livelihood.

Gas flaring began in Nigeria concomitantly with oil extraction in the 1960s by the Shell-BP. It was permitted to proceed with no practicable attempts to regulate same by the Nigerian Government notwithstanding the fact that gas flaring has since been forbidding under the Associated Gas Re-Injection Act.²⁸ Gas flares have possible harmful implications on the health and livelihood of the communities because it contain poisonous substances.²⁹ Thus, exposure to such poisonous substances can lead to a range of respiratory problems which are already prominent among many children in

²⁵ Rufus O. Idris "Impacts of Oil Spillage and Gas Flaring on the Population and Distribution of Birds in Niger Delta of Nigeria: A Brief Interim Report Submitted to ABC Conservation Awards and Fund, United Kingdom" Retrieved from:<http://www.google.com.my/search?q=%20Rufus%20O.%20Idris%20E2%80%9CImpacts%20of%20Oil%20Spillage%20and%20Gas%20Flaring%20on%20the%20Population%20and%20Distribution%20of%20Birds%20in%20Niger%20Delta%20of%20Nigeria&ie=utf-8&oe=utf-8&aq=&rls=org.mozilla:en-US:official&client=firefox-a&source=hp&channel=np> [accessed on 20th January, 2012]

²⁶ Eferiekosa Ukala "Gas Flaring in Nigeria's Niger Delta: Failed promises and Reviving Community Voices" (2011) 97(2) *WASH. & LEE J. ENERGY, CLIMATE & ENV'T*, 98-126.

²⁷ See Gulzhan Nurakhment, "Gas Flaring and Venting: What can Kazakhstan learn from the Norwegian Experience?" (2006) available at http://www.dundee.ac.uk/cepmlp/car/html/CAR10_ARTICLE14.PDF [accessed on 23rd October, 2011] (discussing environmentally safe alternatives to gas flaring); Paula Palmer, "Emergency Action: Stop Gas Flaring in Nigeria" (2009) available at <http://www.foei.org/en/media/archive/2009/nigeria-to-stop-companies-flaring-gas> [accessed on 23rd October, 2011]; Paula Palmer, "Mangrove Action Project, Niger Delta's Mangrove Communities Threatened by Continued Gas Flaring" (2009) Available at <http://mangroveactionproject.org/news/action-alerts/niger-deltas-mangrove-communities-threatened-by-continued-gas-flaring> [accessed on 23rd October, 2011] (noting that despite the fact that Nigeria's Niger Delta is endowed with crude oil, local residents have limited access to crude-oil by-products)

²⁸ See section 3 of the Associated Gas Re-Injection Act, Cap. A 25 Laws of Federation of Nigeria, 2004

²⁹ See Nnimmo Bassey "Gas Flaring: Assaulting Communities, Jeopardizing the World" A Paper Presented at the National Environmental Consultation Organized by the Environmental Rights Action in Conjunction with the Federal Ministry of Environment held in Abuja between 10-11 December, 2008.

the Delta.³⁰ These substances as proved by scientists can intensify asthma, causing breathing difficulties and pains, as well as other related consequences.³¹

C. Dredging

Dredging activities is another problem associated with oil and gas activities in the Niger Delta. This has had an adverse consequence on the environment of the inhabitants. Dredging activities is very apparent in the Niger Delta in order to ease navigation, get sand for construction and ensure hydrological flow and free movement of water. During dredging, the aquatic lives are being distorted thereby leading to the great extinction of rare species. Also, in the process of dredging, sediments are removed from the river channel into the earth surface. These sediments constitute hazards to the plane grounds thereby rendering lands unsuitable for cultivation.

It has been argued that dredging activities affects the economic rights of the people of Niger Delta. This is so because since the people are basically farmers and fishermen, dredged activities affect their productivity economically. The reason being that moment a river is dredged, the concentration of flock of fish will be affected thereby reducing the productivity of fisherman. Also, the amount of water available for human use at the up streams will equally be reduced thereby affecting the irrigation activities in terms of agriculture. Thus, dredging activities have adverse effects on the livelihood of the people of Niger Delta.

Policy Analysis

Policy is defined to mean a pledge of action to tackle any given problem. The nature of formulated policy depends on the nature of the problem. With respect to oil and gas pollution, policy may mean any measures or steps purposely taken to address the use and management of oil and gas deposits. It is usually addressed in relation with the formation of environmental legislation and action plans, but also within the structure of resources management planning. These two interacting areas are often managed in various line ministries - usually a Ministry of Environment and Ministry of Petroleum Resources. To arrive at a situation where the adopted political intentions can result in a genuine impact on the practicable management of oil and gas resources, it is imperative to describe policy statements plainly and in appropriate policy instruments. Thus, oil and gas policy statements can either be placed within a land resources policy document or within an environment policy document, or the statements can form a document in themselves, referring to overall management and use of oil and gas resources. The chosen technique will depend on the organizational

³⁰ ibid

³¹ ibid

setting in a specific country. Thus, policy represents the starting point for a cause of action to tackle an incident. Until the adoption of the National Policy on the Environment in 1989,³² Nigeria had no defined and clearly articulated national policy goals for the nation's environment.³³

The Nigerian Environmental Policy which was adopted in 1989 succinctly acknowledged oil and gas sector has the backbone of the Nigerian economy, contributing over 90% of the nation's foreign exchange earnings and at least 80% of the GDP.³⁴ To ensure the protection of environment in this regard, the policy stresses on the sustainability of oil and gas activities because virtually all of the activities in both the upstream and downstream sectors are not only pollution-prone, but readily provoke social discord. In view of this, the policy listed the following strategies as a means of ensuring sustainability of oil and gas sector and protection of environment. They are:³⁵

- a. evolve a realistic national conservation policy that ensures optimum economic returns from oil and gas exploration and production, while ensuring adequate provisions for strategic reserves and taking into consideration the welfare of the local inhabitants of the oil and gas producing areas;
- b. ensure minimal disturbance of the soil, topography, vegetation, sensitive ecological zones, including critical wildlife habitats, wetlands, avian migratory routes, etc. during the process of exploration, production, refining, transportation and marketing of oil and gas;
- c. proscribe all forms of oil and gas exploration and production in estuaries, coastal waters, beaches and resorts, take such measures as will minimize disturbance to and contamination of benthic and aquatic habitats;
- d. minimize disturbances/displacement of the local inhabitants, their artefacts, roads, historical sites, sacred groves/places of worship, etc., source of livelihood (agriculture, fishing, transportation etc.) and pay adequate compensation for proven cases of pollution;

³² Webster's third international dictionary defines policy as a definite course or method of action selected from among alternatives and in the light of given conditions to guide and determine present and future decisions. Policy does not necessarily imply action. A decision not to act in relation to a particular matter may be considered policy. Inaction may be the policy. Policy includes stated and apparently bona fide positions taken by governments and international organizations in relation to environmental issues and problems.

³³ Margaret Fubara, *Law of Environmental Protection*, Caltop Publication Nigeria Limited, 1998, 56

³⁴ See the Nigerian Environmental Policy 1989 revised in 1999.

³⁵ See Paragraph 4(14) of the National Policy on the Environment for Nigeria 1989 revised in 1998.

- e. prescribe stringent regulations for the efficient collection, treatment and disposal of oil field wastes (drilling muds and additives, formation waters etc);
- f. monitor water quality in open drains, streams and other water bodies around oil and gas operations, as well as groundwater quality in all areas prone to pollution;
- g. inspect periodically pipelines, ships, barges, tanks and other oil field and refinery facilities for early detection of corrosion, leakages, damages etc. and ensure prompt maintenance;
- h. encourage all oil and gas operators to keep accurate records of crude oil and product spills as well as other accidents that impact environmental quality and report them promptly to the appropriate authorities;
- i. maintain an inventory of certified/approved oil spill control chemicals and document their toxicity levels and biodegradability;
- j. monitor air emissions and gaseous wastes (CO, CO₂, NO_x, H₂S, CH₄, SO₂ etc.) discharged at production platforms, refineries, petrochemical and gas processing facilities through continual air quality sampling as well as through daily visual checks for leakages around tanks, pumps, pipelines and transfer points;
- k. promote conservation and restoration of natural formation pressure through elimination of gas flaring and the re-injection of produced associated gas and formation waters;
- l. promote the complete utilization of produced associated gas, reduce gas flaring and the production of greenhouse gases;
- m. monitor regularly the functioning of well head and drilling platform devices to prevent blowouts, and install early warning electronic devices for their detection and prevention;
- n. install pressure monitoring gauges and automatic shut-off devices on pumps, pipelines and ensure their integrity through periodic inspection and testing;
- o. prescribe minimum standards of environmental safety in all upstream and downstream oil sector facilities and maintain regular environmental audits of all existing oil and gas production facilities to ensure the adoption of environmentally safe practices as well as compliance with set standards;
- p. prescribe minimum environmental and safety regulations for the protection of the health of workers, the general public and the

environment and ensure compliance through teams of competent inspectors;

- q. prescribe a realistic Quality Control Assurance scheme for the adoption of all operators and monitor compliance;
- r. ensure the establishment of realistic Oil Spill Contingency Plans to contain oil spillage, accidental explosion, well blowouts and fire incidents;
- s. prescribe stringent penalties for deliberate sabotage of oil and gas installations;
- t. promote research aimed at accumulating baseline ecologic data on oil and gas production areas.

The above listed strategies show that the Environmental Policy has identified strategic and major sectors which demand the integration of environmental matters and sustainability. It has recommended a highly persuasive strategies for the realisation of the goals of the policy which is to ensure a healthy environment for Nigerians. These strategies are in line with the principles contained in Stockholm Declaration,³⁶ Rio Declaration³⁷ and Agenda 21. Though these declarations have no binding effects, its provisions are fundamental to the protection of a healthy environment and sustainable development if implemented by states. This shows that these strategies if enforced would help in the realisation of a sound environment for Niger Delta. On this note, the authors argue that the policy has made ample provisions for plan of action to manage and protect the Nigerian environment through the arrays of strategies intended to ensure sustainability of the oil and gas sector. Be that as it may, the question now is whether the existing legal frameworks on oil and gas operation in Nigeria are designed to fulfil the aspiration of the policy. This will be the focus of discussion in the next part of this paper.

Legal Frameworks

Governmental involvement is vital if measures to protect the environment are to be successful. This is the stage at which the law has an imperative role to play. No quantity of technological or scientific strategies can successfully protect the environment without the aid of legal system to sustain them.³⁸ The purpose of preserving and maintain the purity of the environment can be attained only if the law can be mobilized to operate in

³⁶ See Stockholm Declaration 1972

³⁷ Rio Declaration 1992

³⁸ White, Paul and Anke Jentsch, "The Search for Generality in Studies of Disturbance and Ecosystem Dynamics," in *Progress in Botany*, Vol. 62. Berlin: Springer-Verlag, 2001, 399-450; Wilson Harlan, "Environmental Democracy and the Green State," (2006) Vol. 38, No. 2, April, *Polity*, 276-94.

companionship with science and technology.³⁹ There are some laws made specifically to regulate oil and gas activities while some contains significant provisions on them. These are examined below so as to evaluate their adequacy or otherwise and made the necessary suggestions to improve the system.

i. Oil Navigable Water Act⁴⁰

The Act was originally enacted in 1968⁴¹ to implement the terms of the international Convention for the Prevention of Pollution of the Sea by Oil and to make provisions for such prevention in the navigable waters of Nigeria.⁴² The Act prohibits the discharge of crude oil, fuel lubricating oil and heavy diesel oil or any other description of oil by a Nigerian ship⁴³ into sea area of Nigeria.⁴⁴ The Act makes it an offence for the owner or master of a vessel, the occupier of a land adjoining Nigeria waters or a person in charge of an apparatus used for transferring oil from or to any vessels, to discharge oil or mixture containing oil into the waters of Nigeria. The relevance section here is section 3 which protect the environment against the impacts of oil operations. The section provides:⁴⁵

1. If any oil or mixture containing oil is discharged into waters to which this section applies from any vessel, or from any place on land, or from any apparatus [such as pumping stations and pipelines⁹⁴³] used for transferring oil from or to any vessel (whether to or from a place on land or to or from another vessel), then subject to the provisions of this Act-
 - (a) if the discharge is from a vessel, the owner or master of the vessel; or
 - (b) if the discharge is from a place on land, the occupier of that place;
 - (c) if the discharge is from apparatus used for transferring oil from or to a vessel, the person in charge of the apparatus, shall be guilty of an offence under this section.
2. This section applies to the following waters, that is to say –
 - (a) the whole of the sea within the seaward limits of the territorial waters of Nigeria, and

³⁹ Young and Oran "Regime Effectiveness: Taking Stock," in *The Effectiveness of International Environmental Regimes: Causal Connections and Behavioral Mechanisms*. Edited by Oran Young. Cambridge, Massachusetts: The MIT Press, 1999, 249-279.

⁴⁰Oil Navigable Water Act, Cap. O 6 Laws of Federation of Nigeria, 2004

⁴¹ ibid

⁴² See the International Convention for the Prevention of Pollution of the Sea by Oil 1954 as amended by 1962

⁴³ Nigeria ship means a ship whose port of registry is Nigeria. See section 20 of the Act

⁴⁴ Oil Navigable Act Cap. O6 Laws of Federation of Nigeria, 2004, section 1

⁴⁵ Id, section 3

(b) all other waters (including inland waters) which are within those limits and are navigable by sea-going ships.⁴⁶

By section 6 of the Act anyone who violates the provision of this section shall upon conviction by a High Court or a superior court or on summary conviction by any court of inferior jurisdiction, be liable to a fine. However, where the conviction is by an inferior court, such court cannot impose a fine exceeding “Two Thousand Naira (approximately 15 dollars).⁴⁷

For the present purpose, the most significant aspect of section 3 is the prohibition of discharge into the waters of Nigeria of “any oil or mixture containing oil from any place on land, or from any apparatus used for transferring oil from or to any vessel (whether to or from a place on land or to or from another vessel).” Its significance lies in the fact that it covers cases of oil pollution arising from oil pipelines. More significantly, having regard to the causes of oil pollution and the impact of oil pollution on the Niger Delta environment.⁴⁸

The Act contains minimum provisions for pollution prevention which if complied with would promote sustainable water management. However, it failed to specify the amount to be paid as fine in case of the breach of the provisions of the Act. It has only prescribed maximum penalty in case of conviction by the inferior court to a fine of 2000 naira for the failure to install anti-pollution equipment in ships and discharge of oil in Nigerian water.⁴⁹ The punishment prescribed by the law against the offender is too ridiculous. The penalty imposed for the violation of the Act is so insignificant and given the current economic situation in Nigeria, laughable. Thus, the penalty so prescribed might not give room for the polluter to observe and put in place precautionary measures to mitigate the likely impacts of oil activities on the environment. This is so because industries tend to follow the law where the cost imposed as fine might surpass the cost of maintenance.

ii. Petroleum Act⁵⁰

The Petroleum Act was primarily enacted to regulate and control the exploitation of oil from exploration to production including the granting of concessions, leases and licences, and matters supplementary thereto (such as the payment of rents, royalties, and premium).⁵¹ The Act strictly is not a pollution control statute because it only contains provisions for licensing and

⁴⁶ Id, section 3(2)

⁴⁷ Id, section 6

⁴⁸ Esrey, S. A. and J.P. Habicht. “Epidemiological Evidence for Health Benefits from Improved Water and Sanitation in Developing Countries.” (1986) Vol. 8, *Epidemiological Reviews*, 117-128; Gleick, P.H. (1996). “Basic Water Requirements for Human Activities: Meeting Basic Needs.” (1996) Vol. 21, *Water International*, 83-92.

⁴⁹ Oil Navigable Act Cap. O6 Laws of Federation of Nigeria, 2004, section 6

⁵⁰ Petroleum Act, Cap. P 10 Laws of Federation of Nigeria, 2004

⁵¹ Ibid, see particularly the preamble to the Act

operating in petroleum activities. However, perhaps in acknowledgment of the fact that oil exploitation is a key industrial activity which can result into environmental damage, section 9(1) (b) (iii) and 9 (1) (c) of the Act empower the Minister of Petroleum Resources to make rules and regulations in relation to licenses and leases granted under the Act and operations undertaken thereunder, for the prevention of water pollution, atmospheric pollution and other environmental damage arising from oil operations.⁵² Notably, pursuant to this enabling power, Petroleum (Drilling and Production) Regulations was made by the Minister of Petroleum Resources which contains important environmental protection provisions.⁵³ For instance, Paragraph 25 of the Regulation makes it compulsory for a licensee or lessee to “adopt all practicable precautions including the provision of up-to-date equipment approved by the Director of Petroleum Resources, to prevent the pollution of inland waters, rivers, water courses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to fresh water or marine life.” However, where such pollution occurs or has occurred, the Regulation provides that the licensee or lessee “shall take prompt steps to control and if possible put an end to it.” Possibly, in response to the fact that oil pollution can occur from equipment failure, Regulation 37 require oil companies operating in the country to keep their equipment in proper maintenance. It provides:

The licensee or lessee shall maintain all apparatus and appliances in use in his operations, and all boreholes and wells capable of producing petroleum, in good repair and conditions, and shall carry out all his operations in a proper and workmanlike manner in accordance with these and other relevant Regulations and methods and practices accepted by the Director of Petroleum Resources as good oil field practices

Furthermore, as to what constitutes “good oil-field practices”, the Regulation further stipulates that the licensee or lessee must take all steps practicable to:

- (a) Control the flow and to prevent the escape or avoidable waste of petroleum discovered in or obtained from relevant areas;
- (b) Prevent damage to adjoining petroleum bearing strata;
- (c) Except for the purpose of secondary recovery as authorised by the Director of Petroleum Resources, to prevent the entrance of water through boreholes and wells to petroleum-bearing strata;
- (d) Prevent the escape of petroleum into any water, well, spring, river, lake, reservoir, estuary or harbour; and

⁵² *ibid*

⁵³ Petroleum (Drilling and Production Regulation) 1969

- (e) Cause as little damage as possible to the surface of the relevant area and to the trees, crops, buildings, structures and other property thereon.

Sub-paragraphs (d) and (e) of Regulation 36 are mostly significant in view of the environmental impacts of seismic operations (particularly to buildings and vegetation), and the impact of oil spill on mangrove trees which may affect the livelihood of the people. This Regulations to some extent are in consonance with the international principles of precautionary measures designed to promote environment.⁵⁴ The essence is to ensure that the oil industries exercise adequate care and due diligence in their operation in order to mitigate the likely effects of their operation on the populace and the environment. The problem with the Regulation is on the issue of “practicability” and “possibility” as stated in paragraph 25 which might invoke economic reasons to overcome environmental issues. In addition, Paragraph 25 does not appear to command the ending of pollution which has occurred; the polluter is only required to take ‘prompt steps’ where oil pollution has occurred and ‘if possible put an end to it’. It is arguable that if the suppression of an oil spill will cost a lot of money, it may not be possible to end it. This is because the understanding of this stipulation seems to lie with the affected oil company, which is likely to give priority to economic benefits over environmental concerns.

Also, the Regulation has not prescribed any penalty or punishment against the oil industries in case of the failure to take a precautionary measure in their operation. It only authorized the minister to prescribe the appropriate punishment in case of the failure to comply with any regulation made. Thus, it suffices to say that looking at the Niger Delta Region where oil exploitation activities take place, there is no proof to show the adequacy of punitive measures against the oil companies that are polluting the water source on daily basis. Thus, the Act suffers from enforcement.

iii. Criminal Code Act⁵⁵

The Criminal Code has two significant provisions relating to the protection of water from pollution. Firstly, section 234(e) states that any person who deliberately diverts or obstructs the course of any navigable river so as to diminish its convenience for purposes of navigation is guilty of misdemeanour and is liable upon conviction to imprisonment for two years. The second and more significantly for the present purposes is section 245 which forbids water pollution. It states that: “Any person who corrupts or fowls the water of any spring, stream, well, tank, reservoir, or place so as to render it less fit for the purpose for which it is ordinarily used, is guilty of a misdemeanour, and is liable to imprisonment for six months”. There is an

⁵⁴ See the Rio Declaration 1992

⁵⁵ Criminal Code Act, Cap. C 38 Laws of Federation of Nigeria, 2004.

equivalent provision against air pollution. Section 247 provides that any person who: “(a) vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood, or passing along the public highway; or (b) does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, whether human or animal, is guilty of a misdemeanour, and is liable to imprisonment for six months.”

This Act is the major legislation for criminal liability in Nigeria. It contains minimum degree of provisions for the protection of environment and people against activities which may likely affect their livelihood. However, in the actual fact, Nigeria has not recorded a single case of conviction against corporation on pollution. This provision suffers from a major setback. Under the Nigerian legal system, a corporate body cannot be liable to be sentenced to a term of imprisonment. In the *locus classical* case of *Attorney-General (Eastern Nigeria) v Amalgamated Press*,⁵⁶ the court stated that a company cannot be charged with an offence for which imprisonment is the only punishment. It is equally canvassed that a corporation can never be liable for any offence the sole punishment for which is death. Therefore, where the corporate body is the offender, the only practical punishment is the option or award of fine upon conviction. While it may be argued that the penalty relating to term of imprisonment for six months may be justifiable in the case of individual offenders, this is grossly inadequate with regard to the corporate offender since the corporation cannot be sentenced to imprisonment. The provisions of the Act are only designed for individual offenders. While some other laws made reference to imposition of fine in the alternative, the Criminal Act does not contain provision for fine.

iv. Oil Pipelines Act

Some projects are necessary to facilitate the process of oil activities. For instance, oil pipelines have to be constructed to connect from the flow station to the terminal where the crude oil is being exported to. This Act was therefore enacted to create atmosphere for the holder of license to construct and maintain pipelines which are incidental to oil activities. The Act seeks to regulate and control pollution that may occur from pipelines due to equipment failure or non-routine monitoring of obsolete pipes. The term oil pipeline means a pipeline constructed for the purpose of transporting crude oil or other derived products to a defined destination. The Act forbids the licensee from causing pollution to water or cause any changes to the flow of water use for domestic, industrial or irrigational purposes as to diminish its quality. The purpose of this Act is to control and prevent pollution of water that may occur oil spillage.

⁵⁶ [1956-57] I ER. N.C.R. 12

The Act gives the holder of a license or its agents the right to enter upon and take possession of any land for the purpose of constructing, maintaining and operate an oil pipeline installation. However, it requires the licensee to exercise practicable caution to ensure that unnecessary damages are not done to buildings and economic trees and where damages occurred, the owner or occupier of the land is entitled to compensation. This provision is fundamental to the protection of the Niger Delta environment due to the sensitivity nature of the ecosystem and the mangrove forest which are vital to the subsistence of the people. Once they are destroyed, it is very difficult for them to regenerate unless re-planted. Thus, it is fundamental to bear this in mind in the process of oil pipelines construction. The only lacuna to this aspect is that the Act has not prescribed or lay down the procedures to access what is payable as compensation. By this, the polluter may possess upper hand when the victims considered the task and the expense of going through litigation process.

Besides, The Act only forbids the licensee from erecting or carried out any project works upon any land which is less than fifty yards to any public roads, dam reservoir or building which belongs to the Federal or State Government or Local Government. This provision is designed to protect more of government property from destruction. It suggests that construction of any works may be permitted even if it is less than fifty yards within any land or property which is not own by the government. This has given oil industries the privilege to place their operation in closeness with local community. The closeness has led to the regime of impunity by the oil companies.

General Challenges

Apart from the specific challenge(s) facing each of this legislation, there are some challenges that run across all accounting for the low performance of the legal frameworks.

a. Lack of Proper Implementation and Enforcement

The Existing laws and regulations on oil and gas activities are in no way effectively implemented. While there are arrays of environmental laws and regulations, however, the number of such laws and regulations is not essentially the index for measuring their effectiveness. For many years, the oil industry in the Niger Delta has functioned with tiny or no operational regulation or monitoring.⁵⁷ This has not been due to lack of laws or statutes on the issue.⁵⁸ Nigeria law forbids pollution of land and water; mandate oil industry to ensure and abide by good oil filed practice.⁵⁹ The laws may not be

⁵⁷ Amnesty International, *Nigeria: Petroleum, Pollution, and Poverty in the Niger Delta* Amnesty International Publication, United Kingdom, 2009, 40

⁵⁸ *ibid*

⁵⁹ *ibid*

adequate but the inadequate one are not even enforced. Commenting on the lack of implementation of environmental laws in Nigeria, Jaro Mayda succinctly summarized the position thus:⁶⁰

Legislation is really not the critical factor in environmental improvement. Legislation does not guarantee that the intent of the legislator will be implemented. The major practical problem results from [the] difficulty to set up a control and enforcement mechanism to apply the legal provisions. In the first place, a considerable portion of the law has never been expressed in regulations. Their application is therefore pending. In the second place, the difficulty to establish effective systems of control and enforcement frequently exceeds the capacity of the public sector.

The main challenge associated with environmental law and regulation in developing countries is the lack of the political will to implement the regulation on the ground of encouraging oil investors, predominantly those externally financed. Adewale with particular reference to Nigeria submitted that⁶¹: “A thread that runs through these [Nigerian] statutes is the inability to effectively ensure an enforcement process to enable the workability of these laws. Enforcement requires adequate monitoring equipment, staff and funding. It is doubtful if presently these facilities exist for the monitoring of the environment.”

Onyekuru, NwaJesus Anthony also argued that the major challenge to the existing laws on environmental protection in Nigeria rest on its adequate enforcement. He stated as follows⁶²:

A look at the 1999 environmental policy reveals the following: the policy and laudable institutional arrangements have not yielded the desired results. This failure is ascribed to weak enforcement of the law; inadequate manpower in the area of integrated environment management; insufficient political will; inadequate and mismanaged funding; a low degree of public awareness of environmental issues; and a top-down approach to the planning and implementation of environmental programmes.

Thus, inadequate enforcement of the existing legal framework on environment in Nigeria is largely responsible for growing environmental damage.

⁶⁰ Jaro Mayda, “Environmental Legislation in Developing Countries: Some Parameter and Constraints” (1985) 12(4) *Ecology Q. L.*, 997 at 1007 quoted in David Osigbemhe Iyalomhe “Environmental Regulation of the Oil and Gas Industry in Nigeria: Lessons from Alberta’s Experience” (A Master Dissertation, Faculty of Law, University of Alberta)

⁶¹ Omobolaji Adewale, “The Right of the Individual to Environmental Protection: A Case Study of Nigeria” (1991) 12(4), *Rivista Giuridica Dell’ Ambiente*, 649 at 650 quoted in David Osigbemhe Iyalomhe “Environmental Regulation of the Oil and Gas Industry in Nigeria: Lessons from Alberta’s Experience” (A Master Dissertation, Faculty of Law, University of Alberta)

⁶² Onyekuru, NwaJesus Anthony, “Environmental Regulations and Nigeria’s Economic Decision on the Niger Delta Crisis: the Way Forward” (2011) Volume 2, No. 2 *ASIAN J. EXP. BIOL.SCI.*, 336-342.

b. Independent Institutional Mechanism

Oil operations are under the exclusive legislative list and therefore fall within the purview of federal jurisdiction.⁶³ The Federal Government of Nigeria is a partner in the oil industry it regulates. It is not unusual for a government to be a running mate in a business it regulates. However, unless an institution independent of the government is put in place, the law may likely remain ineffective.⁶⁴ The Government of Nigeria has failed to guarantee autonomous regulation of the oil industry. This is because, much regulatory power of the oil industry is vested in the Department of Petroleum (DPR) which is a wing in the ministry of petroleum resources. This indeed conflict with the concept of independent regulatory institution as understood in the world legal order. The World Bank pictured this and said⁶⁵ “This situation has resulted in the government inadequately regulating oil pollution while at the same time, being party to much of the oil-related environmental problems of the Niger-Delta.”⁶⁶

Also, Osigbemhe lamented that:⁶⁷

Under the present arrangement, the DPR is not an independent body, as the exercise of its powers depends on whatever authority is delegated to it by the Minister. Considering the political nature of decisions relating to oil operations in Nigeria, it would not be surprising if any decision taken against an oil operator by the DPR to enforce environmental protection were rescinded by the Minister. The obstacles to the efficient functioning of DPR are further complicated by inadequate funding, staffing, general services and facilities and the reliance on the Ministry for its needs.

c. Inadequate Funding of Regulatory Agencies and Man Power

Environmental regulatory institutions in developing countries usually lack sufficient funding and technical expertise. For instance, NESREA, NOSDREA and the NNDC financially depend largely on the grant and allocation from the Federal Government to be able to execute their objectives. This may hinder the performance of the institutions where adequate funds are not provided for the implementation of their duties. Also, the finance of the Department of Petroleum Resources is dependent on the allocation from the

⁶³ See for example, section 44 of the Constitution of the federal Republic of Nigeria, 1999. See also the second schedule to the constitution which listed those areas where the Federal Government has exclusive legislative authority. This includes mines and minerals, including oilfields, oil mining, geological surveys and natural gas.

⁶⁴ Amnesty International, *Nigeria: Petroleum, Pollution, and Poverty in the Niger Delta* Amnesty International Publication, United Kingdom, 2009, 43

⁶⁵ The World bank, *The Nigeria Rapid Country Environmental Assessment*, final Report, 30 November, 2006 quoted in Amnesty International, *Nigeria: Petroleum, Pollution, and Poverty in the Niger Delta*, Amnesty International Publication, United Kingdom, 2009, 42

⁶⁶ *ibid*

⁶⁷ David Osigbemhe Iyalomhe “Environmental Regulation of the Oil and Gas Industry in Nigeria: Lessons from Alberta’s Experience” (A Master Dissertation, Faculty of Law, University of Alberta)

Ministry of Petroleum Resources since it is a department in the ministry. Commenting on this attitude, Ohwahwa said⁶⁸:

The ability of the DPR to carry out its onerous functions have been further limited due to the bureaucratic processes in the Ministry crippling its operation, the inadequate training of staff to enable them to cope with the changes in the oil industry, the lack of tools and other infrastructure necessary to perform their jobs and the increasing temptation to look the other way while oil companies violate rules and regulations.

Commenting on the inadequate of funds for the regulatory bodies, Amnesty International said⁶⁹:

Question as to which agency or ministry has responsibility for ensuring that oil companies comply with environmental and safety regulations become somewhat irrelevant when the issue of enforcement is considered. Amnesty International examined the capacity of both the DPR and the state and federal ministry of environment to enforce environmental laws and standards, and address pollution, which would help to protect people's human rights. They were all found to be seriously constrained by lack of capacity and resources. This seems inexcusable given the hundreds of billions of dollars in oil revenues that have been collected by the Nigeria government

Amnesty International observed and said further that⁷⁰ "The DPR environmental monitoring and enforcement capacity was found to be equally weak. DPR staff in the Niger Delta often lack the technical, financial, and material resources to carry out their required functions effectively."

Thus, owing to the limited budgetary resources at the disposal of these institutions, they are incapable to remit adequate numbers of trained and experienced human resources to execute their functions of implementing, managing and administering the environmental regulations and laws. This results in a pitiable circumstance where the officials of the regulatory agencies have had to depend on oil companies (the violators) to take them to the location of oil spills in order to carry out their duties.

Conclusion

This paper has evidently revealed that the exploration of oil and gas deposits in Niger Delta has extremely impacted the ecosystem services of the oil bearing region with its concomitant effects on the socio-economic aspects of the people. The existing environmental legislations are amorphous in addition to being unfair with regard to overlying communities in the delta. Globally, behaviour towards environmental management and protection for

⁶⁸ Fred Ohwahwa "Deliberate Leakage in the Oil Industry" [Lagos] *African Guardian* (28 September 1992), 12 quoted in David Osigbemhe Iyalomhe "Environmental Regulation of the Oil and Gas Industry in Nigeria: Lessons from Alberta's Experience" (A Master Disserattion, Faculty of Law, University of Alberta)

⁶⁹ Amnesty International, "Nigeria: Petroleum, Pollution and Poverty in the Niger Delta" Amnesty International Publication, United Kingdom, 2009, 44

⁷⁰ Ibid.

the future are being re-evaluated. Preservation of natural resources pertaining to quantity and quality is more and more being accentuated as the process to deal with the predictable and mounting shortages of resources of good quality in several parts of the world. This is required to meet ever-growing domestic, industrial and agricultural demands. Economic expansion in most of the world has been energetic, particularly in the so-called recently industrialising countries. Virtually, every new development motion creates pressure on the carrying capacity of the environment to bear the degree of pollution. The Nigerian Environmental Policy has made adequate plan of actions to ensure proper regulation of oil and gas activities with a view to enhance environmental protection and prevent pollution. However, since policy is a mere expression of intentions or wishes, it requires formidable and effective legal frameworks to properly supervise and monitor these activities in order not to diminish the quality and quantity of environmental resources. While the exiting legal frameworks on oil and gas activities in Nigeria are characterized with shortcomings, the minimal provisions can still go a long way if given the necessary fillips and support. It is therefore suggested that the legal frameworks be reviewed upward in view of the present economic realities and with a view to optimistically control pollution activities in Niger Delta.

