Beyond Ogoni Clean-Up: Rethinking Environmental Protection Laws Governing The Operation of The Oil Industry in Nigeria¹

By

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ABSTRACT
In the face of the ongoing clean up exercise of parts of Ogoniland, it becomes apposite that measures be put in place to ensure that the kind of happenstances that caused the massive environmental degradation of Ogoniland does not occur again. It is in this context that this paper examines the major environmental statutes and policies governing the operations of the oil industry in Nigeria. The aim is to appraise the effectiveness, challenges, and possible new focus areas of the laws and policies. Data were mainly from secondary sources. The paper used the historical and analytical methods in tracing the origin of petroleum induced environmental degradation of Ogoniland and appraisal of environmental laws regulating the oil industry operations in Nigeria. Findings by this paper show that the environmental policies and existing laws guiding the activities of the oil industry in their current states should be capable of protecting the host communities from the various forms of ecological devastations unleashed by the oil industry. However, the laws failed due to myriads of hitches such as weak political will, the inadequacy of logistics on the part of agencies charged with implementing the legislation, soft environmental database, duplication, and overlapping of the roles of the regulators. To this end, the paper suggested that communities should be granted various grades of refining licenses. Also, there should be a review of sections of the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act that prohibits the Agency charged with the protection and development of the Nigerian environment and related matters from dabbling into environmental issues arising from the oil and gas sector.

Keywords – Ogoni clean-up, Rethinking, Environmental Protection Laws, Governing, Petroleum Industry, Nigeria.

1. Introduction
Recently, the Federal Government of Nigeria embarked on the cleanup of some oil-producing communities in Ogoniland in the Niger Delta of Nigeria. The exercise is in response to the recommendation of an agency of the United Nations, the United Nations Environmental Programme (UNEP). In 2006, the Nigerian government set up a panel to investigate the nature and extent of damage to the land of Ogoni communities due to oil and gas extraction. The investigation was in response to the abrupt stoppage of petroleum production in Ogoniland in 1993. The stoppage was also the highpoint of spates of agitations, peaceful and violent by Ogoni people against pollutions and other forms of environmental damages foisted on their communities due to oil extraction. Instructive, too, is the fact that Ogoni land comprises only four Local Government Areas (LGAs)² out of the 185 Local Government Areas (LGAs) in the oil-producing Niger Delta

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² The Ogoni LGAs are Eleme, Tai, Gokana and Khana.
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states³ where oil has been produced in the past 60 years. All these LGAs and their communities are equally in need of clean up. With ongoing Ogoni cleanup, it does appear that the other equally devastated oil-producing communities have largely been abandoned to their fate.⁴ Under the preceding and the various interventionist measures launched in the Niger Delta in the past 60 years, there is no gainsaying the fact that clear-cut solutions to the crisis in the region are not anywhere near reach. The above facts must have informed UNEP’s recommendations to the various stakeholders of the Nigerian oil industry.⁵

SUMMARY OF KEY RECOMMENDATIONS IN THE UNEP REPORT

TO GOVERNMENT

- Creation of Ogoniland Restoration Authority
- Creation of Environmental Restoration Fund for Ogoniland
- Coordination of multi-stakeholder efforts
- Institutional and regulatory reforms

TO MULTIPLE STAKEHOLDERS

- Emergency measures in drinking water and health
- Rehabilitation of environment
- Preventative pipeline surveillance
- Environmental and health monitoring
- Oil spill contingency planning

TO OPERATORS

- Re-visit and where necessary remediate identified sites
- Review remediation techniques
- Repair, maintain and decommission non-producing facilities

TO COMMUNITIES

- Speed up access for spill response
- Take proactive stance against theft and illegal refining


One of UNEP’s recommendations to the Federal Government of Nigeria is the need to carry out institutional and regulatory reforms of the oil industry. In other words, UNEP called for reform of the laws and policies guiding the operations of the oil industry.

A plethora of laws guide the operations of the oil industry in Nigeria. Each of these laws has sections specifying how the extractive activities of the oil and gas industry should be carried out so as to reduce degradation of the environments of the host communities. The existence of these

³ Section 2, NDDC Act
⁴ Daily Trust Newspaper, Beyond the Ogoni Clean UP. Available at Daily Trust
laws and policies notwithstanding, massive environmental devastations occurred in many oil-producing communities, including communities in Ogoniland. The devastations caused a lot of untold hardships in the community and led to agitations and subsequently forced closedown of the extractive activities of one of the oil giants, Shell Petroleum Development Company (SPDC) in Ogoniland since 1993. The cleanup of the devastated Ogoni land has commenced and will take thirty years to restore polluted lands. It's against this backdrop that this paper examined the oil and gas-focused environmental laws. The aim being to ascertain the extent their present provisions offer protection for Ogoniland and other host communities from future environmental degradation that may call for another round of clean up as currently being carried out in Ogoniland. To this end, and in the manner the 1988 dumping of toxic wastes in Koko Community in Delta State jolted the Federal Government to re-examine its environmental policies and laws, the ongoing cleanup of Ogoniland this paper argues, should galvanize the government to similarly do something drastic about environmental laws guiding the oil and gas industry to forestall further and future destruction of the land of host communities due to oil and gas extractive activities.

To address the identified problem, the historical, doctrinal, and analytical methods were used in this article to appraise data obtained from secondary sources such as textbooks, journals, law reports, statutes and documents sourced from the internet. While the historical method was used to explore the factors that made outright cleanup of Ogoniland inevitable, the doctrinal and analytical methods were used to assess relevant literature on Nigerian environmental policies and legal framework governing the operations of the oil and gas industry. The paper has four parts as follows: Part one is the introduction, part two examined the nature of the relationship between Nigeria's oil industry and the emergence of environmental legislations directed at environmental issues arising from oil and gas extraction, part three examined relevant environmental laws guiding operations of the petroleum industry. Part four has the conclusions and recommendations.

2. Nigeria's Multinational Oil Industry and Emergence of Petroleum-Specific Environmental Legislations

The importance of petroleum as the main foreign revenue source of Nigeria and globally as a highly sought after energy source cannot be over-emphasised. The two principal actors in the oil and gas extractive activities in Nigeria, the Federal Government (“FG”) and multinational oil companies (“MOCs”) each have their different aims for engaging in the extraction of oil and gas. This divergence of aims presupposes the existence a fundamental conflict between oil and gas companies on the one hand and the FG on the other over the division of risk and reward from a

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8 For example, oil royalties, petroleum profit tax, domestic crude sales, and other petroleum revenues were only 26% of federally collected revenues in 1970, but rose dramatically to 81% in 1980. They represented 73.3% in 1990, 83.5% in 2000 and an estimated is 79 % in 2007, and more than 90% in 2014. See NNPC at www.nnpc.org.ng
9 O. A. Abdul-Rahamoh, F. H. Taiwo and A. T. Adejare, “The Analysis of the Effects of Petroleum Profit Tax on Nigeria’s Economy” Asian Journal of Humanities and Social Sciences (AJHSS) 1 no., 1, (May 2013), P.25-36, at p.26. According to these authors, Petroleum is the most vital source of energy, providing over 50 percent of all commercial energy consumption in the world.
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petroleum project. Both want to maximize rewards and shift as much risk as possible to the other party.  

To the FG, this aim cuts across environmental, economic, social and political spheres of needs. For example, government aims at increasing petroleum resources development, retaining most of the reserves, safeguarding the environment where oil is extracted, creating job opportunities as well as improving local skills in the sector and to generate and retain financial resources. Politically and socially, Nigeria as a host state, aspires to stimulate competition in the oil and gas sector, to establish long-term relationship with the global oil and gas market and entities, to respond to the interests of the local populations and to promote sustainable development.

To the MOCs, the main aim is to earn reasonable profits for their shareholders with possible minimum risks. Other reasons ancillary to this main aim include to ensure payment of reasonable taxation and royalties, to ensure reasonable limitation of liability in proportion to risk to ensure minimal political risk and stabilisation of investment; and to ensure long-term and beneficial relationship with the host countries and to ensure contract validity and enforcement.

Despite the fact that governments give the companies the right to extract oil from its oil reserves and the trite logic that income from a sold asset should belong to the owner of the asset, much of the politics of oil is shaped by the struggle between oil companies and government for control of these payments. Thus, rarely is the struggle about environmental concerns of communities hosting the oil industry. This is because FGN and MOCs bring different capabilities to the extractive table. For example, while the government and in line with the doctrine of state sovereignty over natural resources (SSNR), owns the petroleum resources absolutely, the MOCs have the technology and even the huge financial outlay necessary for the very high-tech petroleum extractive business.


\[\text{Ibid.}\]


\[\text{N. Schrijver, Sovereignty over natural resources, Balancing rights and duties, (New York, USA: Cambridge University Press, 2008), p.41}\]

The seeming incongruence's in the power relations between the government and the oil companies notwithstanding; it becomes apposite that the government, as the owner of the petroleum resources, puts in place a proper legislative, regulatory arrangement to guide all parties seeking to participate in the extractive activities. Furthermore, and for effective monitoring of operations of the oil and gas industry, especially in the area of pollution of the environment, the oil and gas industry is divided into six operational stages as follows: exploration, production, terminal operations, hydrocarbon processing, oil transportation, and marketing operations. Consequently, sections of the various laws address likely environmental issues associated with the specific operational stage of the oil and gas industry. However, it will seem that the presence of these laws could not prevent the huge environmental damage done to oil communities, as seen from the ongoing cleanup of Ogoniland.

3. Environmental Laws Governing Oil And Gas Industry in Nigeria and Extent of Their Implementation

Legislations, rules, or guidelines to regulate the environmental damages from oil and gas operations came in phases. While Ijaiye and Joseph identified two phases, Elenwo and Akankali identified three phases. This paper aligns with the three phases given by Elenwo and Akankali. Phase one covers the era from about the time the Mineral Oils (Safety) Regulation Act was passed into law in 1963 to when the Federal Environmental Protection Agency Decree was enacted in 1988 by the then Military government that held sway at both the state and federal levels. The second phase can be said to be the period between 1988 to about 2010. The third phase is an emerging phase and covers the 2010 LCA passage into law through the pending Petroleum Industry Bill (PIB) scenario, which certainly portends prospective radical reviews of the oil and gas industry’s environmental policies to date.

The relevant laws are in three categories:

a) Category one is the Constitution of the Federal Republic,

b) Category two are those in the manner of petroleum laws that have to bear on environmental protection,

c) Category three is environmental regulations that have a tangential bearing on petroleum operations.

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21 Ibid (Elenwo and Akankali, 2014), p.885
22 Ibid.
23 This is when the toxic waste dump in Koko Delta state not only led to the enactment of the Federal Environmental Protection Agency (FEPA) decree, but also influenced a heightened level of environmental consciousness and activism in the country to about the period when the Local Content Act (LCA) was passed respectively.
24 Ibid (Elenwo, 2014) p.886
Examples of petroleum laws that have sections on environmental protection include the Petroleum Act, 1969, Oil in Navigable Waters Act, National Oil Spill Detection Agency Act.

Others in the same category include some provisions in the Petroleum (Drilling and Production) Regulations, the Nigerian Mineral Oils (Safety) Regulations, the Flare Gas Regulation (Prevention of Waste and Pollution) Regulation 2018, made by the Minister in charge of petroleum resources pursuant to the powers granted by the Petroleum Act and the Associated Gas Re-Injection Act.26

Environmental regulations that have provisions tangential to petroleum operations include the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act.27 NESREA created a regulatory agency, but the powers of the Agency do not extend to environmental issues arising from the oil and gas sector.28 Environmental Impact Assessment (EIA)29 and the Merchant Shipping Act (MSA).30

This paper acknowledges the existence of numerous laws with ancillary provisions to address environmental challenges brought about by oil and gas production. However, only laws specifically enacted to address environmental concerns from oil and gas production will be examined in this paper. Thus, the examined laws, regulations and their institutional agencies laws include the 1999 Constitution, Oil Pipelines Act 1956, Petroleum Act 1969, Environmental Impact Assessment Act 1992, Merchant Shipping Act, the Associated Gas Re-injection Act, the Oil and Gas Pipelines Regulations, the Petroleum (Drilling and Production) Regulations, the Flare Gas (Prevention of Waste and Pollution) Regulations 2018, National Oil Spill Detection and Response Agency (NOSDRA) and Niger Delta Development Commission (NDDC).

The Constitution

The 1999 Constitution of the Federal Republic of Nigeria is a major source of law on oil and gas industry. The constitution vests ownership and control of the oil industry on the Federal government. The federal government is also vested with exclusive powers to enact laws for the general regulation of the industry. However, current state practice does not make constitutions sources of specific legislation on issues like oil and gas. Such issues are often handled by the Act of Parliament or Decrees.31 The Constitution provides the general policy framework to guide the development of specific regulatory regime on issues of public interest. For example, section 20 of the 1999 Constitution provides the general policy framework for environmental management. According to the provision: "The State shall protect and improve the environment and safeguard

26 Associated Gas Re-Injection Act, Cap A25, LFN 2004 which regulates the flaring of gas into the environment during oil production will be discussed under a sub-heading - gas specific statutes.
27 CAP F10, LFN, 2007. This NESREA Act repealed the Nigerian flagship law on the environment ie the Federal Environmental Protection Agency Act (FEPA Act). Consequently, the NESREA Act has become the primary law on environmental protection while the new Agency it created has replaced the old Agency.
28 See section 8 (g) (k), (n), (s).
29 The others are Oil in Navigable Waters Act, CAP06 LFN, 2004; Merchant Shipping Act, CAPM11, LFN, 2004 Nigerian Metrological (Establishment, etc.) Act, CAP N152 LFN, 2004 and Associated Gas Re-Injection Act, CAP A25 LFN, 2004. Since each of these Acts have been examined under different headings already, they will not be discussed here.
the water, air, and land; forest and wildlife of Nigeria.” This tailors the development of future legislation on environmental matters towards the ultimate objective of managing the environment as defined under the constitutional framework.

Also, the Constitution articulates the responsibility of the Nigerian government to protect the environment and conserve its biodiversity. However, this provision of the Constitution is only aspirational and cannot be enforced because it is contained under *Chapter II of the Constitution.*

Also, mines, oilfields and oil mining fall within the exclusive legislative competence of the Federal Government, and supposedly all environmental hazards arising therefrom. Specifically, *sections 44(3)* confers ownership and control of all mineral resources on the Federal Government, *section 162(2)* is specific to the appropriation of rents accruing from petroleum resources. In view of this legal setback, environmental protection for oil-producing communities ("OPCs") cannot be pursued through this constitutional avenue. Resort must, therefore, be made to other legislation.

**Oil Pipelines Act and Oil Pipeline Regulations**

The Oil Pipelines Act was enacted in 1956. According to Ijaiye and Joseph, “It creates a civil liability on the person who owns or is in charge of an oil pipeline. Such a person would be held liable to pay compensation to anyone who suffers physical or economic injury as a result of a break or leak in his pipelines.” The Pipeline Act has a regulation made pursuant to it, the *Oil and Gas Pipelines Regulations.* This Regulation requires a pipeline licensee to implement emergency plans to ensure prompt and remedial action for protecting the environment.

As is the case with other enactments, the Oil Pipeline Act and its Regulations have flaws. The regulatory framework did not prescribe guidelines on how to implement, maintain, enforce and monitor effective security systems for the pipelines, did not prescribe guidelines, enforcement and monitoring system on how the public and stakeholders can adequately be educated on the dangers associated with tampering with pipeline systems. Other areas lacking in the Act and regulations are no provision requiring operators to install adequate enforcement and monitoring system for vandalism or sabotage, lack of provisions requiring operators to put in place mechanism for monitoring pipeline maintenance.

It suffices to say that the identified gaps gave room for illegal bunkering and refining of petrol by unauthorised groups and persons in the Niger Delta. During a focused group discussion, a participant confessed to owning and operating an "illegal" refinery. According to her, their activities entail cutting pipelines to lift crude oil for their illegal refining. That most times, her boys do not seal up cut pipelines due to lack of the technical knowhow and in particular due to fear of being caught by security agencies. Following on the heels of the activities of illegal "bunkerers" is the fact that pipeline owners do not replace old pipelines as required by law. These often lead to leakages that cause pollution of land and water of host communities.

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33 It is the chapter that provides for the social and economic rights which are not justiciable in the Nigerian courts.
34 Zuru, *The Nigerian Upstream Oil and Environmentalism,* (2009), p.195
36 Cap O7, LFN 2004
38 Bunkerers engage in oil thieving operations known as bunkering
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The Petroleum Act and Regulations
The Petroleum Act was enacted since 1969\(^{39}\) and is the primary legislation on oil and gas activities in Nigeria. It ensures public safety and environmental protection. There are three basic regulations under the Petroleum Act. They are:\(^{40}\)

1) Petroleum Drilling and Production Regulations, which place restrictions on licensees from using land within fifty yards of any building, prohibits the cut down of trees in forest reserves and establishes that reasonable measures be taken to prevent water pollution and to end it if it occurs.
2) Petroleum Refining Regulation requires the manager of a refinery to take measures to prevent and control pollution of the environment.
3) Mineral Oil Safety Regulations and Crude Oil Transportation and Shipment Regulations provide that precautions should be taken in the production, loading, transfer, and storage of petroleum products to prevent environmental pollution.

This all-encompassing petroleum 1969 legislation no longer meets the needs of the industry and requires extensive review. A bill for its review, the Petroleum Industry Bill (PIB) has been before the National Assembly since about the time Nigeria returned to democratic rule in 1999. During the 8th Assembly (2015-2019) the PIB was split into four other bills, one of which is the Petroleum Industry Governance Bill. Considering the importance of the oil industry to Nigeria, it is the expectation is that the legislators will treat the bill with the urgency it deserves as a very important piece of legislation.

Environmental Impact Assessment Act
Environmental Impact Assessment Act (The EIA Act)\(^{41}\) was enacted in 1992 and is the first Nigerian enactment to formally accord rights of participation in the decision making processes relevant to development to oil-producing communities other than the Federal Government and multinational oil companies (MOCs).\(^{42}\) The EIA Act regulates the environmental impact assessment process in Nigeria. Its purpose is to identify the environmental, social, and economic impacts of a project prior to decision making.\(^{43}\)

Oil and gas activities are listed among the mandatory study activities contained in the schedule to the Act.\(^{44}\) Thus, section 4 provides that all activities listed in the mandatory section must be preceded by an environmental assessment. Thus the Act prohibits the undertaking or the

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\(^{39}\) Cap P10, LFN, 2004
\(^{40}\) Ijaiya and Joseph, 2014, p.310
\(^{41}\) CAP E12, LFN 2004.
\(^{42}\) Section 1, EIA Act, CAP E12, LFN 2004
\(^{43}\) O’Faircheallaigh, Ciaran. "Public participation and environmental impact assessment: Purposes, implications, and lessons for public policy making." Environmental Impact Assessment Review 30, no. 1 (2010): 19-27, at p. 19-20. The schedule to the EIA Act lists certain projects for which an EIA is mandatory. They include: Petroleum exploration and production among others such as Land development schemes, Airport development, Logging, Mining, and Transportation. See also Section 23 of the EIA Act
\(^{44}\) The schedule to the EIA Act lists certain projects for which an EIA is mandatory. They include: Petroleum exploration and production, Land development schemes, Airport development, Logging, Mining, and Transportation. See also Section 23 of the Act.
authorisation of any project\textsuperscript{45} without prior consideration, at an early stage, of its environmental effects. An approved environmental assessment constitutes a permit to execute the project.

For authorization of EIAs, the Act provides that after receiving a mandatory study report, the FMEHUD shall put out a public notice stating:\textsuperscript{46}

a) The date on which the mandatory study report shall be available to the public,\textsuperscript{47}

b) The place at which copies of this report may be obtained

c) The deadline and address for filing and address for filling comments on the conclusions and recommendations of the report.

The snag with the provisions of section 25 and other sections that guide the EIA process is that community involvement is not made an essential condition for granting approval. For example, section 4 lists the required minimum content an assessment report should have, but community input is not one of them.\textsuperscript{48}

Section 17 of the EIA Act provides that the environmental assessment is to be examined by a review panel. The review panel is to consider the factors such as the environmental effects of the project, the significance, and the comments concerning those effects received from the public in accordance with provisions of the Act.\textsuperscript{49} Some projects may legitimately be excluded from having an EIA under Section 15(1) whereby:

a) Where in the opinion of the President and commander-in-chief of the Armed Forces and the Federal Executive Council, the environmental effects of the project are likely to be minimal.

b) Where the project is to be carried out during a national emergency "for which temporary measures" have been taken by the government.

c) Where the organisation feels the project is in the interests of public health or safety.

The provisions of this section have been criticized as eroding the efficacy of the EIA Act.\textsuperscript{50} From the various provisions of the EIA Act, one finds that the requirement for communities' involvement in the EIA process under the Act is limited to the analysis of the assessment report. The problem with this is that most of the oil-producing communities are rural areas, with most of its dwellers being illiterates. Even where their representatives are literate, they may not be savvy in the nuances of oil and gas operations. One noticed that there is nothing on ground to check if the supervising

\textsuperscript{45} A project means any physical work or activity that a party proposes to construct, operate, modify, decommission, abandon or otherwise carry out. See the interpretations sections under the Act.

\textsuperscript{46} Section 25 EIA Act.

\textsuperscript{47} Environmental Impact Assessment Decree No. 86 1992. \url{http://www.nigeria-law.org/Environmental%20Impact%20Assessment%20Decree%20No.%2086%201992.htm} (Accessed on Monday, 6 April, 2020)


\textsuperscript{49} Section 17 (a)(b) and (c), EIA Act

bodies do indeed notify the communities. And where they did at all, there is no way of ascertaining how far the views of the communities influenced the final decision.\(^5\)

These criticisms notwithstanding, the reality in the Niger Delta communities is quite different. In most cases, projects are completed before the so-called assessment reports are made by communities. In *Douglas v Shell*,\(^5\) an indigene of one the communities sued but was failed for lack of *locus standi*. He appealed, and the Court of Appeal gave him judgment by ordering a retrial on the grounds that the trial court, the Federal High Court, had breached a number of procedural rules. Sadly, the retrial failed because the project for which the appellant sued had been completed by the time the Appeal Court gave its judgment.\(^5\)

Another reality is that communities' 'fight' to have projects of the types listed in the schedule to the EIA Act sited in their communities. The issue of whether the proposed company has kept faith with the provisions of EIA is often inconsequential during such 'fights' to get the company located within their communities. According to a resident of one of the communities, "environmental impact does not matter, will it give me a job, money? But if the company is situated in my community, even old grandmamma will get jobs as cleaners."\(^5\)

**Merchant Shipping Act (MSA)**

*Section 336 of the Merchant Shipping Act (MSA)*\(^5\) domesticats many International Maritime Conventions and Agreements for the Prevention of pollution from ship, etc.\(^5\) It also therein made applicable other international agreements and conventions to which Nigeria is a party that are not mentioned in the Act but relate to the prevention, reduction or control of pollution of the sea or other waters by matters from ships, and civil liability and compensation for pollution damage from ships.\(^5\)

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\(^5\) Ako, “Resource Exploitation and Environmental Justice in Botchway, 2011, p. 89

\(^5\) Douglas v Shell (1999) 2 NWLR (Pt. 591)


\(^5\) Senge, Mena. Interview by author, Eleme, Rivers State, Nigeria, October 1, 2013.


\(^5\) Such as:


(2) Convention relating to Intervention on the High Seas in cases of Threatened Oil Pollution Causalities, 1969.

(3) International Convention on Prevention of Marine Pollution by Dumping of Wastes and other Matters, 1972

(4) International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990

(5) International Convention on Civil Liability for Oil Pollution Damage 1992


The Act imposes on the Minister of Transport the responsibility of preventing the pollution of marine environment from ships, subject however to the provisions of the Act and any other law or convention for the time being in force relating to the prevention of pollution from ships, and to make further regulations giving effect to the provisions of the International Conventions and Agreements mentioned in the Act.

Finally, with regard to the protection of the environment, it equally granted the Minister of Transport powers to make orders for the purpose of giving effect to any provision of the United Nations Convention on the Law of the Sea 1982 for the protection and preservation of the Marine Environment from pollution by matter from ships. It may be proper to point out that offences under this head attract a fine of not less than five hundred thousand Naira or a term of imprisonment of not less than two years or both.

**Associated Gas Re-Injection Act 1979 and Regulation**

The first regulatory framework aimed at promoting anti-gas flaring policies in Nigeria was the Associated Gas Reinjection Act, 1979. Thus, gas flared during petroleum extraction is regulated by the Associated Gas reinjection Act. The Act required every oil and gas producing company in Nigeria to submit to the Minister for petroleum, detailed programmes in relation to the reinjection of produced associated gas or programmes for the use of produced associated gas.

The Act is aimed at getting the MOCs to

1) conserve the enormous gas reserves of the country, and
2) (ii) develop schemes for the processing of gas for industrial purpose.

It requires oil companies to re-inject the gas into the earth’s crusts or better still to provide detailed programs for the utilization of associated gas. This is aimed at checking the reckless flaring of gas by MOCs by setting down a date for oil companies to end gas flaring and instead re-inject the flared gas. The set date has often been shifted as oil companies plead with the Federal Government for more time to acquire the right technology.

The Act imposes a penalty for breach of the law in the form of forfeiture of all concessions granted in respect of the particular field or fields. However, this has not deter the oil multinationals from flaring gas. Both the government and the oil companies are to blame for the continued breach of the provisions of the Act. Firstly, the oil companies prefer to pay the fines imposed by the Act for gas flaring because the fines were considerably cheaper than putting up high-tech equipment for

58 Section 336(2), ibid.
59 Section 336(3), ibid.
60 Section 337, ibid.
61 The punishment here though inadequate is sterner than what obtains in some of the legislation already discussed like the Oil in Navigable Waters Act (ONWA) or Nigerian Ports Authority Act.
62 CAP A25, LFN, 2004. The Associated Gas Re-Injection Amendment Act, 1984 came into been due to amendments of sections
63 Penalty On Gas Flaring: Rhetorics Or Reality .... https://www.independent.ng/penalty-on-gas-flaring-rhetorics-or-reality/.
gas reinjection. On the part of the Federal Government, establishing a reinjection scheme imposed an enormous cost on the Nigerian National Petroleum Corporation (NNPC). This is because, under the joint venture arrangement, the NNPC will have to pay 60 percent of the cost of a reinjection facility.

Faced with these realities, the Federal Government reviewed the Act through the enactment of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations of 1985 and the Associated Gas Re-injection (Amendment) Act of 1985. One of the glaring fall-outs of the new laws is the ouster of the deadlines to end gas flaring as contained in the erstwhile Act. Also introduced were circumstances under which gas flaring will be permissible. Thus, in the new Act, the Minister can issue a certificate to the oil companies where the Minister is satisfied that it is not appropriate or feasible to utilize or re-inject the gas produced or in a particular field or fields.

The Minister is also empowered to impose a penalty for gas flaring. For example, under Section 3 of the amended Act, the Minister is empowered to grant exemptions to certain oil fields from the reinjection programme. In exercise of this power, Minister exempted 86 out of 155 oil fields, or roughly two-thirds of current associated gas output is exempt from the regulating Act. What this means is that two-thirds of gas flared in oil-producing communities is done with the Federal Government's approval. Even the fines paid by the other one third that are not exempted are kept by the Federal Government, and none is given to communities who bear the brunt of the negative effects of the continuing gas flaring. Also, only the oil companies pay the fines, not the Federal Government, despite the joint venture arrangement between it and the MOCs.

To date, gas flaring still continues in the oil fields despite the court ruling in Gbemre v Shell Petroleum Development Company (SPDC) and others. In that case, the Court held that the provisions of the Associated Gas Re-injection Act and the Associated Gas Re-injection (Continued Flaring of Gas) Regulations are inconsistent with the Applicant's right to life and/or dignity of human persons enshrined in the 1999 Constitution. The Court also recommended a quick amendment of the offending sections of the amended Act and Regulations so as to bring them in line with provisions of the Constitution on fundamental Human Rights under Chapter 4.

The Gas reinjection Act and its accompanying rules have not been successful due to

a) lack of appropriate policy for the utilization of gas in Nigeria;

b) government's willingness to grant exemptions on technical and economic considerations and not on environmental considerations to oil companies for noncompliance with the Act - resulting in too many oil wells been exempted and

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70 This negates the environmental justice doctrine. See Bullard, Robert, *Confronting Environmental Racism: Voices from the Grassroots*.(New York, USA: South End Press, 1993), p.3

71 Omorogbe,Oil and Gas Law in Nigeria.(2001), p.60


73 Suite No FHC/B/C/153/05, in the Benin-city Division of Federal High Court of Nigeria. As cited in Ako, “Resource Exploitation and Environmental Justice, p.102
c) the very little fines payable for gas flaring, making it better for oil companies to pay fines than install gadgets to stop gas flaring which is considerably more expensive. For example, Chevron (formerly Gulf) had noted that switching from water injection would cost the company USD56 million, whereas paying fines will cost a mere USD1 per year.\(^{74}\)

On 5 July 2018, President Buhari made the Flare Gas (Prevention of Waste and Pollution) Regulations, 2018 (the "Regulations"). The Regulations seek the reduction of environmental/social impact caused by the flaring of gas, protection of the environment, Prevention of waste of natural resources, and creation of social and economic benefits from flare gas capture. The Regulation aims to:

1) reduce the environmental and social impact of flaring natural gas;
2) protect the environment;
3) prevent the waste of natural resources.\(^{75}\)
4) social and economic benefits from gas flare capture.

**Enforcement Institutions Laws**

**National Oil Spill Detection and Response Agency (NOSDRA)**

NOSDRA Act\(^{76}\) was enacted in 2006 and created an institutional body to co-ordinate the implementation of the National Oil Spill Contingency Plan (NOSCP) for Nigeria in accordance with the International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC 90) to which Nigeria is a signatory.\(^{77}\) Specifically, section 1 (1) of the NOSDRA Act states that the body is a federal agency with the statutory responsibility for preparedness, detection and response to all oil spillages in Nigeria. Thus, it is to focus exclusively on regulatory functions of the oil and gas sector as regards spill detection/response and other environmental pollution arising from oil production.\(^{78}\)

Concerned groups have called for reform of NOSDRA and the legislation governing it to enable NOSDRA to protect the environment more effectively. In response to the calls for review of NODRA, the National Assembly is in the process of revising the Act. The Nigerian Senate recently passed the National Oil Spill Detection and Response Agency (NOSDRA) Amendment Bill. This bill, when eventually enacted into law could help support the cleanup and remediation of communities impacted by the oil industry in the Niger Delta.\(^{79}\) The bill seeks to make crucial changes to NOSDRA in the following ways:

1) Changing its name to the National Oil Pollution Management Agency, NOPMA.

\(^{74}\) J. G Frynas, “Oil in Nigeria: Conflict and litigation between oil companies and village communities.” (2000), p.78

\(^{75}\) Oil and gas environmental protection laws in Nigeria .... https://www.lexology.com/library/detail.aspx?g=12565d6d-b473-4335-be0d-1bd34aa0e4de

\(^{76}\) Cap N157, LFN. 2004

\(^{77}\) This is according to NOSDRA official website, https://www.nosdra.gov.ng/ (Accessed Tuesday, January 14, 2020)


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2) Improving its funding to address spills from third parties: that is, entities or individuals who have or do not have business relations with the facility owner. These include entities or individuals such as servicing companies, vandals, and oil thieves.80
3) Increase the fines and penalties for polluters.
4) Giving it powers to enforce penalties and fines, as well as to inspect and monitor the decommissioning of oil facilities.
5) Making provisions for NOPMA to regulate all tiers of oil spills. The tiered approach is an identification scheme for determining the response capability and resources needed to respond to a spill, based on its volume, location, and geographical reach. Thus, Tier 1 is local, Tier 2 is regional, and Tier 3 international.81

However, when this bill was presented to the President for assent, he denied assent, and consequently, the bill was returned to the National Assembly.82 Mr. President questioned some sections of the new bill, such as Section 3, 6 (1a), 7 (a), and (b), 8, 9, and 11.83

"Section 8 of the bill imposes a new charge on the oil industry, 0.5 percent of Operation Funds of oil companies for the enforcement of the environmental legislation in the petroleum sector. According to the President Mohammadu Buhari, "This imposition is an additional burden on the industry, particularly given that it is unclear what operation funds mean for the purpose of applying the provisions of the bill."84

It will be vital that NOPMA when finally established, will be supported, politically, and financially, to do its job. Giving NOPMA the mandate to hold the oil industry to account is an important development, but it must be adequately resourced to enforce it. It will be better if NOSDRA is given powers to enforce penalties and fines, as well as to inspect and monitor the decommissioning of oil facilities. NOSDRA, in its present state, does not have the powers to impose fines on defaulters.

In NOSDRA v. ExxonMobil,85 NOSDRA (the appellant) had instituted an action against ExxonMobil (the Respondent) claiming the sum of N10,000,000 (ten million naira) as penalty for the alleged infringement of the National Oil Spill Detection and Response Agency Act 2006 (NOSDRA Act), and the regulations made thereunder. In March 2018, the Court of Appeal upheld the ruling of the Federal High Court (the trial Court) that the National Oil Spill Detection and Response Agency (NOSDRA) acted beyond its statutory powers when it imposed a fine on Mobil Producing Nigeria Unlimited (ExxonMobil). NOSDRA argued that levying a fine on the

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80 Policy analysis: NOSDRA Amendment Draft Bill | SDN. https://www.stakeholderdemocracy.org/policy-analysis-nosdra-amendment-draft-bill/
81 ibid
82 Real reasons Buhari refused to sign Electoral Act - PDP .... https://dailypost.ng/2018/12/08/real-reasons-buhari-refused-sign-electoral-act-pdp/
84 ibid
ExxonMobil was done under Section 6(2) and (3) of the NOSDRA Act1 which provides as follows:

Sec.2, an oil spiller is by this Act to report an oil spill to the Agency in writing not later than 24 hours after the occurrence of an oil spill, in default of which the failure to report shall attract a penalty in the sum of five hundred thousand Naira (N500, 000.00) for each day of the failure to report the occurrence.

Sec. 3, the failure to clean up the impacted site, to all practical extent including remediation, shall attract a further fine of one million Naira.

ExxonMobil, on its part, argued that the judicial arm of government has the exclusive powers of imposing fines and penalties, and queried if NOSDRA, being a non-judicial entity, could impose a fine or penalty on ExxonMobil.86

Appeal Court’s decision in the NOSDRA ExxonMobil case makes it pertinent for that section of the bill dealing with powers to impose penalties by NOSDRA be retained. This is because a literal application of the NOSDRA decision could weaken the regulatory powers of various statutory bodies, and will subject matters that can be speedily settled administratively to lengthy criminal prosecution. It will also require the criminalisation of acts or omissions that would best be described as administrative or operational lapses or inaction.

Niger Delta Development Commission (NDDC) Act

The NDDC Act87 is concerned with using allocated funds to tackle ecological problems arising from the exploration of oil minerals in the Niger-Delta. The Act empowers the commission to plan and to implement projects for the sustainable development of the Delta in the field of transportation, health, agriculture, fisheries, urban and housing development, etc.88 The commission under this Act has a duty to liaise with oil and gas companies and advise stakeholders on the control of oil spillages, gas flaring, and other related forms of environmental pollution.

The NDDC has brought anything but development to the region. According to a focus group respondent, "NDDC is known more for erecting signboards showing non-existent projects constructed by it." The observation by this focus group discussant might not be unconnected with the fact that NDDC embarks on the provision of services that some government agencies were specifically created to provide for the Niger Delta people. For example, NDDC now awards scholarships for undergraduates and postgraduate studies, skills acquisitions for interested Niger Delta people, and construction of hostels in selected public tertiary institutions in Niger Delta states.

NDDC leadership is often embroiled in ceaseless tussles despite the fact that all principal officers are indigenes of the Niger Delta as stipulated under sections 4 and 12 (1), respectively. Section 4

87 Cap N68, LFN, 2004
provides that Chairman of the Board must be an indigene and rotated among the nine states constituting the Niger Delta, while section 12(1) provides for a Managing Director and two Executive Directors who shall be indigenes of oil-producing areas.  

**4. Summary Conclusion and Recommendations**

**Summary**

There is poor enforcement of the numerous regulatory regimes by the various agencies charged with implementation of the laws. This is corroborated by oil-producing communities when they allege that "oil companies benefit from non-enforcement of laws regulating the oil industry in ways directly prejudicial to the resident population." Non-enforcement of these laws indirectly leads to subsidizing the cost of production of a commercial commodity like petroleum. It is expected that this attitude will begin to change due to a landmark case on pollution decided some time ago by the West African Criminal Court. In that case of SERAP v Federal Government of Nigeria, the Court unanimously found the Nigerian government responsible for abuses by oil companies and makes it clear that the government must hold the companies and other perpetrators to account.

**Conclusion**

Arising from the examination of the laws for oil and gas-specific environmental matters, what is most desired is the political will to carry out the tenets of the laws. Some sections of these laws provide that breach of any environmental regulation results in criminal proceedings if the breach constitutes a criminal offence under existing laws. Also, individuals or a corporate body who violates environmental regulations can be sanctioned by being fined or imprisoned, have their facilities involved in the violation of the Regulation closed down, or be required to restore the environment polluted or pay for its restoration. However, the reality is different from what these laws stipulate, especially in the area of implementation. Oil companies prefer to pay a relatively low penalty to noncompliance.

Oil companies would rather meet the minimum environmental standards in the legislation than invest in costly pollution monitoring and control. Cleanup is not a very complicated process; all it requires is high-level commitment to implement regulatory policies. That commitment might come as Government and MOCs take stock of the risk of further social unrest by host communities.

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89 Florence U Masajuwa, Effective institutional framework. host communities development and quest for sustainability in Nigeria’s oil industry. *NIALS Journal of Public Law*, vol 1, 2019:119-144 at 139


91 Better known as ECOWAS Court

92 In SERAP v FG of Nigeria, the Court also found that Nigeria violated articles 21 (on the right to natural wealth and resources) and 24 (on the right to a general satisfactory environment) of the African Charter on Human and Peoples’ Rights by failing to protect the Niger Delta and its people from the operations of oil companies that have for many years devastated the region. According to the Court, the right to food and social life of the people of Niger Delta was violated by destroying their environment, and thus destroying their opportunity to earn a living and enjoy a healthy and adequate standard of living.

Finally, Administrative agencies are vital for the checking activities of the oil industry. Thus a ruling like the one in *NOSDRA v Exxon Mobile* that restricts the powers of these agencies without a solid basis could have far-reaching consequences. While resort to the courts as a prerequisite for imposition of penalties may prevent the capricious imposition of fines by administrative bodies, a requirement for all infractions to be determined in Court by way of criminal proceedings will simply create an additional burden for a legal system and will lead to significant delays in the enforcement of laws.

**Recommendations**

Let Nigeria emulate the ways laws are implemented in some other jurisdictions. For example, western countries where environmental standards for oil industries are generally higher because extractive companies usually have an obligation to restore the area upon completion of a project. Some western countries, for example, Germany, strictly enforce this. The Namibian Mineral Legislation seems to have a provision dealing with issues like this. For example, section 52(5) *Mineral Act* \(^\text{94}\) places restrictions on the exercise of rights by holders of mineral licenses where the land is no longer usable for other purposes such as farming. According to this Act:

> When the owner of the land or any authority administering land on which prospecting operations or mining operations are being carried on in an application to the Minister - states that such operations prevent the proper use of the land wholly or partly for farming purposes; and requests that the holder of the mineral licence concerned carrying on such operations be required to purchase so much of the land as cannot be sowed, the Minister may, if he or she is on reasonable grounds satisfied that such operations prevent the land from being so used, by notice in writing addressed and delivered to such holder, direct such holder to purchase so much of the land as cannot be so used on such conditions as may be specified in such notice, and shall notify the owner of the land in question accordingly. \(^\text{95}\)

Also, the ouster of the *National Environmental Standards and Regulations Agency (NESREA) Act*, 2007, in matters pertaining to petroleum operations, should be revisited. Governments at various levels know that the bulk of the environment issues in Nigeria come about from operations of the oil industry. Some writers, however, seem to hold the view that NESREA’s oversight duties can be 'smuggled' into petroleum issues through section 27 of NESREA’s Act. According to Omotoso, \(^\text{96}\) the application of the NESREA Act can be invoked in oil-related pollution pursuant to the provisions of section 27. According to that section, it is unlawful to discharge hazardous substances in harmful quantities into the air or upon the land and waters of Nigeria or adjoining


\(^{95}\)Ibid.

\(^{96}\)W. A. Omotoso, “Towards Corporate Environmental Responsibility in Sub-Saharan Africa’s Oil and Gas Industry: Opportunities and Challenges.” (LLM diss., University of Manitoba, 2014), p.77
shorelines, except when permitted by any law. Since oil-related wastes have a dangerous impact on health and ecology, they qualify as hazardous and, thus, come within the scope of section 27 of the NESREA Act.

Submissions like the one by Omotoso have, however, not cured the lack of NESREA’s oversight power in the petroleum sector, especially on pollution matters. Invoking this section in pollution-related matters depends on the level of technical knowledge of the NESREA’s personnel regarding the quantum of hazardous substances that could pass as dangerous. It also depends on the interpretation given to section 27 of NESREA, considering that it is not framed in absolute terms. The solution is to revisit NESREA Act and insert a section or subsection that will give empower the Agency as the main regulator of environmental issues in Nigeria to lead the envisaged new efforts post-Ogoniland clean up at safeguarding the land of oil-producing communities from further devastations by the oil industries.

The oil environmental remediation exercise currently going on in Ogoni communities should be extended to other equally affected districts outside Ogoniland.

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