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ASSESSING THE ROLES OF THE INSTITUTIONS RESPONSIBLE FOR THE REGULATION OF OIL POLLUTION IN NIGERIA*

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Abstract

This article shall present a detailed assessment of the roles of the institutions responsible for the control of oil pollution in Nigeria. The fulcrum of this article is to evaluate the viability as well as the Gaps in Nigeria's institutional Framework for the control of oil pollution. We argue that there are several regulatory agencies performing identical functions in Nigeria with regards to the monitoring and control of oil spills hence, these is the confusion of social efficiency due to the duplication of statutory duties. Thus, it is submitted that each institutions should be specifically provided/vested and properly spelt out in its establishment framework in such a manner that would ensure their efficiencies in the administration of policies and regulation of oil pollution particularly on matters relating to spillages and payment of compensation to victims.

Keywords: Oil, Pollution, Spill, Institution, Niger, Delta

Introduction

Nigeria is among the oil producing countries in the world. Like any other country, some institutions are always put in place either by statute, executive fiat or by incorporation to carry out certain institutional responsibilities in the management and the control of oil pollution in Nigeria. These institutions are mainly established to safeguard the environment and its resources rather than management, control and detection of oil spillages in Nigeria as well as payment of compensation to the victims of oil spill incidents. Also, the Federal government has recently set up a new commission, the Oil Detection and Response Commission with the sole purpose of managing oil spill problems in the Nigerian Coastal and inland waters. Other agencies that deal with oil pollution in Nigeria's water are the Department of Petroleum Resources, which is the environmental watch dog of the oil industry. All these play one role or another in managing pollution although there appear to be conflicts in roles and responsibilities.

Department of Petroleum Resources (DPR)

The Department of Petroleum Resources (DPR) is a government parastatal responsible for the regulation of production and inland transportation of crude oil through a network of pipelines.[1] Oil companies, both local and international, are obliged to report to the DPR[2] any oil spillage arising from their operations. The DPR also maintain oil production, export and import statistics and ensures that all operators in the industry comply with environmental standards and procedures for environmental control as stipulated in the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 2018.[3] EGASPIN contained interim guidelines for monitoring, handling, treatment and disposal of effluents, oil spills and chemicals drilling, mud and drill cuttings by lessees and oil operators, etc. Marine transportation and export of crude oil is also regulated by the DPR. In order to effectively evaluate and monitor the discharges into the environment, the petroleum industry is conveniently divided into six stages of operations namely, exploration, production, into six stages of operations, hydrocarbon processing, oil transportation and marketing operations. Each of the six stages of the petroleum industry has discussions on processes of operation, sources and characteristics of wastes, treatment and control of wastes, as well as monitoring, effluent limitations and standards.[4]

The first two stages, the exploration and development operations, mainly include some activities which may entail the use of explosives regulated by the Explosive Act,[5] drilling and oil well completion.[6] This part of the regulations is confusing, instead of setting environmental standards for operators, focuses more on explaining the nature of each phase of operations. The regulations generally prescribe guidelines and standards that must be observed by operators, just like the primary Act but this is not the cardinal outlook of this subsidiary legislation. For instance, the entirety of article B-C of this part, spanning several pages merely presents a technical description of the nature of exploration, characteristics and issues like gas flaring which are likely to be associated with environmental harm. It is in article D that it sets standards for the use of explosives and other technical elements associated with seimic operations. These standards however relates to health and safety and not environmental control of gas flaring in the cause of exploration which is the main concern of this research.

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[1] Regulation 21(5) EGASPIN (2018)

[2] Ibid

[3] These guidelines were first issued in 1991 by the DPR and revised in 2002 and reviewed in 2018.

[4] Ibid.

[5] Cap E18 LFN 2004.

[6] Ibid.

At the exploration level of operations, the level of atmospheric emissions is minimal as it may be generated by vehicles, machines and equipment used in the operations.[7] Similarly, sound pollution is usually associated with seismic activities, but depending on the location of the productions, it might also have minimal impact on human health and the environment. At the level of operations, the EGASPIN prescribes that where water based drilling fluids are contaminated with oil to the extent that they would cause sheen upon discharge, they should be treated for oil recovery.[8] Where oil-based fluids are used at this stage, the regulation requires that they be recovered, reconditioned and recycled.[9] The regulations further provide for deck drainage, sanitary wastes, chemical and hazardous waste disposal standards.[10] It would cause nuisance where it is located close to areas already habited or nuisance to those involved in the operations. Other standards set concerning this phase of operations relate to health and safety rather than environmental protection on gas flaring which cause diseases and damages to crops. Furthermore, article E of this part of the guidelines provide for environmental management. It requires operators to adopt planned and integrated environmental management practices. This operates based on the precautionary principle that requires advance steps to be taken to protect the environment, even where there are no generally acceptable scientific evidence showing the likelihood of environmental impact in the future. This phase requires an environmental impact assessment EIA report/environmental permit as a precondition for operations.[11]

The regulations also prohibit the discharge of waste into any waters, swamps, or pits, except those specifically designed for the operations and where there is no likelihood of overflow.[12]The third stage is the production phase. This involves the active recovery of hydrocarbons from production formations. At this stage, discharges are composed principally of produced formations water and also drilling fluids (and other effluents) and drill cuttings while concurrent development drilling is in progress.[13] At this point, wells have been drilled and mobile equipment and installations put in place of the mobile ones in the previous phases, and water and gas are

[7] EGASPIN reviewed 2018 Part II (c) (2.1.1).
[8] Part II (2.2.1) (i).
[9] Ibid. Part (2.2.1) (ii).
[10] Part II (2.4, 2.5) and (2.7) respectively but nothing is mentioned specifically on gas flaring in these provisions.
[11] Part II (E) (3.2).
[12] Part II (3.4).
[13] Part III (A) (i).

separated at the surface.[14] Oil Pollution at this stage may occur as a result of discharges from production operations which may include effluents (solids, liquids and gases) and accidental oil spills, atmospheric emissions from fuel combustion to produce heat oil water separation, and where it results is a gas flaring, of carbon monoxide, oxides of nitrogen, sulphur and particulates are discharge into the atmosphere.[15] Similarly hazardous chemicals and radioactive elements used in the production, sands and other produced solid wastes can retain high oil contents and can contaminate water,[16] if not properly disposed of.

Terminal operations is another phase of petroleum operations which comes with its attendant environmental challenges. Crude oil produced is stored, dehydrated, piped, etc from or to tank farm. This part of the regulations prescribes standards for storage installation of equipment, loading system, among others in order to control associated environmental pollution. Gas flaring could also be as a result of emission problem which may be associated with combustion wastes from gas turbines/ combustion engines, and the hydrocarbon emissions from tank vents.[17]

The last stage of the operations relates to marketing operations. This involves the storage of the products in tanks, especially at retail outlets, which might experience corrosion, malfunction, etc that could lead to leaks that contaminate the environment.[18] The regulations also prescribe the standardization and environmental evaluation (post impact) report.[19] While the EIA is required as a precondition for operations, the EER is done in the course of operations and after pollution has already occurred. It is a process of accessing the level of environmental damage already incurred in order to prepare a strategy for restoration.[20]

Part IX of the regulations provides for the enforcement modality in terms of permits and sanctions for non-compliance with the rules. It provides that all effluent discharges (gaseous, liquid or solid) connected with petroleum operations require environmental permit to be given under the hand of the Director of DPR.[21] Part

[14] Part III (B).
[15] Part III (c).
[16] Ibid.
[17] Part IV (2.1).
[18] Ibid.
[19] Part VIII (1.3).
[20] Ibid.
[21] Part IX (3.1).

IX also prescribes some penal sanctions for non-compliance with the regulations. For example, article 4.5 provides:

Any person or body corporate who contravenes any provisions of the environmental guidelines and standards, commits an offence and shall on conviction, where no specific penalty is prescribed therefore, be liable to a fine, imprisonment and or revocation of licence/permit.

(a) Where the offence is committed by a body corporate or by a member of a partnership, firm or business, every director and /or relevant management staff, shall be liable.

Similarly, on pollution penalty, Part IX (4.6.2) of the regulations provides concerning oil/chemical/hazardous materials spillages thus:

a. All avoidable spillages, when they occur, shall attract a royalty not less than N 500,000, to be deducted at source and additional fine of N 100,000 for every day the offence subsists;
b. The spiller (operator or owner of vessel) shall pay adequate compensation to those affected and;
c. The spiller shall restore/remediate the polluted environment to an acceptable level as shall be directed by the Director of petroleum Resources.[22]

It is worthy to note that the above sanction does not specifically tie the fine to the volume of gas/oil spillage recorded by an oil company, which means a company may pay a sum not commiserate with the volume of environmental harm caused by it through gas flare/ oil spill. This is inequitable as polluters may not be penalized commensurate with the volume of pollution caused by them.

4.2 National Oil Spill Detection and Response Agency (NOSDRA)[23]

NOSDRA was established to perform several environmental protection functions concerning the petroleum industry including the power to detect and respond to oil spill in the petroleum industry of Nigeria. Section 6 (1) of the Act provides that,

The Agency shall:

(a) Be responsible for surveillance and ensure compliance with all the

[22] Part IX (4.6.2) EGASPIN revised 2002, reviewed 2018.
[23] Act No 15 2006.

Detection of oil spill in the petroleum sector;

(b) Receive reports of oil spillages and co-ordinate oil spill response activities throughout Nigeria;

(c) Co-ordinate the implementation of the plan for the removal of hazardous substance as may be issued by the Federal Government.[24]

The Act further empowers the agency to impose a penalty on any oil spiller who fails to report to it any spill from its facility within 24 hours or fail to clean up the impacted site.[25] It is submitted that the provisions of the NOSDRA Act sets it on a collision course with DPR which has been empowered by the Petroleum Act to do similar undertaking. It should be noted at this point that this overlapping authorities and responsibilities between ministries coupled with poor funding of these agencies has serious implications for environmental oil pollution management and enforcement in Nigeria.[26] Furthermore, though it is admitted that the scope of power of DPR on environmental protection made under the EGASPIN is wider than that of NOSDRA, since NOSDRA only regulates oil spill and has nothing to do with gas flaring, as against DPR whose power extends to gas spillage and other forms of environmental problems including gas flaring as a result of petroleum exploration; it would have been neater to delineate their functions in clear terms so as to engender cooperation and avert conflict. If on the other hand, it was the intent of the law maker to give NOSDRA overriding powers over DPR on oil spill issues, it should have clearly stated so. This is because just like the NOSDRA Act, the EGASPIN has provided that all operators are required to report all spills to the DPR and in addition, a joint spillage Investigation (JSI) team, comprising of the Licensee/Operator/Spiller, Community and DPR shall be constituted, within 24 hours, of spillage notification to investigate the spillage.[27]

What is obvious from the above legislation is that environmental protection laws and regulations associated with petroleum operations in Nigeria have mainly reactive and most though-out system of regulations that is the outcome of stakeholder engagement, especially considering the fact that they were made under military rule were public participation in law making process was minimal. For instance, the FEPA Act which was repealed

[24] NOSDRA Act S. 6 (1).
[25] Section 6 (2)-(4).
[26] UNEP (n 27) 9.
[27] Ibid.

by the NESREA Act was a response to the Koko toxic waste dump[28] that resulted in the contamination of the immediate environment in Delta state and the loss of human lives. It should be born in mind that to understand any law requires appreciating its wider socio-political context, but where the laws on environment, as in this instance are reactive in nature, there is a danger that law is understood in 'purely instrumental terms'.[29]

In view of the above, it is pertinent to state that the current state of the Nigeria law leaves a victim of gas flaring where it is caused by an act of sabotage, without much of an option, and where public interest litigation is frustrated by the state of the law as seen in the *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation*,[30] the victim is left with no option than to resort to self-help or off-shore redress (illicit activities), which is the current trend in Nigeria.[31]

National Environmental Standards and Emergency Agency (NESREA)[32]

NESREA is the major Federal body responsible for protecting the Nigeria's environment. It is also responsible for enforcing environmental laws, regulations, guidelines and standards. This includes enforcing of environmental conventions, treaties and Protocols to which Nigeria is a signatory. This Act which came into effect on 30th July 2007 repealed the Federal Environmental Protection Agency Act of 1988.[33] The agency (NESREA) is charged with the responsibility for the protection and development of the environment in Nigeria and for related matters. By the provisions of section 2, the cardinal objectives of the Agency are the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general and environmental technology including coordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines. Most of the Agency's functions were also structured along these lines as could be seen in section 8 a-f of the Act.[34] Surprisingly, the tone of the functions of the Agency thereafter changed in the way it exempted the oil and gas sector from the purview of NESREA,[35] thereby creating a confusion in the Act thus, by making provisions that appeared to cover the oil and gas sector and immediately turning round to exclude same in some other sections. A critical consideration of section 7, 8, and 29 of the Act

[28] MT Okorodud-Fubara, Law of Environmental Protection: Materials and Text (Caltop Publications Nigeria Ltd Ibadan 1998) vii.
[29] Bitrus Lange, Implementing EU Pollution Control (Cambridge University Press, 2008)229.
[30] (2013)LPELR-20075 (CA)
[31] Ken Saro-Wiwa, jr brought a suit against Shell under the Foreign Tort Statute in USA for complicity in human rights abuses in Ogoniland in collaboration with the Federal Government of Nigeria and other claims of human rights abuses was settled out of court and Shell paid about $ 15 million as settlement fees.
[32] NESREA Establishment Act 2007
[33] Section 36 of the Act
[34] The NESREA Act 2007
[35] Section 7 (g), (h) (j), (k) and (i), section 8 (k) and section 29 NESREAA.

excluded the oil and gas sector and the removal of any pollutant related thereto, draws the inference that the sections were strictly made to allow only the Department of Petroleum Resources with the oversight on environmental protection in relation to the oil and gas sector. This weakness is coming to such a conclusion that section 3 (i) (c) (vii) of the Act allows a representative of the oil exploratory and production companies in Nigeria in the Governing council of the Agency. Also, by section 7 (c) of NESREAA, one of the functions of the Agency is to enforce compliance with the provisions of international agreements, protocols, conventions and treaties on environment, including climate change, oil and gas, among others. The combined effect of section 3 and 7 of the Act means that rather than providing a more coherent framework for monitoring compliance on environmental laws and regulations in the sector, it appears that this provision has further created a lacuna in the enforcement of the law.

Furthermore, the Act makes provision for the prevention, abatement and control of pollution. Particularly, Section 20 (1) (f) provides for the use of appropriate means to reduce emission of permissible levels and it is geared towards controlling oil pollution. However, the Act does not define what an 'appropriate means' is thereby creating a confusion in the interpretation of the provision. Similarly, Section 21 (2) of the NESREAA provides that the Agency shall, in the control of any substance, practice, process or activity which may reasonably be anticipated to affect the stratosphere, especially ozone in the stratosphere, when such effects may reasonably be anticipated to endanger public health or welfare. It is apparent that pursuant to this Section that the National Environmental (Ozone Layer Protection) Regulation, 2009 was drawn up. However, the penalty for an offence under this sub-section and the violation of the Ozone layer Protection Regulation are different.[36] Section 21 (3) of NESREAA provides that an offence under section 21 (2), if committed by a body corporate, shall on conviction, be liable to a fine not exceeding N 2,000,000 and an additional fine of N 50,000 for every day if the offence subsist. However, Regulation 22 provides for a penalty not just for a body corporate but also for an individual.[37] In addition, the regulation provides for a fine of N 1,000,000 and as against the N2, 000,000 to be paid by a body corporate in the Act. These provisions has created a confusion as it will lead to the stakeholders finding it difficult to comprehend the actual provisions which should be followed. Thus, there is a need to harmonise the provisions of these laws. The NESREAA provides for the prohibition of harmful discharges in a quantities of any hazardous substance in the Nigeria's atmosphere except where such discharge

[36] Regulation 22 (1) and (2) of the National Environmental (Ozone Layer Protection) Regulation 2009
[37] Ibid

is permitted or authorised under any law in force in Nigeria.[38] It is provided that a person who violates this provision commits an offence and is liable on conviction, to a fine of not exceeding N 1,000,000 or imprisonment for a term not exceeding 5 years.[39] A body corporate that violates the section shall on conviction, be liable to a fine not exceeding 1,000,000 and an additional fine of N 50,000 for every day if the offence subsists.[40] The problem with this provision is that the law did not specify any justification for imposing higher penalty on individual offenders than the corporate entities who are the major polluters of the environment.

Niger-Delta Development Commission (NDDC)[41]

The NDDC was created by an Act for the repeal of the Oil Mineral Producing Area Commission Decree of 1998 which among other things established the agency with the cardinal objective for the reorganization management and administrative structure for more effectiveness, and for the use of the sums received from the allocation of the Federal Account for tackling ecological problems which arise from the exploration of oil minerals in the Niger-Delta area of Nigeria. Section 7 (1) (h) of the NDDC vested the commission with the responsibilities of tackling ecological and environmental problems that arises from the exploration of oil mineral in the Niger-Delta area and to advise the Federal Government and State Governments on the prevention and control of oil spillages, gas flaring and environmental pollution.

This statutory function of the Commission run in conflict with the responsibility of the DPR. It would have been better to delineate the functions of these agencies in clear terms so as to engender cooperation and avert duplication of duties.

The Court

The role of the courts in accessing justice cannot be overemphasised. In its most fundamental sense, the court interprets and implements legislation, reviews regulations and deals with appeals against licences or permits and administrative orders. All these are ways of enforcing the right to access to justice. The Judges and other adjudicators also apply laws to the facts of the case in making decisions in a way that will normally produce justice. By doing so, the court also make laws. [42]

[38] Section 27 (1)
[39] Section 27 (2)
[40] Section 27 (3)
[41] NDDC Establishment Act Cap A 6 LFN, 2000
[42] Benjamin Cardozo, The Nature of the Judicial Process (13 edn Yale University Press 1921) 113-114

This means that the courts have a wide range of powers with wide choices to make in each case in exercising its discretionary powers. Lord Denning[43] succinctly captured the courts' role in interpreting laws when he said 'in theory, the judges do not make law, they merely expound it. But as no one knows what the law is until the judges expound it, it follows that they make it'.[44] According to Mulkey's opinion, judges even do more. She said 'Judges, of course do more than make law. They are critical arbiters of the fairness of the system, help assure reasonable consistency among similarly situated cases, and provide the mechanism through which intransigent law violators can be compelled to comply'.[45]

In environmental law, cases come before the courts in three main ways: interpretation of a law, common law rules and judicial review. The court interprets the provision of environmental statutes where necessary, administratively scrutinise regulations to ensure performance, establish violation and determine suitable penalties within the confines of the law. Secondly, the court also determines the adequacy of the qualification of the damage through interpretation of common law torts[46] such a strict liability,[47] locus standi, costs, personal injury and breach of statutory duty,[48] and balancing the impact of private interests with any competing public interests. It also plays a role where there is a common law breach like environmental trespass,[49] injunction, nuisance,[50] restitution, negligence,[51] declaration and compensatory remedies.[52]

Following the above points, courts have shown in a plethora of environmental cases around the world some ways of achieving access to justice in environmental matters in practical and sometimes innovative ways such as interpretation of the right of life and a healthy environment,[53] the interpretation of standing rules and using expert committees to supervise environmental measures especially where regulatory control are poor.[54] A good example is the interpretation of constitutional right to a healthy environment to include the right to life.[55] The

[43] Lord Denning the Changing Law (Stevens & Sons 1953) vii
[44] Ibid.
[45] Desmond Mulkey, In the Eyes of the Law (Friends Law Publishers 1992) 12
[46] Empress Car Co. Ltd v National Rivers Authority (1998) Env. LR39
[47] Shell v Tiebo VII (1996) 4 NWLR (PT445) 657
[48] Blue Circle Industries v Minister of Defence (1997) Env. LR 22, 286
[49] Southport Corporation v Esso Petroleum (1956) AC 218, where oil pollution has been held as environmental trespass.
[50] Cambridge Water Co. v Eastern Counties Leather (1994) Env. LR 105
[51] Tutton v A.D. Walker Ltd (1985) 2 ALL ER 757
[52] Decisions based on common law rules had been problematic for many reasons. First is that they are mainly remedies. Secondly, with the exception of strict liability, the standard of proofs is high.
[53] Lopez-Ostra v Spain (1994) ECHR 46 (9 December1994)
[54] Vellore Citizens' Welfare v AIR Union of India (1996) SC 2715
[55] Lopez-ostra (supra)

third way of coming before the courts is judicial review, used to challenge the decision, action or failure to act of a public body exercising a public law function. However, there are three main challenges to judicial review which are time, cost and standing[56] as action must be within three months of the decision. Its major shortcoming is that it unlawful acts only and without expert interpretation of scientific facts. In Nigeria Section 46 of the 1999 Constitution empowers the court to act when an aggrieved person brings action in fundamental human rights[57] therefore it is apt to conclude that where there is a breach of human right relating to environmental oil pollution including environmental justice matter, a redress could be sought by way of an action under the fundamental right enforcement in court.

Conclusion

This article examined the institutions that are responsible for the control of oil pollution in Nigeria. The article also examined the processes by which issues bothering on oil pollution remedies are settled in Nigeria. It was also observed that there are many impediments to access environmental justice in Nigeria through the court. Therefore, it is recommended that the courts should invoke the rule of equity in addressing access to justice for litigants especially with the technicalities in the oil and gas industry that makes it difficult for untrained and unequipped victims to challenge the oil companies. The courts should also use their inherent powers to enhance access to environmental justice on matters bothering on oil pollution.

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