Impacts of Oil Production on Nigeria‘s Waters: Assessing the Legal Labyrinth.

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ABSTRACT

Freshwater pollution contaminates substances that render the water body in certain areas of Nigeria unsuitable for specific usage. Two fundamental causative agents of water pollution are oil exploration and exploitation operations. Consequently, environmental pollution from oil production in Nigeria has detrimental impacts on freshwater bodies, particularly for communities located in oil-bearing regions. The resultant pollution has significantly affected the lives and livelihoods both economically and socially of these communities. In response to these environmental hazards, the Federal Government of Nigeria has established legislation to protect the environment against oil pollution. The National Water Resources Bill has generated controversy in that it seeks to determine the clamour for the devolution of power among the tiers of government to actualise true federalism in Nigeria. This paper articulates the inadequacies in the regulatory framework for the administration of freshwater as established in the Constitution of the Federal Republic of Nigeria 1999 (as amended). Further, the paper examines the effectiveness of the relevant environmental protection enactments in implementation, enforcement and monitoring by the responsible governmental agencies. The impacts of oil production on the biodiversity in Nigeria are also evaluated to provide recommendations for strengthening the regulatory structure for the management of freshwater to ensure minimal oil pollution.

Key words: Constitution, Environmental Pollution, Oil Production, Fresh Water, Oil Pollution, Biodiversity, Enactments, Implementation, Enforcement, Monitoring, Oil Bearing Communities.

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Introduction

Fresh water is a resource that sustains the lives, livelihoods, existence of humans, and the biodiversity of an environment. Fortunately, Nigeria is blessed with rich inland freshwater resources, and these resources are serving the human population, providing drinking water, irrigation for farming, and fishing. Therefore, the management system of Nigeria‘s water resources must be efficient and of the highest standard required to maintain the quality that can sustain organisms with the rivers as their habitat and the people who rely on the water resources for their livelihood. Given the importance of freshwater as a source of sustenance for the millions of people it serves in Nigeria, its depletion, contamination, or pollution will mean sentencing the organisms and people that depend on this resource to a life of almost irreversible destitution.

The pollution of fresh water at any point is causing the presence of a substance or certain conditions to such an extent that it makes the water unsuitable for specific purposes[1]. The source of pollution can be point-source or nonpoint-source[2]. Point sources are identifiable points or places that could be pipes or channels that discharge into a water drain. The discharge could be from wastewater treatment plants, factories, industrial plants, latrines, septic tanks, etc. Nonpoint sources are those sources from where pollution arises and spreads over a wider area, thus making it challenging to locate the exact place of origin. For example, fertilisers or pesticides drain from a farm into a river or stream through several surfaces or soil locations.

Oil exploration and exploitation operations have been identified as the top major polluter of freshwater channels globally[3]. Nigeria is rich in both freshwater resources and petroleum resources. But the management of both resources is trapped in a constitutional confluence that has caused the environment and the people the pain of being left to grapple with the devastating effect of water pollution. Under the Constitution of the Federal Republic of Nigeria (CFRN) 1999, petroleum and water resources are under the federal government‘s control. The federal government is not effectively performing this constitutional role due to a weak regulatory framework and lack of political will to initiate amendments that will

give component states the powers to manage necessary activities connected to the use and maintenance of water resources.

This paper examines the weakness in the regulatory structure for the management of freshwater as provided in the constitution and how the federal system as practised in Nigeria is not clear on the role of the state governments in managing fresh water and water channels. A qualitative desk research was conducted by studying public documents, research articles, laws, and records that provides information on the historical background of water resource and land management from pre-independece era to present fourth republic despensation. This method helped us to appreciate the political argument as different from the legal imperatives that underpins the constitutional isues related to water resource management in a federal system. Also, the institutional structure for water resource management at different levels of government is reviewed to make us understanding the areas of conflicts and duplication of roles. The above helped us identify the tilting slop towards federal system of overseeing water water resources while maintaining a quasi-unitary system for natural resource management as responsible for the constant misunderstanding between the federal government and the sub-nationals on specific roles regarding the regulation and protection of water resources.

Furthermore, the paper reviews the federal structure of the division of powers in the CFRN to understand how the structure affects the regulatory control of the exploitation of natural resources and associated activities that results in the pollution of Nigeria‘s inland waters and wetlands. An exploratory method of describing the federal features in the Nigerian Constitution is adopted to achieve this. Critical analysis is made of the system presented in the constitution in light of relevant judicial decisions and some existing scholarly academic perspectives. This descriptive and analytical overview of Nigeria‘s federalism lays the foundation for the sectorial study of the oil industry; the laws regulating the operators in the industry under the exclusive authority of the federal government; and the laws of component states that should represent shared or concurrent regulatory responsibility for their operations in the Federation‘s inland waterways.

Legal Issues in the Constitutional Management of Water Resources in Nigeria

Background

In 2017, the Executive arm of the Federal Government of Nigeria (FGN) sponsored a bill to the National Assembly to transfer the ownership and control of water resources, including surface and underground waterways, from states to the Federal Government. However, the National Water Resources Bill suffered a setback because of the controversy it generated and the opposition from state governments. Notwithstanding the rejection of the Bill in the 8th National Assembly, the National Water Resources Bill was reintroduced in the 9th National Assembly sometime in 2020. By the provisions of this Bill, the Federal Government will take over the control of water resources from the states, license the supply and commercialise water utilisation in Nigeria [4].

Essentially, the National Water Resources Bill exclusively vests on the Minister of Water Resources the power to formulate water resources management strategy to guide integrated planning, management, use and conservation of the nation‘s water resources and provide guidance for the formulation of hydrological area resources strategies [5].

The Bill further regulates, protects, conserves and controls water resources identified by the Bill as water resources crossing state boundaries for equitable and sustainable social and economic development and maintaining the environment‘s integrity [6]. Ultimately, the proposed legislation seeks to enact an Act that would provide a regulatory framework for Nigeria‘s water resources sector [7][8]. The opposition to the Bill is not unconnected with its seeming negation of true federalism and the constitutionality question of its practical implementation.

Nigerian Oil Industry and its Contribution to Water Pollution

Since the discovery of crude oil in 1956 by the Royal Dutch Shell Group, the Oil industry has been growing in operators and operations. The industry has three sectors of operations: the downstream sector, the upstream sector, and the service sector. The downstream sector engages operators dealing in refining and marketing refined products in bulk and retail; the upstream sector is where operators carry out exploration and transportation activities, dominated by multinational oil companies (MOCs). At the same time, the service sector comprises companies that provide support services to the downstream and upstream sectors.

The upstream sector is the most active in the Nigerian economy, accounting for about 90% of national export and 80% of the Federation‘s revenue. Given the strategic economic importance of this sector to the country, legal and environmental experts have adjudged regulatory control of the sector‘s operations as weak and below international standards [9]. Over the decades of oil exploration and exploitation in Nigeria, particularly the Niger Delta region, the MOCs and their national collaborators have conducted their operations in disregard for environmental standards, thereby causing almost irreversible disastrous impacts on the environment in the area. The Niger Delta is the largest wetland in Africa and among the ten most important wetland and marine ecosystems globally, consisting of diverse ecosystems of freshwater swamps, rain forests, and mangrove swamps. But the

operation of MOCs and local oil companies (LOCs) has caused oil pollution that has contaminated streams and rivers, destroyed forests and farmlands, and turned the area into an ecological wasteland.[10]

Oil exploration activities by MOCs and LOCs involve engineering and geological operations that affect the aquatic environment. For exploitation, pipelines have been laid, covering over 7,000 km across different operational areas of the country [11]. These pipelines run across mangroves, rivers, and farmlands, with incidences of oil leakages resulting in devastating environmental pollution. While the oil companies usually blame acts of vandalism for the incidence of petroleum leakages, affected communities and experts have strongly argued that these incidences are due to weak pipeline integrity.

Over the past decades of oil exploitation in Nigeria, oil spills have been identified as one of the major causes of environmental pollution and hazards plaguing people living in oil-bearing regions and even communities that host oil facilities but do not hold any hydrocarbon resources [12]. Apart from accidental industrial discharges or leakages, the reoccurring oil spills result from years of neglect of oil pipelines without routine cheques and maintenance and changes in old and worn-out pipelines, among other factors. Oil pipelines in Nigeria are prone to natural ruptures due to a lack of proper maintenance practice and schedule [13]. The system that should look after the appropriate maintenance of the pipelines has not been functional due to weak or almost non-existent regulatory oversight by the concerned government agencies.

Since 1979 when the Forcados tank 6 Terminal in Delta State spilt about 570,000 barrels of oil into the Forcados estuary,[14] causing pollution of the aquatic environment and neighbouring rivers, the oil industry has been recording the incidence of oil spillages that have adversely affected the well-being of people of the affected areas. According to a statement made by the Nigerian Minister of Environment, 4,919 oil spills were recorded between 2015 and March 2021[15]. With over 400,000 barrels per day(bpd) of oil spilt. The environmental implication is colossal and devastating for present and future generations. Oil-bearing communities have altered their economic and social well-being due to water pollution caused by oil-producing companies‘ exploration and exploitation activities. Most of these communities depend on fishing and farming for their daily sustenance. With the pollution of their waters, their sources of livelihood have been adversely affected, and their lives are thrown into a state of stagnation, desperation, and frustration. While, in theory, the people affected can sue the MOCs and the Federal Republic of Nigeria for violating their right to a healthy and clean environment, the legal and financial hurdles often appear too daunting for them to do so. There is also a lack of confidence in the judicial system of Nigeria. The example of Nigerian claimants filing lawsuits overseas against multinational oil companies operating in the Niger Delta region for damage caused by oil spills proves this point. The Netherlands and the United Kingdom are home to three such lawsuits filed against Royal Dutch Company, the parent company of Shell Petroleum Company: Four farmers filed three claims against Royal Dutch Shell in 2008 in a district in the Hague, Netherlands, seeking reparations for damages caused by spills from pipelines operated by the subsidiary company in the Niger Delta, Nigeria [16]. The communities of Ogale and Bille filed a lawsuit against Royal Dutch Shell and Shell Petroleum Company in the United Kingdom in 2015 for damages caused by oil leaks from pipelines owned by the respondents [17]. An oil spill caused by the Shell spill in 2008 polluted the river and farmlands of the Bodo community in Nigeria. In 2014, they sued Shell in the United Kingdom for the damage. The same year, the company settled out of court and paid fifty-five million pounds to the claimants as compensation [18]. However, there are instances where the court, by its decision, has recognised the people‘s right to a healthy and clean environment and the duty of the government to ensure the MOCs adhere to regulations and practices that will prevent further pollution of the environment.

In SERAP v. the Federal Republic of Nigeria [19], the Socio-Economic Rights and Accountability Project (SERAP) sued as Plaintiff. They argued that the inability of the Nigerian government to enforce extant environmental enactments and corresponding regulations to protect the environment is tantamount to the violation of the right of health and clean environment of the Niger Delta people as guaranteed by the International Covenant on Economic, Social and Cultural Rights (ICESCR and the Africa Charter on Human and Peoples‘ Rights. In consequence, the court held that the failure of the Nigerian government to monitor and enforce environmental legislation violated the rights to health and a healthy environment according to Articles 1 and 24 of the African Charter. Consequently, the court ordered the Federal Republic of Nigeria to effect speedy measures to restore the Niger Delta environment. The court further stated that Nigeria must adopt the necessary mechanism to forestall a repeat of such environmental pollution resulting from oil production. It is noteworthy that this matter was decided by the Economic Community of West African States (ECOWAS) Court and not any of the Courts within the jurisdiction of Nigeria. As this paper illustrates, the extra-territorial proceedings commenced in national and regional courts have shown the difficulty of instituting legal proceedings against MOCs in Nigerian courts for the communities affected by the oil spill. Since the return of democracy in 1999, several legal and institutional changes have been established to regulate the oil industry. These changes, starting with the 1999 constitution, have

Location	Environment	Impacted Area (ha)	Nature of Incidence
Bayelsa State			
Biseni	Freshwater Swamp Forest	20	Oil Spillage
Etiama/Nembe	Freshwater Swamp Forest	20	Oil Spillage and Fire Outbreak
Etelebu	Freshwater Swamp Forest	30	Oil Spill Incidence
Peremabiri	Freshwater Swamp Forest	30	Oil Spill Incidence
Adebawa	Freshwater Swamp Forest	10	Oil Spill Incidence
Diebu	Freshwater Swamp Forest	20	Oil Spill Incidence
Tebidaba	Freshwater Swamp Forest Mangrove	30	Oil Spill Incidence
Nembe Creek	Mangrove Forest	10	Oil Spill Incidence
Azuzuama	Mangrove	50	Oil Spill Incidence
9 sites			
Delta State			
Opuekebe	Barrier Forest Island	50	Salt Water Intrusion
Jones Creek	Mangrove Forest	35	Spillage and Burning
Ugbeji	Mangrove	2	Refinery Waste
Ughelli	Freshwater Swamp Forest	10	Oil Spillage & Well head leak
Jesse	Freshwater Swamp Forest	8	Product leak/Burning
Ajato	Mangrove		Oil Spillage Incidence
Ajala	Freshwater Swamp Forest		Oil Spillage Incidence
Uzere	Freshwater Swamp Forest		Oil Spillage Incidence
Afiesere	Freshwater Swamp Forest		Oil Spillage Incidence
Olomoro	Freshwater Swamp Forest		QC
Ughelli	Freshwater Swamp Forest		Oil Spillage Incidence
Ekakpare	Freshwater Swamp Forest		Oil Spillage Incidence
Ughuwughe	Freshwater Swamp Forest		Oil Spillage Incidence
Ekerejegbe	Freshwater Swamp Forest		Oil Spillage Incidence
Ozoro	Freshwater Swamp Forest		Oil Spillage Incidence
Odimodi	Mangrove Forest		Oil Spillage Incidence
Oghulagha	Mangrove Forest		Oil Spillage Incidence
Otorogu	Mangrove Forest		Oil Spillage Incidence
Macraba	Mangrove Forest		Oil Spillage Incidence
20 sites			
Rivers State			
Rumokwurusi	Freshwater Swamp	20	Oil Spillage
Rukpoku	Freshwater Swamp	10	Oil Spillage

Table 1: Some Oil Polluted Sites in the Niger Delta (as of 2006)
Source: FME, NCF, WWF UK, CEEP-IUCN 2006 Niger Delta Resource Damage Assessment and Restoration Project.

far-reaching implications for regulating and managing water resources against oil spillage and responding to oil spillage that pollutes the same. The 1999 Constitution vests the regulation and granting of a permit for oil exploration and exploitation exclusively in the federal government[20]. On the premise of this constitutional provision, the federal government has established institutional structures, regulations, and laws for the oil industry. However, the effectiveness of the legal and institutional machinery has been adjudged by scholars, experts, activists, and people living in communities being affected by the activities of MOCs as poor and almost of no effect[21].

Overview of Nigeria‘s Federal System.

Nigeria‘s history as a country with a federal system of government dates back to its adoption in the 1954 Constitution, when the Eastern, Northern, and Wes-

tern regions were granted semi-autonomous status, thus allowing them to be self-governed. The same system was retained in the independence constitution of 1960, the republican Constitution of 1963, the presidential Constitution of 1979, the revised Constitution of 1989, and the current presidential Constitution of 1999. The basic definition of federalism posits a system that shares a constitutional alliance between individual component states in a group to form a national state where a central authority will share statutory powers and functions with the component states[22]. Wheare's[23] description of Federalism or Federal principles indicates a division of constitutional powers to legislate in a Federal structure between a central government and sub-national governments in a way that clearly defines the statutory legislative ambit of each side without overlapping each other's legislative authority. In the case of Nigeria, the federal system reflects the list of powers that the constitution allots exclusively to the federal government and the powers that the Federal and State governments exercise concurrently. This fits well with Appadorai's definition of a federal state:

> a federal state is one in which there is a central authority that represents the whole and acts on behalf of the whole in external affairs and in such internal affairs as are held to be of common interest and in which there are also provincial or state authorities with powers of legislation and administration within the spheres allotted to them by the constitution [24].

The question of exclusivity in Nigeria's federal system is often questioned along the lines of what political and structural justification matches Nigeria's peculiar ethnic and geopolitical configuration. In the past two decades, the concurrency of states' powers and the federal government has been a subject of fractious legal arguments and litigations. Given the fluidity of shared constitutional responsibilities and liabilities of the federal and state governments as structured in the Constitution of the Federal Republic of Nigeria 1999(CFRN),) conflicts in the application and interpretation of constitutional provisions are inevitable.

Given the peculiar political ideology that accentuates the primacy of the federal government as supreme in relation to parts of the Federation, it is pertinent that this study stresses the relevancy of the partial autonomy of states vis-à-vis the legal clog that automatically overrides the executory or regulatory powers of states to protect the environment from pollution by the activities of operators in the oil industry.

Nature and Features of Nigeria's Federalism

The 1999 Constitution of Nigeria reflects the basic features of a typical federal system. However, in practice, legal scholars and experts view Nigeria as not practising what they call „true federalism[25]." According to Okpereva, Nigeria has practised its federal system awkwardly, which has prompted questions about whether it is a federal system. Be that as it may, the questions are raised not because there are no elements of federalism in the Nigerian Constitution, but does the practice of federalism in Nigeria conform with the features of federalism?. In this study, the regulatory control by state and federal governments of oil exploration activities affecting inland waters is examined against the backdrop of the practice of federalism.

Exclusive and Shared Powers

A federal state is usually structured constitutionally to reflect and provide for common and exclusive interests. How the central and state governments cater to the interest exclusive to each side is a matter of national pattern of federalism and not according to any strict federal system of government definition. For example, Germany's allocation of powers to states under the federal system being practised in a parliamentary system is different from how powers are shared between the federal government and the states in a presidential system. The division of powers in a federal state is for adequate delineation of political and statutory authority, including responsibilities between the federal and states government, such that matters of national interest should be exclusive to the federal government. In contrast, state governments are conferred powers over issues common to states and municipalities [26]. However, where there is a convergence of national and sub-national interests, the constitution usually makes provisions for the concurrency of federal and sub-national powers[27]. Usually, the federal government's exclusive powers inter alia include national defence matters, foreign affairs, banking, nuclear energy, natural resources, and currency. The 1999 Constitution of the Federal Republic of Nigeria follows the structure where legislative powers are classified as exclusive and concurrent. It confers legislative authority on the National Assembly over matters on the Exclusive Legislative list. Constitutional provisions vest executive powers in the federal government in implementing the laws overseeing such issues[28]. The states and the federal government both have powers to legislate on matters specified in the concurrent list to the extent of the jurisdictional ambits allowed by the constitutions. The Exclusive Legislative list has 68 items, while the concurrent Legislative list has 12 items. Besides the matters listed in the exclusive and concurrent list, there are others that form the residual list but are not expressly mentioned in the constitution. The states can legislate over such matters.

Separation of Powers

As conceptualised by John Locke and accentuated by Montesquieu, the doctrine institutionalised a go-

verning system divided into three arms of government: executive, legislature, and judiciary, with distinct responsibilities and powers. The sanctity of the principle is seen in neither of the arms outstepping its boundary outside its constitutional roles. The doctrine is supposed to entrench efficiency through checks and balances within the statutory functions, with each arm performing its role for the smooth and proper running of government affairs. In keeping with this doctrine, Part II of the 1999 Constitution provides for the powers and functions of the legislature, executive, and judiciary[29]. The legislature enacts the laws, the executive implements the laws made by the parliament, and the judiciary interprets the laws.

It is, however, not a hard-clasped doctrine as the Supreme Court of Nigeria has held that the constitution, being the foundational norm of a State, has a flexible disposition to the application of the doctrine. To this effect, through a provision that expressly creates an exception, the constitution restricts or ignores the application of the doctrine of separation of powers. The Supreme Court of Nigeria in A.G. Abia v. A.G. Federation[30], expounded on this legal position when it upheld the provision of section 315(2) of the 1999 Constitution, which empowers the President as the chief executive of the Federation to modify an existing law either by way of alteration, omission, or repeal if the President considers it necessary to bring such law into conformity with the constitution. Furthermore, the Supreme Court, in the aforementioned case, thereby validated the legislative action of the President when he, without any recourse to the National Assembly, modified the Allocation of Revenue (Federation Account, etc.) (Amendment)Act [31].

Water Resources Administration under the Constitution.

The federal republic of Nigeria, consisting of 36 states and the federal capital territory of Abuja, has a land area of about 924,000 sq. km, with surface water resources estimated at 267.3 billion cubic meters. In contrast, groundwater is estimated to hold a potential volume of 51.9 billion meters. Eight hydrological areas were created for administrative purposes, while River Basin Authorities were established to manage them[32].

Water resource being on the exclusive and concurrent legislative list in the 1999 Constitution means the federal and state governments share responsibility for regulating the use and protection of water resources that flow from sources and connect beyond one State [33]. It means only the federal government controls rivers, lakes, and/or channels that flow from a source that affects more than one State. State governments can only regulate water resources originating and flowing within the State exclusively. There are presently the following laws at the federal level: Water Resources Act, 1993, Minerals Act,1990, National Inland Waterways Authority Act (NIWA Act) 1997, and River Basins Development Authority Act (RBDA Act) 1990. These laws are under the administration of the Federal Ministry of Water Resources. The Ministry is responsible for formulating and implementing national water policies and developing and overseeing water resources infrastructures such as dams, irrigations, and water supply projects.

Through their ministries and agencies for water resources, State governments exercise administrative control over water supply, irrigation, and care for river channels within their states, provided the river channels don‘t flow beyond their State to another state. But the Federal government has exclusive responsibility for protecting the environment, including water sources, channels, underground water, and every area that constitutes the environment [34]. Given the very limited powers of the state governments over the waters that flow within the boundaries of their states, the constitution has confined them to the role of notifying the federal government in the event of oil spillage. In most cases, the states mediate between the MOCs and the affected communities during disputes arising from demands for compensation or remedial service for the occurrence of oil spillage. The National Water Policy, published after the National Council on Water meeting of 2002, sounded a strong warning that the nations‘ water sources are under serious threat from inadequate management and widespread pollution, including the indiscriminate disposal of hazardous substances. The National Council of Water mentioned the uncoordinated management of the nation‘s water resources as one of the major factors responsible for the legal and institutional structures‘ poor effectiveness in preventing pollution and beginning timely remedial actions in an oil spill.

Legal and Institutional Framework on the Regulation of Oil Pollution in Nigeria.

Under this sub-theme, we shall review select legislation and institutions that regulate Nigeria‘s oil and gas sector. The emphasis here is mainly on relevant stipulations of the statutes related to the regulation of oil pollution in Nigeria and the corresponding agencies seeking to ensure compliance with the relevant environmental enactments.

Legal Framework

The Constitution of the Federal Republic of Nigeria of 1999.

The Constitution of the Federal Republic of Nigeria 1999, hereafter called CFRN 1999, is the supreme law of Nigeria. The CFRN 1999 does not make explicit provisions that vest legislative powers in the legislature to regulate environmental pollution in Nigeria [35].

However, the need to ensure a safe and improved environment in Nigeria finds constitutional expression in section 20 under the Fundamental Objectives and Directive Principles of State Policy of the CFRN 1999. It explicitly obligates the State to ‚protect and improve the environment and safeguard the water, air, and land, forest, and wildfire in Nigeria.' By the tenor of this constitutional provision, the activities relating to the exploration and exploitation of mineral oil are expected to be conducted in conformity with the objective encapsulated in Section 20 [36].

Furthermore, the constitution prohibits the exploitation of human or natural resources in any form whatsoever for reasons other than the good of the community[37]. However, the enforceability of the constitutional provisions in chapter two concerning the duty of the government for adequate protection and management of the environment is doubtful because they are not justiciable. Consequently, victims of oil pollution of the environment may not find solace in the current regulatory regime.

It is instructive to note that notwithstanding the absence of specific constitutional provisions to regulate environmental pollution, the National Assembly is vested with the requisite powers to enact a law that governs mines, minerals, and natural gas[38]. This position finds statutory expression and attestation in section 4(2), CFRN 1999, which provides thus, ‚The National Assembly shall have the power to make laws for the peace, order and good government of the Federation or any part thereof concerning any matter included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to the Constitution. By necessary implication, the National Assembly is conferred with the legislative powers to enact laws relating to mines and minerals, including oil and gas and other natural resources being the subject of interstate commerce. Similarly, any international agreements, treaties, and conventions relating to environmental protection to which Nigeria is a signatory can only become enforceable where the National Assembly, pursuant to Section 12, CFRN 1999, enacts them into law. Therefore, by the provisions of Sections 4 and 12 CFRN, 1999, the power to enter into and implement the stipulations of any international environmental agreements is clearly within the exclusive competence of the Federal Government. Against the backdrop of this legislative competence, the Federal Government has since enacted various legislations and the attendant regulations that seek to safeguard and protect the environment against oil pollution. However, nothing inhibits the Federation's component states from making environmental laws, provided they do not conflict with federal legislation.

To these critical enactments, we now turn.

National Environmental Standards Regulation (Establishment) Agency Act, 2007

The National Environmental Standards Regulation (Establishment) Agency Act, 2007 (NESREA) was enacted to replace the Federal Environmental Protection Agency Act [39]. Essentially, the NESREA Act aims at centralising environmental protection and management. Although the NESREA Act's stipulations generally seek to enforce environmental regulations, they have severe limitations in that the NESREA is not applicable regarding the regulation of the oil and gas sub-sector in Nigeria [40].

By the stipulations of Section 7 of the NESREA Act, the enforcement of environmental regulations relating to oil pollution is explicitly excluded. Thus, the NESREA Act does not apply to Nigeria's oil and gas industry. Interestingly, the NESREA Act is supposed to be a comprehensive resource-oriented enactment seeking sustainable utilisation and conservation of natural resources vis-à-vis environmental protection. It is against this background that one cannot fathom the rationale behind the exclusion of oil pollution from the provisions of the NESREA Act. However, one can reasonably posit that lack of the needed political will and enlightened self-interest may have accounted for such damaging exclusion. The reason is that, from the year of the Koko toxic waste dump incident in 1988, it was expected that the government would have envisaged the vulnerability of the Niger Delta area to petroleum exploration activities in the absence of any regulatory control under any Agency other than the Petroleum Ministry.

The National Oil Spill Detection Response Agency (Establishment) Act 2006

The National Oil Spill Detection Response Agency (Establishment) Act 2006, otherwise termed NOSDRA Act, 2006, was enacted in response to the aggravated environmental degradation resulting from oil pollution, particularly in the oil-producing states in Nigeria [41]. The NOSDRA Act was enacted to implement and coordinate Nigeria's National Oil Spill Contingency Plan (NOSCP).

The NOSDRA Act is principally concerned with the enforcement against violations resulting from oil pollution of the environment. In furtherance of this, the NOSDRA Act established NOSDRA as the coordinating and monitoring agency for implementing the Federal Government of Nigeria's policies on the National Oil Spill Contingency Plan. By the provisions of the NOSDRA Act, an oil spiller by whose operations environmental pollution is occasioned shall be liable to the imposition of penalties for failure to report an oil spill incident and clean up the resultant environmental degradation [42].

The Environmental Impact Assessment Act

The Environmental Impact Assessment Act [43] (EIA Act) is principally concerned with considerations of the environmental impact resulting from significant public and private projects. The EIA provides

for the operation and maintenance of a public register, giving the public access to information on potential hazards likely to impact environmental health and safety negatively. This EIA Act stipulates an assessment of the possible environmental consequences of any proposed project. Accordingly, an assessment of the likely impact of public or private projects on the natural environment is required [44]. Further, by the provisions of the EIA, a written application to the agency before embarking on projects for their environmental assessment to ascertain approval is required. The EIA Act sets out the situations that require environmental impact assessment and establishes legal liability for the infringement of any stipulation under the EIA Act [45].

It is to be noted that any person who fails to comply with the provisions of this Act shall be guilty of an offence under the same and liable upon conviction. In the case of an individual, liability can mean a fine of up to N100,000.00 or five years imprisonment. In the case of a firm or corporation, the liability is a fine of not less than N50,000.00 and not more than N100,000.00. Again, the existence of such disproportionality relative to penalty for non-compliance further highlights the inadequacies and weaknesses inherent in Nigeria‘s environmental law enforcement mechanism.

Although the EIA is a critical piece of environmental legislation, the effective execution of its provisions is primarily hampered by the inadequacies and misrepresentations of several environmental regulatory enactments, hence the overlapping of functions and responsibilities in processes and procedures by the various regulatory agencies.

Notwithstanding these constraints, this Act creates the general principles, procedures, and methods to enable the prior consideration of environmental impact assessment of planned public or private projects[46]. It must be emphasised here that the EIA applies to other sectors‘ environmental activities. Still, the focus here is on its application related to mitigating oil pollution of the environment.

The Petroleum Industry Act

The Petroleum industry Act, 2021[47] repealed the Petroleum Act 2004. It has created a wide range of provisions and innovations that will affect the stakeholders of the private sector, public sector, and oil and gas industry. Its objectives are to provide a legal, governance, regulatory, and fiscal framework for the Nigerian Petroleum Industry, set up and develop host communities in the oil sector, and deal with related matters in the upstream, midstream, and downstream sectors.

Being the foundational enactment concerning oil acquisition rights in Nigeria, the Act, in this regard, makes elaborate provisions for the exploration and exploitation of mineral oil in Nigeria. Accordingly, Section 1 vests the entire ownership and control of all petroleum in, under, or upon any lands to which this section applies in the State.

Pursuant to the provisions of the Act, the Minister of Petroleum Resources is vested with the power to conduct general supervision over the operations undertaken based on licenses and leases granted under the Act [48]. In replacement of the Department of Petroleum Resources, the Act created regulators for the petroleum industry: the Nigerian Upstream Petroleum Regulatory Commission (the „Commission“) [49] and the Nigerian Midstream and Downstream Petroleum Authority (the „Authority“)[50].

Institutional Framework

Although several institutions in Nigeria regulate, monitor, and enforce compliance with environmental enactments and regulations, only a selected number of these governmental institutions shall be considered here.

The Nigerian Upstream Petroleum Regulatory Commission (the „Commission“)

The Commission is a corporate body with perpetual successions whose regulatory functions are limited to the upstream petroleum activities as provided for in Section 4 of the Act, which stipulates that „the Commission is responsible for the technical and commercial regulation of the upstream petroleum operations.“ Amongst other functions of the Commission is establishing compliance with all applicable laws and regulations governing upstream petroleum operations. It is also the lead agency ensuring industry compliance with safety and environmental regulations [51].

Nigerian Midstream and Downstream Petroleum Authority (the „Authority“).

As provided under Section 29(3) of the Petroleum Industry Act, the petroleum industry‘s midstream and downstream petroleum operations are regulated by this regulatory authority on a technical and commercial basis. Section 111 of the Act provides that the Nigerian Midstream and Downstream Petroleum Authority may grant, renew, modify or extend individual licenses or permits, provided that where it relates to the establishment of refineries, such licences or permits shall be issued by the Minister on the recommendation of the Authority. According to Section 125 of the Act, midstream and downstream gas operations require a license to perform activities such as establishing, building, or operating gas processing facilities; engaging in bulk transportation of natural gas by rail, barge, or other means of transportation; operating gas transportation networks; engaging in wholesale gas supply, or constructing or operating

chemical and fertiliser plants. Under the Act, the Authority must also develop midstream and downstream gas operations regulations. Such regulations should include the establishment of a wholesale natural gas market to guarantee the availability of natural gas to customers, including pipeline owners and operators, shippers of natural gas, holders of natural gas storage and distribution licenses, and gas retailers, as well as any other activities related to the above.

The National Oil Spill Detection and Response Agency (NOSDRA)

NOSDRA is an agency in the Federal Ministry of Environment (FME) in Nigeria established in 2006 pursuant to the NOSDRA Act specifically to deal with oil spills and ensure compliance by the oil industries to best practices in their operations[52]. The primary responsibility of NOSDRA is oil spill detection, response, and management[53]. Therefore, the NOSDRA coordinates the implementation of the National Oil Spill Contingency Plan (NOSCP) in Nigeria in conformity with the International Convention on Oil Pollution Preparedness Response and Co-operation, to which Nigeria is a signatory[54]. It is gratifying to note that NOSDRA has continued to ensure compliance with environmental enactments and regulations that seek to protect and manage the environment against oil pollution by the petroleum industry.

Consequently, the NOSDRA (Establishment) Act vests the NOSDRA with the power to be responsible for surveillance and ensure compliance with all existing environmental legislation and the detection of oil spills in the petroleum sector[55]. In carrying out its statutory mandate, the NOSDRA receives oil spill reports and coordinates oil spill response operations in Nigeria. It ensures timely, effective, and appropriate response to oil spills that endangers the environment and clean-up activities of oil pollution that ultimately lead to environmental degradation, particularly in the oil-producing states of the Niger-Delta area of Nigeria.

National Environmental Standards and Regulations Enforcement Agency (NESREA)

The NESREA is an environmental agency of the Federal Government of Nigeria established pursuant to the provisions of the NESREA Act[56]. The NESREA is statutorily empowered to enforce all environmental legislation in Nigeria and international conventions or treaties to which Nigeria is a party for protecting the environment. This mandate of NESREA further complies with the articulated strategy of the National Policy on Environment that obligated the government to establish legal institutions for protecting and managing the environment[57].

Although the NESREA has recorded enormous achievements relative to environmental compliance, monitoring, and enforcement since its creation, including making various regulations concerning environmental protection, monitoring environmental compliance, and enforcement activities, its powers do not cover environmental pollution relating to oil and gas matters. It must be emphasised that NESREA‘s broad powers to enforce international conventions and treaties are subject to ratification and domestication by the Nigerian legislature[58].

Factors Responsible for Uncoordinated Management of Water Resources

Nigeria‘s water sources and resources are spread across the six geopolitical areas and the majority of the states of the Federation. Factors clogging effective management of the water resources can be described thus:

Centralised Regulatory System: Given the expansive network of rivers and tributaries, it is extremely burdensome and almost impossible to have an effective regulatory mechanism concentrated at the centre, as is presently the case with the Federal Ministry of Water Resources and other relevant federal agencies. The constitution provides for the regulation of activities relating to the waterways in the exclusive list. The Water Resources Act 1991 grants the Minister for Water Resources enormous powers. Section 8(d) says the powers of the Minister include to „prohibit or regulate the carrying out of any activities on land or water which are likely to interfere with the quantity or quality of any water in any water-course or groundwater.“ On account of the combined effect of the provisions of the Act and the 1999 Constitution, the state governments, through their environment ministries, can only conduct or control activities related to intra-state water resources. The consequence is seen in the slow or non-response to water pollution incidents caused by oil spillage or dumping of hazardous waste by MOCs.

Lack of Judicial Interpretation of Statutory Control: Even though the federal system being practised in Nigeria has been described and criticised as semi-unitary and vests too many statutory powers and responsibilities in the federal government, there are aspects of the constitution that allows room for judicial interpretation in the light of true federalism and the theoretical concept upon which it is founded. Though this paper explains the provision of the 1999 Constitution based on its incorporation of the management of water sources and resources in the exclusive list, some scholars still consider the water resources as being on the concurrent list. The specific powers and roles of the state governments need to be expressly determined by the court for states and federal governments to understand their respective judicial power to allow for adequate coordination of the management and control of the water resources.

Limitations of the National Water Resources Bill, 2020

Section 2(1) of the Bill provides that „All surface water and groundwater wherever it occurs, is a resource common to all people, the use of which is subject to statutory control. There shall be no private ownership of water but the right to use water in accordance with the provisions of this Act". Similarly, section 75 of the Bill also provides that „no corporate organisation or individual shall commence borehole drilling business in Nigeria unless such driller has been issued Water Driller's license."

Therefore, the wording of this provision is in breach of the Constitution of the Federal Republic of Nigeria 1999 and established judicial authorities on the subject. Thus, in **Attorney General, Lagos State v. Attorney-General Federation [59].** The Supreme Court held that „In the circumstance, I have to say that Professor Osinbajo is right, in my view, in his submission that urban and regional planning for the Federal Capital Territory, Abuja is within the exclusive legislative function of the National Assembly, but only by virtue of Section 299(a) conferring residual power on it and not controversial section 20 of the constitution. Similarly, each state House of Assembly has the exclusive function of making planning laws and regulations for the state under its residual power. It follows that the National Assembly cannot make a law in the form and detail of the Nigerian Urban and Regional Planning Decree 88 of 1992. That will be in clear breach of the principles of federalism and an incursion into the legislative jurisdiction of the states. But the National Assembly can make planning laws for the Federal Capital Territory. Again, the National Assembly cannot enact any law in contravention of the constitution, imposing any responsibility on a state and expecting obedience to such a law. It is a non-controversial philosophy of federalism that the Federal Government does not exercise supervisory authority over the State Government."

Consequently, the state government, not the Federal Government, is exclusively vested with the powers over physical planning matters. In essence, it is not within the legislative competence stipulated in the Bill federal government to grant approval or licenses to individuals or corporate bodies who desire to sink boreholes outside the Federal Capital Territory [60]. The Bill further stated that „in implementing the principles under subsection (2) of this section, the institutions established under this Act shall promote integrated water resources management and the coordinated management of land and water resources, surface water and groundwater resources, river basins and adjacent marines and coastal environment and upstream and downstream [61].

It follows from the tenor of this provision that the Ministry of Water Resources is vested with the powers to formulate national policy and water resources management strategy to guide the integrated planning, management, development, use and conservation of the nation's water resources and provide guidance for the formulation of hydrological area resources strategies [62].

Conclusion

The Niger Delta area is the oil-producing area in Nigeria where oil exploration and exploitation operations are sustained. Consequently, the region suffers from tremendous environmental degradation, including damage to aquatic life, inhabitants, and the entire ecosystem. The impact of oil pollution is further aggravated by the inequitable allocation of revenue to mitigate the harsh consequences of environmental degradation connected with oil exploration activities. The challenges of lack of equitable funding and lack of efficacious statutory control of the water resources by the state governments are offshoots of the structure and contents of the federal constitution, the fundamental law of the Federation. Water pollution caused by oil spills causes monumental environmental disasters that usually demand a prompt and comprehensive response from the time of detection to the completion of environmental restoration. The statutory responsibility for detection and response should be that of the state governments because they are closer to the spill site and are directly responsible for providing clean water to the population. Based on the constitution's provisions, the federal government has exercised its powers by establishing the National Oil Detection and Response Agency in 2006 to coordinate the implementation of the National Oil Spill Contingency Plan. But there is a lack of synergy in executing the operational mandates of the agency and the state ministries of the environment. By the provision of the Act establishing it and the federal government's constitutional powers, the agency can rightly access any water resource site and carry out detection or remedial activities without the consent or coordination of the state government. This can be problematic and can slow the pace of detection and response if the affected communities are uncooperative and the state government is not receptive.

Furthermore, the proposed National Water Bill will deepen the already over-centralised administration of environmental matters in the executive arm of the federal government. The intended legislation by its provisions negates the objectives of the Land Use Act was promulgated and subsequently preserved by the 1999 Constitution. By the tenor of the Land Use Act, the governors of the states are vested with absolute powers over land in their states. Consequently, the provision of the Land Use Act vesting absolute powers on the governors of states relative to land in their domain cannot be derogated from by the provisions of the National Water Resources Bill. This is against the background that the Land Use Act enjoys constitutional protection under the 1999 Constriction

[64]. This position finds judicial approval in **Nkwocha v. Governor of Anambra State [63],** wherein the Supreme Court held that the Land Use Act is not an integral part of the constitution but claims the special protection of section 9(2) of the constitution in terms of its amendment. It is in the light of this that the Bill suffers a fatal blow and is thus rendered unconstitutional to the extent that it seeks to vest the control over water resources on land within states on the Federal Government.

A constitutional amendment stipulating that the federal and state governments are to have shared responsibility for maintaining and controlling water resources is highly desirable. It will enhance the efficacy of already established supervisory and regulatory institutions and allow some of the responsibilities of the MOCs to the environment where they operate, to be regulated by state governments. Additionally, the Petroleum Industry Act should be amended to subject the activities of operators in the industry regarding environmental management to the regulatory oversight of the NESREA and not the Nigerian Upstream Petroleum Regulatory Commission, as is currently the case.

In the end, it should be the sub-nationals who control the water resources in their respective spheres without interference from any federal agency. It is unlikely that the provisions in the proposed law will be able to resolve the confusion and contradictions inherent in the CRFN. It will instead result in a greater centralization of administrative control over resources and undermine the effectiveness of agencies that must deal with the entire country in its vastness.

A federal system of governance in Nigeria is being debated and agitated for, where subnationals are more in control of natural resources in their states. Therefore, more research will be necessary in order to ensure that a future constitution does not retain the present challenges and confusion.

References

[1] Owa, F. D (2013), water pollution: source, effect, control and management, Mediterranean journal of social science, MCSER publishing. Rome – Italy.

[2] Mustapha Salihu, Saidiq Abubakar Abdulrahman Shawai, Ibrahim Muhammad Shamsuddin. Effect and Control of Water Pollution a Panacea to National Development.(2017) International Journal of Environmental Chemistry. Vol. 1, No. 2, pp. 23-27. DOI: 10.11648/j.ijec.20170102.11

[3] Khatib, Z., and Verbeek, P. (2002). „Water to value – produced water management for sustainable field development of mature and green fields," in *Proceedings of the SPE International Conference on Health, Safety and Environment in Oil and Gas Exploration and Production* (Kuala Lumpur).

[4] Sections 2 and 75 of the Proposed National Water Resources Bill, 2020

[5] Ibid, Section 94

[6] Ibid, Section 2

[7] Preamble to the Proposed National Water Resources Bill, 2020

[8] Ndubuisi Orji, „Controversial Water Resources Bill Reintroduced by House of Representatives", available at http://www.sunnewsonline.com, accessed June 30, 2022

[9] Olawuyi, Damilola S., and Zibima Tubodenyefa. „Review of the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)." OGEES Institute, Afe Babalola University, Ado Ekiti, Nigeria (2018).

[10] Elekwachi, Wali, et al. „Oil spill incidents and wetlands loss in Niger Delta: Implication for sustainable development goals." International Journal of Environment and Pollution Research 7.1 (2009): 1-20

[11] Onuoha, F.C. (2008). Oil Pipeline Sabotage in Nigeria: Dimensions, Actors and Implications for National Security L/C. African Security Review, 17(3)

[12] United Nations Environmental Programme, Environmental Assessment Report on Ogoniland 2011, 2

[13] Arosanyin, G. T. (2005). „Pipeline transportation of petroleum products in Nigeria: threats, challenges and prospects." CBN Economic & Financial Review, Vol 43, N0.2

[14] Tolulope, A.O. (2004). Oil Exploration and Environmental Degradation: the Nigerian Experience. International Information Archives, 2: 387-393, International Society for Environmental Information Science

[15] See Premium Times News online at https://www.premiumtimesng.com/news/headlines/471901-nigeria-records-4919-oil-spills-in-6-years-4-5trn-barrels-stolen-in-4-years-minister.html accessed 23-07-2021

[16] Milieudefensie et al v Shell, C/09/337058 / HA SA 09-1581

[17] Okpabi v Shell, [2021] UKSC 3.

[18] https://www.leighday.co.uk/latest-updates/cases-and-testimonials/cases/shell-bodo/

[19] Judgment No. ECN/CCJ/JUD/18/12 ECOWAS (14 DECEMBER, 2012) available at http://www.courtecowas.org/site2012/pdf/files/decisions/judgment/2012/SERAPV.FEDERAL_REPUBLIC_OF_NIGERIA.pdf accessed 09-08-2021

[20] Section 44 (3), Schedule II, Part I, Item 39, Constitution of the Federal Republic of Nigeria (CFRN), 1999 (As amended).

[21] Gboyega, Alex, et al. „Political economy of the petroleum sector in Nigeria.“ *World Bank Policy Research Working Paper* 5779 (2011).

[22] See online at https://www.bundesrat.de/EN/funktionen-en/funktion-en/funktion-en-node.html

[23] K . C Wheare, Federal Government (New York: Oxford University Press, 1963), p. 10.

[24] A. Appadorai, The Substance of Politics, (New York: Oxford University Press, 1968), p.4 95.

[25] Okpevra, U.B. A Critique of Nigerian Federalism and Need for Restructuring Towards Achieving Vision 2030.

[26] Elaigwu J.I., P.C Longans and H.S. Galadima, Federalism and Nation Building, (Publ: National council of inter. 2008), p. 64

[27] Second Schedule, Part II, Constitution of the Federal Republic of Nigeria, 1999

[28] Second Schedule, Part I, Constitution of the Federal Republic of Nigeria, 1999,

[29] Sections 4, 5 & 6, 1999 CFRN (as amended)

[30] A.G. Abia state v. A.G. Federation (2003) 4 NWLR (Pt. 809) 124 SC; Amadi v. NNPC (2000) 6 S.C. (Pt. 1) 66 at 94 95.

[31] Allocation of Revenue (Federation Account etc.) Act Cap. A15 Laws of the Federation of Nigeria 2004.

[32] FRN. „The Project for Review and Update of Nigeria National Water Resources Master Plan, Volume 4–32. National Water Resources Master Plan 2013.“ (2014).

[33] Item 64, Part I, second schedule, 1999 CFRN (As amended)

[34] Combined effect of Sections 20 and Item 60 (a), Part I, second schedule, 1999 CFRN (As amended)

[35] O. G., Amokaye, **Environmental Law and Practice in Nigeria** (Lagos: MIJ Professional Publishers Ltd, 2014) p. 117.

[36] F. Ugbaja, ‚Regulation of Environmental Pollution in the Nigerian Oil and Gas Industry: The Need for an Alternative Approach‘ retrieved at University of Calgary‘s Digital Repository, http://hdl.handle.net/11023/3139 accessed 29-07- 2021.

[37] See Section 17(2)(d), CFRN 1999.

[38] See item 39 Part 1 of the Second Schedules to the CFRN 1999 (as amended)

[39] CAP F10, Laws of the Federation of Nigeria, 2004. It is instructive to note that the NESREA Act repealed the FEPA Act, by which NESREA now replaces FEPA.

[40] See Sections 7(h) and 8(g) of the NESREA Act, 2007.

[41] See Section 1, NOSDRA Act, 2006

[42] See generally Section 6, NOSREA Act, 2006.

[43] CAP. E12, Laws of the Federation of Nigeria, 2004.

[44] See Section 2(1) EIA Act.

[45] See Sections 2(4) and 60, EIA Act

[46] A. An Ibrahim et al., ‚Environmental Impact Assessment in Nigeria – A Review‘ in World Journal of Advanced Research and Review, 2000 retrieved from https://www.wjarr.com accessed on 02 August 2021.

[47] Petroleum industry Act 2021

[48] Section 3, PIA 2021

[49] Section 4, PIA 2021

[50] Section 29, PIA 2021

[51] Section 102, PIA 2021

[52] See Sections 5 and 7, NOSDRA (Establishment) Act CAP N157, Laws of the Federation of Nigeria, 2006.

[53] See Section 1, NOSDRA Act, 2006

[54] See Section 5, NOSDRA Act, 2006.

[55] K. K Gogo and N. P Nweke, (2019) ‚The Gap in Nigeria‘s Institutional Framework for Crude Oil Project‘ in Humberside Journal of Law and Social Science, vol. 9, p.27.

[56] See Section 1, NESREA Act, 2007.

[57] See Paragraph 7 of the National Policy on Environment 1989 that was subsequently revised in 1998.

[58] See Section 12(1), the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

[59] (2003) 4 WRN, 124, per Uwaifo, JSC

[60] By the operation of the decision of the Supreme Court in Attorney General of Lagos State v Attorney General of the Federation (supra), the provisions of Section 75 of the National Water Resources Bill is unconstitutional and void.

[61] Section 13 of the Proposed National Water Resources Bill, 2020.

[62] Ibid, section 94

[63] (1984) 1 SCNLR 634 at 652

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