AN APPRAISAL OF THE DEVELOPMENT OF PETROLEUM LAWS IN NIGERIA

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LLM/LAW/8039/2015-2016/P17LAPU8278

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A DISSERTATION SUBMITTED TO THE POSTGRADUATE SCHOOL, AHMADU BELLO UNIVERSITY, ZARIA, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS-LL.M

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JULY, 2021

DECLARATION

I hereby declare that this dissertation entitled "**An Appraisal of the Development of Petroleum Laws in Nigeria"** has been written by me and that it is a record of my research work. It has never been presented in any previous research work for the award of Master of Laws Degree, LL.M to the best of my knowledge. All quotations and references are indicated with specific acknowledgements.

Abubakar Shafiu Maishanu **Date**

CERTIFICATION

This dissertation entitled "An Appraisal of the Development of Petroleum Laws in Nigeria" by Abubakar Shafiu Maishanu meet the Regulations governing the award of Master of Laws LL.M Degree of Ahmadu Bello University, Zaria and is approved for its contribution to legal knowledge and literary presentation.

Dr. O. Iloba-Aninye,	**Signature**	**Date**
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Dr. Salim B. Magashi,	**Signature**	**Date**
Member Supervisory Committee		
Dr. Salim B. Magashi,	**Signature**	**Date**
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Dean, School of Postgraduate Studies		

DEDICATION

This dissertation is dedicated to my parents Malam Abubakar Maishanu and Malama Fatima Abdullahi.

ACKNOWLEDGMENT

I will use this opportunity to express my sincere gratitude to Almighty Allah for giving me the opportunity to attain this level in life. I will also acknowledge my parents Malam Abubakar Maishanu and Malama Fatima Abdullahi, may Allah reward you abundantly. It is also pertinent to acknowledge my lovely wife Dr. Anisa Yahaya Lawal and children, Abdallah, Rahina (Amal), Fatima (Hasana) and Abubakar (Husain) I say thank you and May Allah continue to bless you.Special gratitude goes to Dr. O. ILOBA-Aninye who supervised this dissertation and also my second supervisor Dr. Salim B. Magashi. My internal examiners Prof. Sani Idris and Prof. K.M. Danladi may Almighty God reward you abundantly.

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LIST OF ABBREVIATIONS

Cap	-	Chapter
C.E.O		
D.G	-	Director General
D.D.G	-	Deputy Director General
DPR	-	Department of Petroleum Resources
E.I.A.A	-	Environmental Impact Assessment Act
F.E.P.A	-	Federal Environmental Protection Agency
F.G.N	-	Federal Government of Nigeria
F.M.E.	-	Federal Ministry of the Environment
Ibid	-	In the same place
I.J.V	-	Incorporated Joint Venture
LFN	-	Laws of the Federation Nigeria
M.O.P.I	-	Ministry of Petroleum Incorporated
N.A.P.A.M.A	-	National Petroleum Assets Management Agency
NEITI	-	National Extractive Industry Transparency Initiative
N.E.S.R.E.A	-	National Environmental Standard Regulation and Enforcement Agency
NNPC	-	Nigerian National Petroleum Corporation
N.O.C	-	National Oil Corporations
N.P.A.M.C.	-	Nigeria Petroleum Assets Management
NPD	-	National Petroleum Directorate
NPI	-	Nigerian Petroleum Inspectorate
N.P.R.C	-	National Petroleum Research Centre
NSCDC	-	Nigeria Security and Civil Defence Corps
N.W.L.R	-	Nigeria Weekly Law Report

O.E.L	-	Oil Exploration License
OGIC	-	Oil and Gas Sector Reform Implementation Committee
O.M.L	-	Oil Mining License
Op. Cit	-	Opera Citato
O.P.L	-	Oil Prospecting License
P.E.F	-	Petroleum Equalization Fund
PIB	-	Petroleum Industry Bill
PIGB	-	Petroleum Industry Governance Bill
PIGA	-	Petroleum Industry Governance Act
PPRA	-	Petroleum Products Regulatory Agency
P.S.C	-	Production Sharing Contract
P.T.D.F	-	Petroleum Technology Development Fund

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SUMMARY, FINDINGS AND RECOMMENDATIONS

ABSTACT

This dissertation entitled "An Appraisal of the Development of Petroleum Laws in Nigeria" is aimed at appraising the herein specified various laws in the petroleum sector in Nigeria. With regards to the present realities in Nigeria's petroleum sector, this dissertation carried out an examination of the relevant identified laws in order to ascertain their viability and responsiveness towards their functions. These also include some of the emerging phenomena such as energy security, the dwindling global oil prices and the necessity to prepare grounds for a gradual shift from fossil fuels to a more environmentally friendly and renewable energy resource. Recent developments which has to do with the much discussed Petroleum Industry Bill (PIB) is also adequately looked at. This includes the breakdown of the Bill into portions, of which the first tranche is still before the National Assembly for consideration i.e. Petroleum Industry Governance Bill (PIGB). Others are the Host Communities Bill, Administration Bill and the Fiscal Bill which are still under consideration by the National Assembly. A general foundation was laid down, in which a review of the existing literature was carried out and followed by a conceptual clarification of key terms in the research. On the policies and laws, a thorough examination of the origin and general development of the existing legal regime was carried out. Other areas examined include legal impact of the existing laws in the sector and their enforcement. The laws as examined have shown to be insufficient in ensuring a smooth legal regime. Many legal misplacements have been identified in this dissertation, which indicates the need for a better legal framework to the country's petroleum sector. This dissertation found out that inadequate legislative attention has been one of the challenges to the petroleum sector in Nigeria, this is because the legal framework has been long overdue for a newer legislative enactment and some necessary amendments. Methods of enacting the laws are also poor, as it is usually without first constituting a committee to holistically review past and existing laws in order to prevent conflicts and repetitions. Also, it is found out that the PIGB which is still under consideration need to be timely passed by the National Assembly. Therefore, the herein specified and appraised laws in the petroleum sector need to be restructured and reformed by passing the PIB in full fledge and not in tranches.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background of the Study

The Petroleum industry which is a part of Nigeria's energy sector is an international business concern, which is usually governed by certain standards to regulate its various operations. The Federal Government of Nigeria recognizes this fact and, through appropriate agencies, has passed over a hundred principal and subsidiary pieces of legislations to deal with all aspects of Nigerian oil and gas industry. The Nigerian petroleum laws as specified and identified for the purpose of appraisal in this dissertation, stipulate ways in which business in that sector of the economy should be formed and organised. They further explain the country's transactions, scope of operation, responsibility to the government, consumers, Nigerians in particular and the international community at large. Private enterprise laws confer powers on individuals and corporate bodies to operate business as prescribed by the authorities and in line with the laws guiding such enterprises for mutual benefit.

The Nigerian petroleum laws in this regard, constitute of a system of standards and rules on corporate conducts which imposed well defined obligations, penalties and corresponding rights. Regarding the continuity of such legislation affecting oil and gas industry in Nigeria, they are not static; they are either amended or promulgated as the government deems fit in the context of the complex political, social and religious environment and the overall techno-economic development for the survival and independence of the country.[1]

[1]Duru, O.W.C *An Appraisal of the Legal Framework for the Regulation of Nigerian Oil and Gas Industry, With Appropriate Recommendations* http://ssrn.com/abstrac=2137979. Accessed 7th Dec. 2016.

Oil was first discovered in commercial quantities in Nigeria in 1956 near Oloibiri village in Rivers State.[2] The discovery was made by Shell D'Arcy, a company of Anglo/Dutch origins. The company began operation of 6000 barrels per day (bopd).[3]

Although, the search for crude began in Nigeria as far back as 1908, when a German company, the Nigerian Bitumen corporation explored oil in Araromi area between Ijebu Ode in the present Ogun State and Okitipupa in the present Ondo State. This pioneering effort was terminated at the then outbreak of hostilities between Britain and Germany during First World War in 1914. Given the fact that Nigeria was under the territorial control of the United Kingdom and Germany's loss of the war, the German company's operations were not resumed after the war.[4]

Consequently, the British colonial administration enacted the Mineral Oils Ordinance No.17 of 1914 to regulate the right to search for, win and work mineral oils. The 1914 Ordinance and its amendment in 1925 conferred powers on the Colonial Administration to grant prospecting rights. Despite the instrumentality of this ordinance, Nigeria was constituted into one concession area [1,924,871 km2] and non-British companies were statutorily barred from acquiring mineral oil rights in the area. The law provided that:

No lease or licence shall be granted except to a British subject or to a British company Registered in Great Britain or in British colony having its principal place of business within Her Majesty's dominion, the chairman and the Managing Director [if any] and the majority of the other directors of which are British subjects.[5]

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[2]. I. E. Okagbue: (1985) *The Law and Development of Natural Gas in Nigeria*, NIALS Lagos, p.5
[3]. Olajumoke, A.B *Legal Framework of the Nigerian Petroleum Industry* http://www.mondaq.com Accessed 7th Dec. 2016.
[4]Etikerentse G. (2004) *Nigerian Petroleum Law* 2nd Edition, Dedew Publishers.
[5]Section 6(1) (a) thereof

This discriminatory legislation had a very adverse effect on the development of the oil sector as it discouraged competition from outside Britain, when it was manifestly clear that British companies lacked the requisite capital and manpower for exploration of the vast reserves in Nigeria.

Nevertheless, oil-prospecting activities were resumed in Nigeria in 1973, when Shell D'Arcy, obtained an oil exploration licence covering the entire country. This initial monopoly gave Shell D'Arcy (the forerunner of Shell petroleum Development company of Nigeria [SPDC]) the leading position, which the present-day SPDC maintains over the other oil majors in Nigeria. SPDC thus remains the largest of the exploration and production companies operating in Nigeria today.

The exploration rights, which were formally granted to Shell alone, were later extended to the new comers in line with the government's policy of increasing the pace of exploration in the country. There was a steady increase in Nigeria's oil production from 0.90 million b/d in 1970 to 2.9 million b/d in 1972 and it reached a peak of 2.4 million b/d in 1979. This steady increase in oil production fetched Nigeria the status of a major oil producer and she has grown to become the sixth largest oil-producing country within OPEC.

The earlier-mentioned increase in the number of active oil companies in Nigeria necessitated a change in Nigeria's existing petroleum (oil and gas) laws. The frail structure of the Mineral Oils Ordinance of 1914 with its amendments could not sustain the modern pressure and trends in the industry. Therefore, an attempt to produce a detailed and comprehensive law for the grant of rights to search for and win oil in Nigeria and the condition connected therewith was made in the promulgation of the Petroleum Act and the Petroleum (Drilling and Production) Regulation Act in 1969.

Government's awareness of the importance of oil in the national economy culminated not only in the enactment of laws but, also in direct involvement in oil exploration and exploitation. Government's interest in petroleum was further awakened when it gradually replaced agricultural products as the main export commodity. In order to strengthen and establish government control in the industry, the Nigerian National Oil Corporation (NNOC) was established in 1971 by Act No.18. This metamorphosed into Nigerian National Petroleum Corporation (NNPC) established by Act No.33 of 1977.

Nigerian oil is light and low in sulphur and consequently commands premium prices. Nigeria is the 9th largest world oil producer and the 5th largest OPEC producer. Nigeria also has huge natural gas reserves.

The federal government being a stakeholder participates in the oil industry through the NNPC, inheriting the commercial activities of the NNOC and the supervisory/ regulatory role of the Federal Ministry of Petroleum Resources. However, a de-merger took place in 1984 and presently the NNPC undertakes commercial activities whilst the federal ministry of petroleum resources acting through the Department of Petroleum Resources (DPR) is the regulatory authority.

NNPC is the group holding company headed by a Group Managing Director/Chief Executive. Multinationals are also major players in the Nigerian upstream, some of which include Shell, ExxonMobil, Chevron/Texaco, Total/Elf and Agip. This multinationals account for about 97% of Nigeria's oil reserves and production.[6] They participated in the petroleum industry in joint ventures with NNPC, as operators/contractors in the Nigerian Deep Water under production sharing contracts with NNPC. Others in this regard include indigenous oil companies. Their

[6] Op.cit. page 2

concession programme's aim was to retain ownership and control of indigenous concessions in Nigerian hands and thereby encourage the growth of local expertise production in exploration, development and operations.

The first set of indigenous grants was in 1970s/1980s to Henry Stevens Company, Nigus Petroleum and Niger Delta Oil Co.[7] Later, Dubri Oil concession by assignment from Philips Oil Company Ltd in 1987. However, it was not until 1991 that Professor Jubril Aminu, the then petroleum Minister, awarded eleven (11) concession blocks to Nigerian entrepreneurs on a discretionary basis. This was followed by another round of allocation in 1993, and eventually resulted in more than 40 indigenous Exploration and Prospecting companies holding Oil Prospecting Licences under the programme. In 1990, OPLs for nine (9) blocks were awarded and subsequently cancelled.

Host communities even though they are not direct stakeholders, they are nevertheless one of the most important players in the petroleum industry. The critical role and interest of the host communities long neglected, is finally being recognised and addressed by the Federal Government, inter alia, by the passing of the Niger Delta Development Commission Act.[8]

Generally, the petroleum Act makes the petroleum Minister the 'alter ego' of the Nigerian Oil and Gas sector. This is so because no petroleum business can anyone engage in without the prior consent of the petroleum Minister.[9]Thus it is a curious provision that for a grant of licence over a 'marginal field' which is derived from an unexplored part of land over which a prior and proper lease or licence had been granted the President and Commander –in-Chief is given the power instead of the Minister.

[7]Ibid
[8]Cap N86 L.F.N 2004
[9]The Petroleum Minister can revoke a lease or licence if the lease or licence is in breach of good oil practices.

Moreover, the apparent absence of transparency and accountability led to the enactment of National Extractive Industry Transparency Initiative (NEITI Act No.36 2007). It was targeted at ameliorating the shortcomings on transparency, accountability and effective utilization of oil revenue.

These therefore, constitute the background upon which this topic is chosen. With the approach to looking at the present realities in the Nigeria's petroleum sector, an appraisal of the relevant petroleum laws will be carried out in order to ascertain their viability and responsiveness towards their functions, especially on emerging phenomena, such as energy security, the dwindling global oil price and the necessity to prepare grounds for a gradual departure from fossil fuels to an environmentally friendly renewable energy resource. Recommendations on how to address these inadequacies shall be made after a thorough appraisal is made.

1.2 Statement of the Problem

Over the years, the subsisting legal regime in Nigeria which regulates the petroleum sector has not fully realized its potentials. The existence of inappropriate national policy as well as inadequate and non-robust legal and regulatory regimes to govern the development of this sector, unclear delineation of roles and responsibilities for regulatory institutions in the sector often created difficulties for industry stakeholders who had to deal with issues arising from roles of institutions and authorities overlapping statutory operation in the Petroleum Industry from time to time. Also, the extant laws have not been enacted in a way to accommodate the yearnings of the relevant stakeholders for an independent, transparent and business oriented sector. The questions have been whether the extant laws have the capacity to address these problems as raised.

The following are the problems which this research work has identified and attempts to address:

a. Nigeria's petroleum sector has not been adequately provided with sufficient and well responsive legal frame work so far. Hence, how then, would a thorough appraisal, review and suggestions provide for better legal and institutional regimes?

b. The policy targets, set out to be accomplished through the subsisting legal regime, regarding our regulatory bodies and even enforcement outfits,[10] are all in need of proper appraisal and scrutiny in their development in Nigeria. The burning question is, in what way can an amendment be made?

c. Environmental degradation, pollution[11] and host community issues need to be adequately treated and addressed by our petroleum laws. This is especially on fossil fuel, which is a form of non-renewable energy largely, relied on in Nigeria. What does the term host communities'' connotes which communities deserve to be paid back as social responsibility?[12]

This topic is viable looking at the problems stated herein and the commitment showed on how to appraise and recommend how to better our petroleum law development, by way of amendments or policy redirection.

1.3 Aim and Objectives of the Research

This research study is aimed at:

(a) Highlighting and examining the development of laws in the Nigerian petroleum sector. This will include reviewing and discussing the various legislations that provide legal and regulatory framework for the operation of the petroleum sector in Nigeria. Also, it appraises the extant laws for onward improvements. At the same time, this research is going to provide an in-depth and

[10] *The Nigeria Security and Civil Defence Corps Act* 2007(As Amended) mandated the NSCDC to maintain 24 hours surveillance on public infrastructure including oil and gas installations.
[11] Jonah Gbemre v. Shell P D C and others (2005) AHRLR 151
[12] The Draft Petroleum Industry Governance Bill(PIGB)

thorough appraisals through an efficient effort to not only find out the inadequacies in our petroleum laws but, to also come up with ways of enhancing their capacities.

(b) To examine the policies that have developed in the Nigerian petroleum sector, based on the efforts made to properly find out whether the Nigeria's petroleum policies have been responsive enough legally vis-a-vis the institutions they established.

(c) To critically examine the application, regulation and enforcement of laws and policies in the Nigerian petroleum sector.

At the end, this research study would have succeeded in making some contribution to academic research in the area of policy and legal framework for the petroleum industry. This shall be coupled with recommendations that will strengthen the regulatory institutions created under these laws with a view to increasing their overall efficiency and positive impact on this strategic sector of our national economy.

1.4 Justification of the Research

The product of this research will be beneficial, viable and useful to the government, academia, regulatory institutions and law enforcement agencies. This is because the thorough appraisal shall come up with sound recommendations that may aid in amendments, further academic explorations and better legal and institutional responses.

1.5 Scope of the Research

The scope which this research shall cover is strictly Nigeria geographically, with the specified and identified laws for the purpose of appraisal carried out, also it covers the current development in the Nigeria's petroleum sector. While the area of law centres on public law as enacted or deemed to have been enacted by the Nigerian legislature, as various laws were enacted on policy formulation, implementation, regulation and enforcement in the petroleum Industry. It

is interesting to note that most of the proposed laws that will ultimately change the face of the petroleum sector are waiting to be passed into law by the National Assembly. The final position of Government and the National Assembly cannot precisely be known.

For the purpose of this work, the following statutes were carefully selected and discussed briefly:

(a) The Petroleum Act[13],

(b) The NNPC Act[14],

(c) The Oil Pipeline Act[15]

(d) The Nigerian Liquefied Natural Gas Act[16]

(e) The Associated Gas Reinjection Act.[17]

(f) Petroleum Production and Distribution (Anti-sabotage Act) 1975[18],

(g) Hydrocarbon Oil Refineries Act[19]

(h) The NEITI Act[20]

(i) The Nigeria Oil and Gas Content Development Act, 2010

(j) The Petroleum Regulations, 2004

(k) Petroleum Profit Tax Act[21],

[13] cap 10, vol.13, LFN 2004
[14] cap N124 LFN 2004
[15] cap 07 LFN 2004
[16] cap N89 LFN 2004
[17] Cap N123 LFN 2004 (As Amended) by Act No.35 of 2007
[18] cap P12 LFN 2004
[19] cap H7, LFN 2004
[20] No. 36, 2007
[21] cap P13 LFN 2004 as amended in 2007 by Act No.11

(l) Petroleum Industry Governance Bill 2016

(m) Various Amendments to the above Act

The examination and analysis of these laws, inclusive of government policies as different from the laws, elaborate on the collection of activities in the petroleum industry. Essentially, the scope of this research is confined to the petroleum industry in Nigeria. An appraisal is carried out and recommendations are made on how to better the petroleum laws in Nigeria, in order to make them more efficient and responsive.

1.6 Research Methodology

The research method adopted is the doctrinal method. This method essentially involved reliance on libraries for consultation of books, journals and relevant publications. This approach also used the primary as well as secondary sources of data and/or information.

Articles in daily and periodic newspapers were other relevant sources of data. Radio and television talk-shows and academic discussions on these matters also provided relevant insights. Judgements of courts in cases that pertain to the petroleum industry did constitute sources of information for this research.

1.7 Literature Review

There are substantial works published in respect of exploration, production and exploitation of petroleum, which involve petroleum contracts, licences, leases and sale or export of crude oil. Amongst authorities and experts (whose works were consulted) in this regard are:

Etikerentse, G[22]; "Nigerian Petroleum Law" This work discusses the historical perspective of petroleum activities before, during and after the colonial era. The main thrust of the publication is

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[22] Op.cit P.2

petroleum contracts with particular reference to exploration and production dwelling mostly on the operator at work; fiscal issues concerning incentives under Memorandum of Understanding and Petroleum Profit Tax Act, 1959. Joint venture arrangements, production sharing contracts, pure service contracts, Technical assistance Agreement and Risk service contracts were holistically discussed in the book[23]. It provided a guide to frontline lectures and acted as precursor to Oil and Gas research. The latest edition has stretched the discussion to include emergent areas such as marginal fields and local content policy of the federal government. This work is greatly useful for studying what the law is, concerning the searching, working, winning and carrying away of crude oil.

Omorogbe Yinka[24] examines the Oil and Gas Industry relative to Exploration and Production (E&P) Contracts. This work is detailed in this regard as fundamental issues preparatory to the signing of the contract are discussed. The Contracts, Production Sharing Contract (PSC), Joint Ventures (JVs), Risk Service Contracts (RSCs) are discussed with emphasis being laid on the contract terms and clauses. The author postulates that to reasonable extent government policies determine the formulation of mutually beneficial contract particularly in Organization of Petroleum Exporting Countries (OPEC) where member countries leverage on the economic emancipation provisions of the United Nations Conventions on permanent sovereignty over natural resources.[25] The author further measures the company objectives of the International Oil Companies (IOCs) against the country objectives vis-a-vis the role of national oil companies.

[23] Ibid 1st Edition Macmillan Publishers
[24] *The Oil and Gas Industry*: (1997) Exploration and Production Contracts. 1st edition Malthouse Publishing London.
[25] United Nations General Assembly Resolution 1803; General Assembly Resolution 3201; G.A Res 3281

In a journal article by the same author, titled "Fundamental Issues Relating to the Development of Marginal Fields in Nigeria",[26] she examines the concept of marginal field production. In doing this, issues such as merits and demerits of marginal fields, contractual devices for marginal field acquisition and development were elucidated upon.

Ladan, M.T[27] discusses the Legal Framework on Hydrocarbon Energy generally. Specifically on Oil and Gas, he shows how the Petroleum Industry is principally governed by the Petroleum Act and elaborated further on the ownership and control of oil and gas resources.[28]Thus, the Federal Government owns the petroleum resources and grants written authorization as oil prospecting licence and/or an oil mining lease as provided under section 44(3) of the 1999 Constitution and amplified in several decided cases in contrast to the practice in U.S.A.[29] However, once a party is duly granted a licence or other concession under the Petroleum Act, the licence or concession becomes a piece of property protected by section 44(1) of the same Constitution.

Hence, the Government cannot revoke any such concession except for overriding public interest.[30]

The legal foundation for pipelines in the Oil and Gas sector of the Nigerian economy is critical because pipelines constitute the main means of transportation for both international oil and gas trading and delivery to domestic consumers. Accordingly, the Oil Pipelines Act[31] and the Oil and Gas Pipelines Regulations of 1995 govern pipelines regulation in Nigeria. The Act primarily

[26] *Modern Practice Journal of Finance and Investment Law*, vol. 3, No.4 1999 p.3281

[27](2014) Natural Resources and Environmental Law and Policies for Sustainable Development in Nigeria.1st edition ABU Press Ltd, Zaria.

[28] Section 44(3) of the 1999 Nigerian Constitution as amended, Cap C23 LFN 2004

[29] A.G. Adamawa State v. A.G. Federation (2006) All FWLR (pt. 299) 1450 SC., A.G. Federation v. A.G. Abia State & 35 ors (2006) 1 SCNJ 1., South Atlantic Petroleum Ltd v. Minister of Petroleum Resources (2006) 10 CLRN 122., Chief Joseph Abraham & Anor v. Ishau Amusa Olorunfunmi & ors (1999) NWLR (pt. 165) 53., U.S.A v. Louisiana (1960) USSC 28 and Westmorel and Cambria Natural Gas Co. v. De Witt (18889) 130 pa. 235.

[30] Section 28 of the *Land Use Act*, Cap L.5 LFN 2004 and the Case of FGN v. Zebra Energy ltd (2003) FWLR (pt.142) 154 (Supreme Court Judgment)

[31] Cap 0.7 LFN 2004.

regulates the survey routes for oil pipelines and the grant of licenses to construct, maintain or operate the pipelines.[32]Application for the grant of an oil pipeline licence is made to the Minister through the Department of Petroleum Resources (DPR).

However, the route for pipelines must be surveyed under the authority of a permit to survey, before application is made for the grant of an oil pipeline licence. An oil pipeline is defined as a pipeline for the conveyance of mineral oils, natural gas and any of their derivatives or components, and also any substance (including stream and water), used or intended to be used in the production or refining or conveying mineral oils, natural gas, and any of their derivatives or components.[33]

The 1995 oil and gas Pipelines Regulations generally provides for standards for pipeline design, construction, inspection and testing, environmental protection, operation and maintenance guidelines, among other things: the design of a pipeline shall be such that it shall be suitable for the transportation of liquid petroleum, including crude oil, refined products, natural gas, liquid, condensate and liquefied natural gas; the construction work for a new pipeline or the replacement of an existing one shall not commence without a prior written notice thereof to DPR.

The Oil Pipelines Act further deals with environmental matters. Sections 14 and 15 of the Act impose a number of restrictions on the operation of a licence holder. For example, a licence holder is barred from constructing such work as would alter the flow of water required for domestic, industrial or irrigational use or as would diminish or restrict the quantity of water available for such purpose. Also, a licence to construct oil pipelines will not authorize the holder to enter, take possession or use any land containing any grave, area, tree or anything held to be

[32]Section 7(4) of the *Oil Pipelines Act*.
[33] Ibid, section11(2)

sacred or the object of veneration. Though, the licensee may do so with the consent of the owners, occupiers or persons in charge thereof.

The pollution of navigable waters in Nigeria with oils is dealt with by the Oil in Navigable Waters Act 1968. Section 3 of the Act makes it an offence to discharge any oil mixture containing oil into any part of the territorial waters of Nigeria or other navigable inland waters from any places on land to a sea going vessel. This prohibition clearly covers the operations of petroleum producing companies in Nigeria. In particular, it deals, inter alia, with the escape of crude oil from storage facilities or from apparatus for pumping the crude into ocean tankers at oil terminal. Offenders under this section are punishable by fines by a High Court or summary trial by an inferior court.

Another area on this discussed by previous literatures has to do with the huge financial implications in gas re-injection and the lack of infrastructural facility. The Associated Gas Re-Injection Act was amended in 1985 to empower the Minister to authorize, and thereby legalize gas flaring, however wasteful or dangerous it could have been. The Minster is permitted, where in his own judgement, it is either inappropriate or infeasible to utilize or re-inject associated gas in any field, to issue a certificate specifying such terms and conditions he may at his discretion choose to impose for continued flaring of gas in such fields.

Duru, O.W.C,[34] examined how the ownership and control structure of oil and gas in Nigeria is far from being just and fair. Exclusive ownership by the Federal Government of the nation's hydrocarbon resources has caused bitterness, resentment and a sense of oppression of the minority producers of oil. This author feels that inhabitants of the oil and gas producing areas must be given a stake in the industry for the exploitation to be beneficial to all concerned.

[34] Op.cit. p.1

However, this will guarantee security and stability in our petroleum industry as understood.

Olajumoke A.B,[35] in his article, apart from discussing the historical background in the Nigerian petroleum Industry, goes further to highlight issues on national aspirations, government participation, and stakeholders, multinationals and indigenous companies. Others include law, policy and regulators generally which cover exploration,, production and contracts among other things.

Dr. O. Iloba-Aninye and Dr. Abdullahi Mohammed Kontagora[36], elaborately dwelled on the system of owning of oil and gas resources by way of comparism of the Nigerian and U.S.A experience. The Nigeria's position as presented by these writers, even though incorporated into the Nigeria's constitution, it has been a subject of diverse academic views with calls towards true federalism that will carry along even the host communities.

1.8 Organizational Layout

This thesis is structured in to five chapters with subheadings as follows:

Chapter One deals with general introduction under which background of the study, problem, aim and objectives, scope, methods as well as the justification of the research are stated. It also discusses a vivid literature review of some existing literatures on the subject matter.

Chapter Two is titled "Theoretical Discourse of Petroleum Laws in Nigeria". Under which conceptual clarification of key terms used in the research is carried out for the purpose of easy understanding. Other areas discussed under this chapter include: policy framework for the petroleum industry in Nigeria, origin and development of petroleum law and concluded with regime governance of renewable energy as a diversified energy resource in Nigeria.

[35] Op.cit. p.2

[36] *An Appraisal of the Ownership Theories of Oil and Gas with Particular Reference to Nigeria and U.S.A*

Chapter Three titled **"**Appraisal of Petroleum Law and Policy in Nigeria" discusses inter alia; policy impact on petroleum law in Nigeria, legal impact on petroleum sector in Nigeria, institutional response towards petroleum industry regulation and other new emerging phenomena in the industry.

Chapter Four titled "Control, Regulation and Enforcement of Laws in Nigeria's Petroleum Sector". This discusses regulation and enforcement of the existing petroleum law, institutional enforcement of the petroleum law in Nigeria, the role of law enforcement agencies and smooth operation of the entire petroleum Industry in terms of utilization, production and supply.

Chapter Five is titled "Summary, Findings and Recommendations" where the summary, findings and recommendations of the research were made with a view to enhance the petroleum industry in Nigeria.

CHAPTER TWO

THEORETICAL DISCOURSE OF PETROLEUM LAWS IN NIGERIA

2.1 Introduction

Petroleum is defined in section 15(1) of the Petroleum Act[1] as "...Mineral oil or any related hydrocarbon or natural gas as it exists in its natural state in strata, and does not include coal or bituminous shale or other stratified deposits from which oil can be extracted by destructive distillation". It is deducible from the above statutory definition that petroleum is a compound that is essentially made up of hydrogen and carbon, a combination of which is commonly referred to as hydro-carbon. It can exist in gaseous form (known as crude oil) or as solids (known as coal, shale, tar sands or bitumen). The most commonly used is the crude oil which is a type of hydro-carbon.

The oil industry occupies a prime position in the economy of several nations. This is because of its importance to the world economy and its physical state. As a result of this uniqueness, it has attracted to itself certain features which are rarely found in other sectors of any nation's economy. This physical state has fundamentally affected the evolution of the industry.

The development of the oil and gas industry in Nigeria is traceable to the Mineral Oils Act 1914[2] which was enacted to regulate the right to search for, win and work mineral oil. Because of the importance of oil to the world economy, its ownership has been influenced considerably by activities on the world scene, that is international law especially that which is relating to the exploration of natural resources beneath the high seas. This ultimately gave birth to concessionary

[1] Cap P10 vol. 13, Laws of the Federation of Nigeria 2004

[2]. *Grants to explore for petroleum were given earlier under the provisions of Order 19 of 1909 Laws of Southern Nigeria.*

era where several contractual arrangements which entailed the grant of exclusive rights to explore, produce, market and transport the won petroleum and its products were made.

This chapter generally discusses the law and policy in the petroleum industry in Nigeria, with the aim of laying a proper foundation for a discuss and appraisal of the development of laws in this regard.

2.2 Policy Framework for the Petroleum Sector in Nigeria

A nation endowed with petroleum resources such as Nigeria must endeavour to produce its recoverable petroleum reserves optimally. Such a country must choose whether to allow the current generation to use the entire petroleum wealth derived from current petroleum production for their benefits or give future generations a share of the derived wealth from petroleum resource development.[3]

This means that petroleum produced today must be used to develop durable infrastructure and human capital that benefit and advance society for generations to come. The question the oil and gas reformers in Nigeria seek to address is easy to conceptualize: How can the societies economic welfare be maximized over time using the wealth derived from produced and remaining petroleum reserves in Nigeria?

Supposedly, the answer to this question lies within a pragmatic petroleum development policy framework with serious emphasis on managing revenue flows and expectations, creating linkages with non-petroleum sectors, expanding local capacity, infrastructural development, human capacity building, advancing technical progress, entrepreneurship and managerial skills.

[3]Iledare O.O. (2008): *Petroleum and the Future of Nigeria: Challenges, Constraints and Strategies for Growth and Development*. IPS Monograph Series No.5, p.30. University of Port Harcourt's Institute of Petroleum Studies Nigeria.

The administration in Nigeria under President Olusegun Obasanjo had the above pragmatic policy objectives and instruments in mind when they inaugurated the first Oil and Gas Sector Reform Implementation Committee (OGIC) on April 24, 2000. The essence of the National Oil and Gas Policy (NOGP) that emerged from the OGIC efforts is anchored on the need to separate the commercial institutions in the oil and gas sector in Nigeria from the regulatory and policy-making institutions.

Unfortunately, Obasanjo's administration did not completely put into operation the recommended OGIC policy instruments to facilitate oil and gas sector institutional restructuring. On September 7, 2007, the federal government under President Umaru Musa Yar'adua appointed Dr. Rilwanu Lukman[4] to chair a reconstituted OGIC with a mandate to transform the broad provisions in the NOGP into functional institutional structures that are legal and practical for the effective management of the oil and gas sector in Nigeria. The mandate basically calls for a restructuring of the petroleum industry in Nigeria that can facilitate the propelling of the national economy to a GDP level comparable to the top 20 largest economies by 2020.

2.2.1 A Synopsis of the OGIC Report

The Lukman committee submitted its OGIC report on August 3, 2008. The report provides a pragmatic regulatory framework and institutional arrangements that could bring Nigeria oil and gas industry into global prominence.[5] The report addresses the ineffectiveness of the oil and gas sector in Nigeria over the years, which borders on the use of outdated or very archaic regulatory and institutional arrangements to govern the petroleum industry. The Lukman OGIC establishes

[4]Dr. Lukman, former secretary General of OPEC for many years, chaired the original OGIC inaugurated by president Obasanjo in April 2000. Dr. Lukman has also been a major player in the Nigerian oil and gas policy development and implementation since the 1980s.

[5] Oil and Gas Sector Reforms Implementation Committee Draft Final Report, p. 79, May 2008.

that such regulatory and institutional structures are incongruous with contemporary global oil business. The report provides insight into the national petroleum policy framework, objectives and goals and the innovative institutional structures and policy functions to proffer solutions to the problems affecting the oil and gas industry in Nigeria. Further, it highlights operational strategy and action items necessary to drive the national oil company to a global status and suggests solutions to fiscal policy problems and community issues affecting all segments of the petroleum industry in Nigeria. The Lukman OGIC advocates the need for consultation with energy experts on various regulatory frameworks and institutional structures for clarity and research. The aspects under consideration for further research include funding sources and sustainability, capitalization of the commercial institutions, incorporation of joint venture operations as autonomous commercial entities, and finding progressive policy instruments and terms for existing and new contractual and concessionary fiscal arrangements.

The aspect of the OGIC reform efforts that has inundated public attention is the unbundling of the current National Petroleum Corporation (NNPC). However, the recommended overall institutional framework in the OGIC report is intended to facilitate managing and overseeing all the phases of the oil and gas sector in Nigeria more effectively than before by assigning functional responsibilities to separate institutional structures. The institutional framework is based on the policy mandate to separate the commercial/operations (private sector culture) of the oil and gas sector from the policy-making and regulatory aspects (public sector administration) in Nigeria. Accordingly, the institutions are revenue generating and some are non-revenue generating or revenue "enhancing" institutions. In any case, for many oil industry observers in Nigeria, the main feature for the entire oil and gas sector is the restructuring of the

NNPC and its subsidiaries. The success of the restructuring, therefore, will depend on the implementation of these institutions' policy functions. The OGIC proposed new institutional structures for effective governance and management of the oil and gas industry in Nigeria, which can be appraised thus:

The National Petroleum Directorate (NPD) as one of the cardinal proposed body by the OGIC is designated as the primary institution to initiate, create, and implement the petroleum policy governing the oil and gas sector in Nigeria. The predecessor, the Ministry of Petroleum Resources (MPR), has not been up to these tasks of oil and gas policy initiation, formulation, and implementation. Therefore, the NNPC ended up assuming the industry's policy initiation and implementation functions because of the MPR ineffectiveness. This was to the detriment of its commercial and operational responsibilities over the years.

Accomplishing the thirteen stated objectives for NPD by OGIC would depend significantly on institutional empowerment, funding, and finding and putting highly skilled personnel in the key management positions as envisioned by the OGIC. Surprisingly, either by error of commission or omission, or because we have had several versions of the final report, the OGIC is silent on the terms of employment for the Director General (DG) of NPD. Neither were there any guidelines on whether NPD management positions shall be political appointees or be hired through open resource recruitment. The government, as a matter of obligation, must avoid invoking or applying the spirit of federal character or "geopolitical zoning" to justify "putting a square peg in a round hole" during recruitment or selection exercise for the filling top management positions in NPD. These principles must be used in a pragmatic manner without sacrificing efficiency and effectiveness for equity. Regarding funding for NPD, a surcharge or

fees on per fiscal barrel of oil equivalent basis paid to NPD is constitutionally taxing. A constitutional amendment may be required to do this. A line-item budgeting approach should be evaluated for consideration.

2.2.2 Nigerian Petroleum Inspectorate

The National Petroleum Inspectorate (NPI) is the proposed regulatory unit for the upstream segment of the oil and gas industry in Nigeria. NPI will assume the functions of the Department of Petroleum Resources (DPR) and it will be the upstream industry operation and technical regulator. It will have operational autonomy from the NPD unlike its predecessor the DPR, which traditionally derives its operational directives from the Minister of Petroleum Resources. The extent of NPI's strategic autonomy from the NPD, which serves as the secretariat of the Minister of Petroleum Resources, is not clear. The terms of employment for the management positions in the NPI and the optimal approach to filling these positions either as political appointees or professionally recruited management staff are very important if the ongoing restructuring efforts are to be successful.

Over the years, we have had as many former DPR Director Generals and NNPC MDs as the number of Presidents or Heads of State. The undeveloped nature of the oil and gas industry regulatory framework in Nigeria is therefore, not surprising to many industry observers. Thus, a confirmation process by the National Assembly for a fixed term appointment for the Director General of the upstream regulatory institution will enhance its service deliveries; but I would recommend against making Deputy Director General's (DDG) position a political appointee.

2.2.3 Petroleum Products Regulatory Authority

The Petroleum Product Regulatory Authority (PPRA), which has been designated to regulate the downstream sector of the oil and gas, is a stand-alone authority with no functional relationship with NPI. Alternatively, it could have been a division of the NPI. PPRA should be directed by a technically competent Deputy Director General (DDG) and not a political appointee. This arrangement would optimize the distribution of the limited skilled labour force available at this time both locally and in the Diaspora. This revised arrangement is also not expected to affect the already defined functions and funding of PPRA. The terms of employment for the management positions in the PPRA and the optimal approach to filling these positions either as political appointees or professionally recruited management staff are very important if the ongoing restructuring efforts are to be successful. Thus, a confirmation process by the National Assembly for a fixed term appointment for the DG would enhance the institutional performance of PPRA.

2.2.4 Nigerian National Petroleum Company

There is no doubt that restructuring the Nigerian National Petroleum Corporation (NNPC) is the focal point of the ongoing oil and gas sector reforms in Nigeria. The general observation by the public that NNPC has failed woefully to fulfil its charge is perhaps justifiable. It must be recognized, however, that its failure to attain the prospect to drive the national economy has not entirely been the corporation's error of judgment. For example, there has been as many NNPC CEOs as were Heads of State or Presidents in Nigeria from 1976 to 2017. Thus, the degree of operational and strategic autonomy of the old NNPC from the national government NOCs companies are as old as NNPC, which was created in 1976.

Therefore, the new goal is to reposition the new Nigerian National Petroleum Company, NNPC Ltd., on a level comparable to the status of successful National Oil Corporations (NOCs) worldwide, such as the Malaysia NOC (Petronas), Venezuela NOC, Norway Statoil, Algeria NOC (Sonatraco), Mexico NOC (PEMEX), Brazilian (NOC) and Saudi Aramco. The desired goal is to get the new corporation to a level in which the degree of operational and strategic autonomy from the government is similar to the Norway Statoil. The separation of commercial and business operations from regulatory and policy-making functions in the oil and gas sector in Nigeria will help NNPC Ltd. to be more focused, more so because, the regulatory and operational functions of the oil and gas sector will henceforth be undertaken by separate and autonomous institutions.

The identity and corporate culture, NNPC Ltd., is expected to operate along the entire petroleum supply chain. This will make NNPC Ltd. a fully integrated oil and gas company. The envisioned ownership structure will enhance its ability to function as a purely commercial and capitalized business. The exclusion of NNPC current profitable assets from the take-off assets for the new National Petroleum Company, NNPC Ltd., however, may perhaps make the capitalization process of the national company difficult. The functionality of the Board of Directors in the governance structure of NNPC Ltd. is vague. There is also uncertainty as to the extent of the operational and strategic autonomy of the NNPC Ltd. from the influence and dictate of the Minister of Petroleum Resources.

2.2.5 National Petroleum Assets Management Agency

The National Petroleum Assets Management Agency (NAPAMA), like NNPC Ltd., is a commercial and operational agency empowered to undertake cost/commercial regulation of the oil and gas industry. It is conceived to manage all national assets and investments in exploration and production ventures to ensure maximum government returns and take statistics. It is

paradoxical. However, for NAPAMA to regulate and control costs within the Incorporated Joint Venture (IJV) framework, the IJV concepts seek to convert all of the existing JV arrangements into autonomous commercial entities. Thus, how can NAPAMA regulate and control costs for the IJV companies who have autonomous boards of directors? An outright rejection of the IJV idea as currently proposed seems more likely than not in the national Assembly. Further, the idea is most likely dead on arrival at the door steps of the International Oil Companies operating in Nigeria, not because of its illegality, but for the expediency of the concept. The biggest concern of all, of course, borders on international business ethics. The IJV concepts will be thwarted if the international community perceives the process as a form of petroleum assets nationalization.

2.2.6 National Petroleum Research Centre

The National Petroleum Research Centre (NPRC) is to be responsible for research and development in the petroleum industry in Nigeria. It is expected to pay a great deal of attention to upstream exploration and development issues and problems. As with NAPAMA, NPI, and PPRA, the nucleus of NPRC will be formed by the old NNPC R&D assets. This is going to be another drain on the NNPC Ltd. human resource capacity. The idea of a separate national oil and gas research centre is redundant. All the NPRC policy functions could easily be handled by existing federal institutions. This is the rationale for the establishment of the existing Petroleum Technology Development Fund (PTDF) and the many departments of petroleum engineering and geosciences in Federal Universities and the Centre for Petroleum Studies in Nigeria.

By and large, the OGIC report could not see the light of the day. As a result, several other efforts were made to come up with a more robust policy redirection in the Nigeria's petroleum sector. This led to among other legislations the Oil and Gas Content Development Act 2010 and

the long awaited Petroleum Industry Governance Bill, to address some of the issues already identified by the OGIC.

Lastly, the Nigeria's petroleum policy is still on the pre Obasanjo's administration governing regime, as the OGIC report could not be implemented. However, the PIGB before the National Assembly if passed into law, shall eventually unveil a more specific direction for the petroleum sector in Nigeria.

2.3 Origin and Development of Petroleum Law in Nigeria

The term "Petroleum" has been variously defined in the relevant statute i.e. the Petroleum Act. 2004 as "mineral oil/or any related hydrocarbon or natural gas as it exists in natural state in strata, and does not include coal or bituminous shale or other stratified deposits from which oil can be extracted by destructive distillation". AS far back as the Minerals Oil Act 1914, a Nigerian Statute was enacted to govern the exploration, production and refining or distribution of petroleum products. Although pioneering exploration and production activities in the petroleum industry commenced in 1908, this was spearheaded by the German firm called- the Nigerian Bitumen Company Limited. However, with the outbreak of the First World War these initial activities were stunted or checkmated. In 1937, a company known as Shell D'Arcy commenced oil and gas exploration in the area now known as the Niger-Delta region. They too were interrupted by the 2nd World War.[6]

The renewed entry of British Petroleum and Shell Petroleum Development Company led to the commercial finding of oil in Olobiri, in modern day Bayelsa State in 1952.[7] In 1959, the sole concession rights over the whole country granted to Shell had to be reviewed. Consequently,

[6] Official website of the Department of Petroleum Resources (DPR):www.dprnigeria.com Accessed 29 /2/2017.
[7] Official website of NNPC:www.nnpcgroup.com Accessed 29/2/2017.

exploration rights were extended to companies with other nationalities in line with the Government's policy of increasing the pace of exploration while also ensuring that the country was not overtly dependent on one company. Therefore, there was an increased and sustained participation by other International Oil Companies (IOCs) from the 1960s to 1977 when Nigeria's first national oil company was established.

2.3.1 Past and Present Legislations Governing the Petroleum Industry

The Mineral Oils Act 1914 was enacted to regulate the right to search for, win and work minerals oils. Similarly, other Mineral Oil laws were enacted in 1946, 1948, and1950.

Section 2(1) of the Mineral Oil Act 1914 specifically provides for the ownership of petroleum as well as the right to search for a new mineral oil in Nigeria. The said Section 2(1) provides thus:

"The entire property in and control of all mineral oils, under or upon any lands in Nigeria and of all rivers, streams and watercourses throughout Nigeria, is and shall be vested in the crown in so far as such right may in any case have been limited by any express grant made before the commencement of the Act. Sections1(1) and 14 (1) of the Petroleum Act as well as Section 44 (3) of the Constitution of the Federal Republic of Nigeria 1999 as amended all have similar provisions with the Mineral Oils Act cited herein.

With increased oil and gas exploration activity in Nigeria in the1950s which was to ensure compliance by oil company with the exploration rules. It also ensures safe and good oil field practice measured by international standards as of the time. Accordingly, a set of Regulations were made pursuant to Section 9 of the Mineral Oils Act 1914, updated and renewed to Minerals Oil (safety) Regulation 1963-TheseRegulations which have been variously updated include the

subsidiary legislation- Mineral Oil (Safety) Regulation made pursuant to the extant Petroleum Act[8]

Nigeria's active participation in oil and gas industry dates back to 1914 when the Mineral Oils Act was enacted. Physical participation in the industry was largely absent until the1970s when the Nigerian National Petroleum Corporation (NNPC) was established as a wholly owned and fully integrated national oil and Gas Corporation established in 1977 through the NNPC Act of 1977.[9]

Before 1970s, there was yet no real discernible policy on oil and gas because of inadequate production of oil. Further, the petroleum sector arose from Nigeria's underdeveloped economy and the country's economic life line is still tied to the colonial powers.

Therefore, the country in 1970s established the Nigerian National Oil Company (NNOC) to regulate and manage Government's investment as well as explore the country's huge hydrocarbon resources.

However, the current legal/regulatory framework for the Oil and Gas Industry in Nigeria consists of the following Principal Legislations/Regulations:

a. Petroleum Act,[10]

b. Deep Offshore & Inland Basin (Production Sharing Act)[11]

c. Petroleum Profits Tax Act,[12]

d. Nigerian National Petroleum Act,[13]

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[8] Cap 350 LFN 2004.

[9] Iloba-Aninye (2005), Okechukwu: *Legal Framework for Petroleum Products Marketing in Nigeria.*

[10] CAP. P10 L.F.N 2004

[11] CAP. D3 L.F.N 2004

[12] CAP. P13 L.F.N 2004

e. Oil Pipelines Act,[14]

f. Nigerian National Petroleum Corporation (Projects) Act,[15]

g. Nigerian Oil and Gas Industry Contents Development Act 2010

Whilst the key subsidiary legislations include:

a. Deep Water Block Allocation (Back-in-Rights) Regulations 2003

b. Petroleum (Drilling and Production) Regulations 1995

c. Oil Prospecting Licenses (Conversion to OML etc.) Regulations.

2.3.2 Legal Framework for the Privatization And Reform Program for the Energy Sector in Nigeria

Section 5(1)(9) of the NNPC Act confers on NNPC the right to, on behalf of the Federal Government of Nigeria, enter into various forms of contractual relationship relating to its participation in oil and gas exploration and production activities from the contract. These include:[16]

a. The traditional joint venture (J.V) arrangement with multinational oil companies.

b. Production sharing contract (PSCs) with international oil companies(IOCs) contractor parties;

c. Service contracts.

d. Arrangement Involving Indigenous Companies

e. Discretionary award of oil prospecting licenses (OPLs) to indigenous companies.

f. Sole risk operation on concession arrangements

g. Marginal field award/operation

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[13] CAP.N123 L.F.N 2004
[14] CAP.338 L.F.N 1990
[15] CAP. N124 L.F.N 2004
[16] Op.cit page 2 at pages 8-115

h. Marginal field and Farm- Out agreement.

Regulations governing petroleum drilling include:

a. Petroleum (Drilling and Production) Regulations

b. Oil and gas pipeline Regulations 1995

c. Petroleum Back in Right Regulations 2003

I shall now discuss the nature of the above contractual relationship and legal framework for oil and gas exploration and production in Nigeria in details.

2.3.3 Joint Venture Arrangement

Apart from the granting of Oil and Gas Prospecting Licenses (OPLs), Oil Exploration Licenses (OELs) and Oil Mining licenses (OMLs) in which the FGN requires participating interest through NNPC under a Joint Venture arrangement. NNPC and the major oil companies, operate under this arrangement that was traditionally employed to govern the relationship of NNPC as an agent of Government/and the oil companies.

2.3.4 Traditional Joint Venture Participation

This arrangement obviously, in effect gives NNPC certain participating equitable interest in the operations of the multi-national / transnational oil companies. The acquisition of such interests by the Nigerian Government was to have begun in 1962 with the Nigerian Agip Oil Company to coincide with the discovery of commercial quantity of oil that year by the company.

However, for some reason arising from setback of poor record keeping on the part of the Nigerian Government, the Nigeria – Agip J.V arrangement could not commence until 1971, and it was with Nigerian National Petroleum Company (NNPC) a predecessor – in title to NNPC whereby the latter acquired 31% equity stake in Agip. Subsequent to this, NNPC further in April

1971, acquired 35% in the operation of Elf in other participation of NNPC in the participation interest in the generation of other oil majors, it is interesting to note that NNPC did not at any time hold equity interest i.e. share or obviously of these oil companies i.e. NNPC and the J.V partners of the oil Blocks.

Therefore, under the Joint Venture Arrangement, the oil firms who held 100% concession of the oil Block had to accommodate their new partners, FGN through NNPC in the Venture as a co-Venture or Joint partners. In this case, NNPC's interest was limited to "Working interest" and does not affect the foreign oil companies' ownerships rights over their shares.

NNPC however maintains undivided interest in the concession as well as undivided interest in the assets and liabilities of the Venture in line with its participating interest which is employed and reflected in the Joint operating agreement and participation agreement executed with the international oil companies as of the time.[17]

2.3.5 Features of Traditional Joint Venture Agreement

Firstly, there are Cash Call Obligations – meaning that parties that enter into the Joint–Venture jointly contribute to capital and operating costs in the ratio of their participating interests.

The second feature is Applicable Tax Rate and Revenue from J.V Operations. Usually, NNPC earns 85% from the profit from the J.V operations and an after tax profit of nearly 60% of the concession production.

The commercial aspect of the memorandum of understanding (MOU) defines the guaranteed minimum profit such as the price per barrel of crude oil, after tax and royalty payable on the equity crude.

[17] Ibid

Another feature is Marketing Rights over Crude Oil. Each party under the J.V arrangement markets its equity or participating interest percentage of the available crude oil production from the concession.

2.3.6 Production Sharing Contract

Contractual arrangements involving Production Sharing Contracts (PSCs) commenced in 1972, with the first production sharing contract executed with Ashland Oil Company Limited (now Addax oil) in that year. Under this arrangement, the concession ownership remains entirely with NNPC while NNPC entirely holds the concession i.e. Oil Mining Lease (OMLs), the operation of the oil blocks is held by the contractor company who operates the oil blocks for NNPC as the concession holder. The operator /contractor undertake on sole risk basis, the operations and if commercial quantity of oil reserve is made, it is able to recover its production costs.

In other words, the contractor initially bears all the expenses but obtains reimbursement through the allocation of "cost oil" upon discovery of "first oil" therefore, no contribution towards cost recovery is made by NNPC if the operator fails to make commercial discovery of oil reserves.

Tax is assessed at 50% flat rate over chargeable oil for petroleum profit tax purposes (PPT) while profit oil is computed after tax in line with the agreed proportion as defined in the PSC and the governing legislations such as Petroleum Profit Tax Act (PPTA) 2004 and the Deep offshore and Inland Basin Production Sharing Contract Act 2004 and other subsidiary legislations and regulations made pursuant thereto.

Royalty payable on the Deep Offshore and Inland Basin are determined by the Department of Petroleum Resources (DPR) in accordance with the provisions of the Deep Offshore and Inland Basin (Production Sharing Act) Cap.D3 L.F.N 2004.

It must, however, be noted that under **Section 16(1) of the Deep Offshore Act,** FGN reserved the right to review the price mechanism for production and exploration activities in the contract Area / oil Block once the price per barrel of crude oil exceeds US$ 20 barrel per day threshold. It is strange that FGN has not triggered this provision in the Deep Offshore Act to initiate a review of the 1993 production sharing contracts entered into with companies such as Shell Nigeria Exploration Company Limited(SNEPCO), Nigerian Agip Exploration Company Limited (NAE) and Exploration Company Limited (ESSO) and this dispute over crude oil allocation with NNPC has been a major features of companies operating 1993 PSC. This no doubt requires FGN's intervention for the overall benefit of FGN reserve and the interest of Nigeria at large.

2.4 Key Terminologies Used in Production Sharing Contracts

The first major Law established to govern NNPC contract with the PSCs was the **Deep Offshore and Inland Basin Production Sharing Contract (PSC) Act no. 9 of 1999.** Under this arrangement, available crude oil is apportioned on the following priority basis: Royalty oil Cost oil, Tax oil and Profit oil.

2.4.1 Royalty Oil

Royalty rates are fixed in line with the location of the field or Block such that the deeper or further the location of field from the onshore, the lower the applicable royalty rate – apparently included to encourage Deep offshore prospecting for oil which was largely absent as of the time the PSCs were executed in 1992 and in 1993, they were generally subjected to the same rate as

defined in the “Deep offshore and Inland Basin” (PSC) Act. Itis however instructive to note that Royalty oil is allocated to NNPC or (the holder of the oil prospecting license OPL) in such quantum as shall generate an amount of proceeds equal to the actual royalty payable during each month and the concession rental payable annually in accordance with the PSC terms.

2.4.2 Cost Oil

This is the quantity of available crude oil allocated to the contractor to enable it generate an amount of proceeds for the recovery of operating costs in the OPLs and any OMLs derived therefrom as defined in accounting procedure of the PSCs.

2.4.3 Tax Oil

It is that portion of oil allocated to NNPC or (holder of OPLs) in such quantum as will generate an amount of proceeds equal to the petroleum profit tax (PPT) liability payment during each month. As with Royalties, NNPC or holder is responsible for payment of PPT on behalf of the parties.

However, in practice, the Federal Board of Inland Revenue Service (FIRS)issue separate tax receipt in the names of NNPC or (holder of OPLs) and the contractor companies who operates the oil Block for the respective amount paid as tax. The PPT rate applicable to the PSCs is a flat rate of 50% of the chargeable profit for the duration of the PSCs as provided under Sections 4, 9 and 11 of the Deep Offshore Act.

2.4.4 Profit Oil

Profit oil is the balance of available crude oil after deducting Tax oil, Cost oil and Royalty payable on the oil produced. It is allocated to each party in accordance with the terms of the PSC.

2.4.5 Service Contract Arrangement

After the execution of the first PSC with Ashland oil Nigeria Company Limited, Nigeria Government decided, in certain instance, to adopt the risk service contract or service contract Arrangement in respect of production and exploration of some of the country's oil fields.

2.5 Rights Held by Parties under Oil Concession Arrangements

2.5.1 Oil Exploration license (OELs)

a) The grant of this license by the Federal Government of Nigeria through the Department of Petroleum Resources (DPR) is both contractual and regulatory.

b) It confers on a licensee, a surface right of exploration for oil in the area covered by the license and granted in respect of areas not covered by existing Oil Prospecting Licenses (OPLs)or Oil Mining Licenses (OMLs).

Right conferred on the licensees by OELs include:

i) Non-exclusive right to explore for oil in the area covered by the licenses since another exploration license may be granted over the same area.

ii) Right to erect temporary structures and acquire machinery for its operation and;

iii) Right to undertake aerial survey and seismic surface and preliminary drilling works.

The duration of the OELs is normally for one year and the fees and rate payable are now provided in the applicable law and the regulation.[18]

2.5.2 Oil Prospecting License (OPLs)

The Petroleum Act 1990 makes adequate provisions that empower the Minister of Petroleum Resources to grant oil prospecting license (OPL), a prospective license after a successful bidding for oil blocks.

[18] Section 59 *Petroleum (Drilling and Production) Regulations* 2001

The processes or requirements for applying for an oil prospecting license include but are not limited to the following:

a) Filling of application form for OPL **as laid down under Regulation 1 of the Petroleum (Drilling and Production) Regulations;**

b) Payment of the fixed OPL fees;

c) Acquisition of seismic covering the area applied for;

d) Ensuring that the area covered by the license is demarcated dealing with boundaries or with grid lines designated by the applicant;

e) Concession is then granted over the area covered by the OPL which is normally compact.

Further and upon furnishing amount of funds as agreed as Signature Bonus, the FGN through the Department of Petroleum Resources, grants OPL i.e. exclusive license or right to prospect or explore for oil within the exclusive area covered by the grant.

During the operation or tenure of the OPL, the licensee is permitted to undertake certain activities. Among which is to commence work operation of the contract area or concession area by closing the concession area, making roads within the boundary areas, construct, bring, maintain, and operate or dismantle equipment etc.

2.5.3 Rights Conferred by OPL

The following rights are conferred on a Holder of concession of OPL: It must be emphasized that although by its nature, oil prospecting license is contractual and also regulates the action of a licensee. This is because, upon the license, payment of the acquired license fee/adequate compensation, he/she is entitled to enter into the area covered by the licecse to explore oil.

Therefore, the following rights are exercisable:

i. Exclusive rights to explore, carry away and dispose of any petroleum discovered and won in the area of the licensee's sphere of operation.

ii. However, subject to the terms of the license, no other grant for petroleum prospecting may be made to another licensee for the same licenced area.

2.5.4 Oil Mining Lease

Just as the relationship of "lease" gives rise to landlord and tenant relationship, an Oil Mining Lease (OML) is normally granted by the Minister of Petroleum Resources pursuant to Section 2 of the Petroleum Act.[19] An OML contains regulatory and contractual terms or provision and standard action provision.

However, it is quite distinct from "Lease of Land" which creates an "Estate in Land" an OML lessor of a mineral lease, allows the lessee to use land, explore and dispose of any petroleum discovered within the leased area fora definite period, usually not more than twenty (20) years during which Royalty oil.

In a nutshell therefore, the actual or real rights conferred on a lessee of an OML: "are limited to the interest in the petroleum discovered in the subsoil of the geographical area covered by the OML subject to applicable standardization provisions."

The foregoing, we believe, aptly discusses the various forms of regulatory contracts and contractual relationships that govern exploration and production contracts in the oil and gas industry being a fundamental part of the Energy Sector in Nigeria.

2.6 Features of Joint Venture Arrangements

The principal features of this Joint Venture Arrangements are as follows:

[19]Olakanmi & Co. *Petroleum, Minerals and Mining Law* August (2008) Law Lords Publication Abuja Nigeria at Pp. 21-151

a. **Concession Ownership –** Under the service contract arrangement, ownership of concession remain in NNPC and each contract relates to a single concession or Block unlike in PSC which can cover more than two OPLs e.g. the earlier NNPC / Ashland oil Nigeria PSCs over oil Blocks 98 and 118.

b) **Duration –** Service contract covers a short length of time i.e. between two (2) to three (3) years but renewable for another short term. This duration is at variance with certain Pre – 1959 oil mining areas granted for over forty years (continental shelf areas) and thirty years (land and territorial waters) as well as twenty years for the1993 PSCs. Service contracts which are for shorter periods allow NNPC and Federal Government to reserve full ownership of the contract area, where the concession is refurbished at the end of the exploration period. New arrangements are therefore made to contract out the contract area for much shorter period, than would apply to Traditional Joint Venture.

However, if no commercial quantity of oil reserve is found within the primary period of the service contract, the contract is terminated without further renewal.

c) **Provision of Fund –** All funds for petroleum operations are provided by the contractor in a service contract as well as technical expertise required to operate exploration and production activities in the contract area. The contractor is then reimbursed from funds derived from the sale of the available crude oil. It invariably means that the contractor could not recover its cost when there is no production of commercial quantity of oil from the concerned oil Blocks.

However, it is often argued which makes it a right legal deduction that since NNPC holds the right and title to the oil produced under a service contract arrangement and therefore, it is within the discretion of NNPC either to pay the contractor for his service in cash or kind. This being the position, NNPC has the right to market the oil produced and is also liable to

payment of petroleum profit tax(PPT) in respect of the contract area. NNPC is said to be in "petroleum operation" in accordance with Section 2 of the Petroleum Profit Tax Act, a service contractor under the PPT Act can only engage in petroleum operations not for its own benefit but for the account of NNPC who appointed it as its contractor –ordinarily therefore, taxation of profit of oil majors – servicing as contractor, should not pay PPT but should only pay company income tax under the relevant Companies Income Tax Act (CITA)2004.

d) **Consideration –** another major requirement for legally binding service contractor arrangement to exist is that the service contractors given first option to "buy back" crude production from the concession. The exercise of this option may even continue long after the life of the contract thereby generating sustainable supply of crude in the event that crude oil in commercial quantity is required from the OPL.

e) **NNPC's Exercise of Right to Take Over Entire Operation–** In exercise of the above powers, NNPC may under the service contract take over the entire production activities in the oil field after three years from the date of commercial production of oil from the oil field.

CHAPTER THREE

APPRAISAL OF PETROLEUM POLICY AND LAW IN NIGERIA

3.1 Introduction

Several policies and legislations were formulated, enacted and implemented to oversee the entire petroleum sector in Nigeria. However, over the years, these policies have not really defined a tangible path for Nigeria's oil and gas sector development despite incessant updates from one administration to another. This raises the need to appraise the previous and existing policies and laws, to ascertain the role played at each level and proffer a comprehensive road map.

3.2 Petroleum Policies in Nigeria

Policy may be defined as a course of action intended to be followed by government with a view to achieving certain objectives[20]. Thus, a major role of government policy is to foster and sustain rapid socio-economic development and an improvement in the living standards of the population of a country. In other words, the thrust of a policy should be to properly balance economic and social objectives. The origin of Nigeria's oil policy can be traced to the year 1971. The policies formulated for various areas of oil industry include nationalization and accelerated transfer of technology; coordinated national policy on energy; subsidy on petroleum products; special oil price to other African countries; oil pollution and counter trade.[21] As contained in the Petroleum Industry Bill (P. I. B), the Minister of Petroleum is charged with the responsibility of formulating, determining and monitoring government policy on the petroleum industry.[22] In its general sense, the function of the Minister is more of policy making than regulatory. Policy

[20] Godwin Nwaobi, (2005): *Oil Policy in Nigeria: A Critical Assessment (1958 – 1992)*
[21] Ibid
[22] . see section 6 of the 2012 Petroleum Industry Bill

determines the granting of licenses and leases and it is the Minister that determines this policy[23]. He is also required to exercise general supervisory functions over the affairs and operations of the industry, report developments in the industry to government, advice the government on all matters pertaining to the industry, represent the nation at meetings of international organizations primarily concerned with the petroleum industry; negotiate and execute international petroleum treaties and agreements with other sovereign countries, international organizations and other similar bodies on behalf of the government and have access at all times to areas covered by licenses, permits and leases.[24]

3.3 Policy Impact on Petroleum Law in Nigeria

Several questions emerge with respect to the impact on Nigeria's oil policy. What is the impact of the oil price regime on the growth of energy demand? What is the effect of oil policy on resource allocation and efficient use of energy? Has the country's oil counter trade policy responded positively to aggravated trade and payment difficulties, and cushioning the adverse effects of the oil glut? What is the medium term prospect of oil in dealing with the external financial crisis and finally, what are the prospects of Nigeria's oil policy in stemming global warming and enhancing a cleaner environment? Thus, the choice of oil policy in Nigeria can be evaluated by the multi-dimensional role it is expected to play in the economy: internal, external and environmental[25].

[24] Adamu Kyuka Usman, (2017) *Nigerian Oil and Gas Industry – Institutions, Issues, Law and Policies*. Zaria:Malthouse Press Limited. P.2

[24] . Ibid. p. 3

[25] Godwin Nwaobi, (2005): *Oil Policy in Nigeria: A Critical Assessment (1958 – 1992)*

3.3.1 Internal Dimension

Government's initial interest in the oil industry was limited to collecting the royalties and other dues which the oil companies offered to pay to it and making laws albeit rudimentary, to regulate the activities of the industry. In this era, the primary concern of government was to provide the right climate for the smooth operation and development of the industry, and the entrepreneur oil companies responded by dictating very low levels of government take for oil produced. Nigeria introduced in 1967, the Petroleum Profits Tax (Amendment) Decree No. 1(Now Act) in an attempt to improve its financial receipts from the oil industry. The Decree based the calculation of royalty and petroleum profits tax on posted prices and provided for expensing of royalty. Later, oil became predominant and more strategic to the economy and Government decided to participate in the industry's activities. Hence the second national development plan, 1970-74 stated that Government should participate in the exploration and production of Nigeria's mineral resources[26].

In pursuance of this policy, Government in 1971, acquired $33^{1}/3\%$ equity interest in National Agip Oil Company (NAOC)in accordance with its concession Agreement and 35% in Elf.[27] Since then, Government has been in the oil industry through its organ known as Nigerian National Petroleum Corporation. This indigenization process and policy has been successful, to the extent that we now have indigenous oil companies (private entrepreneurs) that work in the upstream and downstream sectors of the oil industry. To date, petroleum technology has remained foreign dominated largely because of institutional inadequacies and lack of an effectively

[26] Ibid
[27] Ibid

coordinated manpower development policy[28]. Like most foreign entrepreneurs, the oil companies were not interested in developing indigenous experts and in the early years, most oil field problems arising from their operations were solved by seeking advice from their home offices or flying down experts from abroad. The 1969 Petroleum Decree (Now Act) was drawn up in full recognition of the necessity to force the oil companies to train Nigerians to man the industry. The oil companies did not find it difficult to comply with the stipulation of this Act. As early as 1979, all the companies appear to have complied.

However, there is still a measure of window dressing in promoting Nigerians to key position for which they are not adequately prepared. Consequently, there is currently a more intensive use of consultants and contract staff who are not listed in the manpower returns of the companies. When one looks at the oil service companies that provide the vital skills and technologies required to sustain the industry, the situation is more depressing. Unfortunately, the 1969 Act did not regulate the activities of the oil service companies and it is only recently that NNPC and the appropriate ministries are co-operating to improve the situation through the mechanism of the expatriate quota.[29]

This poor management development can also be attributed to the Nigerian's poor attitude to work and lack of national commitment. The Third National Plan 1975-1980 made a provision for the sum of five million naira to be spent on manpower training during the period. Also Petroleum Training Development Fund was established for training Nigerians in oil matters in universities at home and abroad. But the execution of all these programs has been in a manner that they have had little impact on the poor manpower situation in the industry. Government share

[28] Ibid
[29] NNPC (Projects) Act Cap N124 LFN 2004

of crude oil is roughly 70% of total oil produced in the country. This oil is sold for Government by NNPC, and the proceeds are paid directly into federation account. As a matter of policy, NNPC sells oil to customers without any intermediaries. The customers are mostly direct oil users, and include all our joint venture partners. Oil sales are made to all customers at exactly the same price i.e. the official selling price. There is a non-discrimination policy in customer relations. And the only authority on who should buy Nigerian Oil is the Government. However, these policies have been ineffective by the increasing rate of smuggling of crude oil and petroleum products by Nigerians.[30]

Petroleum products marketing activities began in Nigeria by the turn of the 20th century by Second Vacuum Oil Company. It expanded to the seven major companies, namely, Mobil, AP, Total, Agip, Texaco, National, Unipetrol; and a number of independents are now in the trade. Given the overall expansion of economic activities and the unprecedented explosion in the demand for petroleum products in the 1970s the government ventured into petroleum products distribution and marketing.[31]

Prior to 1973, Petroleum product pricing was not uniform throughout the country. The pricing was under the control of the domestic affiliates of the multinational oil companies and prices reflected local cost conditions. The pump price depended on point of sale and this affected the distribution and even development of the country. To encourage even distribution of products to all parts of the country, Government introduced the uniform pricing system on October 1, 1973 for all grades of petroleum products, and to grant subsidies to the marketing companies to

[30] *Petroleum Production and Distribution (Anti sabotage) Act* Cap. P12 LFN 2004
[31] Chukwumerie A.I. (2003) *Between Law, Policy and Good Governance in Nigerian Petroleum Industry. New Conflicts and Experiences,* Rivers States University Journal of Public Law Vol. 1. Department of Public Law

compensate for the differential in the cost of operation. In fact, for long periods of time, the nominal administratively determined price remained unchanged.

Nigerian oil is one of the cheapest in the world - at seventy kobo per litre of gasoline. Hence, it may ask whether the implicit oil subsidy since 1973 has enhanced economic growth or halt inflation. Though, there are developing economies without cheap oil that recorded more impressive economic performance than Nigeria. Indeed, increasingly domestic oil consumption at highly subsidized prices has cut sharply into the more profitable export market.

A crucial policy problem is whether to encourage further unrestrained and efficient burning off of depleted oil resources or generate more export revenues from the displaced domestic consumption to finance imports required to support long-term growth and better social services. And there is not much realization that oil as a unique product is a depleted asset whose long run scarcity must be considered properly in order to ensure its efficient use in the long term.

3.3.2 External Dimension

Nigeria became a member of organization of petroleum exporting countries in 1971 during the decade when the oil market was characterized by strong upward pressures on prices and organization of petroleum exporting countries (OPEC) had assumed a dominant role in production and pricing decisions. Even before joining OPEC she was already adopting policies that originated from OPEC as regards Oil fiscal reform and the national control of oil resources. Her responsibility to OPEC has been a major determinant of Nigeria's oil production policy since 1982. Moreover, her commitment to OPEC has always been very strong inspire of the occasional enlightened self-interested Oil Policy which most member countries pursue when necessary.

Counter trade has been used as a short-term instrument of competition in the world oil market by most OPEC member countries. Available evidence indicates that Nigeria was not the first OPEC country to propose or engage in counter-trading.

However, Nigeria's entry into the business as a strategy of national survival perhaps introduced a new dimension to it. Perhaps, Nigeria will be at a disadvantage if she stays out when other OPEC countries are involving themselves in countertrade deals.

The Nigerian policy making process did not appear to be particularly oriented toward long-term policy outcomes. Thus, Nigeria did not have the special administrative machinery to properly evaluate the countertrade deals, and monitor their efficiency, particularly with regard to the choice, quality and prices of goods to be imported through countertrade.

Furthermore, there was complete isolation of countertrade transaction as an integral policy instrument for macro-economic management of the Nigerian economy. In fact, one may agree with the report of the committee of investigation assessment of Nigerian countertrade that "the countertrading system probably made little more than marginal differences to the structural problems of import dependence, declining output, excess industrial capacity, unemployment, foreign debt problems and high inflation".

Again, the business of importing in Nigeria was made complicated rather than amplified by countertrade. This has meant a high degree of bureaucratization and favouritism, which has created additional opportunities for corrupt practices. Also, the mark-up price of goods being purchased under counter trade deals is usually higher than market prices because such deals lend themselves more to a monopoly instead of a competitive market.

The trading partners who engage in countertrade strive to get the best out of such deals, more so since they do not really require Nigeria's crude oil. To Nigeria, countertrade was a matter of survival, to them it was not.

However, the "Secrete oil Policy" adopted by the Nigerian government is that crude oil was disposed of outside the OPEC quotas through such subterfuge means of agreements or secret discounts, as long as they were beneficial to the economy in terms of relief from both internal and external economic pressures. Moreover, this idea of countertrading in oil appeared to some members of government to be a clever policy instrument irrespective of the cost.

3.3.3 Environmental Dimension

In 1979, the first seminar on pollution of the Nigerian environment from oil industry activities was held in Port Harcourt and a similar seminar was also held in 1981 at Warri. Since then, there has been a growing public and government concerns about the pollution of the Nigerian environmen[32]t. Nigeria has witnessed the slow poisoning of the waters of this country and the destruction of vegetation and agricultural land by oil spills which occurred as a result of petroleum operations. However, the government have designed policies and measures to combat these problems. But, to what extent has these measures been effective? One of these measures was the creation of federal ministry of housing and environment in1979, which took the realistic step of formulating a general policy for environmental protection and control. Some state governments also established their own Ministries to handle environmentally related problems.[33]

Another measure was the establishment of environmental affairs unit by the petroleum inspectorate of NNPC, within its field operations Department. The unit ensures that oilfield

[32] Godwin Nwaobi, (2005): *Oil Policy in Nigeria: A Critical Assessment (1958 – 1992)*
[33] Fagbohun, O., (2010) *The Law of Oil Pollution and Environmental Restoration*. Lagos: Odade Publishers.

operations are carried out at acceptable standards and in accordance with the provisions of the various petroleum laws and regulations. The petroleum inspectorate also closely monitored the activities of the oil companies and ensured that oil field operations were conducted in accordance with "good oil-field practice".[34]

The oil companies themselves initiated and implemented environmental education and awareness programs for all levels of personnel engaged in oil exploration. The petroleum inspectorate of NNPC also took remedial measures to control oil pollution such as enforcing the reporting of oil spills on operating companies, under a new procedure, with a view to documenting all oil spills. Equally, the NNPC embarked upon the collection of baseline data on the changes in the environment of the oil activity. Since the acquisition of baseline data takes time, the petroleum inspectorate worked closely with the oil companies and issued two documents on interim standards for the discharge of formation water, drilling mud and cuttings (NNPC, 1983).

In the "Federal Environmental Control and Protection Agency Bill 1983" are provisions for water, air and noise pollution control, as well as the control of oil pollution and hazardous substances. The Bill also provided enforcement powers, general penalties and legal proceedings. More recently however, the federal government established National Environmental Standard Regulation Agency (NESREA) which functions specifically for the prevention and reduction of environmental pollution and degradation. However, most of these agencies have not functioned effectively because of financial and infrastructures limitations[35].

[34] Oil in Navigable Waters Cap. 06 Act L.F.N 2004
[35] Godwin Nwaobi, (2005): *Oil Policy in Nigeria: A Critical Assessment (1958 – 1992)*

Again, refined petroleum products vary in their pollution potential. The two products which have received greatest attention are gasoline and fuel oil. They emit several pollutants: Carbon monoxide, nitrogen oxides, hydrocarbons, sulphur oxide, carbon dioxide and methane. The bulk of fossil fuel consumption in Nigeria is in transportation, industry and power sectors where, unfortunately, there are very high levels of efficiency in energy utilization. Old stock of transport equipment and inefficient capital equipment are also contributory factors to inefficient energy utilization which has, partly, resulted in current global warming. Thus, the country's cheap fuel pricing policy has increased fuel – related environmental damage. But with the recent changes in petroleum pricing policy (through phased removal of petroleum subsidy) it is hoped that such damage will be reduced.

3.4 Conclusions on Policy Prescription

The worst area of scarcity of local manpower and effective Nigerian participation is still in the service sector of the oil industry. This is where the Nigerian Entrepreneurs and Nigerian Directors of the foreign oil service companies can make a vital contribution by pressing for more rapid and effective training of Nigerian technicians and engineers for Nigerian oil industry.

In the current adjustment process, the government's pricing policy should be laid on three basic principles. This pricing policy should be sufficient to allow the corporation to cover its production and delivery costs; should encourage efficient inter-fuel competition in the energy market; and should be allowed to perform its allocation function. Taxes and direct income transfer in contrast to price subsidies are more appropriate for the latter objective.

Apart from enhancing Nigeria's market share, such a policy will likely restore confidence, among the major multinational oil companies in Nigeria's ability to price her oil "properly" and thus encourage them to remain in the country to expand production. While the current pessimistic

market outlook, and the size of Nigeria's external indebtedness (about 34 billion dollars) presents formidable obstacles to any ambitious oil-based downstream export strategy in the medium term, this should not preclude putting in place the elements of such a strategy. In other words, there is need for a change in policy emphasis from the existing inward-looking oil-based import substitution strategy, to an export oriented strategy that exploits Nigeria's comparative advantage in oil. Amore active downstream export strategy is a key component of such a policy given that several other major oil exporters have successfully embarked on such an approach.

Environmentally, the country's oil policy should be to prevent oil pollution and prohibit discharge. This policy should be accompanied by measures to minimize damage when pollution nevertheless occurs. Thus, there is need for the setting up of a national oil environmental agency with active involvement of all levels of government, the oil companies as well as the Nigeria Navy. This environmental agency should be organized in such a way that it can respond to oil spills at very short notice. Also, environmental awareness scheme should be introduced in school curriculum at every level of the nation’s educational system. Both the NNPC and oil companies should intensify environmental awareness and educational program among the general public.[36]

The NNPC should also support and encourage research among universities and research institutes through grants and provision of research facilities and special provision should be given to inter-disciplinary studies on socio-economic and health aspects of the oil industry in the Nigerian environment. Furthermore, oil marketing companies should be fully involved in petroleum pollution matters and they should set aside a reasonable amount of their resources for environmental protection and monitoring. The administration of the special fund should be

[36] Op.cit. p. 49

depoliticised so as to ensure the promotion and maintenance of sustainable environmental and socio-economic development of the oil producing areas.

For combating pollution from refined petroleum product; substantial improvement in the maintenance and more rational use of transport and other capital equipment, and greater fuel efficiency based on a more comprehensive energy audit in industry suggest feasible short-run oil policy alternatives. Tax concessions and other incentives such as duty-free importation of fuel efficient and environmentally cleaner capital stock to induce greater fuel efficiency are possible oil policy.

Moreover, higher fuel prices which induce lower demand should reduce fuel-related environmental damage. However, it must be recognized that the scope for reduction in the use of polluting energy sources such as oil would be constrained by the rate at which existing capital stock can be replaced with newer and more fuel efficient capital stock. And given the socio-economic condition of our country, we suggest that the government should solicit for technical aid and technology transfer as well as research, development and demonstration in carbon-saving technologies suitable to our country.

The current effort in changing the structure of the oil industry should be sustained. Itis intended to be a structure with Nigerian owned firms and smaller foreign-owned companies having established producing operations. Encouraged, the government has already launched its second open licensing round offering the foreign companies increased scope for exploration and production in Nigeria was a difficult ideological step for government to take, after years of nurturing NNPC so that it could eventually take over from the majors. Even more difficult was the decision to allow foreign companies to participate in Nigeria's refining industry. It is at present wholly under the control of NNPC. But the oil ministry is now set on allowing foreign

companies to take shares in Nigeria's fifth oil refinery which is envisaged as an export-oriented facility. This is aimed at bringing the international contracting companies back in force, after the slack years when many of them closed their bases in Nigeria. We therefore wish that these good efforts are sustained.

In the current decade, if oil demand growth is weakened by environmental legislation (petroleum product and carbon tax), by anti-oil fiscal policies and by the lower economic growth that this would almost certainly entail; then oil prices could come under pressure and thereby hindering the formulation of a stable policy in regard to pricing, production and capacity expansion. But the challenges confronting us are not confined to the upstream sector of the industry. Downstream, an increase in oil demand will entail among other things raising refining capacity and increasing refinery sophistication to meet the demand for lighter and cleaner products.[37]

In conclusion, we cannot expect perfection in trying to handle the whimsical creature that the international oil market has been allowed to become. Other countries also have their hands on the leash. This is right, because we are all in the market together.

Moreover, in the oil policy formulation process, we have to take into account bankers, equipment manufacturers, other energy producers and international organizations whose decisions and participation have a great impact on oil industry and who together with us, want to see clear targets and to minimize risks.

[37]Nwokoji G.U., (2000): *The NNPC and the Development of Oil and Gas Industry: History, Strategies and Current Directions Report*. Prepared in Conjunction with the Energy Study sponsored by Japan Petroleum Energy Centre and the James A. Baker Institute for Public Policy at Rice University.

3.4 Legal Impact of Law on Petroleum Sector in Nigeria

The exploration of petroleum in Nigeria is regulated by law. These laws have been made for the proper administration of the operation of the oil mining process and the general practice in the oil industry. I am going to examine the legal regime from the colonial era and through the discovery of oil and to the enactment of the Petroleum Act in Nigeria. This will form the foundation for further examination of the extant laws covering the oil sector in Nigeria, which to a larger extent have been at a slow phase. However, recent commitments especially the PIB have shown greater indications towards enhancing the subsisting petroleum legal regime.

3.4.1 The Early Legislations on Oil in Nigeria.

The earliest attempt at legislation on mineral oil (petroleum) in Nigeria was the **Petroleum Ordinance of 1889**.[38] This legislation had existed for over ten years before exploration took place. The 1889 ordinance was followed by **Mineral Regulation (Oil) Ordinance of 1907.** Both of these legislations laid down the basic framework for the development of petroleum and other minerals in Nigeria. Etikerentse opined that another piece of legislation was issued by the British colonial government in Nigeria in 1909. This was the Order 19 of 1909 of Southern Nigeria. It was stated under these three pieces of legislations that only British subjects or companies controlled by British subjects would be eligible to explore mineral oil resources. After the unsuccessful attempt of the German Bitumen Company at oil exploration which started in 1908, the company terminated its operations following the outbreak of the World War I. By1914 the Mineral Oil Ordinance was passed. This ordinance was a major legislation relating to petroleum in Nigeria. The ordinance was enacted to regulate the "right to search for,

[38] Op.cit. p.2

win and work mineral oils" in Nigeria. The German Bitumen Company that had earlier been granted the rights to explore for mineral oil did not resume its work after the World War I.

Thus, the Mineral Oil Ordinance remained in force for the next four decades and was damaging Nigerians' interest because it deferred competition from other technologically advanced countries outside Britain in the petroleum exploration. **Section 6(1) of the Mineral Oil Ordinance** provided as follows:

> "No lease or license shall be granted except to a British subject or to a British Company registered in Great Britain or British Colony and having its principal place of business within her majesty's dominion, the Managing Director (if any) and the majority of the other director of which are British subjects."

The ordinance had thereby restricted the granting of the oil exploration licence or lease to only British subjects and companies, excluding other nationals and even the citizens of Nigeria. By1938 the colonial government had granted the State sponsored Shell D'Arcy Company monopoly over exploration of all minerals petroleum throughout the entire colony. The company was a Royal Dutch and Shell (English) Consortium, which carried out exploration activities as from that time from its base first at Owerri. In the absence of competition Shell was able to leisurely explore and select choice areas until 1962 by which time it had retained 15,000 square miles of the original concession area.

In 1959 the sole concessionary rights were reviewed, and various rights were extended to other companies of various nationalities such as Mobil, Gulf (now Chevron), Agip, Safrap (Elf), Teneco and Amoseas (Texaco/Chevron). However due to its previous monopolistic position, Shell remains the largest producer of oil in Nigeria. About eighty per cent of all existing concessions are held by Shell and half of Nigeria's oil is produced within these arrangements.

A new section 10 was added to the 1914 Ordinance by the **Mineral Oils (Amendment) Act 1950** whereby the submarine areas of Nigeria's territorial waters were brought under the ambit of the1914 Ordinance. By another amendment in 1959, the legislative competence of Nigeria's Federal legislature was pronounced over the submarine areas of other waters which the legislature may decide to legislate upon in future, in matters relating to mines and minerals. In 1959 the **Mineral Oils Act** was enacted and it consequently repealed the Mineral Oil Ordinance of 1914.

3.4.2 The Petroleum Act[39].

It should be noted that Nigeria's petroleum legislation evolved gradually through what can be classified as the colonial, post-colonial, and post oil boom phases. Prominent among the colonial legislations were the Mineral Oils Act[40]; the Mineral Oils Act (Amendment) Ordinance 1959; and the Petroleum Profits Tax Ordinance 1959. Not only did these laws cede Nigeria's mineral rights to the British crown, they also reserved exploration and production rights to only British companies which for the mere payment of token rental due and royalties, acquired proprietary rights over all mineral deposits in the country.

Upon attaining independence in 1960, certain numbers of petroleum-related laws were enacted within the first decade of independence. The most significant of these laws was the Petroleum Act promulgated as Decree.[41]

The Act repealed the existing legislations relating to petroleum and for all intent and purposes, remains the principal legislation which governs all activities pertaining to oil and gas in

[39] Cap 10, vol. 13, LFN 2004
[40] No.17 of 1914
[41] No.51 of 1969. Now Cap P10 LFN 2004

Nigeria.[42] The Petroleum Act and the Petroleum (Drilling and Production Regulations) and other regulations made there under laid down the foundation of the legal framework for the regulation of the oil industry in Nigeria.

It has been suggested by some experts that the Act is deficient in many ways, but this was the Nation's first comprehensive petroleum legislation, which covered, among other things, the definition of petroleum, land surface rights and rents, compensation and many other things.

The Petroleum Act, inter alia, provides for the vesting of petroleum in the state. This is done by stating that "*the entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State.*"[43] This provision applies to all land (including land covered by water) which is:

a. Nigeria; or

b. Is under the territorial waters of Nigeria,

c. Forms part of the continental shelf; or

d. Forms part of the Exclusive Economic Zone of Nigeria."

The Act also provides for the oil exploration license, oil prospecting license and the oil mining lease which are the three types of permits that could be obtained on oil operation in Nigeria. The Act further states the provisions for refining oil in Nigeria by stating that "no refinery shall be constructed or operated in Nigeria without license granted by the Minister".

The licenses granted under the section shall be in the prescribed form and shall be subject to the prescribed terms and conditions or where no form is prescribed or no terms and conditions are prescribed such form or subject to such terms and conditions as may be decided or imposed by

[42] Iloba, A. (2015) *An Examination of the Legal Framework for the Marketing of Petroleum Products in the Downstream Sector of the Oil and Gas Industry in Nigeria*, Unpublished PhD Dissertation Submitted to the Department of Commercial Law, A.B.U Zaria, p.79.
[43] Section 1(1) of the Petroleum Act LFN 2004

the Minister. There shall be charge in respect of every license granted under this section such application fees and such other fees may be prescribed[44]**.** The provisions of the section are additional to the provisions of the Hydrocarbon Oil Refineries Act.[45]

The Act provides for the control of petroleum products in **Section 4.** By Section 4 Subsection (1) of the Act no person shall import store, sell or distribute any petroleum products in Nigeria without a license granted by the Minister. It treats the modes of storage, sale or distribution of petroleum products that cannot be done without the license granted by the Minister. But by **subsection (2),** the requirement for obtaining a license shall not apply in respect of:

(a) The storage, sale or distribution of not more than 5 litres of Kerosene and such other categories of petroleum products as may be exempted from the application of subsection

(1) Of the section by the Minister by order published in the Federal Gazette.

(b) Storage of petroleum products undertaken otherwise than in connection with the importation, sale or distribution of petroleum products. Any license granted by the Minister under the section shall be subject to the prescribed terms and conditions where no form is prescribed or no terms or conditions are prescribed, in such form and on such terms and conditions as may be decided or imposed by the Minister[46].

There is a penalty for failure to comply with the provisions for the licensee and any person that does any act which requires license without obtaining appropriate one shall be guilty of an offence and shall be liable on conviction to imprisonment for two years or a fine of N2,000 or

[44] , op cit , Section (3)
[45] Cap H5, LFN 2004
[46]Section 4(3)

both and in addition, the petroleum products in respect of which the offence was committed shall be forfeited.

The Act similarly creates offences in connection with the distribution of petroleum products which include inter alia the relationship between oil marketing companies in the sale and distribution of petroleum products etc.

In **section 7** of the Act the right of pre-emption is provided for the Minister that in the event of a state of emergency or war the Minister shall have the right of pre-emption of all petroleum and petroleum products obtained, marketed or otherwise dealt with under any license or lease granted under the Act[47]**.** A penalty and punishment is prescribed for failure to conform to or obey a direction issued by the Minister.

Furthermore, the Minister may advise the President to declare a state of national emergency if the Minister is satisfied that as a result of the low level of availability of petroleum and its products: (a) There is an actual breakdown of public order and public safety in the federation or any part thereof; or There is a clear and present danger of actual breakdown of public order or public safety in the federation or any part thereof[48]

The Act states that the Minister may make regulations prescribing anything to be done for the purpose of the Act. Consequently, seven different regulations have been made at various times and for a variety of purposes. Some of the regulations were made under laws that have been repealed but the regulations have been retained having been deemed to have been made under the Petroleum Act which succeeds the previous legislations[49].

The seven regulations existing under the Act up till date are:

[47] See Petroleum Act (Amendment) Act 1998, (Decree No. 22 of 1998)
[48] Ibid Section7(5).
[49]Paragraph 4 of the Forth Schedule of the Petroleum Act which deemed the Regulations to have been made under section 9 of the same Act.

1. Mineral Oils (Safety) Regulations.

2. Petroleum Regulations.

3. Petroleum (Drilling and Production) Regulations.

4. Petroleum Refinery Regulations.

5. Crude Oil (Transportation and Shipment) Regulations.

6. Deep Water Block Allocations to Companies (Back in Rights) Regulations.

7. Oil Prospecting Licenses (Conversion to Oil Mining Leases etc.) Regulations.

The Petroleum Act has four schedules, each of the schedules contain provisions relating to oil exploration and Prospecting Licenses and the Oil Mining Leases; the prerequisite for the grant of each of these licenses or lease; the conditions for assignment of same; termination and the revocation**.** It also contains provisions for the fees, rents and royalty payable. The second schedule deals with the rights of pre-emption of the Minister; the third schedule is on the repeals made to certain previous statutes on mineral oil etc. The Fourth Schedule relates to transitional and savings provisions.

The Act essentially reduced the duration of an oil mining lease from the previous 30-40 years to20 years. However, the Act was still seen by many as a bonanza to foreign operators. But after entering into membership of OPEC in 1971 and having established its own national petroleum corporation (the Nigerian National Oil Corporation) in 1972, Nigeria began the venture participation, production sharing and risk service interests with the oil companies.

Between 1973 and 1974, the NNOC, which was later, changed to the NNPC in 1977, negotiated participation in all the major companies, thus acquiring large percentages in the operations of these companies.

The crash of oil prices in the world market in 1986, to below 10 dollars per barrel, rendered further exploration totally unprofitable to the foreign operators.[50] The need, therefore, arose to offer them a new package of generous fiscal incentives to maintain the momentum in this strategic sector of the economy. This package is the Memorandum of Understanding which guarantees to the oil companies a notional margin of 2.3 to 2.50 U. S dollars per barrel and a royalty of 2 U.S. dollars per barrel. Oil companies operating under the various agreements include Shell, Exxon Mobil, Chevron, Elf, Nigeria Agip, Texaco Overseas, Express Petroleum/Conoco, Addax, Atlas, Amni International, Consolidated Oil, Pan-Ocean, Nigeria Petroleum Development Company, and Dubri Oil.

Currently, the Nigerian oil and gas industry is primarily regulated by the Petroleum Act and the Petroleum Profits Tax Act[51]. In addition, there are other laws that are directly relevant to the oil industry in Nigeria. These include the Petroleum Equalisation Fund (Management Board ETC.) Act[52], the Petroleum Production and Distribution (Anti-Sabotage)Act., Petroleum (Special) Trust Fund Act[53], Petroleum Technology Development Fund Act[54], Petroleum Training Institute Act[55], Other laws that have direct bearing on the petroleum industry include the Oil Pipelines Act 1956, Associated Gas Reinjection Act, Oil Terminal Dues Act, NNPC Act and the Oil in Navigable Waters Act. All these laws regulate various aspects of the oil industry in Nigeria and have changed characters in many ways since they were first enacted. Later, certain other laws have been made such as the Nigerian Liquefied Natural Gas Act, the Niger Delta Development Commission Act and lately the Nigerian Local Content Act for the oil industry.

[50] Journal of Law, Policy and Globalization. ISSN(online) accessed 17/12/2017.
[51] Cap P 13 LFN 2005
[52] Cap P11 LFN 2004
[53] Cap P14 LFN 2004
[54] Cap P15 LFN 2004
[55] Cap P16 LFN 2004

3.4.3 Current Legal Developments.

While the Petroleum Act at present has seven 7 regulations, it and the Petroleum Profit Tax Act have been amended severally over the past forty (40) years. Nonetheless, both legislation remain substantially in the original forms in which they were enacted. The circumstances are therefore such that the primary laws regulating the industry, the Petroleum Act (and its Regulations), the Petroleum Profits Tax Act and the NNPC Act are 40, 50 and 32 years old respectively.

Over this period there has been substantial growth in the oil industry in Nigeria that these statutes and others made after them have not met with the challenges of operation and what obtains in practice. One of such issues is the natural gas project. The Nigerian Liquefied Natural Gas Act was enacted and it has been the major law on this field. It is important to note, however that there are new developments which the existing statute have not envisaged.

Thus, a draft law the **Petroleum Industry Bill (PIB)** is currently under consideration by the Nigerian National Assembly which seeks to merge and/or repeal almost all the existing legislation in the petroleum industry. The Bill when finally passed will contain all these existing Acts and regulations in a document with significant amendments and repeals of some provisions. It will also contain additional provisions that are deemed necessary in the industry today. The PIB is an outcome of the Oil and Gas Reforms Implementation Committee (OGIC) of the Federal Government of Nigeria. The PIB is also the mechanism for achieving the broader objectives stated in the OGIC report of July 2008 which include:

a. Maximization of the nation's economic rent from the Oil and Gas Sector while not jeopardizing the growth and development of the industry.
b. Separation and clarity of roles between the different public agencies operating in the industry.

c. Infusion of strict commercial orientation in all relevant aspects of the industry.

d. Fostering an enabling business environment with minimal political interference.

e. Reposition 0f the nation's Oil and Gas industry in view of contemporary challenges within the sector both globally and in the domestic sphere.

f. Meeting the nation's needs for fuels at a competitive price.

g. Maximization of local content and development of Nigerian capacity.

These objectives have been incorporated into the Bill which is a large volume of document.

3.5 Conclusion

A number of statutes have been made to regulate the petroleum exploration in Nigeria from the colonial period. It is seen however that the laws at the time were discriminatory against the indigenous peoples of Nigeria in whose places these oils were found. These provisions similarly made discovery of oil exclusive reserve of the British companies and therefore, delayed discovery of oil in commercial quantity in the country as only the companies of British origin were licensed to conduct exploration activities in the country. Since the enactment of the Petroleum Act, there have been fundamental changes by the vesting of the ownership of petroleum found in Nigeria, in the State.

There are some deficiencies in some issues that affect the industry which has called for a reform in statutory regulations. The result is the introduction of the Petroleum Industry Governance Bill which is a first tranche of the PIB has been passed recently by the Senate of the Federal Republic of Nigeria. The Bill has also been transmitted to the House of Representative for concurrence before it is assented to by the President. The Bill which is expected to take care of

the governing aspect of the industry, scaled third reading following presentation of report of Joint Committee on Petroleum Resources (Upstream, Downstream, Oil and Gas).

If assented to by the President, the Act will unbundle the Nigeria National Petroleum Corporation (NNPC) into two companies: Nigeria Petroleum Assets Management Company and the National Petroleum Company. According to the Bill, the two companies shall be created and supervised by the Ministry of Petroleum.

The passed PIGB provides inter alia, that the Minister of Petroleum Resources shall, within six months after the effective Date, take such steps as are necessary under the Companies and Allied Matters Act to incorporate two entities. The first may be called the Nigeria Petroleum Assets Management (NPAMC) or such other name as may be available and the other may be called the National Petroleum Company (NPC), or such other name as may be available as companies limited by shares which shall be vested with certain assets and liabilities of the NNPC.

Upon incorporation and the transfer of assets pursuant to the PIGA, the NPAMC to be called the 'Management Company" shall be responsible for the management of assets currently held by the NNPC under the Production Sharing Contracts and Back-in Right Provisions under the Petroleum Act 1969 as amended.

The NPC shall be responsible for the management of all other assets held by NNPC except the Production Sharing Contract and Back-in Right assets currently held by the NNPC. At the time of its incorporation, the initial shares of the NPAMC shall be held in the ratio of 20% by the Bureau for Public Enterprises, 40% by the Ministry of Finance and 40% by the Ministry of Petroleum on behalf of the Government.

CHAPTER FOUR

CONTROL, REGULATION AND ENFORCEMENT OF LAWS IN NIGERIA'S PETROLEUM SECTOR

4.1 Introduction

Environmental impacts of the extraction of oil and gas at different times and in various places have included air and water pollution, oil spills, socio cultural impacts, which disproportionately affect women and children, ecological damage and accidental fires that result in the destruction of lives and properties. Since the inception of petroleum exploration in the world at large, and Nigeria, in particular, the constant and epochal question has been, "How do we maintain equilibrium between the pros and cons of oil exploration?" That is, efficiently maximising the extraction of crude oil and its derivatives, to facilitate economic advancement; while simultaneously, ensuring the protection and conservation of the ecosystem, to prevent ecological and socio-economic degradation, giving the crucial role played by oil exploration in Nigeria's socio-economic development. This cardinal question, at least in Nigeria, has been left largely unanswered. Notwithstanding the numerous laws – for instance, the overly ambitious and much storied Petroleum Industry Governance Act, promulgated to guarantee this objective, their enforcement has been of no easy feat, or rather lukewarm. This is owing to the fact that the joint venture between the Federal government and the oil multinationals is, to a large extent, to be faulted for the non-compliance to oil regulations. This is evident in the fact that these oil corporations find it rather difficult to comply with regulations in Nigeria, giving their level of exposure to laws in different parts of the world. This chapter highlights the existing regulations and institutional enforcement of petroleum law in Nigeria.

4.2 Regulation and Enforcement of the Existing Petroleum Sector Legal Regime in Nigeria

As a result of the increased activities of human beings on the earth environment, the problem of living under a clean and healthy environment also increased, thereby constituting environmental pollution. As at today, environmental pollution has been identified as one of the major problems facing the environment globally and Nigeria specifically.[1] In the predawn and subsequent to the advent of oil exploration in Nigeria, though not comprehensive and by no means adequate, fragments of laws aimed at conserving the ecosystem could be found in various enactments. Therefore, it is arguable that, the ecological degradation emanating from petroleum exploration in Nigeria is attributable to lack of comprehensive and inadequate legal framework regulating the activities of the sector. Also, the lack of institutional cohesion and absence of executive willpower to enforce the regulations as supposed, has been part of the problem.

The sector specific legislations can be classified into two, pre-1988 laws and post-1988 laws. According to Fagbohun, the distinction is useful when analysing the scope and focus of these laws.[2] He argued that the pre-1988 laws were aimed at facilitating development and resource exploitation, or directed at localized problems of health and welfare and rectification of immediate problems of pollution and degradation of economically important resources while the post-1988 laws were primarily designed to focus on environmental planning, protection and impact assessment as major ingredients in resource development.[3]

The sector specific laws and regulations pre-1988 include: Criminal Code Act, Petroleum Act; Waterworks Act; Minerals Act; Public Health Act; Territorial Waters Act; Oil in Navigable Waters

[1]. Murgan, M. G., (2015) *An Appraisal of the Laws on Protection of Environment in Nigeria,* Available at: http://works.bepress.com/murtala_ganiyu/1/accessed on 16 September, 2017.
[2]Fagbohun, O., (2010) *The Emergence and Development of Environmental Law in Nigeria*, p. 166, note 6.
[3] ibid

Act; Oil Pipelines Act; Oil Terminal Dues Act; Sea Fisheries Act; River Basins Development Authorities Act; Associated Gas Re-Injection Act; Forestry Act; Quarries Act; Antiquities Act; Kanji Lake National Park Act; Endangered Species (Control of International Trade and Traffic) Act; and Factories Act.[4]

The sector specific laws and regulations post-1988 include: National Effluent Limitation Regulations, Special Instrument No 8, 1991; Associated Gas Re-injection Act, 2004; The Associated Gas Re-injection(continued flaring of Gas) Regulation, 2004; National Environmental Protection (Effluent Limitation) Regulations,1991; National Water Resources Institute Act, LFN, 2004; Territorial Waters Act, 2004; Harmful Waste (Special Criminal Provisions) Act, 2004; Land Use Act, 2004; National Environmental Protection (Management of Solid and Hazardous Wastes) Regulations 1991; Harmful Waste (Special Criminal Provisions) Act, 2004; National Water Resources Institute Act,2004; Oil in Navigable Waters Act, 2004; Water Resources Act, 2004; National Environmental(Surface and Ground water Quality Control) Regulations, 2011; National Environmental(Non-Metallic Mineral Manufacturing Industries Sector) Regulations, 2011; Oil Pipelines Act, Cap. 7 LFN, 2004; Petroleum Act, 2004; Petroleum Regulations, 1967;Petroleum (Drilling &Production) Regulations,1967; Environmental Protection (Pollution Abatement in Industries Generating Wastes) Regulations, 1991; Environmental Impact Assessment (EIA) Act, 1992; Department of Petroleum Resources (DPR) Environmental Guidelines and Standard for the Petroleum Industry in Nigeria (EGASPIN), 2002; The Federal Environmental Protection Agency (FEPA) Act, 1988 which was repealed by National Environmental Standard Regulation and Enforcement Agency Act (NESREA).

[4] LFN 2004

From the foregoing, based on the above sector specific laws and regulations, it is quite evident that there are enough laws and regulations to address specific environmental concerns in the oil sector. However, the relevant question is how many of these legislation and regulations are effectively implemented in order to ensure a sustainable environment in Nigeria?

4.2.1 The Constitution of the Federal Republic of Nigeria

The nucleus of environmental law in Nigeria is found in section 20 of the Constitution of the Federal Republic of Nigeria,[5]which provides that, "The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life in Nigeria". Though, having fallen under Chapter II of the Constitution, viz. Fundamental Objectives and Directive Principles of State Policy, the justiciability of this provision has been highly contentious.

Section 20 of the Nigerian Constitution forms part of the rights guaranteed by the International Covenant on Economic Social and Cultural Rights[6] and the African Charter on Human and Peoples' Rights (African Charter) both of which Nigeria is signatory to. The African Charter was domesticated in Nigeria in 1983 under the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[7] The African Charter is a regional treaty that affirms both civil and political rights such as those guaranteed by Chapter IV of the Nigerian Constitution and economic, social and cultural rights such as those guaranteed under Chapter II of the Constitution and it makes no distinction between them. However, the Nigerian Supreme Court has severally held that the provisions of the Constitution override the African Charter in the event of a conflict.

[5] *Constitution of the Federal Republic of Nigeria*, Cap C23 LFN 2004
[6] GA Res 2200A (XXII) of 16 December 1966.
[7] Cap A9 LFN 2004

In the case of *Sani Abacha v. Gani Fawehinmi*,[8] the Supreme Court held that although the African Charter is superior to other laws, it is subordinate to the Constitution of Nigeria.

Notwithstanding the impediment placed by the non-justiciability of this provision, progressive judges have shown their willingness to transcend this hindrance to safeguard the populace on whose shoulder the overt and insidious consequences of environmental degradation squarely rested. This was demonstrated in the epochal pronouncement of the Federal High Court in *Jonah Gbemre v. Shell Petroleum Development Company Nigeria Ltd and 2 ors*,[9] where the court made a declaration that the plaintiff's constitutionally guaranteed right to life included the right to a clean, poison-free, pollution free and healthy environment. The court founded its decision on the right to life which guarantees the right to a clean environment. Sadly, the declarations of the court ordering Shell and others to stop gas flaring in the plaintiff's community has been ignored and the judge that made the declaration was promptly transferred to the north of the country.[10]It has been rightly submitted that the export of petroleum resources though have enormously contributed to Nigeria's economy over the past fifty five years, the past and present petroleum exploration and production have affected human right to a healthy environment[11] due to harmful/detrimental consequences associated with petroleum-related environmental pollution and degradation in the oil producing host communities within the Niger Delta region.[12]The reality of Nigeria being an oil producing nation makes it imperative to make Section 20 justiciable.

[8] (2000) 6 NWLR [pt. 660] at 228.
[9]Suit No: FHC/B/CS53/05. The judgment was delivered on the 14th day of November 2005.
[10] Available at http://www.climatelaw.org/media/2007May2/, accessed on 19th Sept., 2017.
[11]Eaton, J. P., (1997) *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*," Boston University International Law Journal, 15 261-571.
[12]Ite, A. E., et al, "*Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria's Niger Delta*," American Journal of Environmental Protection, 1 (4).2013, 78-90.

In juxtaposing the position of the Nigerian Supreme Court with the Indian Supreme Court, just like Nigeria, Economic, Social and Cultural rights are not enforceable in India because those rights are contained in a 'Fundamental Objectives and Directive Principle of State Policy. However, the courts in India have through an expansive interpretation of the civil and political rights guaranteed under its constitution, enforced and promoted economic, social and political rights.[13]

4.2.2 Criminal Code Act

In the same vein, section 247 of the Criminal Code Act 2004 provides that:

> *Any person who –*
>
> *(a) vitiates the atmosphere in any place as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood, or passing along a public way; or*
>
> *(b) does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, whether human or animal; is guilty of a misdemeanour, and is liable to imprisonment for six months.*

Notwithstanding the unequivocalness of this section, its enforcement has left much to be desired, for rarely are offenders tried and convicted to deter its prevalent violation.

Basically, the statutory framework for environmental resources management in Nigeria has been classified into three broad models. These are conservation legislation, oil and gas exploration and control legislation and environmental policy and protection legislation. Legal framework for the regulation of environmental protection in Nigeria is derived from National and International Laws,

[13] The Case of *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545.

Conventions and Protocols.[14]The provisions of these legal instruments have given the relevant government authorities and/or government agencies obligations to provide subsidiary instruments in order to ensure that the relevant environmental objectives become operational and binding in the course of petroleum exploration and production in the Nigeria's Niger Delta region.[15]

4.2.3 Environmental Impact Assessment (EIA) Act 2004

As part of the new environmental agenda which most countries in the world adopted as a result of the 1992 Rio de Janero Summit (Brazil) to find a lasting solution to the global and national environmental problems for sustainable development, the EIA (Environmental Impact Assessment) was introduced for development on government land in Nigeria. This decree was promulgated to reduce the pollution and ensure preservation of the Delta environment and anywhere else in the country. It is therefore, the government's decision and attitude toward the non-compliance with oil regulations that necessitated the enactment of the EIAA in 1979. The EIAA (Environmental Impact Assessment Act) was meant to ensure unconditional compliance by any major oil company embarking on exploration project that may have adverse effects on the environment and its people. This clearly shows that prior to the 1979 Act, there was a high rate of non-compliance with oil regulations by oil companies. In effect, oil production had engendered conflict in the Ogoni, Ijaw, Urhobo, Isoko and Ughelli oil-producing areas of the Niger Delta against the federal government and the oil operators.[16]

[14]Anyogu, F. and Ikoni, U. D. (2012) *Towards The Strict Legal Enforcement of Best Practice Principles in Oil and Gas Exploration and Production in Nigeria*, NAUJILJ, p. 17

[15]Ite, A. E., et al, *Petroleum Industry in Nigeria: Environmental Issues, National Environmental Legislation and Implementation of International Environmental Law,* American Journal of Environmental Protection, vol. 4, no. 1 (2016): 21-37.

[16]Nerry, E and Akpofure, E. (2000). *Environmental Impact Assessment in Nigeria: Regulatory Background and Procedural Framework,* in UNEP, EIA Training Resource Manual, Nigerian Tribune, 2003

Currently, the Environmental Impact Assessment (EIA) is a framework that provides prior assessment of potential impact of development activity on the environment and the Section 2 of the 1992 EIA Act obliged the public or private sector of the economy to not undertake or embark on authorised projects or activities without prior consideration of the effect of such projects on the environment. The emergence of EIA Act was a fundamental legal development in terms of enhancing environmental protection efforts and the goal of sustainable development is embedded in the EIA Act. Its full implementation is aimed at improving the physical, biological and socio–economic conditions for all citizens living in Niger Delta region of Nigeria. Conversely, most of these laws exist only in statute books. In other words, they lack any committed enforcement machinery and the penalties provided in some of them are grossly inadequate and can hardly deter any potential polluter.

The Federal Government, in order to lay a solid foundation for the exploration and production of crude oil, adopted certain legal framework to monitor and control the activities of oil multinationals. One of such policy framework was the establishment of the 1951 Oil Pipeline Act to effectively monitor the extraction and production of petroleum products by all oil companies in Nigeria. The main reason for the promulgation of the Oil Pipeline Act was to make provision for licenses to be granted for the establishment and maintenance of pipelines incidental and supplementary to oil fields, oil mining, and for purposes ancillary to such pipelines. This explains that the Act, at the time it was promulgated, was not meant to prevent the environmental pollution and degradation of other natural resources in Nigeria, but to lay down in law that these pipelines were legal and should not be violated by others.

Section 5(1) (a) and (b),[17] had granted the oil license holder the right to enter and survey the land without interference from the third parties. This section inter alia states that:

> *"A permit to survey shall entitle the holder… to enter together with his officers, agents workmen and other servants and with any necessary equipment or vehicles, on any land upon the route specified in the permit of reasonably close to such route for the…purposes to survey and take levels of land, to dig and bore into the soil and subsoil…"*

The import of this provision is that the oil companies were mandated to undertake proper survey of the route for the pipelines to determine its suitability before installation, and provide adequate maintenance of those pipelines in the Niger Delta oil producing communities. The Act further stipulates in Part IV section 20(2), (1) (a) (b) and (c):

> *"Any damage done to any buildings, crops or profitable trees by the holders of license in the exercise of the rights conferred by the license, and… any disturbance caused by the holders in the exercise of such rights, and any damage suffered by any person by reason of any neglect on the part of the holder or his agents, servants, or workmen…"*

As earlier mentioned, the government and the oil operators under the partnership had provided little or no protection for the victims of oil pollution and environmental degradation that had destroyed the basic survival means of the Niger Delta people, therefore rarely are these regulations complied with nor the victims recompensed. Despite the putative environmental policy framework, successive Nigerian governments have failed to effectively implement either the National Policy on Environment (NPE) that ensures sustainable development or any of the related environmental policies and/or legislative instruments aimed at reducing negative impacts of energy production and use on the environment.

4.2.4 Land Use Act[18]

[17] Oil Pipeline Act Cap 338 1990

The problem associated with compensation payment for oil spills in Nigeria was linked to the provisions of the Land Use Act of 1978. It could be argued that the Act only recognised the surface rights of the people, but not below the surface, particularly when it relates to minerals found underneath the earth. This can equally help to explain why compensation payment was based on the mineral found in the soil to which the local people had no access under this Act.

Section 544 (3) of the Land Use Act states that:

> *Notwithstanding the foregoing provision of this section, the entire property in and control of all minerals, mineral oils, and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and exclusive economic zone… shall vest in the government of the federation…*

Based on the above provision, it is submitted that there was no mention of compensation that recognised the land that already belonged to any individual or community before the law was made. It shows that the Niger Delta oil-producing communities had lost their power and rights over the land. Part V Section 28 and 33 of (Revocation of Rights of Occupancy and Compensation) Land Use Act 1978, indicates that the concept of land ownership was no longer acceptable in the Nigeria law.[19]

4.2.5 The Petroleum Act 2004

The Petroleum Act 2004 empowers the Minister in S. 9 (1) (b) (iii) to make regulations for the prevention of pollution of watercourses and the atmosphere. Accordingly, Regulation 25 provides thus:

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[18] L.F.N 2004

[19] Raji. A. O. Y. and Abejide, T. S., (2000) *Compliance with Oil and Gas Regulations in The Niger Delta Region, Nigeria* C.: An Assessment, *Arabian Journal of Business and Management Review (OMAN Chapter),* Vol. 3, No. 8, March. 2014, p. 39

> The licensee or lessee shall adopt all practicable precautions including the provision of up to date equipment approved by the Director of Petroleum Resources to prevent pollution of inland waters, River courses, the territorial waters of Nigeria or the high seas by oil, mud or other fluid or substances which might contaminate the water, bank or shore line which might cause harm or destruction to fresh water or marine life and where any such pollution occurs or has occurred, shall take prompt steps to control and if possible, end it."

The Federal Government's reactive rather than proactive measures towards safeguarding the environment from foreseeable devastation evidently reveals its lack of political will. This was made plain in the aftermath of the Koko incidence in a community in defunct Bendel state in 1988, where about 4,000 tons of assorted toxic wastes were dumped within Nigeria borders by the Italians.[20] The trend of subsequent enactments showcases this, i.e. the Harmful Waste (Special Criminal Provision) Act[21], the Federal Environmental Protection Agency Act (Decree No. 58 1988), to mention but few.

4.2.6 Associated Gas Reinjection Act 2004

This Act which is the only legislation so far on gas makes it obligatory for every company producing oil in Nigeria to submit detailed plans for gas utilization. The Act also stipulates that no company engaging in the production of oil shall flare gas produced in association with oil without permission in writing from the Minister.

4.2.7 Harmful Waste (Special Criminal Provision) Act, (L.F.N 2004)

[20] Ibid
[21](Decree No. 42 of 1988

Promulgation of Harmful Waste (Special Criminal Provision Act) Decree took place in 1988, sequel to the Koko port incidence. The dumping of the harmful wastes made the populace aware of the dangers posed by waste production in whatever form. The Harmful Waste Act prohibited the purchase, sale, importation, transmission, transportation, deposit and storage of harmful waste in Nigerians. It also made it an offence for anybody to collect and keep or dump harmful waste anywhere within the territorial water, the contiguous shelf zone or the exclusive economic zone of Nigeria or the inland water ways. A section of the Act also provided that apart from criminal liability, anyone responsible for dealing in harmful wastes will also suffer civil liability.[22]

The lukewarm attitude demonstrated by the federal government in the enforcement of these laws to curb the incessant oil spillage, flaring, indiscriminate dumping of toxic waste, has culminated in the socio-political unrest that pervade the Niger Delta region in Nigeria. With the continuous environmental degradation that comes with the discovery and exploration of oil, it would have been expected that Nigeria would have fashioned out a more coherent and effective environmental governance and management system much earlier than 1988. Although decades late, Nigeria finally has a draft Petroleum Industry Governance Bill (now an Act**)** to establish the legal and regulatory framework, institutions and regulatory authorities for the Nigerian petroleum industry and to establish guidelines for the operation of the upstream, midstream and downstream sectors. However, there are certain criticisms levelled against this Act. For instance, the Act fails to address the issue of gas flaring and like the Associated Continued Flaring of Gas Act, it merely stipulates monetary penalties for the continued flaring of gas in Nigeria. Section 201 of the Bill provides that "The lessee shall pay such gas flaring penalties as the Minister may determine from time to time" Furthermore, Section 201(2) provides that the lessee shall install such measurement equipment as

[22] Section 1 *Harmful Wastes Decree* 1988

ordered by the Inspectorate to "properly measure the amount of gas being flared." It is, therefore, clear that oil companies will continue to flare associated gas in vulnerable communities in Nigeria.

4.3 Institutional Enforcement under National Environmental Standard Regulation and Enforcement Agency (NESREA) Act

The main environmental legislation relevant to the Nigerian petroleum industry are the Federal Environmental Protection Agency (FEPA) Act[23], the various guidelines and regulations made pursuant to the FEPA Act, the EIA Decree, the Oil in Navigable Waters Act, and the Harmful Wastes (Special Criminal Provisions) Act. FEPA came into existencein1988, with a view to establishing the basic institutional machinery for environmental management in Nigeria. Although preceded by an earlier environmental protection statute prohibiting activities on harmful wastes, The FEPA Act was established for two purposes; the establishment of Federal environmental protection Agency and provision of legal foundation for the national policy on environment.[24] Although the FEPA Act is a framework legislation which provides for a comprehensive system of environmental protection and management in Nigeria, it also includes provisions on establishment of a regulatory agency charged with coordination of environmental liability and enforcement powers. The establishment of FEPA in 1988, now the Federal Ministry of the Environment (FME), significantly changed the legal status quo of environmental regulation in the Nigerian petroleum industry.[25] Penalties and enforcement mechanisms were imposed and multinational oil companies could be held liable for the costs of clean–up and/or restoration, and compensation to parties injured by their illegal practices. Although the FEPA is the apex authority, there are various

[23] 1988 as amended by Act No.59 of 1992

[24]UcheGbuonu C.C., (2009) *Examination of the Enforcement of Environmental Laws in Nigeria*, LLM thesis Unilorin, p. 37

[25]Mba, H. C., (2004) *Management of Environmental Problems and Hazards in Nigeria*, Aldershot: Ashgate Publishing Company.

agencies charged with the responsibility of monitoring and enforcing different environmental laws in Nigeria.[26] For example, the Federal Ministry of Water Resources is charged with the monitoring and enforcement of water pollution while the Department of Petroleum Resources (DPR) is specifically charged with the monitoring and enforcement of the petroleum laws and regulations. However, the FEPA (now FME) has overall responsibility for the management of the environment in Nigeria whilst the DPR has the sectorial regulatory and/or supervisory role over FEPA in the Nigerian petroleum industry.

The duties of FEPA include advising the government on national environmental policies and priorities, scientific and technological activities affecting the environment, and to cooperate with Federal and State Ministries, Local Government Councils, statutory bodies and research agencies on matters and facilities relating to environmental protection.[27]As a result of its overseeing role, it was expected that FEPA would coordinate, supervise, monitor and handle environmental issues in a holistic manner.[28] However, FEPA had some undermining influences such as political interest, irrational support for the parastatals of the State, complacency and bureaucratic rules.[29] For instance, FEPA's ability to function independently of political interest and avoid conflict of interest situations was slim. This is because the functions of the Agency were subject to the discretion of the Minister of environment, who is empowered to give directions on the running of affairs of the Agency. The general powers of the Minister no doubt constituted a major source of interference with the Agency's independence to carry out its regulatory duties, especially where

[26]Emeseh, E., *Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria," Journal of Energy and Natural Resources Law,* 24, 2006, pp. 574-606.
[27]See S. 4(a) – (e) of FEPA Act.
[28]Fagbohun, O., *The Emergence and Development of Environmental Law in Nigeria* (1960-2010), note 6, p. 177,
[29]Ibid, p. 180

the violator is another government agency or has close relationship with government.[30] Furthermore, the composition of FEPA left little room for public participation and monitoring of FEPA activities in relation to the protection of the environment. For instance, the Public or concerned stakeholders could not compel FEPA to carry out the enforcement and implementation of its regulations because of the limitations of standing to sue.[31]

4.3.1 National Environmental Standards and Regulations Enforcement Agency (NESREA) Act

Amongst the most recent and important addition to Nigeria's environmental regime is the establishment of National Environmental Standards and Regulations Enforcement Agency (NESREA) Act, which came into force on July 31 2007. The Act was promulgated due to the series of criticisms levelled against the FEPA Act. The NESREA is the second environmental law enforcement agency that is responsible for enforcing all national environmental laws and/or regulations as well as enforcing compliance with provisions of international environmental laws and multilateral environmental agreements (MEAs) to which Nigeria is a signatory. The NESREA is the Nigeria's lead environmental protection agency and the NESREA Act repealed the defunct FEPA that was formerly charged with the protection and development of the environment.[32] In accordance with the NESREA Act, all regulations, authorizations and directives made pursuant to the FEPA Act which were in force at the commencement of the NESREA Act shall continue to be in force. Although the NESREA is charged with the responsibility to enforce all environmental

[30] Ibid, p. 179
[31] Ibid, p. 180
[32] Janicke, M., et al, (1997) *National Environmental Policies: A Comparative Study of Capacity-Building - With a Data Appendix: International Profiles of Changes since 1970,* Berlin: Springer-Verlag.

laws, guidelines, policies, standards and regulations in Nigeria, NESREA's functions do not however include enforcement of environmental standards, regulations, policies and guidelines in the Nigerian oil and gas sector.[33] Therefore, in order to achieve environmental protection and development in Nigeria, NESREA is obliged to enforce compliance with the provisions of all international agreements, protocols, conventions and treaties on the environment to which Nigeria is a signatory. Although the legislation is a framework legislation for the overall management of the environment at the national level,[34] there are other framework and legislation that contain detailed regulations that complement the Act.

The creation of NESREA as the regulatory agency for the environment came eight years after the scrapping of FEPA. In between this time, the Ministry of Environment assumed the functions of regulator. However, despite the eight years interval and vacuum, the eventual NESREA Act, like its predecessor, was not able to provide a more coherent framework for monitoring compliance with environmental laws and regulations, rather, it created more confusion in the governance and management of the different sectors of the environment. The NESREA Act failed to cure one of the major inadequacies of the FEPA Act with regards to the environmental management of the oil and gas sector.[35] For example, despite the fact that NESREA is the overall regulatory body responsible for the management of the environment, its regulatory jurisdiction is limited in the oil and gas sector.

4.3.2 Niger Delta Development Commission (NDDC) Act

[33]Adeyemo, A. O., (2008). ("*Assessing Environmental Protection and Management Systems in West Africa: A Case Study of Nigeria*," Dissertations & Theses, Geography and Environmental Resources, Southern Illinois University at Carbondale, Ann Arbor,

[34]Du Plessis, W., *The Balancing of Interests in Environmental Law in Africa*, Pretoria, South Africa: Pretoria University Law Press, 2011.

[35]Section 7, 8 and 29 of the NESREA Act expressly excluded the oil and gas sector from the regulatory jurisdiction of NESREA.

The above is concerned with using allocated funds of Federal Government to tackle ecological problems arising from exploration of oil minerals in the Niger Delta. Section 7 (I) (b) of the NDDC Act empowers the commission to plan and implement projects for sustainable development of the Niger delta.[36]However, it has been observed that the activities of the commission so far, have not really solved the ecological problems in the Niger Delta area.

4.3.3 The Petroleum Industry Governance Bill 2017

The emergence and passage of The Petroleum Industry Governance Bill 2017 by the Senate is the most practical effort ever made by the federal government to restructure the legal and institutional frameworks of the oil sector. It remains for the Governance Bill to be considered and hopefully passed by the House of Representatives, which is the second chamber of Nigeria's bicameral legislature, after which it was transmitted to the President for his assent. If the President gives his assent, the bill will become law. If eventually passed into law it will have the capability to curb the excesses emanating from the equivocal provisions regarding the exercise and extent of the discretionary powers of the Petroleum Resources Minister and Minister of Environment, which has been rather vague and broad. Also, taking cognizance of the flaws of the Petroleum Industry Governance Bill (PIGB), which attempted to overhaul the existing legal and institutional framework of the petroleum sector and replacing it with a novel legal regime and institutions, the Governance Bill seeks to reorganise and restructure the existing bodies, and divest their respective enormous powers and functions into a more organised and transparent bodies in order to water down the excesses of NNPC and the petroleum resources Minister.

[36]Atofarati, G.A., (2010) *Environmental Rights and Sustainable Development and Inventors Rights in Nigeria*; LLM Thesis Unilorin, p. 14

At its core, is the much-pared down Governance Bill which deals mainly with the governance and institutional framework for the petroleum industry, and seeks to establish bright lines between policymaking, regulation and commercial activities, and the authorities or bodies that are charged with those respective functions. It also seeks to engender value addition, transparency, accountability and a re-orientation towards optimal profit creation for national petroleum assets. In this first of a series of updates on the Governance Bill and its implications for the petroleum industry, a brief summary of the highlights of the bill, including the (I) clear intention of the bill to limit the role of the Minister of Petroleum Resources (''Minister'') essentially to that of a policy maker, (ii) the transfer of industry regulatory functions to a new independent petroleum regulatory commission; and (iii) the restructuring of the Nigerian National Petroleum Corporation ("NNPC") with the aim of resolving its age-long funding challenges, lack of transparency and accountability, and steering it towards value creation and profitability.

4.3.4 Role of the Minister of Petroleum Resources under the PIGB

The Minister remains responsible for the supervision of operations and affairs of the Industry. He is authorized to determine, formulate, modify and monitor petroleum policies and after due consultation with the relevant stakeholders in the Industry and the general public, issue new petroleum policies.[37]The Minister is authorized on behalf of the Federal Government to negotiate and execute international petroleum treaties and agreements with other countries and international organizations and do all such things incidental and necessary for the performance of the duties of his office. The Governance Bill also preserves the right of pre-emption of the Minister to all petroleum and petroleum products in the event of a state of national emergency.

[37] Section 2 0f the Petroleum Industry Governance Bill

However, unlike the position under the current Petroleum Act,[38] which confers discretionary powers on the Minister to grant, renew extend or revoke petroleum exploration and production licences and leases, the Governance Bill gives the power to exercise those functions, to the Nigeria Petroleum Regulatory Commission (the "Petroleum Regulatory Commission" or the "Commission"). The Act also transfers the power to grant licences in relation to refineries and such other downstream activities as the importation, sale, storage or distribution of petroleum products, and price control of petroleum products from the Minister to the Commission.

With regards to the issuance of regulations, the powers of the Minister under the current Petroleum Act, the Hydrocarbon Oil Refineries Act and the Oil Pipelines Act have been completely whittled down. Under the Governance Bill, those rule-making functions will be assumed by the Petroleum Regulatory Commission. In the same vein, the regulatory functions of the chief executive of the Petroleum Inspectorate set up pursuant to the NNPC Act shall be assumed by the Nigeria Petroleum Regulatory Commission. All the resources, rights, liabilities, obligations and assets of the Department of Petroleum Resources, the Petroleum Inspectorate and the Petroleum Products Pricing Regulatory Agency will be transferred to the Petroleum Regulatory Commission.

Therefore, it can be argued that poor management of the petroleum resources, ineffective government's petroleum development policies and unsustainable operational practices by the multinational oil companies have led to socio–economic, socio–political, militancy and complex interaction problems involving the people, economic development and the environment in the Niger Delta region.

4.3.5 The Nigeria Petroleum Regulatory Commission

[38] P10, LFN 2004

It is laudable that the tenets undergirding the establishment of the Petroleum Regulatory Commission are the necessity of agency autonomy and independence from ministerial control. These are apparent in the clarity of the functions of the Commission as well as the composition of the Governing Board of the Commission (''Board''). The Minister has no seat on the Board, and the members of the Board will be appointed through a transparent process by the President subject to the approval of the Senate. In instances, where the Minister issues general policy directions to the Petroleum Regulatory Commission, the Commission shall only be obligated to implement such policies if they are not in conflict with the provisions of the enabling law.[39]

The Commission's functions will include enforcing compliance with all applicable laws and regulations, executing policies, issuing fair and balanced regulations, developing and publishing methodologies for tariffs and pricing relating to third party access to petroleum facilities, evaluation of national reserves, licensing for the upstream, midstream and downstream regulated activities, modification and revocation of licences, allocation of petroleum production quotas in a non-discriminatory manner, promotion of competition and arresting situations of abuse of dominant power, establishing consumer protection measures, developing market rules for trading in wholesale gas supplies and developing open access rules for petroleum products and transportation infrastructure. The Governance Bill also gives the Commission full responsibility for environmental matters and enforcement of environmental policies, regulations and laws in the petroleum industry.[40]

[39] Section 4 of the PIGB
[40] Op.cit p.20

4.3.6 Establishment of Commercial Entities and the future of the Nigerian National Petroleum Corporation

In a bid to reposition Nigeria's upstream assets and its key asset-holding vehicles for self-sustainability and accountability, the Governance Bill provides for the creation of three new entities, namely, the Ministry of Petroleum Incorporated ('MOPI'), the Nigeria Petroleum Assets Management Company ('NPAMC') and the National Petroleum Company ('NPC').[41]

The MOPI which will be established as a corporation will be the sole investment vehicle of the Government and will hold the shares of the Government in the successor commercial entities like NPAMC and NPC.

NPAMC will be incorporated as a company limited by shares under the general company law. It will be capitalized from public funds with the expectation that it will fund its operations from its revenue after it becomes fully operational. The production sharing contract assets currently held by the NNPC will be transferred to it under a transfer order to be issued by the Minister. It will also assume specified liabilities, rights, obligations and employees of the NNPC.[42]

Its mandate includes the management of the production sharing contract assets with a view to achieving maximum return on investment for the Federal Government. To further entrench the Governance Bill's commitment to accountability and transparency, NPAMC has an obligation to comply with the Codes of Corporate Governance issued by the Securities and Exchange Commission, and publish its annual reports and accounts on its website and public media. It is comforting to note that the Governance Bill preserves all existing causes of action and contractual relationships (including bonds, loans, financing agreements, joint operating agreements,

[41] Section 60 of the PIGB
[42] Section 66 of the PIGB

production sharing contracts and all working arrangements) relating to the assets that will be transferred from the NNPC to NPAMC. All such relationships, etc. shall be fully effective and enforceable against or in favour of NPAMC as though NPAMC was the original named party or against both NPAMC and NNPC depending on the terms of the transfer order. Furthermore, the Governance Bill expressly exempts the transfer of the assets from any stamp duties or capital gains tax that would otherwise have been chargeable as a result of the transfer.

Similar to NPAMC, the third entity, NPC will be set up as a company under general company law with a transitional equity divestment plan that ensures that the Government retains controlling interest in the company. At incorporation, its shares will be held by the Ministry of Finance, the Bureau of Public Enterprises and MOPI. Within five (5) years from the date of incorporation, NPC shall divest a certain percentage of its shares to the public, and within ten (10) years of the date of incorporation, divest an additional number of its shares to the public. Certain assets, liabilities and obligations of NNPC will be transferred to NPC pursuant to a transfer order issued by the Minister and NPC's mandate will be the operation of such assets on a fully commercial basis.

In a bid to insulate NPC from the transactional bottlenecks that the NNPC continues to experience in the areas of commercial borrowing, incurring expenditure for its petroleum operations, public procurement of technical services and disposal of public assets, the Governance Bill expressly exempts NPC from complying with the provisions of the Fiscal Responsibility Act, 2007 and the Public Procurement Act, 2007. However, it will be liable to comply with the general rules of accountability applicable to companies under the Companies and Allied Matters Act (CAMA) and the Investment and Securities Act (ISA). To enable continuous creation of value and a clean break from existing liabilities, the board of directors of NPC is empowered (with the approval of its

shareholders) to utilize any appropriate mechanism, including asset and interest sale, to offset any liabilities, meet future obligations and implement strategic objectives.

Another feature of the Act that aims at resolving funding challenge that has historically plagued the NNPC is the provision entitling NPC to, notwithstanding the provisions of any law to the contrary, retain the revenue from its operations to defray its expenses including its cash call obligations and its payment obligations to its lenders. The extent of the efficacy of this provision is open to possible debate in the light of the judicial decisions on the constitutional requirement for all revenue of the Nigerian Federation to first be paid into a central public account known as the Federation Account.

As with NPAMC, the Governance Bill also preserves all existing causes of action and contractual relationships (including bonds, loans, financing agreements, joint operating agreements, production sharing contracts and all working arrangements) relating to the assets that will be transferred from NNPC to NPC. All such contractual arrangements shall be fully effective and enforceable against or in favour of NPC as though NPC was the original named party or against both NPC and NNPC depending on the terms of the transfer order. Again as with NPAMC, the transfer of all such assets from NNPC to NPC is exempted from any stamp duties or capital gains tax that will otherwise have been chargeable as a result of the transfer.[43]

To ensure that NPAMC and NPC are not financially encumbered with the liabilities of NNPC, the Governance Bill proposes the incorporation of a liability management company to which certain liabilities of the NNPC will be transferred for resolution purposes. Upon the conclusion of the settlement of such liabilities, the liability management company shall be wound up.

[43] Op. Cit page 89

4.3.7 Miscellany

If it is ultimately enacted into law following passage by the House of Representatives and assented to by the President, the Governance Bill shall prevail over any existing law including the provisions of the Petroleum Act, the Oil Pipelines Act, Hydrocarbon Oil Refineries Act and the Companies and Allied Matters Act to the extent of any inconsistencies between the Bill and any of those laws. The Governance Bill will also repeal the Petroleum Products Pricing Regulatory Agency (Establishment) Act LFN 2004, the Petroleum Equalisation Fund (Management Board) Act, Cap P11, LFN 2004, the Nigerian National Petroleum Corporation Act Cap P43, LFN 2004, Nigerian National Petroleum Corporation (Projects) Act, Cap N124, LFN 2004, and the Nigerian National Petroleum Corporation Amendment Act, Cap N123, LFN 2004. All validly existing authorisations or certificates, permits, licences and leases issued by the Department of Petroleum Resources or under any of the above laws shall continue to have effect for the remainder of the period of their validity.

Historically, petroleum Ministers have been known, in the exercise of their discretionary powers, to make certain allocations without significant consideration being given to the capabilities of the potential awardees to successfully explore such resources. Consequently, a considerable number of prolific fields particularly gas bearing assets, remain unexploited long after being awarded.

Also, with the introduction of a single and independent petroleum regulator, operators within the sector and potential investors will no longer have to contend with similar requirements from multiple agencies. A single petroleum regulatory agency will assist greatly to streamline the regulatory process, introduce clarity and reduce the several layers of bureaucracy in a sector that is already notorious for unnecessary regulatory processes and hurdles.

An endemic problem in the management and operation of the nation's petroleum assets has been the absence of transparency. If the proposal to restructure the NNPC for transparency, accountability and value addition scales the outstanding regulatory and executive hurdles, the nation's asset-holding vehicles will, for the first time in Nigeria's history, become positioned to compete globally and attract funding for resource exploitation.

4.4 Smooth Operation of the Entire Petroleum Sector in Terms of Utilisation, Production, and Supply

The Oil and Gas sector control, ownership, regulation and enforcement activities in Nigeria are guided by certain extant laws. The starting point is, the Exclusive Legislative List of the 1999 Constitution, more particularly items 39 and 41, second schedule, part II, which makes provisions for mines and minerals, including oil fields, oil mining, geological surveys and natural gas as well as nuclear energy. The implication of which is only the National Assembly has the exclusive legislative competence to legislate on these matters.

The principal law on Oil and Gas in Nigeria is the Petroleum Act. Section 1(1) thereof and section 44(3) of the Nigerian Constitution 1999, as amended, vested the ownership and control of all petroleum in and under any land in Nigeria, or under or upon the territorial waters and the Exclusive Economic Zone of Nigeria in the Government of the Federation.

The consequence of these provisions is that no person shall undertake any activity for the exploration or production of oil and gas without a written authorization of the Federal Government. Such authorization will usually be by the grant of oil prospecting licence or an oil mining lease. However, once a party is duly granted a licence or other concession under the Petroleum Act, the licence or concession becomes a piece of property protected by section 44(1) of the Constitution. Although, ownership of natural resource can fully be appreciated if and when that

owner is allowed the full enjoyment of all legal rights attached thereto, including the right of alienation.[44]

Lastly, the PIGB has indeed stationed the Petroleum Regulatory Commission in such a manner that, it shall enhance and ensure the smooth operation of the entire petroleum sector. This is in terms of utilization, production and supply.

[44] SPDC v. Sheikh of Abu Dhabi (1959) 18 ILR at p.152

CHAPTER FIVE

SUMMARY, FINDINGS AND RECOMMENDATIONS

5.1 Summary

This dissertation finds out that petroleum is one of the most important and highly utilized natural resources in the world scene and it is the highest export earner for Nigeria today. The development of the petroleum legal framework is far from being comprehensive, because several aspects are in dire need of legal coverage. The recent tranche of the much talked about PIB, i.e. PIGB simply created the institutions which might be useless without passing the substantive new petroleum Act. It could rationally be observed that legislative process in Nigeria is often belated and bereft of foresight.

The historical development of the petroleum industry is traceable to the colonial era when the British Government was in absolute control of the then nascent industry. The ownership and control of revenue arising from petroleum activities then belonged to the colonial country, Britain. This status quo changed in 1960 when Nigeria became politically independent.

The petroleum industry in Nigeria occupies a prime position in the economic configuration, earning as much as 90% (Ninety percent) of its foreign exchange. During the early stage of the petroleum industry, Nigeria's development was (and even now) inextricably tied to the revenue realized from the sale of petroleum and its products. Just before and immediately after the amalgamation of Southern and Northern protectorates, the Minerals Oil Act of 1914 provided the legal framework within which petroleum activities were carried out. This was enacted to search for, work and win mineral oils. Today, after series of legal enactments the Petroleum Act 2004 is the final authority of petroleum exploration and production.

The main thrust of this dissertation is "An appraisal of the development of the petroleum law in Nigeria" which was extensively adumbrated in chapters two, three and four.

After laying the general foundation with an introduction under which background of the study, problem, aim and objectives, scope, methods as well as the justification of the research, coupled with a vivid literature reviewing of some existing literatures on the subject matter. Chapter Two titled "Theoretical Discourse of Petroleum Laws in Nigeria" undertook a conceptual clarification of laws in Pertroleum sector for the purpose of easy understanding. Other areas discussed under this chapter include: policy framework for the petroleum industry in Nigeria, origin and development of petroleum law and it was concluded with regime governance of renewable energy as a diversified energy resource in Nigeria.

Chapter three titled "Appraisal of Petroleum Law and Policy in Nigeria" discussed inter alia: policy impact on petroleum law in Nigeria, legal impact on petroleum sector in Nigeria, Institutional response towards Petroleum Industry Regulation and other new emerging phenomena in the industry.

Chapter Four titled "Control, Regulation and Enforcement of laws in Nigeria's Petroleum Sector". This discussed regulation and enforcement of the existing petroleum law, institutional enforcement of the petroleum law in Nigeria, the role of law enforcement agencies and smooth operation of the entire petroleum Industry in terms of utilization, production and supply.

5.2 Findings

From the research above, the following findings are therefore made:

i. It is observed that, the legal framework for the petroleum industry has not provided needed enabling environment for efficient utilization of the oil and gas resources in Nigeria. Thus, the enabling laws are long overdue for a newer legislative enactment and some necessary

amendments in the extant law. For example, the Petroleum Act and other sister laws, have not provided the needed enabling environment in the area of governance, accountability, transparency and host communities.

ii. Furthermore, most of the stakeholders ranging from the industry practitioners, host communities are sometimes not adequately engaged when enacting laws for the petroleum sector. This has in so many respects created situations of conflicts and repetitions. For example, in the Niger Delta region, the host communities and the government often engaged in unhealthy clashes due to the regulatory laws for oil exploration which the people claimed that it damages their farmlands, waters and the environment without adequate compensations.

iii. Moreover, the research found that the Petroleum Industry Bill has not been passed into law. This causes a lot of challenges in the desired expectations as a result of disagreements between the legislature and the executive. This problem has led to inadequate utilization of the oil and gas resources in Nigeria.

5.3 Recommendations

From the above findings, the following recommendations are therefore made:

i. It is recommended that there should be amendment on the current legal framework on the petroleum industry so as to take care of the challenges faced in the sector. Also, there should be enabling environment that will guarantee efficient utilization of oil and gas resources in Nigeria.

ii. It is recommended that both stakeholders such as industry practitioners, host communities, etc. should be engaged whenever a new law regulating petroleum exploration is to be enacted. This will help in reducing the high conflicts and tension in the oil region of Niger

Delta. Government should as a matter of urgent concern look at the claim so as to ensure enabling environment for petroleum exploration.

iii. The legislature should ensure timely passage of Petroleum Bill so as to guarantee effective legal framework that will lead to the desired expectations in the petroleum sector. Both the legislative arm and executive should work hand-in-hand to ensure quick passage of such law.

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