A LEGAL FRAMEWORK EVALUATION OF THE CONTROL OF OIL AND GAS POLLUTION IN NIGERIA, MALTA AND UNITED STATES OF AMERICA

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Abstract

Legal framework depicts the body of domestic or international laws that apply in a particular county, that gives structure to the relationship between the state and the population and define the parameters for legal conduct. Evaluation on the other hand means the making of a judgement about the amount, number or value of something; assessment. The précis of this paper therefore, is a review of the legal framework in Nigeria oil and gas production industries to seeing how effective, efficient, active and innovative they provided against environmental pollution for sustainable development. We made comparison with the position of laws in United States of America and Malta. We found that while America and to a great extent Malta have developed laws in environmental protection in oil and gas, Nigeria is just waking up with case law but still engulfed in statutory cum legislative double roles jeopardy in environmental protection in oil and gas pollution. We made some recommendations for way forward.

Keywords: Oil, Gas, Pollution, Prevention and Control, Environment and Sustainable Development.

1. Introduction

Primarily, as a result of industrialization, irreparable damage is done to the environment. Mankind is now faced with the fact that the current destruction might lead to a very bleak or even blurred future for the earth and its inhabitants. Environmental pollution from oil and gas activities has become very common phenomenon for the Nigerians; especially in the Niger Delta environment. The Niger Delta has a richly endowed ecosystem. The oil industry unfortunately constitutes dams all over the terrain in a most reckless manner without paying much attention to the environmental devastation. The control and regulation of the use of the environment by all nation is therefore essential. Laws, which achieve this purpose, provide the framework for such regulation and control.[1] Environmental issues were not in the front burner of national debate before 1988.[2] However, with the advent of toxic waste in the Nigerian port town of Koko and with the public outcry that followed, concern about the sustainability of the Nigerian environment became an issue of national discourse.[3]Gas flaring from oil wells for instance, has also become a veritable source of environmental pollution. The scenario is that while the lands and waters are being

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1 L Atsegbua et al, Environmental Law in Nigeria: Theory and Practice (Benin City, New edition, AMBIK Press, 2010) p. 50.

2 Livinus I. Nwokike, 'Sustainable Strategies for Waste Management in Nigeria: A Legal Appraisal, Ph.D Dissertation, Faculty of Law, Nnamdi Azikiwe University, (2020) p. 80

3 T C Eze & U G Eze, The Law for the Prevention of Oil and Gas Pollution in Nigeria, (Enugu: Ebenezer Productions Nigerian Limited, 2015) p. 58

polluted by oil spills, the atmosphere is at the same time receiving a mixture of gasses that also pollutes it. Effluent and waste discharge are another sources of oil and gas pollution in Nigeria. Effluent discharges are discharges into the surrounding environment and water by oil companies during drill cuttings. Drilling and fluids are extensively used in simulating production.

Furthermore, other sources of pollution from petroleum activities include the discharge of refinery chemicals and wastes which are harmful to the environment in the course of petroleum refining, disposal of wastes into the sea from offshore oil facilities, discharges of crude oil from accident vessels and sabotage. Nigeria has laws against these petroleum activities that pollute the Nigerian environment, though with their attendant inadequacies and improper enforcement mechanism. Examples abound here, for instance, before the signing of the Petroleum Industry Act, 2021, Nigerian Petroleum Act, 1969 was the Law in operation. The Act was enacted to provide the legal framework for the exploration and exploitation of oil and gas resources in Nigeria and all other matters incidental thereto.[4] Apart from conferring on the minister the power to make regulations to prescribe standards and procedures for the purposes of the Act,[5] The Petroleum Act is not polite on the issue of oil and gas pollution. However, there is need to utilize the innovation in Petroleum Industry Act, 2021 which severed the enormous discretional powers of the Minister. Be that as it may, the problem is still there; as the Nigeria President almost controls everything in Nigeria Petroleum operations and management. Other Acts for the control of pollution in our environment are not free from this problem of complications in the implementation and execution of the laws. For instance, Associated Gas Re-injection Act, 1979. Thus, despite series of amendments in the Act, inadequacy of technological utilization, lack of environmental consciousness and lack of political wills on the part of government continued to result in the postponement dates of the implementation of the Act unlike in Malta and the United States of America that have realized this.

This is the reason for this research as we employ Nigeria to develop her Laws on the control of oil and gas pollution to address environmental problems bedeviling our environment for sustainable development. On certain provisions of the 1992 Liability Convention given force of law in Malta, it is provided that subject to the provisions of sub-articles (2) to (5) of this article and notwithstanding the provisions of any other law, those provisions of the 1992 Liability Convention, contained in the First Schedule to this Act shall form part of and be enforceable as part of the law of Malta.[6] We shall carry the appraisal under the following legal frameworks:

2.1 A Summary of the Legal Framework for the Control of Oil and Gas Pollution in Nigeria, Malta and United States of America Nigeria:

2.1.1 Common Law

The common law, in contrast to the law on legislation, comprises various legal principles, which have been developed by the judiciary in decided cases over many years.

[4] Preamble to the Petroleum Act Cap 10 LFN, 2004

[5] (n.1)

[6] See Section 4(1) of the Maltan Oil Production (Liability and Compensation) Act Cap 412, 2001 (as amended) online at http://www.justiceservices.gov.mt/downloaddocument.aspx?app-lom&itimid=8878 accessed on 8th July, 2020

2.1.2 The Constitution of the Federal Republic of Nigeria 1999, Cap C23, Laws of the Federation of Nigeria, 2004

First, the Constitution is the formulation of the country's law and basic principles that governs a country. The proposition that rights are interrelated and are equally important is not merely a theoretical postulate.

2.1.3 The Petroleum Act[7]

This Act which came into effect on the 27th of November, 1969 to provide for the exploration of Petroleum from the territorial waters and the Continental Shelf of Nigeria and to vest the ownership of and all on-shore revenue from Petroleum resources derivable therefore in the Federal Government and for all other matters incidental thereto. However, if the Petroleum Industry Governance Bill is passed by the National Assembly and assented by the President, the unlimited roles of the minister will be reduced and checked.

2.1.4 National Environmental Standards Regulation and Enforcement Agency Act (NESREA), 2007

The NESREA Act was enacted in 2007 to replace the FEPA Act. The Act created the National Environmental Standards Regulation and Enforcement Agency and conferred on it the responsibility for the protection and development of the environment in Nigeria and other related matters.

2.1.5 Harmful Waste (Special Criminal Provisions e.t.c) Act, 1988 (HWSCPA)

This Act was enacted as a response to the dumping of harmful toxic wastes at Koko, Delta state, Nigeria by an Italian company. The Act prohibits the dumping or depositing of harmful waste in the air, land or waters of Nigeria (Section 1. HW (SCP) Act, Cap H1, LFN. 2004). One interesting feature of this Act is that notwithstanding its depiction as an Act with "Special Criminal Provisions", it provides for civil liability of offenders to persons who have suffered injury as a result of the offending act.

2.1.6 Oil in Navigable Waters Act, (ONWA) 1968.

The Act provides for penalty for violation of its provisions but failed to stipulate the minimum or maximum amount for such penalties. It only stated without adducing any reason that where trial is by a court of summary jurisdiction other than a High Court, such penalty, shall not exceed N2,000.00.[8]

2.1.7 Oil in Navigable Waters Regulation (ONWR), 1968

This regulation was made pursuant to the Oil in Navigable Waters Act. It prescribes equipment to be fixed in ships to prevent and avoid pollution of navigable waters. The major pitfall in this subsidiary legislation is that it made no express provisions for remediation steps to be taken when the navigable waters are polluted by oil.

[7] Petroleum Act, Cap P.10, Laws of the Federation of Nigeria, 2004
[8] Section 5 *ibid*

 ISSN: 2736-0342

2.1.8 Associated Gas Re - Injection Act (AGRA), 1979

The Act made an initial provision for ending oil flaring by April, 1980 and the imposition of fines against defaulters. A new deadline was set in 1984 by the Associated Gas (Continual Flaring of Gas) Regulations which permitted flaring under certain circumstances. The Act was further amended in 1985 to fix the penalty of 2 kobo for every 1000 cubic feet of gas flared.[9] Despite the above provisions, the oil companies preferred to pay the paltry fines than engage in gas utilization project: The legislative provisions have never been enforced and the government has been in the habit of shifting dates for ending gas flaring without any legislative or statutory back up. The last date fixed for ending gas flaring was 2012 but as at the present day, gas flaring is still going on around many of installations in the country. The greatest problem with this Act is the unwillingness of both the government and the oil companies to comply with its provisions.

2.1.9 National Environmental Protection (Effluent Limitation) Regulations (NEPELR), 1991

The main object of this regulation made pursuant to the FEPA Act is the regulation of liquid wastes generated from factories and other industrial productions including refineries and oil drilling installations. The regulation makes it mandatory for every industry to install anti -pollution equipment for the detoxification of effluent and chemical discharges emanating from the industry on the basis of Best Available Technology (BAT)

2.1.10 National Oil Spill Detection and Response Agency (NOSDRA) Act, 2006.

The Act established the National Oil Spill Detection and Response Agency. It empowered the Agency to manage the National Oil Spill Contingency Plan (NOSCP) and take responsibility for detecting and clearing up oil spills in Nigeria.[10] The Agency was established in compliance with the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPPRC, 1990) to which Nigeria is a signatory. There is currently a bill before the National Assembly Christened "The National Oil Pollution Management Agency" bill. The purpose of the Bill is to amend the NOSDRA Act so as to replace the agency with a New National Oil Pollution Management Agency with wider and broader powers in the prevention and control of oil and gas pollution

2.1.11 Oil Spill and Oil Waste Management Regulations, (OSOWMR) 2011

This regulation is made pursuant to the NOSDRA Act, 2006. The regulation require facility owners to have in place a spill prevention, control and countermeasure plan (SPCCP) as well as an Oil Spill Contingency Plan (OSCP) to be approved by the Agency.[11] The operator is to report any discharge of oil or oily waste on land or navigable waters of Nigeria in the prescribed form to the Agency within 24 hours.

[9] Associated Gas re-injection (Amendment) Act, 1985
[10] Preamble to the NOSDRA Act 2007
[11] Regulation 4 of the Oil Spills and Oil Waste Management Regulations, 2011

2.1.12 Oil Spill Recovery, Clean Up, Remediation and Damage Assessment Regulation, 2011 (OSRCRDAR)

The instant regulation is also made pursuant to the NOSDRA Act, 2006. While the previous regulation dealt generally on oil spill and oil waste management, this regulation centres on recovery, clean - up, remediation and compensation after an oil spill incident has occurred. As a criticism, the regulation is however scanty on compensation and damage assessment.

2.1.13 Hydrocarbon Oils Refineries Act (HORA), 1965

This Act does not make any direct provision for pollution control. Its major focus is the taxing of petroleum refining[12]activities. It is rather unfortunate that an Act designed to regulate the refining of hydrocarbon products does not have a single provision for environmental protection. This depicts the general attitude of legislation in the petroleum sector where no attention to environmental protection. This is the major pitfall in the Act. We suggest that the minister in making regulations for the control of production, storage and ware housing of hydrocarbon oils, should go beyond excise duty and make provisions for environmental protection while all the above processes are going on.

2.1.14 Niger Delta Development Commission Act, (NDDC)

The purpose of the Act was to establish a commission which will be an instrument for effective channelling of ecological funds from the federation account toward tackling ecological problems which arise from oil and gas exploration and exploitation in the Niger Delta and other purposes connected therewith.[13] It would appear that the NDDC and the newly created Ministry of the Niger Delta are duplications. This casts the Commission in the mould of a mere talk shop.[14]

2.1.2 Malta:

The principal laws governing oil and gas activities are the following:

- the Petroleum (Production) Act (Chapter 156 of the Laws of Malta);
- the Petroleum (Production) Regulations (Subsidiary Legislation 156.01);
- the Offshore Safety (Oil and Gas) Regulations (Subsidiary Legislation 156.02);
- the Continental Shelf Regulations (Subsidiary Legislation 535.02);
- the Natural Gas Market Regulations (Subsidiary Legislation 545.12); and
- the Petroleum for the Inland (Wholesale) Fuel Market, Bottling of LPG and Primary Storage Facilities Regulations (Subsidiary Legislation 545.17)

2.1.3 Regulation

The authority to grant oil and gas rights and to regulate oil and gas exploration and production rests with the prime minister. With respect to offshore oil and gas operations, licence holders must

[12] Preamble to the Hydrocarbon Oils Refineries Act, Cap H5. LFN, 2004

[13] preamble to the NDDC Act. Cap N86, LFN/2004

[14] T C Eze *et al*, *The Law for the Prevention of oil and gas pollution in Nigeria* (Enugu: Ebenezer Productions Nigeria Limited, 2015), 64 See also Livinus I Nwokike, Dissertation for the award of Doctor of Philosophy in Law, Faculty of Law, Nnamdi Azikiwe University, Awka, 2020 at p. 80

comply with the Offshore Safety (Oil and Gas) Regulations, which require them to submit to the Offshore Safety (Oil and Gas) Board:

- a major accident prevention policy;
- a safety and environmental management system applicable to the installation; and
- an internal emergency response plan.

External emergency response plans covering all offshore oil and gas installations and potentially affected areas are dealt with under the Offshore (Oil and Gas) External Emergency Response Regulations (subsidiary Legislation 499.64). These plans are prepared by the Maritime Safety and Pollution Prevention Committee.[15] It is provided that the scope of these regulations is to transpose Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC which aims to reduce as far as possible the occurrence of major accidents relating to offshore oil and gas operations and to limit their consequences, thus increasing the protection of the marine environmental and coastal economies against pollution, establishing minimum conditions for safe offshore exploration and exploitation of oil and gas and limiting possible disruptions to European Union indigenous energy production, and to improve the response mechanisms in case of an accident.[16] These regulations shall be without prejudice to European Union law concerning safety and health of workers at work, in particular Directives 89/391/EEC and 92/91/EEC[17]

2.1.4 Environmental Protection

The environmental authorizations required for oil and gas-related activities will largely depend on the type of activity being carried out and the area in which it is carried out. An integrated pollution prevention and control permit, which is an operating permit issued by the Environment and Resources Authority, and which controls the release of harmful emissions into the air, water and soil, may be required for certain oil and gas-related activities. Additionally, as part of the permitting process for the construction of oil and gas facilities, comprehensive environmental impact assessments may be required. Regarding offshore activities, the government of Malta will grant a licence for oil and gas activities only where it is satisfied that the licensee has the financial capacity to cover liabilities which may potentially arise from the licensed activities – specifically, the environmental damage which might be caused. Additionally, prior to commencing operations, the licensee must prepare and submit to the Offshore Safety (Oil and Gas) Board a report detailing the safety and environmental management system of the installation. The licensee must also submit a report on major hazards which must contain, among other things, a description of the equipment and arrangements to ensure:

- containment of hazardous substances;
- prevention of fire and explosion;
- protection of the workers from hazardous substances; and

[15] C Preziosi, Oil and Gas in Malta, available on line at https://www.lexiology.com/library/detail.aspx7g=5d010845-disc-4318-8ea8-088160868f4d accessed on 24th August, 2020

[16] See Section 2(1) of Malta Subsidiary Legislation 156.02 Offshore Safety (Oil and Gas) Regulation: Legal Notice 174 of 2015, as amended by Legal Notice 200 of 2015

[17] See Section 2(2) (n.1)

- protection of the environment from a major accident.

The report must also include an assessment of the identified potential environmental effects that would result from the loss of containment of pollutants arising from a major accident, and a description of the technical and non-technical measures envisaged to prevent, reduce or offset them, including monitoring.

2.1.5 Requirements for Environmental Protection

General environmental protection law regulating the discharge of emissions and pollutants into the air and the marine environment apply to oil and gas activities. Wastes laws regulating the disposal of harmful substances also apply to such activities. The operation of certain oil and gas installations might also require an integrated pollution prevention and control permit, which would impose a number of additional monitoring and reporting obligations on the operator. Apart from the above, the Prevention and Remedying of Environmental Damage Regulations (Subsidiary Legislation 549.97) also apply to oil and gas activities. These regulations require an operator or licensee to take all necessary preventative measures in the event of an imminent threat of environmental damage. Where environmental damage has occurred, the operator must inform the competent authority immediately of the situation and take all steps necessary to control, contain and remove or otherwise manage the contamination or other harm caused.[18]

2.1.6 Breach and Consequences

Violations of environmental laws and regulations may lead to both civil and criminal penalties. Violations occurring during the development of a project can result in the suspension of development activities until the environmental harm is remedied. Violations which occur during operation may result in the suspension or revocation of the permit or authorization. In terms of the Prevention and Remedying of Environmental Damage Regulations, an operator may be held liable for the full costs of remedying the environmental harm caused through its activities. The operator would also be required to reimburse the competent authorities (including emergency responders) for the costs incurred in taking remedial action and responding to the harm.[19]

3.1 United States of America

The legal framework for the control of oil and gas pollution in the United States is founded on three laws. These are the Oil Pollution Act (OPA) of 1990,[20] the Comprehensive Environmental Responses, Compensation and Liability Act (CERCLA), 1980[21] and the Water Control Act of 1972 otherwise known as the Clean Water Act.[22] In addition to the above Acts is the National Oil and Hazardous Substances Contingency Plan issued by the United States Environmental Protection Agency.[23] We shall now treat the objectives of these Acts seriatim:

[18] *Ibid*
[19] *Ibid*
[20] 33 U.S.C. 2701
[21] 42 U.S.C. 9601
[22] 33 U.S.C. 1251
[23] Restoration, Natural Resources Damage Assessment and Restoration Program 'Laws, Regulations and Authorizing Statutes" at <http//restoration.doc.gov/laws.html accessed 19-02-2012

3.1.1 Clean Water Act (CWA)

Objectives

- Impose restrictions and strict controls with respect to the discharge of pollutants, including spills and leaks of oil and other substances, into the waters of the United States, unless authorized by an issued permit.
- Also prohibit the discharge of dredge and fill material into regulated waters, including wetlands, unless authorized by an issued permit.
- Spill prevention, control and counter measure requirements of the federal law requires appropriate containment terms and similar structures to help prevent the contamination of navigable waters in the event of a spill, rupture or leak.
- Federal and state regulatory agencies can impose administrative, civil and criminal penalties for non-compliance with discharge permits or other requirements of the CWA.[24]

3.1.2 Resource Conservation and Recovery Act (RCRA)

Objectives

- Regulates the generation, transportation, treatment, storage, disposal and cleanup of hazardous and non-hazardous waste.
- Under the direction of the EPA, individual states regulate and administer to the Act.
- Drilling fluids, produced waters and most of the other wastes associated with the exploration, development and production of crude oil or gas are regulated under non-hazardous waste provisions.
- Also, in the course of ordinary business, some industrial waste is generated such as paint waste, waste solvents and waste oils that might be regulated as hazardous wastes.
- Wastes containing naturally occurring radioactive materials may also be generated in connection with the operations of an oil or gas well.[25]

3.1.3 Safe Drinking Water Act (SDWA)

Objectives

- Operations associated with the company's properties also produce waste waters that are disposed through injection in underground wells. These activities are regulated under this Act.
- Classifies produced waste waters and imposed restrictions on the drilling and operation of disposal wells as well as the quality of injected wastewaters.[26]

3.1.4 Federal Clean Air Act (CAA)

Objectives

- Regulate emissions of various air pollutants through air emissions permitting programs and the imposition of other requirements.

[24] E Walker, Environmental Regulation of the Oil and Gas Industry, Pioneer Natural Resources – Response of a large Independence, https://www.uscg.mil/Mariners/Nationa-Pollution-Funds-Center/e-tools/Oil

[25] *Ibid*

[26] *Ibid*

- May require a facility to obtain preapproval for the construction or modification of certain projects or facilities expected to produce air emissions or result in the increase of existing air emissions; obtain or strictly comply with air permits containing various emissions and operational limitations; or utilize specific emission control technologies to limit emissions of certain air pollutants.
- EPA continues to develop strict regulations for toxic emissions at specified sources and states can impose regulations that are stricter than those that the EPA sets.
- Federal and state regulatory agencies can impose administrative, civil and criminal penalties on those that are non-compliant.
- Permits and related compliance obligations under the CAA, as well as changes to state implementation plans for controlling air emissions in regional non-attainment areas, may require the company to incur future capital expenditures in connection with the addition or modification of existing air emission control equipment and strategies for gas and oil exploration and production operations.
- Additionally, some gas and oil production facilities may be included within the categories of hazardous air pollutant sources, which are subject to increasing regulation under the CAA. Failure to comply with these requirements could subject a regulated entity to monetary penalties, injunctions, conditions or restrictions on operations.[27]

3.1.5 Oil Pollution Act (OPA)

- Primary federal law imposing liability for oil spills.
- Sets minimum standards for prevention, containment and cleanup of oil spills.
- Applies to vessels, offshore and onshore oil facilities, including exploration and production facilities that may affect the waters of the United States.
- Under OPA, responsible parties, including owners and operations of onshore facilities may be subject to oil spill clean-up costs and natural resource damages as well as public and private damages that may result from oil spills.[28]

3.1.6 Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

Objectives

- Imposes joint and several liability, without regard to fault or legality of conduct, on classes of persons who are considered to be responsible for the release of hazardous substances into the environment.
- These persons include the current and past owner or operator of the site where the release occurred, and anyone who disposed or arranged for the disposal of a hazardous substance released at the site.
- Subject to liability for the costs of cleaning up the hazardous substances that have been released into the environment, for damages to natural resources and for the costs of certain health studies.

[27] *Ibid*
[28] *Ibid*

 ISSN: 2736-0342

- Additionally, it is not uncommon for adjacent landowners or third parties to file claims for personal injury and property damage allegedly caused by the hazardous substance that was released into the environment.[29]

4. Conclusion

We have gone through the laws, regulations and authorizations towards effective and efficient management of oil and gas for the protection of environmental pollution in Nigeria, Malta and United States of America. It is observed that the above countries have legal frameworks though their levels of application of technology toward the mitigation of pollution in these countries varied based on their level of development, positive political will and available strategies for sustainable development. Thus, in Nigeria both the old and the present legislation in the oil and gas sector do not show themselves with the issue of pollution. In Nigeria, there is inadequate technology for the control of pollution and gas flaring is the order of the day; because they still dance to the tune of the multinational corporations. Besides, corruption on the side of some authorities of the oil and gas agencies is another limiting factor. More importantly, there are overlap of functions and responsibilities among the Agencies regulating and managing some of these oil and gas in Nigeria. Defences available to the offenders to the provisions of the Acts regulating oil and gas in Nigeria offer escape routes to them. In Malta, prior to commencing operation, the licensee must prepare and submit to the offshore safety Board a report detailing the safety and environmental management system of the installation. The licensee must also submit a report on major hazards which must contain among other things, a description of the equipment and arrangement to ensure containment of hazardous substances. This is unlike in Nigeria, where corruption may not allow for using 'must' in this regard. Again, Malta has better technical know-how than Nigeria. However, American technology is better off than that of Nigeria and Malta. In America, a sophisticated and effective legal framework and regulations are there to meet the challenges of potential threats for devastating oil spills in view of the large size of the oil industry. The objectives of each of their laws on oil and gas pollution enumerated above have explained this point. We do not need to repeat them here.

5. Recommendations

It is not only important and imperative to have legal framework for the control of oil and gas pollution in Nigeria, Malta and United States of America. But it is more necessary to make the enforcement and implementation of the provisions that provides for punishment in time of breach so as to act as deterrence to the likely offenders. Again, developing countries should go for modern technology for the management and exploration of these petroleum products to reduce pollution. Gas flaring must be eschewed no matter the benefits. In fact, there is need for better reforms in laws to make oil and gas offences a strict liability ones. America should offer more technical assistance to developing economy like Nigeria and with a more liberal condition. These are only ways sustainable development can be achieved in Nigeria, Malta and America.

[29] *Ibid*