IMPROVING COMPLIANCE AND ENFORCEMENT OF ENVIRONMENTAL REGULATION OF THE PETROLEUM SECTOR IN NIGERIA: THE ROLE OF INSTITUTIONALISM

Brown, Cleverline Taribokiesimama

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Faculty of Business and Law

University of the West of England, Bristol

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Abstract

Regardless of the existence of a wide range of regulatory instruments and agencies, the petroleum sector has remained largely unregulated in Nigeria. The impact of lack of or weak regulation is seen in the increasing environmental damage across Nigeria and the increasing number of court cases on the subject matter. In querying the failure of the existing regulatory regime with particular reference to the petroleum sector, this thesis challenges the conventional scholarship which had hitherto concentrated on the development of enforcement of environmental regulations and ignoring the compliance aspect that can be adopted to create a balanced regulatory model that is capable of meeting the regulatory demands of the petroleum sector. This thesis argues that since law alone is not enough to regulate the petroleum sector, an improved regulatory architecture that embodies value and promotes innovative compliance and enforcement mechanisms can be institutionalised in the regulatory design of the Nigeran petroleum sector. In support of this, this thesis adopted a socio-legal analysis of the literature on compliance and enforcement strategies practised at the international, regional and national levels of other jurisdictions and the role of the executive, legislature and the judiciary in improving compliance and enforcement the insitutionalism of ssome values. This thesis demonstrates that a more cooperative system of environmental regulation that emphasises a balanced compliance and enforcement model can produce the desired regulatory effect and secure a transformative environmental development outcome. This thesis also finds that addressing regulatory challenges like access rights, funding failures, technological advancement in petroleum operations, restructuring environmental courts systems, consolidation of regulatory legal instruments in the petroleum sector in Nigeria can bring the Nigerian environmental regulatory regime at par with international best practices. As such this research recommends reforms that will encourage the development of compliance mechanisms that facilitate effective environmental regulation.

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CHAPTER 1

General Introduction

1.1 Introduction

Environmental sustainability is a pivotal part of any developmental strategy adopted by individual states or a cluster of states[1] to deal with the negative impacts of pollution on the human and natural environment.[2] The consequences of the development of natural resources on the environment have compelled most states to take steps to mitigate the impact of these developments on the environment.[3]

This chapter provides an examination of the background on which this research is premised in **section 1.2** while highlighting the problem which necessitated this research and the research questions sought to be resolved in **sections 1.3** and **1.4** respectively. This chapter further elucidates the aims, specific objectives of the research, and the significance of this research in **section 1.5** especially in an area of study that so much has been written about. The thorough analysis of these aspects of this research will display the originality and contribution to knowledge that this research offers to the environmental law scholarship on the subject as highlighted in **section 1.6** of this chapter. This research builds on previously written works on the subject from within and outside the case study jurisdiction (i.e. Nigeria) and the legal framework that has promoted compliance and enforcement of environmental and petroleum sector regulation.

[1] CB Onuoha, EI Bassey and H Ufomba, 'The Impact of Oil Exploration and Environmental Degradation in the Niger Delta Region of Nigeria: A Study of Oil Producing Communities in Akwa Ibom State' (2018) 18 (3) Global Journal of Human-Social Science (F) 55, 55.

[2] http://www.opec.co.uk/oil-pollution-recovery.html accessed 18th July 2017.

[3] The steps taken include enactment of laws and other legislative measures, the creation of standards, policies, the establishment of compliance and enforcement protocols, and the establishment of regulatory bodies for monitoring compliance and enforcement of these regulations.

1.2 Background to the research

The Nigerian environment faces degradation from the effects of the operations of the various sectors of the economy.[4] However, it is beyond the scope of this research to attempt a study of every sector of the Nigerian economy in seeking the answers to the research questions. The exploitation of the vast natural resources found in the country and some agricultural development practices[5] have contributed to the environmental degradation in Nigeria like in most African countries.[6]

The continued environmental degradation from the operations of the petroleum sector has generated the hypothesis that the existing compliance and enforcement mechanisms in the petroleum sector in Nigeria are inadequate to protect the environment[7] and promote effective environmental regulation. Since Nigeria is a part of the global environmental sustainability movement, an environmental regulation paradigm that supports sustainable development must be pursued and achieved.[8] As noted earlier, the desire for the continuous development of the natural resources and by implication, the environment, is now the motivation for any developmental approach adopted by states.[9] This desire has continued to increase in importance

[4] Some of the natural resources found in Nigeria include rivers, fossil fuel such as crude oil, natural gas and coal, metallic minerals such as tin, columbite, iron, lead, zinc and gold, radioactive minerals such as uranium, thulium and monazite, non-metallic minerals such as limestone, marble, gravel, clay and shale and arable land. See CNC Ugochukwu and J Ertel, 'Negative Impacts of Oil Exploration on Biodiversity Management in the Niger Delta Area of Nigeria' (2008) 26(2) Impact Assessment and Project Appraisal 139, 139.

[5] VT Jike, 'Environmental Degradation, Social Disequilibrium, and the Dilemma of Sustainable Development in the Niger-Delta of Nigeria' (2004) 34 (5) Journal of Black Studies 686, 689. Agriculture was the initial primary source of income of the nation. There was increased use of fertilizer and pesticides to protect crops and boost food production.

[6] AM Yusuf, AB and SO Mamman, 'Relationship Between Greenhouse Gas Emission, Energy Consumption, and Economic Growth: Evidence from Some Selected Oil-producing African Countries' (2020) 7 Environmental Science and Pollution Research 15815, 15815.

[7] BR Konne, 'Inadequate Monitoring and Enforcement in the Nigerian Oil industry: The Case of Shell and Ogoni land' (2014) 47 Cornell International Law Journal 181, 203.

[8] AE Ite and others, 'Petroleum Industry in Nigeria: Environmental Issues, National Environmental Legislation and Implementation of International Environmental Law' (2016) 4(1) American Journal of Environmental Protection 21, 22.

[9] J Meadowcroft, 'National Sustainable Development Strategies: Features, Challenges and Reflexivity' 17(3) European Environment 152, 153.

because of the determination of oil-producing countries like Nigeria to improve the negative impacts of pollution on the human and natural environment from petroleum-related activities.

It is imperative to note that Nigeria is a party to some international environmental agreements with binding and non-binding commitments and this pushes Nigeria to take firm actions to ensure that the national laws are complied with.[10] For example, Nigeria is a party to the United Nations Framework Convention on Climate Change (1992) which is a binding treaty.[11] Binding obligations to mitigate greenhouse gases means that Nigeria has to ensure that stronger compliance and enforcement measures are applied in the petroleum sector which is the relevant sector.[12]

Indeed, the consideration of the enormous deleterious effects of exploration and production of oil and gas on the environment compelled Nigeria as a country to adopt measures to stem the trend.[13] While a lot of actions were taken by Nigeria at the international level, such as participation in international and regional environmental programmes,[14] other steps were taken at the national level such as the enactment of national laws, regulations, policies, environmental guidelines and standards, the establishment of regulatory agencies to enforce the laws.[15] It is contended that the existence of these laws and policies has proved to be inadequate to guarantee a safe and healthy environment, especially where petroleum resources development is the main economic activity. The weak or lack of compliance and enforcement is seen as the main reason

[10] Some of these agreements include International Convention on Civil Liability for Oil Pollution Damage (CLC) (1969) and Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND) (1971); United Nations Convention of the Law of the Sea (UNCLOS) (1982); International Convention on Oil Pollution Preparedness, Response and Co-operation (1990); Convention on Biological Diversity (1992); United Nations Framework Convention on Climate Change (1992); The Kyoto Protocol (1997).
[11] Ite and others (n 8) 27 -31.
[12] ibid 32.
[13] OJ Olujobi, OA Oyewunmi and AE Oyewunmi, 'Oil Spillage in Nigeria's Upstream Petroleum Sector: Beyond the Legal Frameworks' (2018) 8(1) International Journal of Energy Economics and Policy 220, 221.
[14] For example, Nigeria participated in the UNCED at Rio, signed the Convention on Biological Diversity in 1992 and ratified it in 1994. AE Ite and others, 'Petroleum Industry in Nigeria: Environmental Issues, National Environmental Legislation and Implementation of International Environmental Law' (2016) 4(1) American Journal of Environmental Protection 21, 30.
[15] Olujobi, Oyewunmi and Oyewunmi (n 13) 225.

behind the poor implementation of laws and other policies seeking to regulate actions relating to the environment.

1.3 Statement of the problem

Over the last six decades, the Nigerian petroleum sector has grown to a globally enviable position as the largest oil-producing country in Africa. It holds the largest crude oil reserves on the continent[16] and is the thirteenth largest oil producer in the world. At the national level, Nigeria's economy was dominated by the petroleum sector bringing about a decline in the economic contribution of other viable sectors of the economy such as agriculture.[17] The petroleum sector which is ranked the 10th largest oil reserves in the world accounted for about 90% of the Government's revenue originating from the sector and 35% of the government's Gross Domestic Products (GDP) derived from the oil sector and not fewer than 1% of its national GDP emanates from the downstream petroleum sector.[18] The significant contribution of the petroleum sector to the country's economy has necessitated increased attention on the strategies for regulating the operations of the industry[19] and the quest for a more effective system of environmental regulation. At the same time, oil exploration activities and oil spills have continued to cause degradation to land and marine ecosystems with adverse impacts on the human[20] and natural environment.

[16] H Price, 'Crude Awakening: The International Politics of Oil' (2020) 14(3) Global Tides 1, 11; 'Top 20 Oil Producing Countries in Africa' (2017) <https://www.africanvault.com/oil-producing-countries-in-africa/> accessed 30 January 2018.
[17] Ite (n 8) 81.
[18] OJ Olujobi, OMM Olujobi and DE Ufua, 'A Critical Appraisal of Legal Framework on Deregulation of the Downstream Sector of the Nigerian Petroleum Industry' (2020) 11(6) International Journal of Management 252, 254; Ite (n 8) 81.
[19] GO Odularu, 'Crude oil and the Nigerian Economic Performance' (2008) (1) Oil and Gas Business 29 <http://www.myvirtualibrary.com/books/8K057LB13.pdf> accessed 19 July 2017.
[20] A Gaughran, 'Nigeria: Hundreds of Oil Spills Continue to Blight the Niger Delta' (2018) <https://www.amnesty.org/en/latest/news/2015/03/hundreds-of-oil-spills-continue-to-blight-niger-delta/> accessed 30 January 2018.

The problems of environmental pollution and ineffective regulation of the sector have pushed national efforts towards promoting environmental regulations that integrate better enforcement and compliance strategies.[21] Some of the laws and regulatory agencies enacted and established respectively by the Nigerian government to ensure the adequate monitoring of compliance and enforcement of environmental regulations by the operators of the sector are as follows: the Petroleum Act,[22] Oil Pipelines Act 1956,[23] Oil Terminals Dues Decree 1969, Oil in Navigable Waters Decree 1968,[24] Mineral Oil (Safety) Regulations 1963, Federal Environmental Protection Agency (FEPA) Decree that established the Federal Environmental Protection Agency (FEPA)[25] and was later repealed by the National Environmental Standards Regulations Enforcement Agency (NESREA) Act[26] which established the National Environmental Standards Regulations Enforcement Agency (NESREA). Other regulatory agencies include the Department of Petroleum Resources (DPR) and the National Oil Spill Detection Response Agency (NOSDRA).[27] Regardless of the efforts by the government in this respect, little impact has been seen either by the human[28] or natural environment as there have been countless incidents of environmental mishaps.[29] Remediation and compensation have also been few and far between for the immediate and remote victims of these environmental mishaps.[30]

[21] EM Ityavyar and TT Thomas, 'Environmental Pollution in Nigeria: The Need for Awareness Creation for Sustainable Development' (2012) 4(2) Journal of Research in Forestry, Wildlife and Environment 1.
[22] Petroleum Act Cap P10 Laws of the Federation of Nigeria 2010.
[23] Oil Pipelines Act Cap O7 Laws of the Federation of Nigeria 2010.
[24] Oil in Navigable Waters Act Cap O6 Laws of the Federation of Nigeria 2010.
[25] Federal Environmental Protection Agency Decree No 58 of 1988 (defunct); J Brooke, 'Waste Dumpers Turning to West Africa' *The New York Times* (New York, 17 July 1988) 1.
[26] National Environmental Standards Regulations Enforcement Agency (Establishment) Act Cap N36 Laws of the Federation of Nigeria 2007; National Environmental Standards Regulations Enforcement Agency (Establishment) (Amendment) Act Laws of the Federation of Nigeria 2018.
[27] National Oil Spill Detection and Response Agency (Establishment) Act Cap N63 Laws of the Federation of Nigeria 2010.
[28] Konne (n 7) 192.
[29] FOA Egberongbe, PC Nwilo and OT Badejo, 'Oil Spill Disaster Monitoring along Nigerian Coastline' (5th FIG Regional Conference: Promoting Land Administration and Good Governance, Ghana March 08 2011) 1, 5.
[30] KG Kingston and P Nweke, 'Management, Remediation and Compensation in Cases of Crude Oil Spills in Nigeria: An Appraisal' (2018) 8(1) Journal of Mineral Resources Law 27, 28.

The key factors that affect compliance and enforcement of environmental regulations in Nigeria are weak, ineffective, and obsolete laws,[31] lack of effectiveness of the regulatory agencies as a result of inadequate resources, lack of the political will to enforce environmental laws,[32] insufficient capacity in the agencies responsible for monitoring compliance with environmental regulations and enforcement, inadequate sanctions and low level of fines for offenders,[33] lack of awareness of the importance of environmental regulation in the judiciary, corruption, and other economic and political considerations.[34] It is contended that significant regulatory and implementation challenges remain in the Nigerian environmental regulatory architecture. There is the risk that key standards set in existing policies and legislation cannot be met unless these challenges are addressed. The nature of these challenges like communal conflicts, criminal activities, sabotage, and corruption varies in different sectors and involves different stakeholders such as the state, government agencies, multinational corporations, industry operatives, host communities, and NGOs.[35]

This research acknowledges that weak or lack of compliance and enforcement of environmental regulations affect all types of natural resources sectors in Nigeria including land, mining, forestry and water. However, this research focuses on the petroleum sector of Nigeria because Nigeria is a key producer and exporter of oil and gas and attracts foreign investors and

[31] MT Ladan, 'Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' (2012) 8 (1) Law Environment and Development Journal 118, 120.
[32] JP Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations and the Human Right to a Healthy Environment.' (1997) 15 Boston University International Law Journal 261, 288-289.
[33] ibid.
[34] M Aklin and others, 'Who Blames Corruption for the Poor Enforcement of Environmental Laws? Survey Evidence from Brazil' (2014) 16(3) Environmental Economics and Policy Studies 241; F Allison-Kulo, 'Enforcement of Environmental Regulatory Laws in Nigeria' (2007) <https://www.academia.edu/10234192/ENFORCEMENT_OF_ENVIRONMENTAL_REGULATORY_LAWS_IN_NIGERIA_BY> accessed 29 May 2017.
[35] ED Oruonye and YM Ahmed, 'The Role of Enforcement in Environmental Protection in Nigeria' (2020) 7(1) World Journal of Advanced Research and Reviews 48, 54-55; AO Noah and others, 'Corporate Environmental Accountability in Nigeria: An Example of Regulatory Failure and Regulatory Capture' (2020) Journal of Accounting in Emerging Economies 1, 13; CC Ajibo and others, 'Sustainable Development Enforcement Conundrum in Nigeria: Challenges and Way Forward' (2020) Commonwealth Law Bulletin 1, 16; ZO Edo, 'The Challenges of Effective Environmental Enforcement and Compliance in The Niger Delta Region of Nigeria' (2012) 14(6) Journal of Sustainable Development in Africa 261, 269; H Ijaiya and OT Joseph, 'Rethinking Environmental Law Enforcement in Nigeria' (2014) 5 Beijing Law Review 306, 315.

multinational companies.[36] Petroleum sector operations have been poorly managed, and evidence abounds of long-term adverse impacts on the human and natural environment.[37] Furthermore, the overwhelming reality of Nigeria's national dependence on the petroleum sector as the main source of income for the country has continued to generate interests from within and outside Nigeria.[38] This means that petroleum exploration and exploitation in Nigeria will remain for a long time hence the need to find more effective ways of institutionalising compliance and enforcement of environmental regulations to sustain the Nigerian environment.[39] These reasons informed the decision to use the petroleum sector in Nigeria as a case study.

The above discussion highlights the fact that the current environmental regulatory framework that is adopted to monitor the Nigerian petroleum sector has been largely ineffective. This has been the result of many factors especially the poor compliance and enforcement mechanisms in existence to regulate the petroleum sector or implement the existing law.[40] Environmental regulatory laws in Nigeria have for so long suffered poor implementation, causing the lacuna to expose the Nigerian petroleum sector and indeed the environment to inimical forms of danger and unfriendly environmental practices and this has continued unabated for many years.[41]

1.4 Research question and objectives

The key research question sought to be resolved is how effective and efficient compliance and enforcement of environmental regulation in the petroleum sector in Nigeria can be improved.

[36] A Nwozor and others, 'Reform in a Limbo: The Politics and Politicization of Reforms in Nigeria's Petroleum Sector' (2020) 10(4) International Journal of Energy Economics and Policy 184, 184.
[37] G Kpae, 'Impact of Oil Exploration on the Niger Delta: The Drivers and Dynamics of Conflict over Environmental Degradation' (2021) 7(1) Journal of Advances in Social Science and Humanities 1382, 1383, 1387.
[38] Olujobi, Oyewunmi and Oyewunmi (n 13) 223.
[39] AO Ideh, NM Okolo and ES Emengini, 'Non-Oil Sector and Economic Growth in Nigeria: The National Accounts Perspective' (2021) 10(1) European Journal of Sustainable Development 185, 185 – 186.
[40] Some of the other factors that make the environmental regulatory framework ineffective include legal, non-legal and institutional factors. These will be discussed in **Chapter 5**.
[41] Kpae (n 37) 1393.

To address this research question, the laws and regulatory agencies responsible for compliance and enforcement of environmental regulations in Nigeria are analysed to determine why little or no appreciable success in the regulation of the petroleum sector has been achieved with the existing environmental regulatory regime and how compliance and enforcement can be improved. The task of resolving the main research question runs throughout this entire thesis and necessitates some subsidiary research questions which are also addressed to effectively resolve the main research question.

Chapter 2 addresses the subsidiary research question of clarifying the meaning of institutionalism in the context of compliance and enforcement of environmental regulation. This question is resolved in **sections 2.1, 2.2** and **2.3** by unbundling the term institutionalism into the constituent words that make up the term and the various institutional theories that underpin it. **Section 2.4** sets out the values that must be institutionalised in the petroleum sector stakeholders to improve compliance and enforcement. Another subsidiary question investigates why petroleum operations have remained insufficiently monitored in Nigeria regardless of the existing key legal instruments and regulatory agencies discussed in **Chapters 3** and **4**. This discussion brings to the fore some of the motivation for compliance and reasons for non-compliance as well as the barriers that hinder effective compliance and enforcement and was further discussed in **sections 5.1** and **5.2** respectively.

It is trite that in any society where laws exist for the regulation of any relationship, the laws are usually crafted by the legislature, implemented by the executive and interpreted by the judiciary. The subsidiary question as to whether the roles of the three arms of government in improving compliance and enforcement have been adequately discharged is discussed in **sections 3.5** and **3.6** of **Chapter 3,** and **Chapter 6**. This shows that compliance and enforcement of environmental regulation in the context of Nigeria are largely dependent on the trilogy of government in ensuring good governance, effective environmental rule of law, and

access to judicial and administrative proceedings including courts. It has been noted that all the arms of government in Nigeria have active roles to play in regulating the actions of the stakeholders of the petroleum sector as the regulation and protection of the environment fall under the responsibility of the government to act in that regard.[42]

The initiation of this research is an indication that the environmental regulatory status quo in the petroleum sector in Nigeria is not satisfactory. The quest for an alternative regulatory strategy or a combination of regulatory strategies that can solve the regulatory deficiency in the petroleum sector necessitated the need to consider existing regulatory strategies from other jurisdictions. Therefore, the subsidiary question of whether there is a better alternative to the existing regulatory regime is imperative. This question is resolved in **section 4.4.1** of **Chapter 4** by analysing regulatory strategies from other jurisdictions to show that there are other options besides what exists in the Nigerian regulatory regime.

The objective of the research is *first* to assess why regardless of the existence of environmental legislation and regulatory agencies, compliance and enforcement mechanisms remain weak at the national and local level in Nigeria and *second,* to provide recommendations that will support a more effective compliance and enforcement system of environmental regulation in the petroleum sector in Nigeria.

1.5 Significance of the research

The significance of this research lies in the conviction that the law alone is not enough to ensure the effective regulation of the Nigerian environment and petroleum sector. Therefore, this research goes beyond rectifying the law to reforming the law and addressing the issues that make it possible to sidestep the law and encourage non-compliance. A discussion of the various compliance and enforcement mechanisms shows that more can be done than enacting laws that

[42] UI Agbor, 'Local Governance and Regional Crisis in Nigeria: Rethinking Governance Dimension to Crisis in the Niger Delta Region' (2013) 3 (10) Developing Country Studies 78, 82.

do not serve the purpose for which they were enacted. Since more regulators are moving away from the traditional command and control approach of environmental regulation towards a more participatory and cooperative strategy of environmental regulation,[43] this research also examined alternative strategies to improve compliance and enforcement in environmental regulations.[44]

Several developing countries experience similar challenges with compliance and enforcement of environmental regulations because development proceeds at the cost of environmental destruction and environmental circumstances become worse even with growth and development.[45] It is expected that the recommendations offered in this research could guide such developing countries because there is a recognised link between good governance and sustainable development.[46]

1.6 Originality and contribution to knowledge

The originality of this research stems from the fact that previously written works on the challenges of compliance and enforcement of environmental regulations in Nigeria have not explored the various options to improve compliance and enforcement mechanisms effectively,[47] which is what this research intends to achieve by examining best practices from

[43] DJ Fiorino, 'Regulating for the Future: A New Approach for Environmental Governance' in DA Mazmanian and ME Kraft (eds), *Toward Sustainable Communities: Transition and Transformations in Environmental Policy* (2nd edn, MIT Press 2009) 63, 71.
[44] This is discussed in **section 4.4.1** of **Chapter 4** of this thesis.
[45] Y Dadgara and R Nazari, 'The Impact of Good Governance on Environmental Pollution in South West Asian Countries' (2017) 5(1) Iranian Journal of Economic Studies 49, 50.
[46] AG Gaghman, 'The Importance of Good Governance on Achieving Sustainable Development Case Study: Yemen' (2020) Social Sciences 170, 189.
[47] See DS Olawuyi, *The Principles of Environmental Law* (Afe Babalola University Press 2015) 363; MT Ladan, 'Appraisal of the Recent Environmental Regulatory Trends in Petroleum and Mineral Resources Governance in Nigeria: - Viable Options' (National Stakeholders' Summit on Legislative Framework for Petroleum Industry Reform in Nigeria Abuja July 18 2016) 1; OC Eneh and VC Agbazue, 'Protection of Nigeria's Environment: A Critical Policy Review' (2011) 4(5) Journal of Environmental Science and Technology 490; MT Ladan, 'Enforcement and Compliance Monitoring of Environmental Law and Regulatory Good Practices in Nigeria', *Sustainable Development Goals, Climate Change and Extractive Resource Management in Africa* (Ahmadu Bello University Press 2017) 1; MT Okorodudu-Fubara, *Law of Environmental Protection* (Caltop Publications (Nigeria) Ltd 1998) 938 etc.

other jurisdictions. This research argues that the continuous technological revolution in all sectors and specifically in the petroleum operations across the globe was not taken into consideration in crafting compliance and enforcement plans in Nigeria and provisions to accommodate these future changes are lacking.[48] For several years, the petroleum sector in Nigeria was operated with the confidence that the existing environmental and petroleum sector regulatory architecture would be reliable enough to cater to the need for the effective regulation of the sector. However, the failure of the petroleum sector operatives to comply with the laws and the failure of the regulatory agencies to effectively enforce compliance alone or with the assistance of the judiciary points to the fact that a different approach to effective and efficient environmental and petroleum sector regulation is urgently needed.

The literature so far examined suggest that most of the written works in this area have focused on enforcement but not so much on compliance.[49] This research aims to fill this gap. The outcome of this research could be a reliable policy template for Nigeria in dealing with the problems arising out of the operations of the petroleum sector to effectively employ environmentally friendly practices to improve compliance and enforcement of environmental laws.

[48] This can be seen in the archaic equipment used in the operations of the sector some of which have been installed since the actual operations of the sector started in the late 1950s.

[49] Largely because most of the time, action is taken after the fact of environmental disaster therefore, only very little time if any is spent on considering the implications of the legal pronouncements through before actually making them. See e.g. AO Noah and others, 'Corporate Environmental Accountability in Nigeria: An Example of Regulatory Failure and Regulatory Capture' (2020) Journal of Accounting in Emerging Economies 1; U Etemire and NU Sobere, 'Improving Public Compliance with Modern Environmental Laws in Nigeria: Looking to Traditional African Norms and Practices' (2020) 38(3) Journal of Energy & Natural Resources Law 305; C Nwapi, 'The Achievement of Regulatory Excellence in the Oil and Gas Industry in Nigeria: The 2017 National Oil and Gas Policy' (2019) Journal of Energy and Natural Resources Law 91, 105; VE Agbazue, EK Anih and BU Ngang, 'The Role of NESREA Act 2007 in Ensuring Environmental Awareness and Compliance in Nigeria' (2017) 10(9) IOSR Journal of Applied Chemistry 32; H Ijaiya and OT Joseph, 'Rethinking Environmental Law Enforcement in Nigeria' (2014) 5 Beijing Law Review 306; J Brooke, 'Waste Dumpers Turning to West Africa' *The New York Times* (1988) 1.

1.7 Methodology

A methodology has been defined by Henn *et al* as the research strategy as a whole employed to execute research work, distinct from methods, which is the range of techniques available and applied in data collection.[50] Therefore, it is the activity of finding information that is needed to answer a question.[51] This research adopts the socio-legal methodology in exploring the institutionalisation of compliance and enforcement of environmental regulation. It is trite that there has not been a consensus on a particular definition of socio-legal research because various contributors to this approach have not been able to agree on a clear definition of the term. Jolly who defined the socio-legal methodology as one that investigates law in action, went beyond the absolute doctrinal analysis of supposedly authoritative legal texts.[52] However, diverse opinions abound because the law is perceived from a wider context beyond the letter of the law to the vast range of studies carried out within the topic.[53] According to Thomas, since the law is a part of the wider social and political structure, and is inextricably related to it, it can only be well understood if it is studied from those points of view.[54]

The adoption of this methodology is hinged on the belief that the enquiry of this research goes beyond an investigation into the stipulations and interpretations of the law regarding environmental regulation and extends to the impact of the law on the petroleum sector, the human and natural environment and the factors that affect compliance and effective enforcement of environmental regulation of the Nigerian petroleum sector. The stipulations and interpretations of the law together with its impact on the petroleum sector and the

[50] M Henn, M Weinstein and N Foard, *A Critical Introduction to Social Research* (Second edn, SAGE Publications 2004) 356, 10.
[51] BA Garner, *Black's Law Dictionary* (10th edn, Thomson Reuters 2014) 2016.
[52] M Salter and J Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Education Limited 2007) 245, 125.
[53] F Cownie and A Bradney, 'Socio-legal studies A challenge to doctrinal approach' in Dawn Watkins and Mandy Burton (eds), *Research methods in law* (Second edn, Routledge, London 2013) 156, 16.
[54] P Thomas, 'Curriculum Development in Legal Studies' (1986) 20 Law Teacher 110, 112.

environment and the factors that affect compliance and enforcement are usually set out in policy documents, legal instruments and other official documentation publicly available in libraries, websites and other external sources such as academic publications on the subject. This is opposed to applying the doctrinal methodology which seeks to only explore the law and the analysis of the legal doctrine including development and application in a particular sector.[55] It has been noted that sometimes the doctrinal methodology may rely on some other external factors or seek answers to explain the stance of law[56] and so would be inadequate for this research because this research is not likely to produce a *one-size-fits-all* solution.

The socio-legal methodology, being an interface with a sociological, historical, economic, and geographical context within which law exists, offers an interdisciplinary approach to analyse the law, legal phenomenon, and relationships between these and wider society[57] and the factors which promote or impede the effective compliance and enforcement of environmental regulation. The main advantage of this methodology is that it is more realistic and practical as it exposes the reality of the situation unlike in the doctrinal approach where it is unable to relate what the law enacts to what happens in practice[58] and appears to be out of touch with the present realities and has become more procedural.[59]

As the focus of this research is improving compliance and enforcement of environmental regulation of the petroleum sector in Nigeria, a socio-legal approach will enable this research to move beyond an inquiry into the legal framework of environmental regulation to investigate the factors affecting the effective implementation of those legislations and the efficient

[55] VM Gawas, 'Doctrinal Legal Research Method: A Guiding Principle in Reforming the Law and Legal System Towards the Research Development.' (2017) 3(5) International Journal of Law 128, 129.
[56] P Chynoweth, 'Legal Research' in A Knight and L Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley & Blackwell 2009) 28, 30. The example of such instances can be seen where vague legal decisions can properly be understood when interpreted in a historical or social context or where the interpreter possesses sufficient understanding of the industry to which the legal decision relates. P Thomas 'Curriculum Development in Legal Studies' (1986) 20 Law Teacher 110, 112.
[57] S Wheeler and P Thomas, *Socio-legal Studies* (Oxford Hart Publishing 2002) 267, 16.
[58] ibid 113.
[59] ibid 117.

operation of the statutory regulatory agencies set up to monitor the compliance and enforcement process. The factors affecting the effective compliance and enforcement of environmental regulation are examined to determine whether these are stand-alone factors or are consequent upon some other factors.

The effects of the failure of compliance and enforcement of environmental regulation have been recorded in grievances of individuals, communities, NGOs etc. who have experienced the direct impact of such environmental disturbances and have approached the courts to resolve their dilemma.[60] A discussion of the case law on these issues explores the role the judiciary plays in monitoring compliance and enforcement. It will also further the application of theoretical perspectives from other social sciences such as economics, politics and management, to reinforce the theme of this research. Dewey has opined that social enquiry should be guided by the problems of life and practice rather than by intellectually self-generated conceptions and techniques, therefore the problems of social enquiry must grow out of actual social tensions, needs and troubles.[61]

1.7.1 Methods

To achieve the objective of this research, the use of primary and secondary sources of law relating to compliance and enforcement of environmental regulation to determine *inter alia* how authorised measures can impact the regulation of petroleum sector actors to make their practices more responsive to environmental law concerns was employed.[62] Specifically, library-based doctrinal legal research, supported by case law analysis of environmental and petroleum sector-related cases, reference to internet sources, in-depth literature review of academic scholarship on the subject and best practices analysis of similar petroleum-producing countries around the world were explored.

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[60] *SPDC v Abel Isaiah* (2001) 5 S.C 9Pt 11) 1*; Graham Otoko v SPDC* (1990) 6 NWLR 693.
[61] J Dewey, *Logic: The Theory of Inquiry* (H Holt 1938) 546.
[62] ibid 151.

Some of the relevant primary sources in Nigeria include a National Policy on the Environment, Constitution of the Federal Republic of Nigeria 1999, [63] Environmental Impact Assessment Act, Harmful Waste (Special Criminal Provision) Decree etc. Other international primary sources that have been domesticated in Nigeria include the Geneva Conventions Act, African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act,[64] International Convention on the Establishment of an International Fund for the Compensation for Oil Pollution, International Convention of Civil Liability for Oil Pollution Damage (Ratification and Enforcement) Act 1992 etc.[65]

This research also employed the use of secondary sources such as books, journal articles and research materials on the subject matter, to build a more contextual analysis of the subject.[66] Secondary sources relied upon include academic literature relevant to the area of this research, library-based search, legislative documents, commentaries and analysis of case law relevant to environmental regulation, online search materials and legal databases, keyword search in data gathering and analysis.

Finally, this research uses the Nigerian petroleum sector as a case study to show the impact of the current compliance and enforcement mechanisms in environmental regulation and how it has failed to effectively regulate the petroleum sector. It also relies on best practices from some

[63] Constitution of the Federal Republic of Nigeria 1999 Cap C23 Laws of the Federation of Nigeria 2010, Environmental Impact Assessment Act Cap E12 Laws of the Federation of Nigeria 2010, Harmful Waste (Special Criminal Provision) Decree now Cap H1 Laws of the Federation of Nigeria 2010. Others include the and the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN).

[64] African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act CAP A9 Laws of the Federation of Nigeria 2004.

[65] Others include International Convention for the Prevention of Pollution from Ships 1973 and 1978 Protocol (Ratification and Enforcement) Act, United Nations Convention on the Carriage of Goods by Sea (Ratification and Enforcement) Act 2005, International Convention for the Safety of Life at Sea (Ratification and Enforcement) Act 2004, International Convention on Oil Pollution Preparedness, Response and Cooperation, Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), Agreement on Co-operation in the Fields of Mining, Geology, Exploration and Beneficiation of Minerals and Energy, United Nations Convention on Environment and Development (Rio Convention), United Nations Framework Convention on Climate Change, the Paris agreement and the United Nations Convention of the Human Environment (Stockholm Convention). Nigeria has signed and ratified some international, bilateral and regional agreements which are relevant to environmental matters.

[66] 'Research Methods: Socio-Legal Methodology' (2017).

jurisdictions to show how the institutionalisation of competent compliance and enforcement models can effectively promote environmental regulation in the Nigerian petroleum sector. The criteria for the choice of these jurisdictions is based on the similarity they bear to the Nigerian petroleum sector development trajectory (including factors that impede and promote the effective regulation of the sector and how such factors were conquered) and the roles played by various actors in the regulation of the petroleum sector in these other jurisdictions.

1.7.2 Limitations of the research

This research was carried out by studying primary and secondary sources on the subject. However, access to some of the legal instruments and policy documents was problematic because some of these documents are in the middle of a review or copies were missing especially in the relevant offices where they ought to be found. It usually took a lot of time for the updated versions of such documents to be made accessible to the public. Records of some vital environmental incidents which are kept by the regulatory bodies such as oil spill reports were inaccessible and, in some instances, the records were non-existent. This had to be solved by relying on the records of some of the operating companies and community liaison offices. During the literature review, it was found that prior studies on compliance with environmental and petroleum sector regulation in Nigeria were very limited. The writing-up of this thesis was impacted by the COVID-19 global pandemic as it seriously restricted movement and access to libraries and other physical facilities that hitherto made the research comfortable to conduct and write up. This impacted the writing up of this thesis and made it physically and emotionally tasking towards the end of this research. However, it did not affect the outcome of the research which was to find ways to institutionalise compliance and enforcement of environmental regulation of the petroleum sector in Nigeria.

1.8 Thesis Structure

This research seeks to resolve the main research question of how to improve effective compliance and enforcement of environmental regulation using the petroleum sector in Nigeria as a case study. This involves the enquiry into areas of law, practice, environment and human activities and human and environmental responses to developmental issues. To pursue and logically explore the argument of this research, this thesis is divided into eight chapters.

- **Chapter 1** gives a general overview of the thesis, by introducing the problem that necessitated this research and proceeds to discuss its significance, stating the research question, elucidating the background to the research and stating the originality and significant contribution to knowledge of the outcome of this research. There has been some written work on the compliance and enforcement of environmental regulation generally in Nigeria. However, the focus of this research is specifically the petroleum sector in Nigeria. This focus is hinged on the importance of the petroleum sector to the economic sustenance of Nigeria.[67] Not only did the petroleum sector put Nigeria on the world map, but it also exposed the Nigerian environment to environmental degradation from pollution due to some negative operational practices in the sector. This chapter also includes a discussion on the methodology and methods applied to carry out this research.
- **Chapters 2** undertakes the theoretical analysis of institutionalism. It is divided into two parts with the first part exploring the concept of institutionalism, covering the definition and discussion of the terms that make up the word *institutionalism*. This part also discussed the various institutional theories that have been proposed by prominent researchers on the subject. This chapter aims to provide an understanding of the concept

[67] AA Olojede and NF Michael, 'Oil Revenue and Nigerian Economic Growth from 1981-2018: A Resource Curse?' (2020) 2(4) International Journal of Management Studies and Social Science Research 291, 291.

of institutionalisation and to examine the relevant theories that support the concept and how these are reflected in regulations and organisations regarding compliance and enforcement in the Nigerian petroleum sector. It is the finding of this chapter that institutionalisation of compliance and enforcement in regulatory organisations and regulation is capable of producing gradual but incremental value to environmental regulatory efforts. This is hinged on the fact that institutionalisation infuses value in legislation and policies which in turn finds expression in the activities of the various sector actors.

- **Chapter 3** discussed the contextual perspective of this research and revealed the definition of some of the focal terms of this research. This chapter is divided into two parts with **Part A** setting out the contextual analysis of compliance and enforcement mechanisms and tools in international environmental law. The sources of these mechanisms and tools and their expression in international environmental instruments are traced to show their path of development. **Part B** discusses compliance and enforcement mechanisms and tools in the national environmental laws of Nigeria, highlighting the roles of the legislature and the executive in shaping effective environmental laws. The significance of this chapter lies in the fact that while it is conceded that various compliance and enforcement strategies exist, the options that have so far been replicated and applied from the beginning of the development of the Nigerian petroleum sector is the point from which the research proceeds to search for the failure of the system. The chapter aims to assess the current compliance and enforcement regime in Nigerian environmental law and identify the barriers that have hindered the institutionalisation of the values that support compliance and enforcement, in the various stakeholders such as the Nigerian government and petroleum sector operatives. This chapter finds that the existing compliance and enforcement

mechanisms and tools in Nigerian environmental laws are weak and largely incapable of promoting a sustainable petroleum sector or environmental regulation. While it is acknowledged that compliance and enforcement is not a term that is peculiar to environmental regulatory issues, this chapter delineates the contextual boundaries of the research.

- **Chapter 4** discussed the application of the relevant institutional theories to regulation and organisations i.e. how to institutionalise compliance and enforcement in laws regulating petroleum operations and organisations involved in the implementation of environmental laws. The institutional framework for environmental regulation in the petroleum sector is discussed in this chapter to exhibit the reflection of the institutional theories where they exist and how they have fared in the light of the environmental issues prevalent in the petroleum sector in Nigeria. Therefore, other compliance and enforcement strategies can be adopted and customised to suit the social, economic and political structure of Nigeria to encourage better compliance and enforcement behaviour in the activities of the petroleum sector operatives.
- **Chapter 5** discussed some of the reasons why regulated entities comply or do not comply with environmental laws. Regardless of the motivation for compliance or reason for non-compliance, some barriers have been in Chapter 3 identified that inhibit the institutionalisation of the necessary values that support compliance and enforcement in the environmental and petroleum sector stakeholders. The barriers are legal, non-legal and institutional barriers which when further dissected, include weak, ineffective or obsolete laws, ineffective regulatory agencies, poor resources allocation, lack of the political will to enforce environmental laws, lack of awareness, corruption and other economic considerations. The key finding in this chapter is that there exists some motivation for which compliance or non-compliance occurs. This chapter concludes

that the identified barriers can be surmounted to produce better compliance and enforcement behaviour in the petroleum sector and environmental stakeholders.

- While **Chapter 3** dealt with the significance of the role of the executive and legislative arms of government in the successful environmental regulation of the petroleum sector in Nigeria, **Chapter 6** considered the vital role of the judiciary in improving compliance and enforcement of environmental regulations and their impact on the petroleum sector and the society. Based on the discussions in **Chapters 2** and **3**, **Chapter 6** evaluated the strengths and weaknesses of the existing enforcement tools for environmental regulation in Nigeria through the judiciary. This chapter considered the role of the courts in the adjudication of environmental matters and judicial attitudes to environmental litigation[68] by undertaking a case law analysis of matters bordering on the compliance and enforcement of environmental law in the petroleum sector in Nigeria to determine the role of the judiciary in setting precedence for the effective implementation of environmental laws.[69] This was accomplished by tracing the evolution of the judiciary's stance on matters of environmental disputes and how this has been received and responded to by the larger Nigerian society. The key finding of this chapter is that the judiciary has a vital role to play in improving compliance and enforcement of environmental regulation. However, it suffers some challenges which hinder the effective discharge of this role. The Chapter further finds that there are solutions to overcome these challenges as having been tested by other jurisdictions.

[68] RA Mmadu, 'Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from *Kiobel*' (2013) 2(1) Afe Babalola University Journal of Sustainable Development Law and Policy 149, 155.

[69] It has been mooted that protecting the environment from degradation as a result of the operations of the petroleum sector is another sure path to securing environmental human rights. O Awolowo, 'Environmental Rights and Sustainable Development in Nigeria' (2017) 10 (6) OIDA International Journal of Sustainable Development 17.

- **Chapter 7,** the reform chapter, proceeds with a summary of the findings of this research. It explores some best practices from other jurisdictions and what Nigeria can learn from these regulatory techniques on compliance and enforcement to improve the regulations and agency practices. The reform proposals are expressed in two ways. *First,* from the point of view of general reforms because compliance and enforcement is a generic issue that affects every sector sought to be regulated. *Second*, from the point of view of the petroleum sector-specific reforms. The analysis in this chapter takes into consideration the peculiar political, economic and social development pace of Nigeria. These jurisdictional best practices were selected in the course of the research based on some similarities which they bear to the development style of the Nigerian petroleum sector and how the sector has been managed in those jurisdictions. In the process of concluding this research, compliance and enforcement were analysed from the perspective of transformative change towards good institutional practices in Nigeria.
- **Chapter 8** concludes the thesis by underscoring the need for a more collaborative regulatory strategy in the promotion of effective and efficient compliance and enforcement of environmental and petroleum sector regulation by the institutionalisation of some values in the petroleum sector stakeholders. This is because petroleum business and petroleum sector operations in Nigeria are not likely to be terminated any time soon hence the need for a more reliable regulatory regime. This more collaborative regulatory regime highlights the important roles of the executive, legislative and judicial arms of government and creates room for the development of environmental good governance, rule of law and access to justice by upholding the foundations on which these legal concepts emerged and thrive.

1.9 Conclusion

This chapter has presented an overview of this thesis. The concept of institutionalising compliance and enforcement mechanisms of environmental and petroleum sector regulation in the context of the Nigeria petroleum sector is based on the hypothesis that the existing environmental regulatory regime has suffered several weaknesses and challenges and therefore does not support the current drive for a healthy and regulated environment. It is concluded that when implemented, the reforms in the petroleum sector will match words with the actions of the government, regulatory agencies and environmental and petroleum-sector stakeholders. This will also gauge the impact of effective and efficient regulation on the human and natural environment lending the much-needed backing to the efforts to achieve the Sustainable Development Goals of the United Nations. This is because it has been opined that there is nowhere that compliance, rule of law and good governance is more important than in the field of environment and sustainable development.[70] As Toepfer succinctly put it, development cannot be achieved unless laws governing society, the economy and our relationship with the earth connect with our deepest values and are put into practice internationally and domestically. Law must be enforced and complied with by all society and all of society must share this obligation.[71] Therefore, compliance is an indivisible part of the rule of law and without it, the rule of law is redundant.[72]

[70] T Higdon and D Zaelke, 'The Role of Compliance in the Rule of Law, Good Governance, and Sustainable Development' (2006) 3(5) Journal for European Environmental & Planning Law 376, 378.
[71] Klau Toepfer Former UNEP Executive Director. See D Zaelke, D Kaniaru and E Kruzikova, *Making Law Work: Environmental Compliance and Sustainable Development* (D Zaelke ed, May 2005) 646, 19.
[72] Higdon and Zaelke (n 70) 378.

CHAPTER 2

Institutionalising compliance and enforcement: Theoretical perspective

Introduction

This chapter offers a theoretical analysis of the concept of institutionalism and the various institutional theories that underpin it.[1] This conceptual discussion is essential to bring focus to the content of this thesis and to act as a link between existing literature on compliance and enforcement, methodology and outcome of this research.[2] This is in response to the first subsidiary research question of what institutionalism is. It includes the definitions of the terms institution, institutionalism, institutionalisation and some of the proponents of these theories of institutionalism. By providing an understanding of the theoretical basis for institutionalism and sets out some of the values that support compliance and enforcement. This chapter aims to show the relationship between the institutional theories and compliance and enforcement to the extent of a potential change in the behaviour of the relevant stakehilders of the petroleum sector.

2.1 The concept of Institutionalism

Institutionalism stems from the word institution and has another offshoot like institutionalise/institutionalisation. The early scholars of the concept of institutionalism discussed the concept from the points of view of diverse disciplines[3] like economics, organisational theory, political science and public choice, history and sociology, as such the

[1] JW Meyer, 'Reflections on Institutional Theories of Organizations' in Royston Greenwood and others (ed), *The Sage Handbook of Organizational Institutionalism* (2nd edn, SAGE Publications 2017) 831.
[2] J Morse and others, 'Verification Strategies for Establishing Reliability and Validity in Qualitative Research' (2002) 1 (2) International Journal of Qualitative Methods 13.
[3] ED Oruonye and YM Ahmed, 'The Role of Enforcement in Environmental Protection in Nigeria' (2020) 7(1) World Journal of Advanced Research and Reviews 48, 51.

existing definitions vary from one discipline to another.[4] Implementation of the compliance and enforcement of any regulation can only be achieved by the regulators of the sector, which in the case of the petroleum sector in Nigeria is the Nigerian government through its various regulatory agencies.[5] This section discusses institutionalism from the point of view of regulatory agencies to explain the part it plays in shaping the behaviour of regulated entities in a given sector concerning their response to laws made to regulate that sector.

2.1.1 Institution

Institutions are structural features in societies and political systems that have formal character and informal features. The structural feature of institutions translates to mean that they have some stability over time and do change when individuals leave the organisation.[6] The meaning of the term varies from an informal to a more formal dimension. From an informal perspective, habits, customs and conventions crystalise to become collectively binding, taking a more formal structure to an institution.[7] Therefore, an institution can be a repetitive action, any pre-agreed procedure or habit shared by an organisation that comes to be self-consciously recognised by society.[8] It may be established by law or custom such as social institutions, constitutions and procedures and can either constrain political actors or offer them opportunities for action.[9]

Institutions are synonymous with structures or organisations in the sense that organisations that are properly institutionalised or have longevity and acquire a high scale and degree of

[4] PJ DiMaggio and WW Powell, 'Introduction' in WW Powell and PJ DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (University of Chicago Press 2012) 1, 3.
[5] Petroleum Act Cap P10 Laws of the Federation of Nigeria 2010, S 1 (1).
[6] J Olsson, 'Institutionalism and Public Administration', *Oxford Research Encyclopedia of Politics* (Oxford University Press 2020) 1, 2.
[7]EM Immergut, 'Institutions and Institutionalism' in B. Badie, D. Berg-Schlosser and L. Morlino (eds), *International Encyclopedia of Political Science* (SAGE Publications Inc 2011) 1203,1202.
[8] ibid 1204.
[9] S Sonal, 'Institutions and Institutionalism' in HJ Wiarda (ed), *Grand Theories and Ideologies in the Social Sciences* (Springer 2010) 113, 119.

acceptance can be seen as an institution.[10] This concept was supported by Lammers and Barbour where it was suggested that the term *institution* was used synonymously with the term *organisation* regarding formal entities such as corporations and describes specific practices as well as rules and laws or arrangements that are established or enduring as established practices.[11] The scholars believed that when the term is used, certain organisations, rules, behaviours and ways of thinking have an enduring and fixed character.[12] This approach is adopted in this thesis to the extent of the discussion on the stakeholders of the Nigerian petroleum sector.

Eberlein interprets institution as a style of behaviour that is relatively stable, valued sets of formal and informal rules, norms and practices that constrain and enable a particular behaviour at the same time[13] providing a frame of meaning which guides organisational behaviour.[14] However March and Olsen define an institution as a collection of interrelated rules and routines that define appropriate action in terms of relations between roles and situations and this involves determining what the situation is, what role is being fulfilled and the obligation of the organisation in that situation.[15]

Institutions have a range of procedures and are characterised by their durability and capacity to influence behaviour and arguably possess inherent legitimacy that encourages behaviour in a particular way.[16] Some proponents of the institutional theory[17] view institutions as formal

[10] L Fuenfschilling and B Truffer, 'The Structuration of Socio-Technical Regimes—Conceptual Foundations from Institutional Theory' 43(4) Research Policy 772, 775.
[11] JC Lammers and JB Barbour, 'An Institutional Theory of Organisational Communication' (2006) 16 (3) Communication Theory 356, 358.
[12] ibid.
[13] B Eberlein, 'Institutionalisation' in B Badie, D Berg-Schlosser and L Morlino (eds), *International Encyclopaedia of Political Science* (SAGE Publications 2011) 1200.
[14] J Thoenig, 'Institutional Theories and Public Institutions: New Agendas and Appropriateness' in BG Peters and J Pierre (eds), *Hand Book of Public Administration* (SAGE Publications 2012) 169, 171.
[15] JG March and JP Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (The Free Press 1989) 227, 21.
[16] BG Peters, *Institutional Theory in Political Science: The 'New Institutionalism'* (Pinter 1999) 183, 29.
[17] Such as Meyer and Rowan, Selznick and Abbot.

structures which are perceived as ceremonial rather than structures meeting functional requirement or performance, their practices infused with value beyond the technical requirement of their primary tasks, hierarchical, shape and control the structure of an organisation and the actions within the organisation.[18] In Scott's view, 'institutions are comprised of regulative, normative and cultural-cognitive elements that, together with associated activities and resources, provide stability and meaning to social life.[19] Zucker and Giddens posit that institutions get transmitted across generations, to be maintained and replicated as the more enduring features of social life, giving solidity to social systems across time and space.[20]

2.1.2 Institutionalism

Institutionalism is a broad umbrella term used in the social sciences to describe the study of institutions and their importance in social economic and political life.[21] Institutionalism is an off-shoot of the word institution and defines the study of organisations in the various sectors which they regulate[22] such as the study of the long-term effect of regulatory agencies on compliance and enforcement in environmental regulation. It is an adaptive process of an organisational structure to the features and commitments of the operators and to the external environments in which the organisation becomes valued and gains intrinsic worth.[23]

[18] Lammers and Babour (n 11) 359.
[19] WR Scott, 'Crafting an analytical framework I', in *Institutions and Organizations: Ideas and Interests* (3rd edn, SAGE Publications 2008) 48. These are termed the three pillars of institutions which he further identifies as vital ingredients of institutions which are characteristically multi-faceted, durable social structures made up of symbolic elements, social activities and material resources and relatively resistant to change.
[20] LG Zucker, 'The Role of Institutionalization in Cultural Persistence' (1977) 42 (5) American Sociological Review 726, 727. A Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (University of California Press 1984) 402.
[21] C Ansell, 'Institutionalism', *The Palgrave Handbook of EU Crises* (Springer 2021) 135, 135.
[22] Immergut (n 7) 1207.
[23] Thoenig (n 14) 17.

The discussion of the concept of institutions grew under two distinct notions, *old institutionalism* as headlined by Selznick,[24] and *new institutionalism*. In the former category, the experience was observed in the role of political science detailing the political structure, legal framework, detailed rules of procedure and describing and prescribing systems of measurement.[25] The latter was viewed as an attempt to integrate both analyses of the old and new approaches to the study of institutions to show that not only are the actions of individual institutions important but those actions and the goals they have are shaped by institutional structures.[26] However, from the perspective of organisational analysis, institutions comprising of those norms and conventions which have a rule-like status in social thought and action, may or may not be legal but are taken for granted as legitimate.[27] Here it is argued that formal organisations have become a cultural institution embodying and symbolising the promise of the highest ideals of rationality.[28]

New institutionalism focuses on a wider perception of institutions in a broader sense, as patterned behaviour flowing from informal rules, norms and habits.[29] It differs from old institutionalism in three aspects. *First*, concern for the informal aspects of institutions has been expanded while still acknowledging the relevance of formal rules and organisations. *Second*, there is a critical understanding of the way institutions work in practice which is based on the

[24] ML Besharov and R Khurana, 'Leading Amidst Competing Technical and Institutional Demands: Revisiting Selznick's Conception of Leadership'*, Institutions and Ideals: Philip Selznick's Legacy for Organizational Studies* (Emerald Group Publishing Limited 2015) 53, 58. Some of the characteristics of the old institutionalism are that it was more concerned with the law and its central role in governance, it emphasised structure which determined behaviour and allowed no room for the impact of individual influence on governance, and it was holistic in character and did not consider individual agents that contribute to the entire structure while the new institutionalism paid credence to the contrary. However new institutionalism grew out of the old institutionalism in carving a new paradigm for its sustenance. S Sonal, 'Institutions and Institutionalism' in HJ Wiarda (ed), *Grand Theories and Ideologies in the Social Sciences* (Springer 2010) 113, 118.

[25] A Ansar, 'The Fate of Ideals in the Real World: A Long View on Philip Selznick's Classic on the Tennessee Valley Authority (TVA)' (2018) 36 (2) International Journal of Project Management 385.

[26] J Black, 'New Institutionalism and Naturalism in Socio-Legal Analysis: Institutionalist Approaches to Regulatory Decision Making' (1997) 19 (1) Law and Policy 51, 57.

[27] DiMaggio and Powell (n 4) 1.

[28] L Ringel, J Brankovic and T Werron, 'The Organizational Engine of Rankings: Connecting "New" and "Old" Institutionalism' (2020) 8(2) Politics and Governance 36, 37.

[29] Olsson (n 6) 1.

insight that formal organisations are embedded in informal shared understanding, rules and norms. *Third*, new institutionalism holds that both old and new institutionalism constrain and enable individual behaviour.[30] This dichotomy between the old and new institutionalism has been promoted by various scholars in raising the consciousness and calling attention to issues omitted from the focus of the concept at any given time.[31] The distinction, however, is that the old institutionalism centres on the action that an individual organisation will take on a particular issue while the new institutionalism relates more to the structure of the organisation in a particular sector.[32]

However, Black warns that institutionalism has its shortcomings, internal discrepancies and opponents.[33] One such limitation is the fact that institutional theorists seem to share the view in their definition of institutions, that "*institutions matter*" because they provide a framework for organisational actions and interactions. However, despite this seeming point of agreement, the various definitions tend to be vague, ambiguous and vary from one discipline to the next resulting in an inconsistency in the definition.[34] Black further holds the view that generally, institutionalism offers a study that suggests that institutions structure actions and possibly preferences and are shaped by the actions of individuals and organisations themselves.[35] According to Sahu, institutionalism is not a single animal but rather is a genus with some specific species within it.[36] Clean Nigeria Associates (CNA) is an example of where this is applied in Nigeria.[37]

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[30] Olsson (n 6) 2; Peters (n 16).
[31] Zucker (n 20) 726; JW Meyer and B Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83(2) American Journal of Sociology 340; P DiMaggio and W Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48(2) American Sociological Review 147.
[32] PM Hirsch and M Lounsbury, 'Ending the Family Quarrel: Toward a Reconciliation of "Old" and "New" Institutionalisms' (1997) 40 (4) The American Behavioural Scientist 406, 415.
[33] Black (n 26) 51.
[34] Black (n 26) 54, 58.
[35] Black (n 26) 74.
[36] S Sonal (n 9) 128.
[37] See **section 4.4.5** of **Chapter 4** of this thesis.

2.2 Institutional Theory

Institutional theory follows an open system view that an environment that is in part, a social construction that is deeply historically sedimented, affects an organisation[38] and is concerned with how organisations adapt to their environment and manage their credibility.[39] Schools of thought of diverse pedagogy have emerged in the study of institutions and organisations.[40] Institutional theory expresses the fact that these schools are not exactly alike. This is because many proponents of the institutional theory[41] have proposed different theories to streamline the various approaches to understanding organisations and management practices because of social pressures[42] and to explain the dynamics of change in such organisations. The whole thrust of institutionalism is on how institutions persist over time as exhibited in the institutional theories.[43]

2.2.1 What are institutional theories?

These are perspectives that seek an understanding of the relationship between institutions and behaviour and outcomes.[44] According to Suddaby, the core concept of the institutional theory is the tendency for social structures and processes to acquire value and stability in their rights rather than as instrumental paraphernalia for the achievement of specified ends.[45] However, he points out that the concept of institutional theory has drifted substantially from the 'old institutionalism' which was its philosophical roots, to 'new institutionalism' which is a new

[38] C Biesenthal and others, 'Applying Institutional Theories to Managing Megaprojects' (2018) 36 (1) International Journal of Project Management 43, 46.
[39] RE Levitt and WR Scott, 'Institutional Challenges and Solutions for Global Megaprojects' in B Flyvberg (ed), *The Oxford Handbook of Megaproject Management* (Oxford University Press 2017).
[40] For example, the historical, rational, sociological, normative institutional theories.
[41] Such proponents as March and Olsen, Weingast, Krasner, Weaver and Rockman, North, Khalil, Zucker, DiMaggio and Powell.
[42] R Suddaby, 'Institutional Theory' in Eric H. Kessler (ed), *Encyclopaedia of Management Theory* (SAGE Publications 2013) 379.
[43] C Ansell, 'Institutionalism', *The Palgrave Handbook of EU Crises* (Springer 2021) 135, 138.
[44] D Diermeier and K Krehbiel, 'Institutionalism as a Methodology' (2003) 15(2) Journal of Theoretical Politics 123, 127.
[45] R Suddaby, 'Challenges for Institutional Theory' (2010) 19 (1) Journal of Management Inquiry 14, 15.

focus on the institutional agency as promoted by March and Olsen in their 1984 publication where the focus is on organisations.[46] Institutional theories have traditionally been applied to explain stability and similarity (*"isomorphism"*) in a given field of organisations and can sometimes be regarded as a theory of organizational change.[47] Selznick however, advocates for an integration of the old and new institutionalisation by taking full account of theoretical and empirical continuities.[48] Some of the prominent institutional theories are the rational choice institutionalism theory, historical institutionalism theory, sociological institutionalism and normative institutionalism theory. Other less prominent theories include the empirical institutionalism theory, international institutionalism theory and societal institutionalism theory.[49]

All the above approaches to institutionalism focus on the importance of institutions as a concept but differ on the definition of institutions.[50] For this conceptual discussion, however, only the theories that promote compliance and enforcement and are relevant to this research will be examined in the following section. These are rational choice institutionalism, historical institutionalism, normative institutionalism and sociological institutionalism.

2.2.2 Rational choice institutionalism

Rational choice institutionalism developed a more accurate understanding of the relationship between institutions and behaviour and has exhibited real strength for explaining the

[46] R Suddaby, 'Can Institutional Theory Be Critical?' (2015) 24 (1) Journal of Management Inquiry 93. New institutionalism according to DiMaggio and Powell, comprises a rejection of rational-actor models, an interest in institutions as independent variables, a turn toward cognitive and cultural explanations, and an interest in properties of supra individual units of analysis that cannot be reduced to aggregations or direct consequences of individual attributes. PJ DiMaggio and WW Powell, 'Introduction' in WW Powell and PJ DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (University of Chicago Press 1991) 1, 8.
[47] R Greenwood and CR Hinings, 'Understanding Radical Organisational Change: Bringing Together the Old and the New Institutionalism' (1996) 21(4) Academy of Management Review 1022, 1023.
[48] P Selznick, 'Institutionalism" old" and" new"' (1996) 41 Administrative Science Quarterly 270, 275.
[49] Peters (n 16) 19.
[50] VA Schmidt, 'Institutional Theory' in B Badie, D Berg-Schlosser and L Morlino (eds), *International Encyclopaedia of Political Science* (SAGE Publications 2011) 1188.

continuous existence of institutions.[51] Within the framework of this theory, it is argued that behaviour is a function of rules and incentives. The proponents of this theory see institutions as a system of rules and inducements to behaviour in which individual organisations attempt to maximise their utilities or act rationally (usually for self-interest) concerning the rules.[52] According to Green and Fox, this theory is predicated on the notion that individual organisations pursue their goals efficiently, deciding on a course of action that promises the greatest benefits, based on the understanding of the alternatives before them.[53] For example, an organisation's decision to acquire company A over the acquisition of company B based on the rational belief that the organisation's goal will be better served.[54] The defining feature of rational choice theory is the notion of the efficiency of the pursuit of the organisation's aims.

Dowding explains the rational choice theory as a system or organising perspective that generates questions about the social world and provides some standard techniques for answering those questions and not just a theory of how organisations' central processes work.[55] As such this theory is largely based on investigating the difficulties of governing from a basic normative perception that leads to questions of efficiency in governing procedures and how to ameliorate them.[56] Following this theory, new compliance and enforcement strategies or new interpretations thereof can be introduced that supplant or replace existing but ineffective compliance and enforcement strategies to bring about gradual but incremental change in the regulatory process.[57]

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[51] PA Hall and RC Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44 Political Studies 936, 951. The analogy is drawn in this article of the rationality of anyone who waits at a traffic light when no one else was around and shows that there are dimensions to the relationship between institutions and behaviour.
[52] Peters (n 16) 19.
[53] PD Green and J Fox, 'Rational Choice Theory' in W Outhwaite and SP Turner (eds), *Social Science Methodology* (Sage Publications 2007) 269, 270.
[54] R Wittek, 'Rational Choice Theory' in JR McGee and RL Warms (eds), *Theory in Social and Cultural Anthropology: An Encyclopedia* (SAGE Publications 2013) 688, 688.
[55] K Dowding, 'Rational Choice Theory?' in M Bevir (ed), *The SAGE Handbook of Governance* (SAGE Publications 2010) 36.
[56] ibid 41.
[57] Ansell (n 21) 141.

2.2.3 Historical institutionalism

This school of thought argues that the policy choices of an organisation at its inception and the established commitments that emanate therefrom will influence and determine the subsequent behaviour of the organisation and will subsist because policies are path-dependent and will maintain the path in which it was launched until a stronger policy decision deflects it.[58] Consequently, organisational policies do not only reflect the preferences of the strongest social forces but are also guided by past and existing arrangements that the organisation would have subscribed to from inception.[59] Historical institutionalism grew out of the examination of how institutions structure the interaction between states and markets and between markets and actors.[60] An example of this can be seen in the efforts to stop associated gas flaring in the petroleum sector in Nigeria to control air pollution.[61]

While old institutionalism suggests that institutions shape policies, historical institutionalism highlights the fact that policy choices made in the past, shape present choices made by institutions, hence institutions faced with new problems, use their familiar older solutions irrespective of the appropriateness of such solutions or whether they can reasonably be expected to work.[62] Historical institutionalism has the most commodious conception of the relationship between institutions and behaviour because the proponents in this field devoted less attention to creating a refined understanding of exactly how institutions affect behaviour.[63]

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[58] BG Peters, *Institutional Theory: Problems and Prospects* (Reihe Politikwissenschaft (Vienna, Austria) No 69 (Institut für Höhere Studien (IHS) 2000) 1, 3.
[59] Thoenig (n 14) 170.
[60] Ansell (n 21) 35.
[61] s 3 of the Associated Gas Re-injection Act of Nigeria prohibits the flaring of associated gas after 1 January 1984 without the permission of the Minister of Petroleum. The provision of the law itself further provided a loophole by which the producers of associated gas, can escape the main import of the section which was to stop gas flaring. The loophole being satisfying the Minister that utilisation or re-injection of the associated gas is not feasible or appropriate in a particular field and the option of paying fees to flare the gas sort to be re-injected or utilised. This trend has become the norm in the Nigerian natural gas production as the sector operators continue to flare gas, being confident that it will always be allowed by the government provided the fees are paid.
[62] Meyer (n 1) 833.
[63] Hall and Taylor (n 51) 950.

Policy choices that promote compliance and enforcement made from inception by institutions can be reinforced by the continuous practice of such policies based on positive feedback. However, when faced with novel problems, which can no longer be serviced by the initial policies, new and stronger policies which promote more effective compliance and enforcement strategies are made to replace the old policies.[64]

2.2.4 Normative institutionalism

The proponents of this theory place great emphasis on the standards of an organisation, using the logic of appropriateness[65] to shape the behaviour of the organisation. Therefore, organisations respond as they do to compliance and enforcement because of the standards by which they operate.[66] In this approach, norms, standards and values within an organisation, occupy a central position in explaining behaviour. Normative institutionalism offers a framework for the analysis of organisational institutionalisation because it emphasises the relevance of norms and perceives organisations as tools that form the basic framework for individual actions in a social process.[67] For instance, an executive may resign from office as a result of a crisis relating to his department following an informal norm of appropriate behaviour in such circumstances, regardless of whether the executive perceives that action as instrumental to his future re-appointment prospects or not.[68] Normative institutional theory has contributed to the study of organisations by explaining some core characteristics and behaviours of actors or the emergence and diffusion of practices by pointing to the significance of higher-order

[64] Ansell (n 21) 140.
[65] The logic of appropriateness is a viewpoint that sees action as driven by rules of appropriate or exemplary behaviour, structured into organisations. The rules are followed because they are seen as natural, rightful, expected, and legitimate per JG March and JP Olsen, 'The Logic of Appropriateness' in RE Goodin (ed), *Oxford Handbook of Political Science* (Oxford University Press 2011) 1.
[66] Peters (n 58) 2.
[67] E Bolfíková, D Hrehová and J Frenová, 'Normative Institutionalism, Institutional Basis of Organising' (2012) 50 (1) Sociologija i Prostor/Sociology & Space 89, 90.
[68] S Gilad, 'Institution' (2019) <https://www.britannica.com/topic/institution> accessed 21 February 2019.

principles such as rules, norms, standards and values.[69] An example of this is the standards, rules and values by which a multinational corporation like Shell operates in its home country. Formerly seen as a company that operates with high standards and values, Shell grew to earn its place in the petroleum business. Unfortunately, this turned out to be untrue with the dangerous business practices applied by Shell in Ogoni land in southern Nigeria as noted by the UNEP report on the environmental condition of Ogoni land.[70] It is argued that while this happens in Nigeria, a developing country, higher standards are applied by this same company in its home country.

2.2.5 Sociological institutionalism

Sociological institutionalism is characterised by three features that distinguished it from other neo-institutionalist theories i.e. those that follow new institutionalism. *First*, the definition of institutions under this theory is broader in addition to formal rules, norms and procedures, it includes symbol systems, cognitive scripts and moral templates that guide human actions. *Second*, there is a distinctive understanding of the relationship between institutions and individual actions which follow the cultural approach. *Third*, this theory takes a distinctive approach to the issue of explaining how institutional practices originate and bring about change in an organisation.[71]

Sociological institutionalism focuses on explaining stability around a dominant, consistent complex of norms or schemas where organisational structures constitute the hypothesized infrastructures through which normative, cognitive and dependence mechanisms exert their influence.[72] However, sociological institutional arguments do not address the conditions under

[69] Fuenfschilling and Truffer (n 10) 774.
[70] United Nations Environment Programme, 'Environmental Assessment of Ogoniland' (2011) <https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf> accessed on 6 July 2019.
[71] ibid 947.
[72] E Amenta and KM Ramsey, 'Institutional Theory' in KT Leicht and JC Jenkins (eds), *Handbook of Politics: State and Society in Global Perspective* (Handbooks of Sociology and Social Research, Springer 2010) 15, 21.

which organisations change. In line with this theory, change in compliance and enforcement behaviour happens when one institution influences other institutions through coercive, normative or mimetic mechanisms to bring about institutional change.[73]

Table I: *The table below shows the various proponents of institutional theory and their theories.*

Thoeing	**Peters**	**Meyer**	**March and Olsen**
Historical	Historical	Realist	Historical
Sociological	Rational choice	Sociological- Social organisation and Phenomenological versions	Sociological
New Institutionalism	Normative		Rational Choice
Actor Institutionalism	Societal		Normative
	Empirical		Empirical
	International		International & Societal

Since institutional theories are not typically perceived as a theory of organisational change, the central idea of institutional theories is that many structures, programmes and practices in organisations achieve legitimacy and stability through the social construction of reality.[74] The

[73] Ansell (n 21) 142.
[74] J Palthe, 'Regulative, Normative, and Cognitive Elements of Organisations: Implications for Managing Change' (2014) 1(2) Management and Organisational Studies 59, 60.

institutional theories discussed above, have served to explain both institutional stability and institutional change in compliance and enforcement behaviour.[75]

2.3 Institutionalisation

The study of the concept of institutionalisation in fields such as political science, economics, sociology etc. has generated diverse theories.[76] Selznick, one of the foremost institutionalist scholars viewed institutionalisation as something that happens to an organisation over time, reflecting the organisation's distinctive history, the people who have been in it, the vested interests they have created and the way it has facilitated the organisation's adaptation to the environment in which it functions.[77] While interpreting it as a process, he also viewed it as a variable concerning the organisation's stability in goals and technologies.[78] This transition of institutions from the informal to the formal dimension is referred to basically as *institutionalisation*.[79]

Institutionalisation as a process explains how different structures such as regulations, norms, values and culture, become increasingly sedimented in organisations throughout society.[80] In other words, it is a process by which routine tasks, organisational structures or functional positions acquire surplus meaning or a process by which an organisation becomes infused with value beyond the intended or bare functional utility and structure.[81] For instance, exhibiting

[75] Ansell (n 21) 148.
[76] Peters (n 58).
[77] P Selznick, *Leadership in Administration: A Sociological Interpretation* (Harper and Row 1957) 162.
[78] ibid.
[79] Immergut (n 7) 1203. The rationale behind this being that it can be viewed as a transition from nature to culture and this explains the variance of such institutions according to whether they are self-enforcing, or they require intervention for sustainability.
[80] J Barnes and others, 'The Institutionalisation of Sustainable Practices in Cities: How Sustainability Initiatives Shape Local Selection Environments' (2018) Environmental Innovation and Societal Transitions <http://www.sciencedirect.com/science/article/pii/S2210422417301181> accessed 1 July 2018.
[81] Peters (n 58) 8.

autonomy in making and implementing decisions in furtherance of the values of the organisation such as what the organisation construes as right or wrong.

In the context of compliance and enforcement, institutionalisation is a gradual process that brings incremental changes in an organisation and structural changes in regulation and institutions.[82] It is a process by which routines are developed to implement and enforce a collection of normative values and rules that impact relevant actors in a particular organisation.[83]

The more an organisation becomes institutionalised, the more difficult it is for that organisation to be easily altered or abolished. The organisation can survive various internal and external challenges and become self-regulatory.[84] For this research, the main elements of institutionalisation are identifying the key institutions, strengthening institutional structures, changing or adjusting regulatory mandates, developing or strengthening policy statements, developing skills, resource allocation, and education and awareness.[85] These issues will be further explored in the context of Nigeria in **Chapters 4** and **6** of this thesis.

In their analysis of the process of institutionalisation, Dambrin *et al* highlighted the fact that institutionalisation is both the implementation of the process and the internalisation of new practices[86] or infused values beyond the technical requirements of the organisation and both must be completed for institutionalisation to take place.[87] The entire process of

[82] *Institutionalising the Environmental Planning and Management (EPM) Process* Vol 5 (Sustainable Cities Programme (SCP) Source Book Series UN-HABITAT 1999) 11, 14; Peters (n 58) 1.
[83] March and Olsen (n 15) 29.
[84] L Ragsdale and JJ Theis, 'The Institutionalization of the American Presidency, 1924-92' (1997) 41 (4) American Journal Political Science 1280, 1282.
[85] RE Goodin, 'Institutions and Their Design' in RE Goodin (ed), *The Theory of Institutional Design* (Cambridge University Press 1998) 1.
[86] C Dambrin and others, 'Control and Change - Analysing the Process of Institutionalisation' (2007) 18 Management Accounting Research 172, 173.
[87] ibid 176.

institutionalisation embodies three stages namely *habitualisation*,[88] *objectification*[89] and *sedimentation*[90] which represent the organisation's increase in exteriority.[91]

As a test for institutionalisation, an organisation must possess the characteristics of autonomy, adaptability, complexity and coherence,[92] congruence and exclusivity.[93] As one of the central concepts used in political and social science, institutionalisation studies the continuous process of patterning, preservation, construction, organising and deconstruction of daily activities and interactions through which institutions are regenerated.[94]

2.4 Values that support the institutionalisation of compliance and enforcement

From the theoretical discussion above, institutionalism is seen as a process through which compliance and enforcement of environmental regulations can be improved. However, for this to happen, certain values need to be institutionalised in the various stakeholders of the petroleum sector as these stakeholders are the necessary drivers of compliance and enforcement. Some of these values include good governance or the political will to implement

[88] This is the stage of generating new structural arrangements in response to a specific organisational problem, formalising the structural arrangements in policies and procedures of organisations confronting similar issues, so that the arrangements can be evoked with minimal decision-making when responding to problems. See PS Tolbert and LG Zucker, 'The Institutionalization of Institutional Theory' in SR Clegg and C Hardy (eds), *Studying Organization: Theory & Method* (SAGE Publications 1999) 169, 175. At this stage, the process is usually an uncoordinated activity without theory, knowledge base or associated values or legitimated users and is usually unstable and temporary.

[89] This involves the development of some degree of social consensus among organisational decision-makers concerning the value of a structure and the increasing adoption by other organisations based on that consensus. See PS Tolbert and LG Zucker, 'The Institutionalization of Institutional Theory' in SR Clegg and C Hardy (eds), *Studying Organization: Theory & Method* (SAGE Publications 1999) 169, 175. This stage involves extensive work by actors such as solution projection, advising, theorising, forming alliances and mobilising resources.

[90] This is the process that rests on the historical continuity of structure and its survival across generations of organisational members, characterised by the spread of structures across the group of actors and perpetuation of structure over a protracted period. See PS Tolbert and LG Zucker, 'The Institutionalization of Institutional Theory' in SR Clegg and C Hardy (eds), *Studying Organization: Theory & Method* (SAGE Publications 1999) 169, 175.

[91] Fuenfschilling and Truffer (n 69) 775. Exteriority is the degree to which institutionalisation is experienced by actors as part of an objective, external reality and a coercive fact.

[92] Peters (n 58) 2.

[93] Peters (n 58) 9.

[94] J van Tatenhove and P Leroy, 'The Institutionalisation of Environmental Politics' in J van Tatenhove, B Arts and P Leroy (eds), *Political Modernisation and the Environment* (Springer, Dordrecht 2000) 17, 1.

environmental regulation, effective environmental rule of law, access to administrative and judicial proceedings.

Good governance means exercising political authority clearly and legitimately to achieve consistent and effective policies.[95] Environmental good governance, therefore, means exercising this authority to make decisions that promote sustainable development of the environment and must incorporate coherence, proportionality, accessibility, effectiveness, public participation and accountability.[96] Institutionalising compliance and enforcement has a direct impact on good governance and respect for the rule of law and vice versa.[97] It is contended that environmental good governance is a framework in which effective compliance and enforcement can thrive. Compliance and enforcement in Nigeria have suffered serious setbacks partly due to bad environmental governance.[98] It is therefore important to establish a framework in Nigeria that encompasses environmental policies backed by legislation because compliance is more likely to happen in a regime where good governance is practised.[99] Good governance depends on the rule of law to thrive.[100]

The rule of law is a principle of governance where all persons, public and private organisations, including the State are accountable to existing laws, equally enforced and independently adjudicated, and which are consistent with international norms and standards.[101] In Nigeria, there have been instances of disregard for the rule of law by way of outright disobedience to

[95] J Harman, 'The Relationship Between Good Governance and Environmental Compliance and Enforcement' (Proceedings of the International Network for Environmental Compliance and Enforcement, Seventh International Conference, Marrakesh, Morocco, April 2005) 5, 5.
[96] Commission of the European Communities. European Governance: A white paper. COM 428, 2001 Brussels.
[97] T Higdon and D Zaelke, 'The Role of Compliance in the Rule of Law, Good Governance, and Sustainable Development' (2006) 3(5) Journal for European Environmental & Planning Law 376, 378.
[98] W Ehwarieme and J Cocodia, 'Corruption and Environmental Degradation in Nigeria and its Niger Delta' (2011) 13(5) Journal of Sustainable Development in Africa 34, 36, 44.
[99] This issue is extensively discussed in **sections 5.2.3 (v)** and **5.3** of **Chapter 5** of this thesis.
[100] Higdon and Zaelke (n 97) 377.
[101] I Khan, 'How Can the Rule of Law Advance Sustainable Development in a Troubled and Turbulent World' (2017) 13(2) McGill Journal of Sustainable Development Law 211, 213; RC Onwanibe, 'The Rule of Law and the Rule of Man' in OC Eze (ed), *Society and the Rule of Law* (Totan Publishers 1989) 171.

court decisions[102] and disregard for existing environmental legislation and these drive poor compliance and enforcement.[103] The institutionalisation of compliance and enforcement in Nigeria will reinforce the targets under goal 16 of the United Nations SDGs[104] in the context of the Nigerian environment.[105] It will also encourage Nigeria to honour the binding obligations under multilateral environmental agreements such as the Convention on Biological Diversity (1992) and United Nations Framework Convention on Climate Change (1992) by strengthening the relevant national laws and compliance and enforcement measures.[106]

It is contended that in this picture of effective and efficient environmental regulation, good governance, rule of law and institutionalisation of compliance and enforcement all play active roles.[107] Where regulators expect regulated entities to comply with good regulatory standards, regulators must also meet their responsibility of proper accountability of their regulatory practices to the general public, regulated entities and government.

[102] *Jonah Gbemre v SPDC Ltd. & Ors* (2005) 6 African Human Rights Law Report 152
[103] SA Mvondo, 'State Failure and Governance in Vulnerable States: An Assessment of Forest Law Compliance and Enforcement in Cameroon' (2009) 55(3) Africa Today 85, 99.
[104] Goal 16 of the UN SDGs promotes peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.
[105] I Khan and others, 'Shifting the Paradigm: Rule of Law and the 2030 Agenda for Sustainable Development', *Financing and Implementing the Post-2015 Development Agenda: The Role of Law and Justice System* (World Bank Legal Review edn, World Bank Group 2016) 221, 225.
[106] AE Ite and others, 'Petroleum Industry in Nigeria: Environmental Issues, National Environmental Legislation and Implementation of International Environmental Law' (2016) 4(1) American Journal of Environmental Protection 21, 32.
[107] OS Adesina, I Mohammed and KV Otokiti, 'The Place of Environmental Laws in Checking Oil Spillage in the Niger Delta Region of Nigeria' (2020) 6 (1) International Journal of Environmental Planning and Management 6, 11.

CHAPTER 3

Institutionalising compliance and enforcement in the context of environmental regulation

PART A

Introduction

Part A of this chapter examines the concept of institutionalising compliance and enforcement in the international environmental law context to identify any similarities with the situation in Nigerian environmental law to put this chapter in perspective. This includes a brief discussion of the sources and tools of compliance and enforcement in international environmental law. This chapter further discusses the mechanisms and tools employed to achieve compliance and enforcement by international organisations and member states in international relationships. **Sections 3.1** and **3.2** provide the reasoning behind the contextual discussion of this research and a brief definition of compliance and enforcement. Compliance and enforcement in both international environmental law and Nigeria environmental law are explored in **sections 3.3** and **3.4** tracing the evolution, sources and the mechanisms and tools through which compliance and enforcement are realised at both levels.

Since laws are an essential part of society, helping to regulate relationships and behaviour,[1] **Part B** of this chapter traces the development of compliance and enforcement in environmental laws and how it has evolved in regulating the petroleum sector in Nigeria with particular reference to the legal framework for environmental regulation. In expounding on the shortcomings of the current state of compliance and enforcement in the petroleum sector in

[1] O Amir and O Lobel, 'Stumble, Predict, Nudge: How Behavioural Economics Informs Law and Policy' (2008) Columbia Law Review 2098.

Nigeria, the concluding part of this chapter finds the reason for the failure of compliance and enforcement in the sector.

This chapter examines why petroleum operations have remained insufficiently monitored regardless of existing key statutory regulatory agencies and legal instruments. **Sections 3.5** and **3.6** briefly discuss the role of the legislature and executive in the establishment of environmental and petroleum-sector laws that carry compliance and enforcement provisions and the establishment of instruments of implementation[2] of such laws respectively and whether these roles have been adequately discharged. The significance of this discussion is to show that the collective involvement of all the arms of government is important to achieve an effective regulatory regime.[3]

3.1 Rationale for a contextual analysis of compliance and enforcement of environmental regulation

In seeking ways of improving the environment, governments around the world have adopted several approaches including the enactment of laws, standards and policies[4] with the expectation that regulated entities and individuals will progressively change how they interact with the environment in response to these regulatory efforts. However, it has been noted that rather than depend on a single approach to compliance and enforcement, a combination of intervention strategies can be applied according to their suitability to particular regulatory contexts.[5] This is because how to connect the various actors such as regulated entities and environmental regulatory agencies to the effectiveness of the laws, standards and policies remains the missing link as this has eluded most environmental regulation efforts.[6] Another

[2] The Discussion of the roles of the Legislature, Executive in this chapter and Judiciary in chapter 5.
[3] The role of the Judiciary as the third arm of government is discussed in **Chapter 6** of this thesis.
[4] N Gunningham, 'Environmental Law, Regulation and Governance: Shifting Architectures' (2009) 21 (2) Journal of Environmental Law 179, 182.
[5] N Gunningham, 'Enforcing Environmental Regulations' (2011) 23(2) Journal of Environmental Law 169, 201.
[6] A Chayes and AH Chayes, 'On Compliance' (1993) 47 International Organization 175, 178.

consequence of this reliance is the weakening of environmental regulation structures due to changing international collaborations. For example, when the UK eventually leaves the EU, the position of the UK on environmental regulation will invariably be weakened especially in terms of monitoring, the role of public interest organisations and court sanctions.[7]

In the light of the above, the concept of compliance and enforcement is examined in international environmental law and in Nigerian environmental law to understand how they have evolved and their bearing if any, on environmental regulation of the Nigerian petroleum sector. To provide a sense of direction, however, examples of compliance and enforcement mechanisms and tools will be drawn from international and national sources from other jurisdictions to highlight various compliance mechanisms and enforcement tools and identify them in Nigeria national laws and policies where they exist.[8] Since **Part A** seeks to assess the compliance and enforcement regime in the Nigerian petroleum sector, the use of national sources from other jurisdictions is relevant. This lays the foundation for the discussion of compliance and enforcement mechanisms integrated into Nigerian national laws.

3.2 Definition of Compliance and Enforcement

i Compliance

Compliance is the state of conformity with obligations, imposed by a State, its competent authorities and agencies on the regulated community, whether directly or through conditions and requirements in permits, licences and authorisations.[9] It is an indivisible part of the rule of law and is classified as a 'state of conformity or identity between an actor's behaviour and

[7] M Nesbit and others, *Ensuring Compliance with Environmental Obligations Through a Future UK-EU Relationship* (Institute for European Environmental Policy, 2017) 1, 8-9.
[8] These sources of compliance and enforcement mechanisms and tools will be discussed later on in **sections 3.3.1** and **3.3.2** of this Chapter.
[9] ED Oruonye and YM Ahmed, 'The Role of Enforcement in Environmental Protection in Nigeria' (2020) 7(1) World Journal of Advanced Research and Reviews 48, 49.

specified rule'.[10] A regulated entity, whether state, firm or individual, is 'in compliance' when they are acting by the law regardless of the motivations or other circumstances that may have led to that conformity.[11] It connotes a state of being or acting under established guidelines or specifications or the process of becoming so and includes efforts to ensure that regulated entities are abiding by both industry regulations and government legislation.[12] The International Compliance Association (ICA)[13] describes compliance as the ability to act according to an order, a set of rules or a request.[14] However, these definitions invoke ideas of conformity and point to compliance through the lenses of enforcement and equating it to complying with legal rules and nothing more.[15] In Amodu's opinion, this has led to compliance being defined loosely as a mechanism used to secure obedience to the law and does not elaborate on the description of compliance in a regulatory context.[16] Hence Amodu's definition of compliance as a term to encompass a range of activities and aspects of regulation including the process of securing the underlying aims and objectives of regulations, and the negotiation of regulatory outcomes[17] appears to be a more holistic definition of compliance. This definition is applied throughout this thesis.

It has been noted that the inconsistency and lack of measurement of compliance constitutes a problem in research especially when it comes to international study as such, a conceptual

[10] K Raustiala, 'Compliance & Effectiveness in International Regulatory Cooperation' (2000) 32(3) Case Western Reserve Journal of International Law 387, 391.
[11] T Higdon and D Zaelke, 'The Role of Compliance in the Rule of Law, Good Governance, and Sustainable Development' (2006) 3(5) Journal for European Environmental & Planning Law 376, 378.
[12] 'Compliance' <http://searchdatamanagement.techtarget.com/definition/compliance> accessed 16 May 2017.
[13] A professional membership and awarding body with the aim of training compliance specialists to perform to the highest standards of professional practice and codes of conduct, integrity and ethics – which includes uncovering the spirit and intent of regulations https://www.int-comp.org/about-ica/> accessed 11 February 2019.
[14] 'Compliance' <https://www.complydirect.com/environmental-compliance> accessed 19 October 2017.
[15] T Amodu, *The Determinants of Compliance with Laws and Regulations with Special Reference to Health and Safety* (London School of Economics and Political Science for the Health and Safety Executive RR638, 2008) 1 <http://www.hse.gov.uk/research/rrpdf/rr638.pdf> accessed 19 February 2018.
[16] ibid 3.
[17] ibid.

framework ought to be developed.[18] However, in discussing the importance of measuring environmental compliance and enforcement, Metzenbaum stated that integration of measurement into environmental compliance and enforcement management decisions can be transformative and help regulatory agencies achieve better environmental regulatory outcomes, higher compliance rates etc.[19] Stein has also attempted to define compliance as the degree to which state behaviour conforms to what an agreement prescribes or proscribes.[20] The degree to which state behaviour conforms to what the agreement prescribes or proscribes has been however differentiated from the degree to which the agreement impacts state behaviour which goes to show effectiveness.[21] Compliance with environmental law, therefore, extends to regulations, laws and standards put in place to manage the environment sustainably.[22] Oruonye and Musa posit that compliance with legal requirements regarding environmental protection should result in appropriate environmental control measures and better environmental performance.[23]

ii Enforcement

The success of the law is measured by the effective enforcement of such a law. Enforcement is the (threat of) application of sanctions or some material consequence if a party does not comply with an agreement.[24] Enforcement, derived from the word *enforce,* has been variously defined

[18] H Kyngäs, ME Duffy and T Kroll, 'Conceptual Analysis of Compliance' (2000) 9 (1) Journal of Clinical Nursing 5; M Fitzmaurice, 'Environmental Compliance Control' (2018) 8(2) Wroclaw Review of Law, Administration and Economics 372, 375.
[19] SH Metzenbaum, 'Environmental Compliance and Enforcement Measurement: Why, What and How?' in L Paddock, DL Markell and NS Bryner (eds), *Compliance and Enforcement of Environmental Law* (Edgar Egar Publishing Limited 2017) 242.
[20] JV Stein, 'Compliance with International Law' (2017) <http://www.janavonstein.org/research.html> accessed 19 October 2017.
[21] ibid.
[22] 'Compliance' <http://searchdatamanagement.techtarget.com/definition/compliance> accessed 16 May 2017.
[23] Oruonye and Ahmed (n 9) 49.
[24] JV Stein, 'International Law: Understanding Compliance and Enforcement' in RA Denemark (ed), *The International Studies Encyclopaedia* (Blackwell Publishing 2010) 1; N Gunningham, 'Enforcing Environmental Regulations' (2011) 23(2) Journal of Environmental Law 169, 170.

to mean an act to put or keep in force or compel obedience by force or compulsion[25] or making sure a rule, standard, court order or policy is followed[26] and the act of compelling observance of or compliance with a law, rule or obligation.[27] Enforcement is the set of actions or range of procedures that a government or its competent authorities, agencies or institutions take to achieve full implementation of environmental requirements (compliance) within the regulated entity or to ensure that organizations or persons, potentially failing to comply with environmental laws or regulations, can be brought or returned to compliance and or punished through civil, administrative[28] or criminal action and to correct or bring to stop situations or activities that poses threat to the environment or public health.[29] This definition is adopted throughout this thesis. It is contended that effective enforcement creates and develops a philosophy of compliance as it sends a clear message that non-compliance will not be tolerated.[30]

3.3 Compliance and enforcement in international environmental law

The concept of compliance and enforcement has been studied from various perspectives,[31] however, for this part of the discussion, it will be explored from the perspective of international environmental law. Compliance and enforcement in international environmental law first came to light when the international community began to recognise the effects of various human activities on the environment. Securing compliance with international environmental

[25] 'Enforcement' http://www.dictionary.com/browse/enforcement Accessed 15 May 2017.
[26] HC Black, 'The Law Dictionary - Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.' <http://thelawdictionary.org/comply/> accessed 30 June 2017.
[27] *Oxford Dictionary of English* (3rd Revised edn, Oxford University Press 2010) 2112.
[28] This can include actions that can be undertaken by other industry actors to promote compliance, to correct or halt behaviour that fails to comply with *any given* requirement, including compliance promotion, compliance monitoring and non-compliance response. See MT Ladan, 'Enforcement and Compliance Monitoring of Environmental Law and Regulatory Good Practices in Nigeria', in *Sustainable Development Goals, Climate Change and Extractive Resource Management in Africa* (Ahmadu Bello University Press 2017) 1.
[29] Oruonye and Ahmed (n 9) 49; LA Atsegbua, V Akpotaire and F Dimowo, *Environmental Law in Nigeria: Theory and Practice* (Ababa Press 2004) 384, 54.
[30] The United Kingdom Environmental Protection Agency for example considers the issuance of an enforcement notice as part of enforcement. See s 13 Environmental Protection Act 1990.
[31] Kyngäs, Duffy and Kroll (n 18) 5.

obligations by members of the international community has been a source of concern due to the rising number of environmental disputes which international judicial bodies have had to address.[32] Many members who subscribed to international conventions were encouraged by the United Nations to not just ratify them but to incorporate the same into domestic legislation.[33] This means that if the import of these international gatherings is given due effect in the various national laws, it will extend the compliance effect of the decisions reached at such international gatherings to the national level and facilitate the implementation thereof and further strengthen the reason for it.

Many scholars have echoed the question of whether international law is law.[34] Looking at law from a national perspective, it is seen as those rules created by the legislature, interpreted by the judiciary, and enforced by the executive arm of government, using the police, if and where necessary, to coerce citizens to obey.[35] However, in international law, because there is no overarching authority to enforce it, many do not consider international law as law.[36] For this reason, some scholars view non-compliance as a problem of enforcement.[37] Others however argue that despite the absence of a specific enforcing authority, international law is still law

[32] P Sands and others, *Principles of International Environmental Law* (Third Edition edn, Cambridge University Press 2012) 926, 134.
[33] United Nations Conference on Human Environment, 'Stockholm Declaration' (Stockholm, Sweden June 16 2016).
[34] R Howse and R Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 1(2) Global Policy 127, 129; C Bruch, 'Is International Environmental Law Really Law: An Analysis of Application in Domestic Courts' (2005) 23(2) Pace Environmental Law Review 423, 427; JR Bolton, 'Is There Really Law in International Affairs' (2000) 10(1) Transnational Law and Contemporary Problems 1, 2; ME O'Connell, 'Enforcement and the Success of International Environmental Law' (1995) 3 (1) Indiana Journal of Global Legal Studies 47; A d'Amato, 'Is International Law Really "Law"?' (1984) 79(5 & 6) Northwestern University Law Review 1293, 1300.
[35] Globalisation 101, 'Is International Law Really "Law"?' (2016) <http://www.globalization101.org/is-international-law-really-law/> accessed 3 November 2017.
[36] Stein (n 24) 3.
[37] J Jackson and others, 'Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions' (2012) 52 (6) British Journal of Criminology 1051, 1052.

except that it is characterised by different practice and enforcement models[38] since the sources of enforcement exist elsewhere like in domestic institutions, reputation and reciprocity.[39]

Another question arises as to why some nations comply with international agreements and some others do not. It has been noted that when nations enter into some international agreements, their behaviour, relationships and expectations of one another are altered over time in line with the terms of such agreements.[40] The reason for this is still the subject of literary debates because compliance or non-compliance levels cannot be measured. Chayes further noted that the notion that nations comply with international agreements on the one hand and on the other hand, exhibit non-compliance when it is in their best interest to do so, are mere assumptions and not statements of fact.[41] However, this is to the extent that the relationship is between nations and at international law where Chayes has argued that acceptable compliance, as opposed to strict compliance, should be the expectation of parties in international agreements like treaties.[42]

Since a satisfactory theory as to why and when states comply with international law is still missing, some theories have been put forward by legal scholars even though these theories are not without criticism.[43] In attempting a theory of compliance with international law, Guzman draws on the international relations theory which explains compliance by a model of rational and self-interested states.[44] He posits that compliance is brought about because a state is

[38] Stein (n 20) 1; D Cann and J Yates, 'This Side of the Law: Evaluating Citizens Attitudes Toward Legal Compliance' (2020) Justice System Journal 1, 3; R Howse and R Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 1(2) Global Policy 127, 128.
[39] Stein (n 24); R Howse and R Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 1(2) Global Policy 127, 128.
[40] Chayes and Chayes (n 6) 176.
[41] ibid.
[42] ibid.
[43] J Wu, 'Environmental Compliance: The Good, the Bad, and the Super Green' (2009) 90 (11) Journal of Environmental Management 3363, 3370; AT Guzman, 'A Compliance-Based Theory of International Law' (2002) 90(6) California Law Review 1823, 1827; SC Winter and PJ May, 'Motivation for Compliance with Environmental Regulations' (2001) 20(4) Journal of Policy Analysis and Management 675, 676.
[44] AT Guzman, 'A Compliance-Based Theory of International Law' (2002) 90(6) California Law Review 1823, 1827.

concerned for its reputation and direct sanctions if the law is violated.[45] Compliance while being vital to the subsistence of international law in the regulation of relationships between nations, still does not lend itself to an easily definitive theory to explain it. Another prominent theory is the traditional legal theory[46] which embodies the managerial model[47] and consent-based theory.[48] Under this traditional legal theory, it is suggested that the enforcement model of compliance in which coercion is applied to bring about compliance should be replaced by the managerial model which supports a cooperative and problem-solving approach. The reason for this suggestion is that once parties have agreed to a set of conducts then no party will have a motivation to digress from the agreement thereby guaranteeing compliance and because of this, resources are directed at managing the relationship.[49]

A satisfactory theory of compliance must at best be able to explain instances of compliance and violation of international law.[50] These theories of compliance can apply to international and national environmental law because environmental regulation has attained global prominence and can only stand when ratifying parties comply with the agreements. Dempsey noted that 'law without compliance and enforcement is like poetry – pleasing to the ear, but has little to do with the practical world in which we live.'[51]

The thrust of this section is that compliance is as much an issue at the international level as well as the national level. Therefore, state parties to international agreements should be

[45] ibid.
[46] A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1998) 432, 110.
[47] Guzman (n 44) 1830.
[48] However, Chayes *et al* argues that compliance is recorded because the norm itself generates a compliance pull. In other words, the compliance norm is what causes states to comply. However, this position has been shot down by the argument that a norm can exist either in support of or in defiance of compliance.
[49] Guzman (n 44) 1830.
[50] Guzman (n 44) 1840.
[51] SP Dempsey, 'Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety' (2004) Vol 30 (1) North Carolina Journal of International Law and Commercial Regulation 1.

encouraged to comply because this compliance culture can cascade to the national level and generally improve compliance at the national level.

3.3.1 Sources of compliance mechanisms and enforcement tools in international environmental law

The evolution of the concept of compliance and enforcement in international environmental law has been expressed in various environmental law literature.[52] The sources of compliance and enforcement in international environmental law can be found in various legal and regulatory instruments such as treaties, conventions, protocols, customary international laws, declarations, resolutions and action plans.[53] Other sources of international environmental regulations include Declarations, Resolutions, Action Plans etc which generally give rise to non-binding commitments. They all bear provisions that seek to regulate how state and non-state actors interact with the environment at the international and regional level and embody compliance mechanisms and enforcement tools and techniques.

Environmental regulations concerning compliance and enforcement in international environmental law are also found in the standards and policies of some international financial

[52] RB Mitchell, 'Compliance Theory: An Overview' in J Werksman, J Cameron and P Roderick (eds), *Improving Compliance with International Environmental Law* (Routledge 2014) 21; LA Malone, 'Enforcing International Environmental Law through Domestic Law Mechanisms in the United States: Civil Society Initiatives Against Global Warming' in L Paddock and others (ed), (The IUCN Academy of Environmental Law Series edn, Edward Elgar Publishing Limited 2011) 111; G Loibl, 'Compliance Procedures and Mechanisms' in M Fitzmaurice, DM Ong and P Merkouris (eds), *Research Handbook on International Environmental Law* (Research Handbooks in International Law Series, Edgar Publishing 2010) 426; J Brunnee, 'Enforcement mechanisms in international and environmental law' in U Beyerlin, P Stoll and R Wolfrum (eds), *Ensuring compliance with multilateral environmental agreements: a dialogue between practitioners and academia* (Brill 2006) 1 etc.

[53] Examples of some of the treaties, relevant to this thesis include the International Convention on the Prevention of Pollution of the Sea by Oil 1954 (OILPOL 1954), Article II and Article III International Convention on the Prevention of Pollution of the Sea by Oil 1954 (OILPOL 1954); Convention on the High Seas 1958 (Geneva Convention), International Convention on Civil Liability for Oil Pollution Damage 1969 (IMO CLC), United Nations Convention on the Law of the Sea (UNCLOS) 1982, United Nations Convention on the Law of the Sea (UNCLOS) 1982 Article 26, 30, 31 and 73 on enforcement of laws and regulations of the coastal State; African Charter on Human and Peoples' Rights (ACHPR), African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act CAP A9 Laws of the Federation of Nigeria 2004. See further, Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997, United Nations Convention to Combat Desertification 1994 etc. See also Chapter 5 of P Sands and J Peel, *Principles of International Environmental Law* (Fourth edn, Cambridge University Press 2018) 968, 144; Chapter 4 of P Birnie, A Boyle and C Regwell, *International Law and the Environment* (Third edn, Oxford University Press 2009) 851, 212 on compliance.

institutions and multinational companies whose standards target petroleum sector operations. For example, the Extractive Industries Source Book of the World Bank[54] suggests some responses to the failure of compliance and enforcement in the extractive industry. These responses are sector-specific policy and legislative framework through detailed legislation or thorough individually-legislated contracts, agreements or a hybrid of both; assignment of clear and specific roles to key sector agencies and institutions including the three arms of government; adoption of an appropriate fiscal regime with policies and rules for proper management of sector revenues and policies to promote sustainable development of the sector. The sourcebook further suggests effective implementation, monitoring and enforcement of the requirements set out in the sourcebook.[55]

Another example is the United Nations Protect, Respect and Remedy Framework 2008.[56] This Framework specifically establishes three pillars: The duty of the state to protect against human rights abuses by third parties, the corporate responsibility to respect human rights and greater access by victims of human rights abuses to effective judicial and non-judicial remedies. Other International institutions that embody compliance provisions targeting the petroleum sector include the Extractive Industry Transparency Initiative,[57] Global Reporting Initiative for Oil

[54] PD Cameron and MC Stanley, *Oil, Gas, and Mining: A Sourcebook for Understanding Extractive Industries* (International Bank for Reconstruction and Development/The World Bank 2017) 298.

[55] ibid 294. Despite the existence of the current environmental and social policies called Safeguard Policies, the World Bank also ensures that people and the environment are better protected from the potential adverse impacts of developmental projects by adopting a new set of environmental and social policies called the Environmental and Social Framework (ESF) which applies to all new World Bank investments project financing. see World Bank, *The World Bank Environmental and Social Framework* (International Bank for Reconstruction and Development/The World Bank 2017) 121, 3; World Bank, 'Environmental and Social Policies' (2021). <https://www.worldbank.org/en/projects-operations/environmental-and-social-policies> accessed 17 March 2021. This framework applies to all new projects funded by the World Bank effective October 1, 2018 while the existing Safeguard Policies still apply to existing projects;

[56] UN Human Rights Council, *Protect, Respect and Remedy: A framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 7 April 2008, A/HRC/8/5 3 <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 9 December 2020, 3, 13 and 27.

[57] Extractive Industries Transparency Initiative, 'THE EITI STANDARD 2019: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources' (2019) <https://eiti.org/files/documents/eiti_standard_2019_en_a4_web.pdf> accessed 9 December 2020.

and Gas Sector Disclosure[58] and Global Reporting Initiative for Environmental Compliance.[59] The key finding of this section is that the sources of compliance and enforcement mechanisms and tools at international law are found in various international and multilateral arrangements where the continuous enjoyment of the benefits of such arrangements is dependent on the sustained compliance of parties with the terms of such agreements.

3.3.2 Compliance mechanisms and enforcement tools in international environmental law

The literature on the issue of compliance and enforcement has acknowledged that in most jurisdictions where activities that affect the environment are regulated, experience abounds of the challenges and gains of effective compliance and enforcement. Governments continuously seek ways to improve compliance and enforcement.[60] It has been noted that the complexity of environmental legislation is proportional to the level of compliance it enjoys.[61] In other words, the level of compliance is boosted by how easy it is to comply with the law.

Some compliance mechanisms have been identified and they include generating rules or laws with compliance strategies built-in such as advanced pollution monitoring, electronic monitoring, increased transparency and innovative enforcement strategies.[62] Other compliance mechanisms identified are education and training, capacity building, self-inspection and self-audit, industry co-regulation and self-management, fiscal incentives, voluntary approaches,

[58] Global Reporting Initiative, 'Oil and Gas Sector Disclosure' (2016) <https://www.globalreporting.org/how-to-use-the-gri-standards/gri-standards-english-language/> accessed 9 December 2020.
[59] ibid.
[60] This can be seen in the various repeals and amendments that are seen in environmental legislations for example the Federal Environmental Protection Agency Act 1988 was repealed by the National Environmental Standards Regulation and Enforcement Agency Act 2007 in Nigeria
[61] C Giles, 'Next Generation Compliance' in LeRoy Paddock and Jessica A. Wentz (eds), *Next Generation Environmental Compliance and Enforcement* (Environmental Law Institute 2014) 22.
[62] ibid 23.

public voluntary programs, economic instruments, regulatory flexibility and informational regulation.[63]

The available literature on the enforcement of environmental laws attempts to explore the various enforcement tools available in international law.[64] Enforcement was discussed from two approaches in Rinceanu's work: the horizontal and vertical approaches.[65] The horizontal approach involves enforcement through countermeasures such as reciprocal action, retorsion, reprisal and enforcement through negotiations and countermeasures.[66] This approach applies to international and regional legal instruments. The vertical approach to enforcement involves enforcement through domestic mechanisms, enforcement through litigation and countermeasures and enforcement mechanisms available through international regulatory instruments such as treaties and conventions[67] and via international organisations.[68] The vertical approach to enforcement is discussed in detail later in this thesis because this is the enforcement style that is applicable in Nigeria.[69]

Enforcement is a generic term. Therefore, enforcement tools can apply to most laws that have suffered non-compliance irrespective of the sector to which it applies. Some of these tools include the conduct of investigations, publicity, penalties, suspensions and public censures, variation and cancellation of permits, prohibition orders and withdrawal of approval, injunctions, restitution and redress and prosecution.[70] One major weakness of these

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[63] N Gunningham, 'Beyond Compliance: Next Generation Environmental Regulation' Paper presented at the Current Issues in Regulation: Enforcement and Compliance Conference convened by the Australian Institute of Criminology in conjunction with the Regulatory Institutions Network, RSSS, Australian National University and the Division of Business and Enterprise, University of South Australia. Australian Institute of Criminology, Melbourne, 2 September 2003) 3, 4, 7, 18.
[64] J Rinceanu, 'Enforcement Mechanisms in International Environmental Law: Quo Vadunt?' (2000) 15 Journal of Environmental Law & Litigation 147.
[65] ibid 150, 153.
[66] ibid.
[67] ibid 156.
[68] ibid 158.
[69] See **section 5.2.1 (iv)** of **Chapter 5** of this thesis.
[70] Financial Conduct Authority, 'FCA Handbook' (2018) <https://www.handbook.fca.org.uk/handbook> accessed February 5, 2018.

enforcement tools or approaches is that they do not lend themselves to universal application due to differences in economic, political, ethical and developmental circumstances.

This section has discussed enforcement and compliance in international environmental law. It is argued that while some compliance mechanisms and enforcement tools can be borrowed from international environmental law, the effectiveness and suitability of the application of these mechanisms and tools in the Nigerian petroleum sector will be dependent on the socio-economic and political landscape of Nigeria.

PART B

3.4 Compliance and enforcement in Nigerian environmental law

Compliance and enforcement of environmental laws in Nigeria have checkered history coupled with the unsuccessful implementation of the laws and judicial pronouncements on environmental issues.[71] As a developing country, since the discovery of petroleum in commercial quantity in 1956, Nigeria has been battling with balancing its need for economic development and the sustainability of its natural resources.[72] This is not a dilemma peculiar to Nigeria but can be seen in the early days of the industrial revolution of most industrialised nations.[73]

Before the discovery of petroleum in Nigeria, the country relied largely on trade and agriculture to sustain its economy and cater to its citizens.[74] The protection of the environment was not the primary concern of the government then, rather it was the sustainable use of the land for

[71] ZO Edo, 'The Challenges of Effective Environmental Enforcement and Compliance in The Niger Delta Region of Nigeria' (2012) 14(6) Journal of Sustainable Development in Africa 261, 263.
[72] AE Ite and others, 'Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria's Niger Delta' (2013) 1(4) American Journal of Environmental Protection 78, 81; A Ogunba, 'An Appraisal of the Evolution of Environmental Legislation in Nigeria' (2016) 40 (3) Vermont Law Review 673, 674.
[73] This was the experience of nations like America and Europe. See P Wisman, 'EPA History (1970 - 1985)' (2016) <https://archive.epa.gov/epa/aboutepa/epa-history-1970-1985.html> accessed 13 November 2017.
[74] T Falola and MM Heaton, *A History of Nigeria* (Cambridge University Press 2008) 332, 78.

continuous crop production that was paramount.[75] Therefore, during that period, many environmental conservation measures were applied to sustain the environment in agricultural areas. There were methods to regulate the sustainable use of farmlands such as crop and land rotation, land designated and reserved for different crop types with different lifespan and outright rest for land that has been used for farming for a given period.[76] Although these measures were not documented at the time, they created a balance in the use of the environment for agricultural purposes to the satisfaction of the country. Back then, environmental concerns were seen in Nigeria as hindrances or threats to advancing industrialisation or economic development.[77]

3.4.1 Evolution of the legal framework for environmental regulation in Nigeria

The legal framework for environmental regulation in Nigeria has come a long way since the development of the petroleum sector began. This section aims to evaluate the evolution of compliance and enforcement mechanisms through the evolution of environmental laws in Nigeria. This section shows that although environmental protection was not the priority of the Nigerian government, the drastic steps later taken by the government were due to some environmental exigencies and since then the government of Nigeria has been in a race against time in its effort to regulate activities that impact the environment.

This thesis acknowledges that there are many actions and sectors of the Nigerian economy that impact the environment. These include the petroleum sector, the agricultural sector (land use

[75] MT Ladan, *Law, Cases and Policies on Energy, Mineral Resources, Climate Change, Environment, Water, Maritime and Human Rights in Nigeria* (ABU Press Ltd 2009).

[76] F Allison-Kulo, 'Enforcement of Environmental Regulatory Laws in Nigeria' (2007) <https://www.academia.edu/10234192/ENFORCEMENT_OF_ENVIRONMENTAL_REGULATORY_LAWS_IN_NIGERIA_BY> accessed 29 May 2017 1, 6. The framework for environmental regulation in Nigeria incorporates both legal regulatory instruments and institutional regulatory agencies.

[77] A Ogunba, 'An Appraisal of the Evolution of Environmental Legislation in Nigeria' (2016) 40 (3) Vermont Law Review 673, 674; A Adegoroye, 'The Challenges of Environmental Enforcement in Africa: The Nigerian experience' (Proceedings of the Third International Conference on Environmental Enforcement Oaxaca, México 25April 1994) 43, 43.

and soil conservation),[78] the manufacturing sector, emission of fumes from exhaust pipes of motor vehicles, industries, illegal mining activities and household waste disposal methods including disposing of wastes in drainages and river courses. However, the focus of this research is the Nigerian petroleum sector and the effort of the Nigerian government to improve environmental regulation.

Nigeria had practiced several environmental conservation methods in the past. For example, there were practices to protect agricultural farms, forest and fishing rivers and help them heal from agricultural activities to foster the preservation and sustainable use of land.[79] These methods included crop and land rotation, land designated and reserved for different kinds of crops with different lifespans.[80] In most local communities, the land was allocated and reserved for various uses, such as farming, forest land (where wild animals were allowed to thrive in their natural habitat), hunting forest, religious forest and forest reserved as an abode for evil spirits.[81] There was also in place indigenous practices that were accessible, sustainable and affordable.[82] Though rudimentary at the time, these indigenous practices helped to balance the sustainable use of the available land, forest and marine resources.[83] The lack of a specific environmental protection and preservation policy at that time clearly showed that the protection of the environment *per se* was not a priority before the discovery of oil in 1956.[84] The closest

[78] Through the use of unapproved agricultural practices including fishing with the use of dynamite and unregulated use of fishing trawlers.
[79] U Etemire and NU Sobere, 'Improving Public Compliance with Modern Environmental Laws in Nigeria: Looking to Traditional African Norms and Practices' (2020) 38(3) Journal of Energy & Natural Resources Law 305, 308.
[80] Allison-Kulo (n 76) 6.
[81] TA Aina and AT Salau, *Challenge of Sustainable Development in Nigeria.* (Nigerian Environmental Study/Action Team 1992) 247, 156.
[82] MO Agada, VA Otene and SO Adikwu, 'Usage of Indigenous Production and Preservation Practices by Maize farmers in Ugbokolo, Benue State, Nigeria' (2020) 8(3) World Journal of Advanced Research and Reviews 52, 57. Other indigenous practices of land preservation existed such as selective prohibition of killing and eating of certain animals at all or during a given period in a year because they were seen as sacred or just an opportunity for the species to regenerate, heal and mature from the previous hunting or fishing season.
[83] RO Salami, L Akawu and P Abutu, 'The Role of Indigenous Knowledge in Sustainable Urban Agriculture and Urban Food Security in Minna, Nigeria.' (2020) Library Philosophy and Practice 1, 13; FI Nweke and others, (1991) 'Production Costs in the Yam-Based Cropping Systems of South-Eastern Nigeria', RCMP *research monograph/International Institute of Tropical Agriculture, Resource and Crop Management Program; no 6*.
[84] Ladan (n 75) 35.

effort at addressing environmental protection was the Criminal Code Act[85] which prohibited water pollution.

Several reasons have been adduced for the late response to an objective and deliberate policy for environmental protection in Nigeria.[86] Some of the reasons include political instability (constant change between military and civilian governments that had their different agenda outside environmental protection upon the assumption of office). The monthly environmental sanitation exercise[87] which was operational across the country was erroneously thought to be a viable substitute for actual environmental protection policies to specifically address the impact of petroleum operations on the environment.[88] Following the discovery of petroleum in Nigeria and the speed with which the country embarked on the exploration of the resource, it soon began to encounter the harsh reality of the disadvantages of the sector operations, especially pollution and consequent environmental degradation.[89]

With the increased environmental awareness in Nigeria, the 1999 Constitution of the Federal Republic of Nigeria provided that the government is responsible for the protection and improvement of the environment and for safeguarding the water, air and land, forest and wildlife of Nigeria.[90] However, the provision was not an actionable one as it falls under the provisions of fundamental objectives and directive principles of state policy.[91]

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[85] Criminal Code Act of 1916, s 245.
[86] Aina and Salau (n 80) 156.
[87] As provided for under relevant Public Health Laws across the country.
[88] This can be gleaned from the encouragement of state governments to create state environmental protection agencies after the federal government had established the Federal Environmental Protection Agency (FEPA).
[89] MG Murgan, 'An Appraisal of the Laws on Protection of Environment in Nigeria' (2015) <http://works.bepress.com/murtala_ganiyu/1/> accessed 2 June 2017.
[90] Constitution of the Federal Republic of Nigeria 1999, S 20.
[91] See **Chapter 2** of the Constitution of the Federal Republic of Nigeria 1999. This is to the effect that where there is any form of violation of that provision, the same Constitution prevents anyone from seeking to enforce that provision of the Constitution. This is addressed in detail in **Chapter 5** where the role of the judiciary in institutionalising compliance and enforcement of environmental regulation is examined.

Following the discovery of petroleum, this environmental preservation effort was reactivated and became more evident from the involvement of Nigeria in various environment-focused activities and meetings, especially on a regional and continental level. Such environmental matters include preservation of the marine and coastal environment, the conservation of natural resources and the management of transboundary hazardous wastes in Africa.[92] Unfortunately, these efforts at environmental-focused activities and meetings, while having produced results, hardly translated to practice as the diverse environmental problems in Africa have been described as "staggering".[93]

Environmental laws in Nigeria have thus far developed in four stages. The development has spanned the colonial period of 1900-1956, the Petroleum focused environmental legislation period of 1956-1970s, the rudimentary and perfunctory environmental legislation period of 1970s-1987 and the contemporary period of post-1987 until the present.[94] Before the enactment of published legislation and policies, there were customary laws that crystallised into common law and consequently into the Criminal Code of 1916 and the Public Health Act of 1917. Subsequently, the policy and legal framework for environmental concerns were shaped by the discovery of petroleum. The experience of the advantages and disadvantages of petroleum discovery in Nigeria contributed to shaping the subsequent policy and legislative framework for environmental regulation and was followed by institutional reforms.[95]

Colonial period of 1900-1956: During this period, the interest in Nigeria was in its strategic coastline location because it was vital to trade.[96] Little or no attention was given to the

[92] Ogunba (n 77) 674.
[93] WL Andreen, 'Environmental Law and International Assistance: The Challenge of Strengthening Environmental Law in the Developing World' (2000) 25 Columbia Journal of Environmental Law 17, 19.
[94] Ogunba (n 77) 675.
[95] T Olarinoye and SM Orecho, 'Evolution of Environmental Policies in Uganda and Nigeria: A Developing Country Perspective' (2015) <https://fenix.tecnico.ulisboa.pt/downloadFile/563568428721349/> accessed 14 October 2019 1, 2.
[96] AL Mabogunje, 'The Evolution and Analysis of the Retail Structure of Lagos, Nigeria' (1964) 40(4) Economic Geography 304, 305.

environmental implication of concentrating on and doing business at the coastline[97] because the means of livelihood then was settled agricultural practices and trade. However, the interest in Nigera quickly changed at the possibility of the existence of other natural resources in the country. Instead, the desire to acquire access to natural resources became the driving force for Nigeria's colonialism[98] and there was an obvious lack of attention to serious environmental protection policies.[99] **S**ome indirect protection for the environment during this period however targeted public health[100] and not environmental protection.[101] The 1914 Mineral Ordinance was enacted that established the right to search for, mine and work minerals.[102] The Mineral Ordinances that followed in 1916 and 1945 were essentially the same as they were more concerned with the ownership of the prospective find than they were about the protection of the environment or the safety and rights of the citizens.[103] In the event of environmental wrong, remedies were sought within the English common law tort of negligence. Strict liability to redress personal injury resulting from environmental pollution and public nuisance and trespass redressed environmental harm to property.[104]

Petroleum-Focused Environmental Legislation period of 1956-1970. This discovery of petroleum in 1956[105] brought with it an unexpected thrust of the Nigerian economy in a

[97] Ogunba (n 77) 676.
[98] Ogunba (n 77) 676.
[99] Ladan (n 75) 1206.
[100] Public Health Act CAP C38 Laws of the Federation of Nigeria 2004.
[101] The Public Health Act 1917 (repealed) and s 245 Criminal Code Act 1916 which is still good law and now CAP C38 Laws of the Federation of Nigeria 2004. These include some legislation that prohibited water pollution and other acts of public health violations. A number of issues were addressed by these laws such as the selling of noxious food and drinks and the adulteration of such items meant for sale, see Criminal Code Act 1916 s 243.
[102] Mineral Ordinance 1914.
[103] Mineral Ordinance 1916 and 1945.
[104] F Olarenwaju (ed), *Mournful Remedies, Endless Conflicts and Inconsistencies in Nigeria's Quest for Environmental Governance: Rethinking the Legal Possibilities for Sustainability.* (4th Inaugural Lecture edn, Nigeria Institute of Advanced Legal Studies 2012) 59. The doctrine of strict liability was established in the common law case of *Ryland v Fletcher* [1868] UKHL J0717-1 where the prosecution did not really have to prove *mens rea*. This principle was adopted in the Nigerian case of *Umudje v. Shell British Petroleum* (1975) NSCC. In that case, the plaintiffs suffered pollution of their ponds, killing the fish, from the incidence of crude oil waste that escaped from the defendant's facility.
[105] IC Chimezie, 'Gas Flaring and Climate Change: Impact on Niger Delta Communities' (2020) 6(1) Management and Social Sciences 106, 106; AA Kadafa, 'Oil Exploration and Spillage in the Niger Delta of Nigeria' (2012) 2(3) Civl and Environmental Research 38, 38.

completely different direction. The economy went from the usual agriculture and trade-based economic practice which was the major source of foreign exchange earnings[106] to a petroleum-focused economy and laws were enacted to reflect this new focus. Some of the legislation that was enacted during this period were; Petroleum Act 1969,[107] Oil Pipelines Act 1956, Oil terminals dues decree 1969, Oil in Navigable water decree 1968, Explosives Act 1964, Mineral Oil (Safety) Regulation (1963), Petroleum Regulation (1968), Oil Pipeline Act (1956) (Amended By Oil Pipeline Act 1965)[108] in addition to the existing laws.[109] The laws did not seek to provide general protection for the environment but they sought to only protect the environment from pollution as a result of the operations of the petroleum sector.[110]

Environmental protection legislation period of 1970s-1987: This period witnessed the enactment of laws to cater to the health and safety of workers in a hazardous working environment.[111] Other notable legislation that pertained to the environment or affected how the environment was dealt with includes the Land Use Act of 1978, the 1979 Energy Commission of Nigeria Act, the Endangered Species (Control of International Trade and Traffic) Act Cap E9 2004,[112] the Sea Fisheries Act (repealed by Sea Fisheries Decree 1992) and the 1986 River Basins Development Authorities Act. These legislations made provisions for issues affecting the environment, but the focus was the continuous development and control of the natural resources not to for the actual protection of the environment.

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[106] Ogunba (n 77) 679.
[107] This piece of legislation remains the most coherent of all the laws so far regulating the operations in petroleum sector and environment regardless of its shortcomings.
[108] MG Murgan, 'An Appraisal of the Laws on Protection of Environment in Nigeria' (2015) <http://works.bepress.com/murtala_ganiyu/1/> accessed 2 June 2017, 5.
[109] The Mineral ordinance of 1914, the Criminal Code Act of 1916, the Water Works Act 1915, and Minerals Act of 1946.
[110] Ogunba (n 77) 679.
[111] Factories Act 1987.
[112] Amended by Endangered Species (Control of International Trade and Traffic) Amendment Act 2016.

During this period, Nigeria participated in regional[113] and international meetings to discuss and analyse vital environmental issues.[114] An important international meeting attended by Nigeria was the United Nations Conference on the Human Environment in 1972 which was held in Stockholm.[115]The Federal Ministry of Environment was created after this to cater to environmental and allied issues.[116] This exhibited the country's higher level of environmental awareness[117] that prompted more deliberate actions and laws targeting the environment such as the third National Development Plan.[118]

The contemporary period: 1987 until the present: During this period, the awareness of the protection of the environment was no longer lost on Nigeria. Due to the various national, regional and international engagements it was quite clear where the stand was on environmental regulation.[119] In 1987 there was a national public outcry over the dumping of over 3500 tonnes of industrial toxic waste in Nigeria by an Italian company.[120] This necessitated the promulgation of the Harmful Wastes (Special Criminal Provision) Decree[121] which criminalised the sale, purchase, transportation, importation, deposit or storage of harmful

[113] MVS Sirleaf, 'Not Your Dumping Ground: Criminalization of Trafficking in Hazardous Waste in Africa' (2018) 35 (2) Wisconsin International Law Journal 326, 329.
[114] Ogunba (n 77) 683. The issues discussed included the protection of the marine and coastal environment, conservation of natural resources and management of transboundary hazardous wastes within Africa.
[115] Stockholm Conference (n 33)
[116] L Egunjobi, 'Issues in Environmental Management for Sustainable Development' (1993) 13 Environmentalist 33.
[117] ibid,
[118] Third National Development Plan 1975 – 1980 3.
[119] United Nations Conference on Environment and Development (UNCED), (Rio Summit) 1992; Millennium Development Goals, United Nations Millennium Declaration. New York: United Nations, 2000. (United Nations General Assembly Resolution 55/2); Sustainable Development Goals, United Nations, Transforming Our World: The 2030 Agenda for Sustainable Development, New York: United Nations General Assembly, 11 – 12 August 2015. However, back at the national level, the environmental awareness Nigeria exhibited, did not translate to practice as matters of environmental protection was still treated with levity.
[120] A Nabegu, AB Mustapha and AI Naibbi,' Environmental Regulations in Nigeria: A Mini Review' (2017) 1(5) International Journal of Environmental Sciences and Natural Resources 1, 1. The substances contaminated the land and water of the Koko community, in the old Bendel State of southern Nigeria, resulting in the death of human beings, animals and destructions of acres of farmland and watercourses. See B James, 'Waste Dumpers Turning to West Africa' <http://www.nytimes.com/1988/07/17/world/waste-dumpers-turning-to-west-africa.html?pagewanted=all> accessed 19 July 2017.
[121] Harmful Wastes (Special Criminal Provision) Decree No 42 of 1988.

wastes on Nigeria's soil, air or sea.[122] The National Policy on the Environment[123] was also developed after an international workshop on the environment was organised by the federal government. The rationale behind the development of a national environmental policy in Nigeria is contained in the 1999 Constitution of the Federal Republic of Nigeria.[124] **C**orresponding environmental regulatory agencies were set up and replicated across the states and local government areas in Nigeria.[125] Nigeria joined the international campaign for the protection and preservation of the environment by subscribing to international conventions and treaties and domesticating some of them such as the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (INTERVENTION 1969),[126] International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC),[127] The African Charter on Human and Peoples' Rights (ACHPR,)[128] The International Convention on Civil Liability for Oil Pollution Damage 1969, renewed in 1992 and often referred to as the CLC Convention).[129] It is imperative to note that for these treaties to have any force of law in Nigeria, they must be ratified and subsequently enacted into law by the

[122] Harmful Wastes (Special Criminal Provision) Decree No 42 of 1988 ss 1 – 2.
[123] The National Policy on the Environment was formulated in 1991, revised in 1999 and again in 2016.
[124] Pursuant to section 20 of the Constitution, the State is empowered to protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria. In addition to this, section 2 of the Environmental Impact Assessment Act of 1992 (EIA Act) provides that the public or private sector of the economy shall not undertake or embark on or authorise projects or activities without prior consideration of the effect on the environment. This policy contained specific guidelines for achieving sustainable development in vital sectors of the Nigerian economy such as human population, land use and soil conservation; water resource management; forestry; wildlife and protected natural areas; marine and coastal area resources; sanitation and waste management; toxic and hazardous substances; mining and mineral resources; energy production, air pollution, noise working environment, settlements, recreational space, green belts, monuments and cultural properties. T Olarinoye and SM Orecho, 'Evolution of Environmental Policies in Uganda and Nigeria: A Developing Country Perspective' (2015) <https://fenix.tecnico.ulisboa.pt/downloadFile/563568428721349/> accessed 14 October 2019 1, 2.
[125] H Ijaiya and OT Joseph, 'Rethinking Environmental Law Enforcement in Nigeria' (2014) 5 Beijing Law Review 306.
[126] Treaty Series No. 77 (1975), *International Convention Relating to Intervention on The High Seas in Cases of Oil Pollution Casualties*. Cambridge [England]: Proquest LLC.
[127] *International Convention on Oil Pollution Preparedness, Response and Co-Operation, 1990*. London: IMO.
[128] African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act CAP A9 Laws of the Federation of Nigeria 2004.
[129] *International Conference on Liability and Compensation for Damage in Connexion with The Carriage of Certain Substances by Sea, 1984*. London: International Maritime Organization.

National Assembly.[130] These treaties are relevant to Nigeria because they fill the gaps in the Nigerian legal system and also expands its frontiers concerning environmental regulation.[131] For example, the ACHPR created the legal basis for the enforcement of some human rights in a Nigerian court whose rights were otherwise non-justiciable.[132] Unfortunately, the national assembly has been quite slow to enact ratified treaties into law hence the difference between ratified and domesticated treaties and ratified and undomesticated treaties in Nigeria.[133]

More laws were enacted, amended or repealed to reflect the development of the sector and to reflect the country's involvement in regional and international environmental meetings, conferences and ratification of the outcomes.[134] For example, the repealed Federal Environmental Protection Agency (FEPA) Act[135] and the Bill to amend the Petroleum Act of 1969.[136] The proposed bill seeks to strengthen the oil and gas sector and effectively resolve the exploration and exploitation fallouts and the issue of corruption and lack of transparency in the sector.[137] Due to the difficulties experienced in passing the Bill because of many competing interests, the Buhari administration proposed passing the Bill in segments by splitting it into

[130] S 12 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), Cap C23, LFN, 2004. See also D Ogunniyi, 'The Challenge of Domesticating Children's Rights Treaties in Nigeria and Alternative Legal Avenues for Protecting Children' (2018) 62(3) Journal of African Law 447, 449.

[131] CE Okeke and MI Anushiem, 'Implementation of Treaties in Nigeria: Issues, Challenges and the Way Forward' (2018) 9(2) Journal of International Law and Jurisprudence 216, 221.

[132] See **section 5.2.1 (i)** of **Chapter 5** of this thesis.

[133] Regardless of the undomesticated status of some ratified treaties, such treaties have constituted a useful guide in interpreting statutes in Nigerian courts. For example, in the case of *Abacha v Fawehinmi* (2000) FWLR (Pt.4) 553, 586, the Supreme Court referred to the English case of *Higgs & Anor v Minister for National Security & Ors* [2000] 2 AC 228 where the Privy Council held that Undomesticated treaties might have an indirect effect on the construction of statues.

[134] African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act CAP A9 Laws of the Federation of Nigeria 2004; National Environmental Standards Regulations Enforcement Agency (Amendment) Act Laws of the Federation of Nigeria 2018; National Oil Spill Detection Response Agency (NOSDRA) Act Cap N63 Laws of the Federation of Nigeria 2010; Oil in Navigable Water Decree 1968 now Cap O6 Laws of the Federation of Nigeria 2010.

[135] FEPA Decree No 58 of 1988 repealed by the National Environmental Standards Regulations Enforcement Agency (Establishment) Act 2007. It established the Federal Environmental Protection Agency (FEPA) now replaced by NESREA.

[136] Petroleum Act 1969 Cap P10 Laws of the Federation of Nigeria 2010. The Bill is now styled the Petroleum Industry Governance Bill, Petroleum Industry (Draft) Bill, 2012. Curiously, that proposed bill has been before the legislative arm of the National assembly for over six years now and the delay has been due to the many competing interests that have marred the smooth passage of the Bill.

[137] A Nwozor and others, 'Reform in a Limbo: The Politics and Politicization of Reforms in Nigeria's Petroleum Sector' (2020) 10(4) International Journal of Energy Economics and Policy 184, 186.

four separate Bills; Petroleum Industry Governance Bill, Fiscal Regime Bill, Upstream and Midstream Administration Bill, Petroleum Host Communities Bill.[138]

In an attempt to further strengthen the legal framework for environmental regulation in the petroleum sector, the National Oil Spill Detection and Response Agency (NOSDRA) Act[139] was enacted closely followed by the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act[140] that repealed the FEPA Act. It is argued that the legal framework for the evolution of environmental regulation in Nigeria has come a long way and has steadily improved. However, the impact of this framework development remains to be seen in practice because of the various amendments to laws and reviews of the enforcement models of regulatory agencies in Nigeria.

3.4.2 Compliance and enforcement in the Nigerian petroleum sector

This section discusses compliance and enforcement efforts specific to the Nigerian petroleum sector. It is, therefore, necessary to trace the history and evolution of the sector. This discussion follows the operations of the sector to harness the benefits of the natural resources therein, and the evolution of the legal and institutional framework in the bid to regulate the sector while protecting the environment.

The deleterious effects of the poor environmental practices of the operators of the petroleum sector motivated the government although out of necessity, to set up both legal and institutional instruments for the regulation of the sector. This is evident in the number of laws enacted over a given period[141] to achieve the elusive effective regulation that the sector and the environment so urgently needed. Some of the relevant laws, policies and agencies include National Policy

[138] KC Ene, 'The fall and rise of the Nigerian Petroleum Industry Governance Bill' <https://www.opml.co.uk/blog/nigerian-petroleum-industry-governance-bill> accessed 17 March 2021.
[139] National Oil Spill Detection and Response Agency Act Cap N63 Laws of the Federation of Nigeria 2010.
[140] National Environmental Standards and Regulation Enforcement Agency (NESREA) Act Cap N36 Laws of the Federation of Nigeria 2010.
[141] See **section 3.4.1** of this **Chapter.**

on the Environment, Constitution of the Federal Republic of Nigeria 1999,[142] Environmental Impact Assessment,[143] Harmful Waste (Special Criminal Provision) Decree,[144] Oil Pipelines Act,[145] Petroleum Act,[146] National Environmental Standards and Regulations Enforcement Agency (NESREA) as established by the National Environmental Standards and Regulation Enforcement Agency (NESREA) Act,[147] the National Oil Spill Detection and Response Agency (NOSDRA), established by the National Oil Spill Detection and Response Agency Act[148] and the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN), this is a policy document from the Department of Petroleum Resources.[149]

When laws are enacted, the success or otherwise of such laws is measured by the level of compliance and enforcement that such laws enjoy.[150] Other factors that underpin environmental legislative success include effective implementation, financial and technical backing and the awareness it creates.[151] In the course of the development of environmental protection laws in Nigeria, it can be deduced that not much thought was given to the actual compliance and enforcement structure of the laws which has led to a systematic failure of these laws.[152] This is evidenced by the fact that many of the environmental laws are burdened with problems of implementation making them ineffective.[153]

[142] Constitution of the Federal Republic of Nigeria (Amended) Cap C23 Laws of the Federation of Nigeria 2010.
[143] Environmental Impact Assessment Cap E12 Laws of the Federation of Nigeria 2010.
[144] Harmful Waste (Special Criminal Provision) Decree now Cap H1 Laws of the Federation of Nigeria 2010.
[145] Oil Pipelines Act Cap O7 Laws of the Federation of Nigeria 2010.
[146] Petroleum Act Cap P10 Laws of the Federation of Nigeria 2010.
[147] NESREA Act (n 140).
[148] NOSDRA Act (n 139).
[149] Department of Petroleum Resources, Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 2002.
[150] World Health Organisation, 'Legislation and Enforcement' (2017) <http://www.who.int/tobacco/control/legislation/en/> accessed 5 December 2017.
[151] ME O'Connell, 'Enforcement and the Success of International Environmental Law' (1995) 3(1) Indiana Journal of Global Legal Studies 47, 47.
[152] Murgan (n 89).
[153] Murgan (n 89) 15.

As stated earlier, during the colonial era, protection of the environment was not exactly a priority hence the little or outright lack of environmental protection policies. Environmental issues were dealt with under the tort of nuisance or the Criminal Code Act.[154] In the course of the literature review of the development of environmental laws as outlined above, very little was seen of a compliance strategy. The laws rather made more provisions for enforcement. For example, the provisions of the NESREA Act listed an array of enforcement actions but excluded the *oil* and *gas* sector from its area of application.[155] This spelt the failure of the Agency which was primarily enacted to protect the environment as its regulatory power hugely decreased by the exclusion of the *oil* and *gas* sector.[156] It must be noted that the effects of the operations of the oil and gas sector in Nigeria have resulted in development as well as pollution, environmental degradation and harm to public health,[157] therefore proper regulation of the petroleum sector is vital. However, the NESREA Act which was enacted to regulate environmental matters is left impotent by the exclusion of the sector that is currently most responsible for pollution and environmental degradation, the oil and gas sector. The failure of the foregoing processes and actions necessitated further efforts to regulate the petroleum sector as discussed below.

[154] Criminal Code Act 1916.

[155] s 7 NESREA Act (n 140) provides that the Agency shall as part of its function, (a) enforce compliance with all laws, guidelines, policies and standards on environmental matters, enforce compliance with importation, exportation…handling and disposal of hazardous chemicals and wastes other than in the oil and gas sector (g), enforce through compliance monitoring, environmental regulations and standards and noise, air, land, seas, oceans and other water bodies other than in the oil and gas sector (h), enforce environmental control measures through registration, licensing and permitting systems other than in the oil and gas sector (j) and conduct environmental audit and establish data bank on regulatory and enforcement mechanisms of environmental standards other than in the oil and gas sector (k).

[156] The above weaknesses in the FEPA Act was replicated in s 8 (g), (k) and (n) of the NESREA Act. This research has not found any critical analysis for the explanation of the exclusion of the oil and gas sector from the regulatory jurisdiction of the legislation.

[157] C Chuks-Ezike, 'The Petroleum Industries Bill: A Deficient Policy for Environmental Management in Nigeria's Oil and Gas Sector' (2018) 2(2) Environmental Risk Assessment and Remediation 35, 35.

3.4.3 Compliance mechanisms within environmental laws in Nigeria

This discussion on compliance mechanisms will be pursued in the context of the legal instruments for environmental protection and the strategies by which compliance is driven. The development of a compliance culture is important in environmental matters because whatever happens to the environment has a rippling effect on other aspects of nature including the very existence of human beings. The biggest danger that Nigeria faces today is the environmental crisis from the operations of its petroleum sector. There have been several cases of environmental pollution primarily due to oil spills and other allied services[158] and this can be attributed to poor environmental decisions and non-compliance with laws made to manage the sector. Despite the efforts to make more laws to regulate the environment, national compliance mechanisms have to be established for the laws to be effective.[159] The compliance mechanisms that exist in the national environmental and petroleums sector laws are being drawn from the NESREA Act, NOSDRA Act and the Environmental Impact Assessment Act.

It is clear from the provisions of the NESREA Act on its regulatory jurisdiction that compliance is not the focal point of the law. This is evidenced by the fact that not many of its provisions have compliance mechanisms in them and even where they are present, they are not given any prominence.[160] However, the law is more concerned with the enforcement through punitive measures as can be seen in the various provisions outlining the powers of the agency to impose fines[161] which overshadowed the few compliance mechanisms provisions in the law. Some of

[158] Such as the Ogoni oil spill incident that went unabated for decades, the Bomu oil spill and the Bonga oil spill. See United Nations Environment Programme, 'Environmental Assessment of Ogoniland' (2011) <https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf> accessed 6 July 2019; T Bodo and BG Gimah, 'Oil Crisis in the Niger Delta Region of Nigeria: Genesis and Extent' (2019) 15(36) European Scientific Journal 141; Ite and others (n 239) 84.

[159] AW Samaan, 'Enforcement of International Environmental Treaties: An Analysis' (2011) 5 (1) Fordham Environmental Law Review 260, 264.

[160] NESREA Act (n 140) ss 7 (b), (k), (l) and 8 (e) outlined below.

[161] See ss 20 (3) and (4) fine for violation of regulations setting specifications and standards to protect and enhance the quality of Nigeria's air resources; 21 (3) fine for violation of programmes for the control of any substance, practice, process or activity which may be reasonably anticipated to affect the ozone in the stratosphere; 22 (3)

the compliance mechanisms include coordinating and liaising with relevant stakeholders within and outside Nigeria on matters of environmental standards, regulations and enforcement,[162] conducting an environmental audit and creating a data bank on regulatory and enforcement mechanisms of environmental standards…[163] and creating public awareness and providing environmental education (…) promotion of private-sector compliance with environmental regulations,[164] and conducting field follow-up of compliance with set standards and taking procedures prescribed by law[165] inspection, compliance monitoring, negotiation and review existing guidelines, regulations and standards on environment.[166]

NOSDRA has also applied some compliance mechanisms to achieve the statutory function of ensuring compliance such as monitoring, training and drill exercises to ensure readiness to oil pollution preparedness, implementation of appropriate audit system,[167] surveillance,[168] reporting and alerting and other response activities relating to oil spills, promotion of technical cooperation between Nigeria and member states of the West African sub-region.[169] The Environmental Impact Assessment Act (EIA) also contains compliance mechanisms such as supervision,[170] notification, transmission and discussion of the information of an environmental impact assessment,[171] issuance of public notice for comments on an EIA report.[172] The table

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and (4) for violation of noise, emission, control, abatement regulations as may be necessary to preserve and maintain public health and welfare; 23 (3) and (4) for violation of regulations for the purpose of protecting public health or welfare and enhancing the quality of water to serve the purpose of the NESREA Act; 24 (5) and (6) for violation of established affluent limitations and application of best management practices; 26 (3) and (4) for violation of regulations, guidelines and standards for the protection and enhancement of the quality of land resources, natural watershed, coastal zone, dams and reservoirs including prevention of flood and erosion; 27 (3) for the of any hazardous substance into the air or upon the land and the waters of Nigeria or at the adjoining shorelines is prohibited, except where such discharge is permitted or authorized under any law in force in Nigeria; 31 for the obstruction of an officer of the agency.

[162] NESREA Act s 7 (b).
[163] NESREA Act s 7 (k).
[164] NESREA Act s 7 (l).
[165] NESREA Act s 8 (e).
[166] NESREA Act s 8 (e).
[167] NOSDRA Act s 5 (c), (f) and (m).
[168] NOSDRA Act s 6 (a).
[169] NOSDRA Act s 7 (b) and (e).
[170] s 10 EIA (n 143) Act.
[171] s 11 EIA Act.
[172] s 24 EIA Act.

below sets out some environmental and petroleum sector laws with compliance and enforcement provisions.

Table II: *Compliance and enforcement provisions in environmental and petroleum sector laws in Nigeria.*

Laws regulating the environment and petroleum sector	**Compliance related provisions**	**Enforcement related provisions**
NESREA Act	S 7 (b) Coordinating and liaising with relevant stakeholders within and outside Nigeria on matters of environmental standards, regulations and enforcement. S 7 (k) Conducting an environmental audit and creating a data bank on regulatory and enforcement mechanisms of environmental standards… S 7 (l) Create public awareness and provide environmental education (…) promotion of private-sector compliance with environmental regulations. S 8 (l) Conducting field follow-up of compliance with set standards and take procedures prescribed by law. S 8 (e) Inspection, compliance monitoring, negotiation and review existing guidelines, regulations and standards on environment.	ss 20 (3) and (4) fine for violation of regulations setting specifications and standards to protect and enhance the quality of Nigeria's air resources; 21 (3) fine for violation of programmes for the control of any substance, practice, process or activity which may be reasonably anticipated to affect the ozone in the stratosphere. 22 (3) and (4) for violation of noise, emission, control, abatement regulations as may be necessary to preserve and maintain public health and welfare. 23 (3) and (4) for violation of regulations for the purpose of protecting public health or welfare and enhancing the quality of water to serve the purpose of the NESREA Act; 24 (5) and (6) for violation of established affluent limitations and application of best management practices; 26 (3) and (4) for violation of regulations, guidelines and standards for the protection and enhancement of the quality of land resources, natural watershed, coastal zone, dams and reservoirs including prevention of flood and erosion;

		27 (3) for the of any hazardous substance into the air or upon the land and the waters of Nigeria or at the adjoining shorelines is prohibited, except where such discharge is permitted or authorized under any law in force in Nigeria; 31 for the obstruction of an officer of the agency
NOSDRA Act	S 5 (c), (f) (m) Monitoring, training and drill exercises to ensure readiness to oil pollution preparedness, implementation of appropriate audit system. S 6 (a) Surveillance S 7 (b) and (e) Reporting and alerting and other response activities relating to oil spills, promotion of technical cooperation between Nigeria and member states of the West African sub-region	S 6 (2) fine for failure to report an oil spill not later than 24 hours after the spill. S 6 (3) fine for failure to clean up and impacted site and an action plan for remediation of the impacted site. S 24 (2) fine or terms of imprisonment disclosure or misuse of official information by any member of the governing board. S 26 (3) fine for the violation of any regulation made by the agency relating to the use of dispersant, established benchmark for oil spill contingency plan, framework guide for oil spill contingency planning and prevention and combatting oil spills and pollution. S 28 (1) Fine or term of imprisonment for obstruction of an officer of the agency in the performance of his duties. S 31 (3) fine or term of imprisonment for failure to honour a requisition demand for oil spill clean-up or rescue operation by the agency
Environmental Impact Assessment Act	S 10 Supervision of the activity of a subject of an EIA. S 11 notification, transmission and discussion of the information of an environmental impact assessment.	S 60 fine or a term of imprisonment for failure to comply with any of the provisions of this law.

	S 24 issuance of public notice for comments on an EIA report	

Compliance challenges have plagued the Nigerian petroleum sector for decades. This is because, despite the array of laws available to regulate the sector, it is argued that the sector remains largely unregulated due to significant non-compliance with the laws by sector actors.[173] The actors for whom the laws were enacted have realised that the cost of compliance is high and outweighs the cost of non-compliance,[174] therefore, they would rather default and pay the cost for non-compliance and postpone compliance to a later date.[175] This is seen in the flaring of associated gas still happening in Nigeria and endangering the environment.[176] In the instance of judicial pronouncements on environmental matters, court orders have been seen to be disobeyed or completely ignored without consequences.[177] In the case of *Jonah Gbemre v SPDC Ltd & Ors*, the court decided that the continuous flaring of gas in the plaintiff's community impacted negatively on the right to life of the plaintiff and ordered that the defendants stop the flaring of gas in that community. However, the company ignored the court order and continued flaring gas. It is believed that compliance mechanisms for environmental regulations appear to be practically non-existent in the Nigerian petroleum sector as justice must not only be done but must be seen to be done.[178]

[173] Oruonye and Ahmed (n 9) 49.
[174] ibid 48.
[175] Ijaiya and Joseph (125) 320.
[176] This is evident in the continuous flaring of associated gas and excess natural gas in defiance of the Associated Gas Reinjection Act 2004 as amended. Another example of non-compliance is the style of oil waste disposal practiced by oil sector actors and recently the NSCDC in their effort to curb illegal petroleum refining in the creeks of the Niger Delta region.
[177] *Jonah Gbemre v SPDC Ltd & Ors* (2005) African Human Rights Law Report (NgHC) 151. See also **section 6.4.6** of **Chapter 6** of this thesis.
[178] AR Oakes and H Davies, 'Justice Must Be Seen to Be Done: A Contextual Reappraisal' (2016) 37 (2) Adelaide Law Review 461, 461.

3.4.4 Enforcement tools and techniques within environmental laws in Nigerian

The enforcement of environmental laws in Nigeria is carried out through the environmental enforcement agencies established by law. This section discusses some of these agencies relevant to the petroleum sector to the extent of their powers and jurisdiction of enforcement and the tools and techniques by which these powers are exercised.

Enforcement in the context of environmental protection is a set of actions taken to achieve compliance and to correct or halt actions that endanger the environment or public health.[179] NESREA is the flagship agency on environmental regulation and the main focus is enforcement. NESREA exercises its power of enforcement through issuing of licences, permits and registration,[180] the power to enter and search any premises…,[181] seizure and detention,[182] suspension of operations by order of the court,[183] fines and imprisonment,[184] variation of licence conditions, implementing the *polluter pays principle*,[185] legal action, prosecution, injunctions and implementing orders of effecting remedial works.[186] In considering the enforcement powers of the Agency, it is argued that from the wording of the NESREA Act, the enforcement powers of the agency are watered down by some inhibitions present in the law.

[179] Edo (n 71) 265.
[180] NESREA Act s 7 (j).
[181] NESREA Act s 30 (1) a.
[182] NESREA Act s 30 (f).
[183] NESREA Act s 30 (g).
[184] NESREA Act s 31.
[185] The polluter pays principle indicates that cost of pollution should be borne by the person responsible for the pollution. See Sands and others (n 32) 228; P Dupuy and JE Vinuales, *International Environmental Law* (Cambridge University Press 2015) 438, 71; P Schwartz, 'Polluter-Pays Principle' in M Fitzmaurice, DM Ong and P Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2010) 736, 243; G Omedo, K Muigua and R Mulwa, 'Financing Environmental Management in Kenya's Extractive Industry: The Place of the Polluter Pays Principle' (2020) 16(1) Law, Environment and Development Journal 1.
[186] E Sodipo and others, 'Environmental Law and Practice in Nigeria: Overview' (2018) <https://uk.practicallaw.thomsonreuters.com/w-006-3572?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk> accessed 31 October 2018.

First, for the power to enter and search to be exercised, the Agency must possess a search warrant[187] which can hardly be obtained without administrative delays. The power to enter and search is expedient and cannot afford to suffer the prevalent administrative delays akin to the Nigerian judicial system. This is because of the urgency of the impact of a suspected violation as any delay may allow further deterioration of the environment in the event of an actual violation. This provision also differed from that of the repealed FEPA Act where FEPA was empowered to conduct such search activities without a warrant.[188] However, in 2018 this position was purportedly rectified by an amendment of the NESREA Act[189] where a new s 30 (4) (a) was inserted to allow the power to enter and search without a warrant in *'a case of verifiable urgency where the environmental pollution is an immediate or imminent threat to life and privacy or to prevent the commission of an offence and an application for a warrant would cause a delay that may be prejudicial to the maintenance of public safety or order while the warrant is being sought from the court or a Judge in Chambers'.*[190] It is contended that while this amendment may have been crafted to envisage an emergency, it creates the problem of defining what situation qualifies as that.

Second, even when there is evidence of non-compliance or violation of an environmental law that requires the exercise of the power of the Agency to suspend activities, seal and close down premises, the Agency must obtain a court order to do so.[191] It is trite that in matters of environmental protection and the race to ensure effective enforcement, the regulatory agency must act quickly. Time spent on issues of administrative and other procedural checks can allow violators to tamper with or destroy evidence or actions may be continued in furtherance of the violation. These highlighted hurdles would only continue to diminish the powers of the

[187] NESREA Act s 30 (1).
[188] S 27 (1) (a) of the Federal Environmental Protection Act (Defunct), formerly Decree No 58 of 1988.
[189] National Environmental Standards Enforcement and Regulations Agency (Establishment) (Amendment) Act 2018.
[190] ibid S 30 (4) (a).
[191] NESREA Act s 30 (1) g.

regulatory agency to achieve its functions or exercise its powers of enforcement. It is conceded, however, that the procedure for the exercise of the power to enter and search, suspend activities, seal or close down premises may have been inserted in the NESREA Act to ensure that powers are not abused however, it is believed that with the provision of a speedier option to obtain a search warrant, such matters can be expedited without abuse of power.

Third, the powers of enforcement as provided by the NESREA Act are quite extensive, but the copious provisions on enforcement are all to the exclusion of the *oil* and *gas* sector. The 2018 amendment of the NESREA Act, also removed the oil and gas sector from s 7 (c) which hitherto had allowed the agency to 'enforce compliance with the provisions of international agreements…on the environment including climate change…*oil and gas*, chemicals…'.[192] The reason for this exclusion is still unknown and therefore, questionable because the *oil* and *gas* sector contributes to the actions that further environmental degradation.[193]

Petroleum has been the main source of income for Nigeria since the late 1950s. This fact is obvious from the extent to which operations in the petroleum sector have increased over the years. As stated earlier, the sector is also unarguably the major cause of environmental pollution and degradation in Nigeria.[194] It is therefore curious that the major piece of legislation, the NESREA Act, that creates the primary environmental regulatory agency that regulates the activities that most affect the environment excludes the *oil* and *gas* sector from the regulatory purview of the NESREA Act.[195] This means that no enforcement action can be taken by the agency in matters relating to the *oil* and *gas sector* in Nigeria. This shows the

[192] NESREA Act s 7 (c).
[193] NESREA Act ss 7 (g), (h), (j), (k), (l), 8 (g) and 29
[194] EM Ityavyar and TT Tyav, 'Environmental Pollution in Nigeria: The Need for Awareness Creation for Sustainable Development' (2012) 4(2) Journal of Research in Forestry, Wildlife and Environment 92, 99.
[195] NESREA Act s 7 (g), (h), (j), (k), (l), 8 (g) and 29.

inconsistency of the enforcement provisions in the NESREA Act and consequently, NESREA itself and further weakens the powers of enforcement of the agency.

It is obvious that the enforcement powers of NESREA are not settled, and has provided a platform on which confusion thrives as to which regulatory agency is responsible for implementing environmental laws regarding the *oil* and *gas* sector. Some of the enforcement processes by which NESREA exercises its powers include registration, licences and permit systems[196] conduct of public investigations on pollution of natural resources,[197] the establishment of mobile courts for the speedy dispensation of cases of violation of environmental regulation,[198] power to enter and search premises, open and examine, seize and detain, suspend activities, seal and close down any premises including land vehicle, tent, vessel floating craft and to impose fines.[199]

The National Oil Spill Detection and Response Agency (NOSDRA) is the regulatory agency that is responsible for the coordination and implementation of the National Oil Spill Contingency Plan (NOSCP) for Nigeria.[200] It is dedicated to managing oil spills in the oil and gas sector in Nigeria[201] by the establishment of a national operational organisation that guarantees a safe, timely, effective and appropriate response to major or disastrous oil spills and pollution,[202] identify high risk and priority areas for protection and clean up,[203] to establish monitoring mechanisms for response expediency,[204] maximising the use of available facilities in implementing appropriate spill responses,[205] provide training, drill exercises and programme

[196] NESREA Act s 7 (j).
[197] NESREA Act s 7 (g)
[198] NESREA Act s 8 (f).
[199] NESREA Act s 30 (a), (d), (f), (g) and s 31.
[200] NOSDRA Act s 5.
[201] C Obilor, 'Review of the NOSDRA Act 2006'
<https://www.academia.edu/28817987/REVIEW_OF_THE_NOSDRA_ACT_2006> accessed 21 January 2018.
[202] NOSDRA Act s 5 (a).
[203] NOSDRA Act s 5 (b).
[204] NOSDRA Act s 5 (c).
[205] NOSDRA Act s 5 (d).

activation to ensure preparedness, response and management of oil spills.[206] These objectives of the agency are carried out along with those in other laws such as the Oil in Navigable waters Act, the Oil Pipelines Act and the Petroleum Act. Some of the tools and techniques through which the agency exercises its powers of enforcement include fines for failure to clean up impacted sites[207] and issuance of notices.[208]

From the foregoing, it appears that rather than retain a preventive function, the NOSDRA can only activate its powers in the aftermath of an oil spill. The agency is not empowered to prevent or act to prevent a spill action. This handicap of the Agency and its enabling law has been the subject of academic literature on the performance of the Agency since its inception. Many writers have called for the review of the present NOSDRA Act to give it more effective powers and coverage.[209] It has been noted that the Agency is hampered by both institutionally and politically induced challenges.[210]

In response to the call for the review of the NOSDRA Act, the federal government through its legislative arm has proposed an amendment to the existing NOSDRA Act (2006).[211] Apart from a proposal for the change of the name of the Agency from National Oil Spill Detection and Response Agency (NOSDRA) to National Oil Pollution Management Agency, a very vital proposal was made in section 1 (1) to read

> There is established an Agency to be known as the National Oil Pollution Management Agency (in this Act referred to as the Agency)" with the responsibility to **prevent**, detect, minimize and respond to all oil spillages and pollution as well as gas flaring and leakages and other hazardous and obnoxious substances in

[206] NOSDRA Act s 5 (f).
[207] NOSDRA Act s 6 (3).
[208] NOSDRA Act s 6 (4).
[209] UJ Orji, 'An Appraisal of the Legal Frameworks for the Control of Environmental Pollution in Nigeria' (2012) 38 (2) Common Wealth Law Bulletin 321; R Ajayi, 'Environmental Degradation: Review of NOSDRA Act Now.' *Vanguard* (11 October 2011) https://www.vanguardngr.com/2011/10/environmental-degradation-review-of-nosdra-act-now/ accessed 6 March 2019.
[210] EO Ekhator, 'Environmental Protection in the Oil and Gas Industry in Nigeria: The Roles of Governmental Agencies' (2013) 5 International Energy Law Review 196.
[211] National Oil Spill Detection and Response Agency (NOSDRA) (Amendment) Bill 2018 Nigerian Senate.

> the **petroleum sector**, coordinate private sector participation in oil pollution management, have access to the 'Oil Spillage Liability Trust Fund' as set up by law.[212]

The 2018 bill also made proposals that empower it to exercise its enforcement powers over the petroleum sector and further defines Persons to cover individuals, corporations, partnerships, associations, states, municipality, commission or political sub-division of states or any interstate body[213] and for an upward review of the financial penalties for violators.[214] The Bill was passed into law in 2019 and transmitted to the President of Nigeria for assent. Unfortunately, assent was denied because the President felt some important sections of the Bill undermined the powers of the minister of petroleum resources and the functions and powers of the ministry of petroleum resources.[215] It is hoped that if the bill is eventually signed into law, it will go a long way to solve the primary issue of shifting responsibility and blame between operators of the sector and host communities.[216]

The Petroleum Act sanctions anyone who constructs or operates a refinery in Nigeria without a licence,[217] explores for petroleum without an oil exploration licence,[218] prospects for petroleum without an oil prospecting licence[219] granted under the law by a fine. The Minister for Petroleum Resources reserves the right to revoke any oil prospecting licence or oil mining lease if in his opinion the licensee or lessee is not conducting operations continuously[220] in a vigorous and business-like manner following the basic work programme[221] and good oil field practice.[222] Revocation can also occur where the licensee or lessee fails to comply with the

[212] NOSDRA amendment Bill s 2 (2).
[213] NOSDRA amendment Bill s 33.
[214] NOSDRA amendment Bill s 8 (1).
[215] Q Iroanusi, 'Buhari Declines Assent to NOSDRA Amendment Bill, Gives Reasons' *Premium Times* (2019) 1.
[216] L Dunkwu, 'A Review of the National Oil Spill Detection and Response Agency (Amendment) Bill 2012: Identifying Loopholes for Improvements' (2013) <https://www.academia.edu/8732244/A_Review_of_the_Nigerian_Oil_Spill_Detection_And_Response_Agency_Amendment_Bill> accessed 21 January 2018.
[217] S 13 (2) (a) Petroleum Act.
[218] S 13 (2) (b) (i) Petroleum Act.
[219] S 13 (2) (b) (ii) Petroleum Act.
[220] S 25 (1) (a) (i) Petroleum Act.
[221] S 25 (1) (a) (ii) Petroleum Act.
[222] S 25 (1) (a) (iii) Petroleum Act.

provisions of the petroleum Act or regulations thereto,[223] fails to meet his financial obligations under the law[224] or fails to furnish such reports as may be required by the Minister.[225]

Another regulatory arm of the government to be considered is the Department of Petroleum Resources (DPR). This is the technical arm of the Ministry of Petroleum Resources which has the duty of ensuring compliance with petroleum laws, regulations and guidelines. It discharges this duty through supervision of all petroleum sector operations under licences and leases in the country, monitoring the petroleum sector to ensure that operations therein align with national goals and aspirations, processing industry application for licences, leases and permits with the corresponding power to refuse to grant or withdraw same. This is achieved through the issuance of licenses, leases and other permits, standards and guidelines that regulate the operations of the petroleum sector.[226] The DPR derives its enforcement powers from the provision in Petroleum Act that empowers the Minister for Petroleum Resources to make regulations.[227] One of such important guidelines is the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN).[228] The EGASPIN has extensive provisions for the monitoring of petroleum operations at drilling sites, producing wells, production platforms and flow stations, crude stations, retail outlets and any other location where petroleum is either stored or sold including matters of health and safety.[229] The DPR

[223] S 25 (1) (b) Petroleum Act.
[224] S 25 (1) (c) Petroleum Act.
[225] S 25 (1) (d) Petroleum Act.
[226] SIC Ogbuji, 'Evaluation of Environmental Laws and Policies Impact on Selected Oil Producing Areas of Imo State' (2020) 10(1) African Journal of Social and Behavioural Sciences 177, 183.
[227] S 9 Petroleum Act.
[228] The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) issued in 1991 and revised in 2002, 2016 and 2018.
[229] **Part III** (Production), **Ss 3.8.8.1** and section **4.4** Regulate production of oil and gas including the permit to flare associated gas. **Part V** (Refining) regulates the process of refining oil and natural gas at refineries and gas processing plans, blending plants including the emissions that might occur at flare towers or as general fugitive emissions. In Part **VI** (Oil and Gas Transportation), the guidelines suggest controlling emissions from vessels and cargos with a vapour recovery system. **S 3.2.1** requires pipelines to be patrolled and inspected once a month or as approved by the Director of Petroleum Resources. **Part VIII** provides detail on the EIA process as it applies to oil and gas activities, which shall include air emissions. **Part IX** indicates that permits will be issued to new and existing facilities, limiting discharges from point sources (including gas effluent).

exercises wide discretionary powers in the regulation of the petroleum sector and this extends to fiscal and taxation powers through regulations made by the Ministry under the Petroleum Act.[230]

These agencies have faced several challenges that are both substantive and procedural. Such challenges include inadequate manpower, inadequate funds to execute the process of enforcement to a conclusive end, corruption and bad governance, inadequate and conflicting laws, lack of the technical know-how in a technologically transforming world, conflicting roles of other enforcement agencies, lack of expertise and facilities to conduct required tests and gather data without compromising on time and integrity,[231] lack of specialised courts to facilitate the speedy dispensation of justice, undue delay with court processes and access to information, inter-departmental bottlenecks and lack of commensurate punitive measures in the laws.[232]

3.5 The role of the Legislature in environmental regulation

Nigeria operates a presidential system of government, which supports the principle of separation of powers in the existence of the legislative, executive and judicial arms of government.[233] The Senate and the House of Representatives make up the National Assembly where the legislative powers of the Federal Republic of Nigeria lie.[234] The petroleum sector in Nigeria is replete with laws, regulations, policies and standards directed at the total and effective regulation of the sector.[235] However, regardless of the existence of the laws regulating

[230] This is a technical department under the Ministry of Petroleum Resources though which the federal government maintains control of the petroleum sector. 'What we do' (2017) <https://dpr.gov.ng/index/functions-of-dpr/> accessed 20 March 2018.
[231] Ijaiya and Joseph (n 125).
[232] *Jonah Gbemre v SPDC* (n 177) 151.
[233] UC Kalu, 'Separation of Powers in Nigeria: An Anatomy of Power Convergences and Divergences' (2018) 9(1) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 116, 117.
[234] Constitution of the Federal Republic of Nigeria (Amendment) (n 142) S 4.
[235] Petroleum Act, Oil Minerals Act, Oil in Navigable Waters Act, Associated Gas Re-Injection Act, National Oil Spill Detection and Response Act, National Environmental Standards Regulation and Enforcement Agency Act etc.

the petroleum sector, not much can be said to have been achieved in the aspect of regulation. This implies that the environmental regulatory efforts have not yielded much result because the operations of the petroleum sector still account for most of the environmental damage experienced in Nigeria.[236] Flowing from the preceding chapters, further discussion on the nature of the laws and regulations and the often touted 'Nigerian factor'[237] responsible for the failure of compliance and enforcement, will elucidate why and how the regulatory agencies should be effectively equipped for implementation. This is because the low level of compliance and enforcement of environmental laws have been blamed on the government of Nigeria at all levels as well as the operators in the petroleum sector.[238]

With the global movement towards a green and better environment,[239] the Nigerian government has continued to play its part in this movement by outlining the specific roles played by the different arms of government.[240] The role of the legislative arm of government includes making legislation, oversight function, financial functions, act in committees[241] and act as a general check on the executive and judiciary. The process of making laws is considered the most important function performed by the legislative arm of any government considering the breadth

[236] This can be seen in the data gathered from the Nigerian Oil Spill Monitor on www.oilspillmonitor.ng

[237] F Omotoso, 'Public-service Ethics and Accountability for Effective Service Delivery in Nigeria' (2014) 60(3) Africa Today 119. '-the Nigerian factor is an inelegant or improper way of doing things, which puts sectional interest, political considerations, elite interest, pecuniary benefits and wealth accumulation over and above public service.'

[238] EE Okon, 'The Legal Status of Sustainable Development in the Nigerian Environmental Law' (2016) 7(2) Afe Babalola University Journal of Sustainable Development Law and Policy 104, 129.

[239] For example, technological, fiscal instruments and market-based solutions are being applied to existing industrial sectors in environmental governance. M Bergius and JT Buseth, 'Towards a Green Modernization Development Discourse: The New Green Revolution in Africa' (2019) 26(1) Journal of Political Ecology 57, 59; I Bailey and F Caprotti, 'The Green Economy: Functional Domains and Theoretical Directions of Enquiry' (2014) 46 Environment and Planning A 1797. This also includes more emphasis on greater participation in environmental decision-making and improved environmental human right through environmental protection efforts. J Razzaque, 'Environmental Human Rights in South Asia: Towards Stronger Participatory Mechanisms', *Human Rights and the Environment: Proceedings of a Geneva Environment Network Roundtable* (United Nations Environment Programme for the Geneva Environment Network 2004) 29.

[240] The 1999 Constitution of Nigeria provides for the Legislature in s 47, the Executive in s 130 and Judicature in s 230.

[241] K Sanyal, 'The Executive versus the Legislature' (2009) PRS Legislative Research 1, 3.

and depth of influence that legislative functions have on the lives of people.[242] In the Constitution of Nigeria, the functions of the legislature include law-making and policy formulation,[243] oversight functions,[244] investigative functions,[245] acting as a check on the administration of public funds and representative functions.[246]

The legislative arm not only enacts laws but in recent democracies, its functions have been extended to oversight of the administration of laws and policies made by it.[247] While it is conceded that one of the main functions of the legislative arm of government is law- and policy-making, some scholars have opined that the other legislative function of oversight of the administration of its laws, has taken priority over other functions.[248] However, legislative oversight function is necessitated by the need to effectively manage the excessive exercise of power by personnel and government institutions as well as ensure accountability[249] in a democracy.

The role of the legislature does not change regarding environmental laws. Specifically, the legislature transforms policies relating to environmental and health issues into legally defined

[242] CM Kerwin and SR Furlong, 'The Substance of Rules and the Reasons for Rulemaking', *Rulemaking: How Government Agencies Write Law and Make Policy* (5th edn, CQ Press 2018) 1.
[243] Law making ss 4, 58 and 59 of the Constitution of the Federal Republic of Nigeria.
[244] S 80 (1) – (4) of the 1999 Constitution of Nigeria. BH Odalonu, 'The Role of Legislature in Promoting Good Governance in Nigeria' in EO Aninwene and others (ed), *Studies in Social Sciences and Humanities* (Book Works 2020) 140, 151; A Akinbobola, 'Political Institutionalization in Democratic Setting: The Impact of Intergovernmental Relations in Nigeria's Fourth Republic' (2001) 2(2) The Constitution 1, 5.
[245] S. 88 (1) of the 1999 Constitution of Nigeria; O Oyewo, 'Constitutionalism and the Oversight Functions of the Legislature in Nigeria' (African Network of Constitutional Law conference on Fostering Constitutionalism in Africa Nairobi, Kenya 1 April 2007) 1.
[246] Ss 80 and 81 of the 1999 Constitution of Nigeria.
[247] JY Fashagba and A Mu'awiyya, 'A Comparative Analysis of the Roles of the Legislature in Nigeria and South Africa: The Central Legislature in Focus' in O Fagbadebo and F Ruffin (eds), *Perspectives on the Legislature and the Prospects of Accountability in Nigeria and South Africa* (Springer 2019) 63, 76.
[248] JY Fashagba, 'Legislative Oversight Under the Nigerian Presidential System' (2009) 15 (4) The Journal of Legislative Studies 439, 439; DV Verney, 'Structure of Government' in J. Blondel (ed), *Comparative Government: A Reader* (London: Macmillan Press 1969) 160, 167. Verney has specifically noted that the function of *watchdog* is perhaps more important for an assembly than that of law-making.
[249] RO Garuba and A Ameen, 'Democracy, Legislature and Nation-Building in Nigeria's Fourth Republic' (2020) 7(2) Islamic University Multidisciplinary Journal 6, 11; UC Kalu, 'Separation of Powers in Nigeria: An Anatomy of Power Convergences and Divergences' (2018) 9(1) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 116, 117; JY Fashagba, 'Legislative Oversight Under the Nigerian Presidential System' (2009) 15 (4) The Journal of Legislative Studies 439; *Myers v United States* (1962) 272 US 52, per Hon. Justice Brandeis.

rights and obligations and set forth plans and procedures designed to ensure the observance of such rights and obligations.[250] Environmental matters in the context of the petroleum sector in Nigeria are federal matters relating to matters listed within the exclusive legislative list of the National Assembly of the Federal Republic of Nigeria.[251] This means that only the federal legislature is empowered by law to legislate on the issues concerning the petroleum sector.[252] However, this position has not yielded the expected effective regulation of the petroleum sector. This is because the acts of non-compliance are not committed at the federal capital territory and the devastating effects are also not visible and felt there.[253] Instead, the acts of non-compliance and the consequent deleterious effects are committed at the host community level,[254] which has now become where the effect of bad environmental decisions are most felt.[255] Consequently, this has triggered the under-development of these communities, causing extensive environmental damage to the social and economic structures of such communities. This is evidenced in the complaints of environmental damage and marginalisation from such communities that have not benefitted much from the vast proceeds of the petroleum sector.[256]

It is contended that the legislative process needs to incorporate the participation of the host communities through the local government authorities[257] by their contribution (regarding their

[250] The Health and Environment Linkages Initiatives (HELI), 'Legislation and Regulation' (2019) <https://www.who.int/heli/tools/legis_regul/en/> accessed 6 January 2019.
[251] No. 39 of Part I of the Second Schedule to the 1999 Constitution of Nigeria.
[252] Mines and minerals, including oil fields, oil mining, geological surveys and natural gas are issues that fall under the exclusive legislative list in Part I of the Second Schedule to the Constitution of the Federal Republic of Nigeria 1999.
[253] For the purpose of this discussion, the federal level means the federal capital territory Abuja.
[254] For the purpose of this discussion, host communities mean the federating units or local government areas.
[255] OH Yakubu, 'Addressing Environmental Health Problems in Ogoni land Through Implementation of United Nations Environment Program Recommendations: Environmental Management Strategies' (2017) 4(2) Environments 28.
[256] UI Agbor, 'Local Governance and Regional Crisis in Nigeria: Rethinking Governance Dimension to Crisis in the Niger Delta Region' (2013) 3 (10) Developing Country Studies 78, 81.
[257] In Nigeria, host communities are the locations across the country where petroleum operations take place. Local Government Authorities administer these host communities, which are under a state. However, because the petroleum sector is under the purview of the federal government, all discussions regarding petroleum operations and petroleum business are held at the federal level without much participation of the indigenes of the location of the actual petroleum operation. The participation of the states under which these host communities exist is also limited. This has necessitated the agitation of nine states of the Niger Delta region of Nigeria (Abia, Akwa-Ibom,

experiences with the direct effects of the petroleum operations) and by their understanding of the implications of the law and their obligation towards its successful implementation. Increased participation at this level in the formation and implementation of environmental laws is likely to promote the goals of environmental regulation.[258] This will pave the way for a better symbiotic relationship between the host communities through the states[259] and the federal government. It has the added advantage of the ability and promptness of the local government to respond to environmental matters of local concern if they are adequately equipped to react swiftly to protect their immediate environment.[260]

3.6 The role of the Executive in environmental regulation

While it is conceded that the executive arm of government implements the law, there is the usual misconception that the executive arm of government refers to the individual cabinet members of the government in public office. It is argued that the role of the executive arm of government in environmental regulation goes beyond the individual members of the executive arm of government. This role extends to the regulatory agencies at various levels, the influence exerted by sector actors on regulatory outcomes and whether they have constituted help or hindrance in the implementation of environmental regulation. Agbor has argued that governance has become a problem because the government has failed to regulate the activities of the petroleum sector operatives.[261] He maintained that environmental regulations are not

Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers) for a more inclusive stance on the matters of the petroleum sector.

[258] P Corrie, 'An Assessment of the Role of Local Government in Environmental Regulation' (1986) 5(2) UCLA Journal of Environmental Law and Policy 145,146.

[259] That powers of the local government are derived from state laws and the states are empowered by s 7 (1) of the Constitution of the Federal Republic of Nigeria, to ensure their structure, composition, finance, and function of such local government councils.

[260] O Fagbohun, 'Reappraising the Nigerian Constitution for Environmental Management' (2002) 1(1) Ambrose Alli University Law Journal 24, 44; P Corrie, 'An Assessment of the Role of Local Government in Environmental Regulation' (1986) 5(2) UCLA Journal of Environmental Law and Policy 145, 147.

[261] Agbor (n 256) 82.

followed by the sector operators because the government has remained docile and complacent in their regulatory functions.[262]

There is the general assumption that wherever laws are made, provisions are also made for their implementation. The executive usually implements the laws through the regulatory agencies and institutions of government.[263] However, the government has been known to interfere with the effective implementation of laws thereby occasioning conflict of roles from other arms of government and agencies of government.[264] The reality in Nigeria is that the existence of environmental laws and regulatory agencies have not produced the much-desired environmental regulation nor has it improved the compliance behaviour of the various sector actors.[265] One of the reasons behind this is that the government lacks the political will to strictly implement environmental regulations. It is argued that the executive arm of government needs to be more dynamic in its function of ensuring that environmental regulations are complied with especially through its supervisory powers.

3.6.1 Failure of compliance mechanisms and enforcement tools within Nigerian environmental laws

From the discussions so far, it is clear that considerable effort was made by the Nigerian government to make laws to cater to environmental issues. However, the laws were usually reactive in nature[266] rather than being proactive towards the protection of the environment hence the inability of the laws to achieve their purpose. The various environmental laws

[262] ibid.
[263] GI Oikhala, 'An Assessment of Administrative Law and Governance System in Nigeria' (2020) 6(3) Kampala International University of Social Sciences 75, 81.
[264] A case in point is the dual roles played by Nigeria as a shareholder in the business of the petroleum sector, creator of the laws regulating the industry through the legislature and the implementer of the laws through the executive arm.
[265] MT Ladan, 'Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' (2012) 8(1) Law Environment and Development Journal (LEAD) 118.
[266] See **section 3.4.1** of this **Chapter**. See the National Oil Spill Detection and Response Agency (NOSDRA) (Amendment) Bill 2018 Nigerian Senate and Petroleum Industry Bill (Draft) 2008, Nigerian National Assembly.

mentioned above are not exhaustive, but one issue that stands out is the fact that the provisions concerned with environmental protection are scattered across many laws.[267] This is one of the major shortcomings of the legal framework for environmental protection in Nigeria. The location of the various provisions makes it practically impossible to tell if the law for any particular situation exists or not and also made it confusing and cumbersome to ascertain which regulatory agency has the right or authority of enforcement.[268]

The implementation of environmental laws in Nigeria also failed for other reasons. *First*, the laws did not address past environmental problems caused by pollution resulting from the many years of operations of the petroleum sector.[269] *Second*, sanctions provided by the laws were either unrealistic or too weak to create any deterrent effect and was always subject to abuse, neither did it create an incentive to clean up the environment as soon as the need arose.[270] *Third*, there were too many loopholes in the laws that enabled the violators to escape prosecution.[271] Despite the many incidents of environmental abuse, there was hardly any record of effective enforcement successfully executed because of the inadequacies in the laws and the enforcement agencies. *Fourth*, due to poor funding, there is a lack of basic training in the enforcement procedure. *Fifth*, the government enjoys extensive economic benefits such as foreign exchange earnings, taxes, contract jobs and services hence their perceived lack of concern for the implementation of the petroleum sector and the environment laws through enforcement.[272] It is argued that if environmental regulation had been more serious, that would have threatened the free flow of these benefits.

[267] See Ijaiya and Joseph (n 294).
[268] Ladan (n 265) 120.
[269] JP Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations and the Human Right to a Healthy Environment' (1997) 15 Boston University International Law Journal 261.
[270] ibid 288.
[271] FEPA Act S 21 (4).
[272] Eaton (n 269) 289.

The fact that the laws were also enacted in response to critical environmental problems[273] and consideration of the economic benefits from the petroleum sector, exposed the unpreparedness of the Nigerian government for proper environmental and petroleum sector regulation. It is believed that this unpreparedness resulted in the inadequacy of the environmental laws to effectively regulate the petroleum sector. It is concluded therefore that because regulation goes beyond enacting laws but extends to incentivising compliance, it is instructive to effect enforcement where there is non-compliance or apply promptness to review the laws where the situation demands.

3.6.2. Key findings

First, the distinction between compliance and enforcement is to the effect that compliance favours a more cooperative approach to regulation as against the adversarial system applied in the enforcement system of environmental regulation. A compliance strategy aspires to attain the broad aims of the law rather than sanctioning its breach by requiring some positive accomplishment rather than just abstaining from the act.[274] In other words, while compliance seeks to prevent harm, enforcement employs a strategy of compliance in regulatory control and seeks to punish an evil to achieve retribution.[275]

Second, by the participation of Nigeria in international and regional engagements in matters of good environmental practices, the importance of the need to take a more serious look at the issue of fortifying the environmental integrity of Nigeria, cannot be overemphasised. In furtherance of this, Nigeria has taken steps to ratify and adopt international environmental instruments and even expressed some of them in the national laws of the country and

[273] Ladan (n 265) 199.
[274] N Gunningham, 'Enforcement and Compliance Strategies' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 120, 121.
[275] K Hawkins, 'Bargain and Bluff: Compliance Strategy and Deterrence in the Enforcement of Regulation' (1983) 5(1) Law and Policy Quarterly 35, 36.

established regulatory agencies to give such laws effect. However contradictory provisions in the laws, a multiplicity of functioning agencies and weak enforcement keep taking out the strength in the laws and making the agencies impotent to their responsibilities.

Third, the temptation is always there to assume that the existence of law in a particular sector automatically brings about compliance and the abatement of the problems which it is intended to solve.[276] It has been opined that oil and gas from its cradle to its grave, though essential to the economic sustenance of Nigeria, is highly hazardous to the human and natural environment.[277] Again, the lack of or weakness of institutional structures for compliance monitoring and enforcement of environmental laws is a major factor in the Niger Delta struggle with the federal government of Nigeria[278] for better operational conditions and better economic existence. It is argued that the elements of the application, innovative compliance and enforcement styles must be addressed as such laws may be honoured more in breach than in observance where it is thought that it will be cheaper to violate the law and pay the penalty than to comply with the law. This is because the sector operatives hold the prospect of higher profits over the sanctity of the environment.[279]

3.7 Conclusion

It has been established that while environmental degradation is now a global issue, differences in circumstances of the development, economy, politics, corruption indices, technological

[276] Edo (n 71) 265.
[277] KK Ezeibe, 'The Legislative and Institutional Framework of Environmental Protection in the Oil and Gas Sector in Nigeria – A Review' (2011) 2 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 39. According to Ezeibe, these hazards can be in form of greenhouse gases, poisonous and carcinogenic chemicals produced in the course of gas flaring, through the destruction of fauna, flora, clean water soil and the environment through oil spills and oil drilling, transportation and handling activities or even exhaust fumes released into the atmosphere by the final consumers of the products of the sector or by its mere unprotected presence.
[278] AOY Raji and TS Abejide, 'Compliance with Oil and Gas Regulations in the Niger Delta Region, Nigeria C. 1960s-2000: An Assessment' (2014) 3(8) Arabian Journal of Business and Management Review (OMAN Chapter) 35.
[279] ibid.

advancement, funding etc., make it practically impossible for such enviable compliance mechanisms and enforcement tools to be wholly replicated in any jurisdiction and expected to work seamlessly. Whether such compliance mechanisms and enforcement tools are effective in international law is also still a subject of scholarly debate as empirical evidence to support that fact is still lacking. It is contended that while such mechanisms and tools are desirable, they can only work if gradually introduced and in consideration of the peculiar environmental regulatory needs of Nigeria and the fact that such mechanisms and tools may or may not have worked in international law.

CHAPTER 4

Application of institutional theories

Part A

Introduction

This chapter is divided into two parts. **Part A** examines the application of the institutional theory to organisations such as regulatory agencies and corporations, that exercise compliance and enforcement functions. The essence of the discussion in this part is to show the effectiveness or otherwise of these regulatory agencies and illustrate the reflection of the institutional theories where they exist. As noted in **Chapter 1**, the case study of this research is the petroleum sector in Nigeria, therefore, this part examines the regulatory agencies charged with the responsibility of environmental regulation of the petroleum sector in Nigeria. The current state of compliance and enforcement in such agencies and how they have evolved in the face of environmental problems from the inception of the operations of the petroleum sector until the current time are also discussed.[1]

Part B seeks to resolve the query of whether compliance and enforcement of environmental regulation are achievable with the existing regulatory framework in Nigeria. In response to this subsidiary research question, this part of this chapter examined the application of the institutional theories to environmental regulation by discussing the various regulatory strategies[2] by which compliance and enforcement can be achieved in environmental regulation. This discussion highlights where the discussed regulatory strategies are replicated and applied in the environmental regulatory regime in Nigeria if they exist. Section **4.4** explores some of

[1] H Ijaiya and OT Joseph, 'Rethinking Environmental Law Enforcement in Nigeria' (2014) 5 Beijing Law Review 306, 315.

[2] This chapter follows the regulatory strategies set out by Gunningham in N Gunningham, 'Enforcing Environmental Regulations' (2011) 23 (2) Journal of Environmental Law 169, 173.

these alternative regulatory strategies that are already being practised in other jurisdictions. Furthermore, **section 4.5** discusses the various ways to assess the effectiveness of these strategies when adopted and helps regulators to decide whether to continue with such options or not.

4.1 Application of institutional theories to compliance and enforcement

Institutions have formal and informal rules, regulations and organisation and institutional change can occur through evolution, accident, and design.[3] In considering the institutionalisation of compliance and enforcement in the context of Nigeria for instance, all three types of processes (i.e., evolution, accident and design) play a role. The discussion on the *evolution* of the compliance and enforcement mechanisms within environmental regulations in Nigeria;[4] through the modification of compliance and enforcement mechanisms due to *accidents* such as oil spills or dumping of toxic wastes;[5] and the changes in the *design* of national compliance and enforcement strategies due to international and regional commitments[6] all form part of the process of the institutionalisation of compliance and enforcement mechanism. This process is further discussed in **Chapter 7** of this thesis.[7]

For an organisation to be institutionalised, it must actively adopt the ideals or institutional logic and values promoted inside the organisation, which is a way of defining relevant goals to be accomplished, roles involved and the criteria for implementation, and techniques of control in the form of an elaborate system of measurement and documentation of action-outcome and complemented by internalisation of the entire process.[8] It is believed that institutionalisation

[3] B Waterhout, *The Institutionalisation of European Spatial Planning* (IOS Press 2008) 229, 18-20. This thesis will further discuss these processes in Chapter 6.
[4] Introduction of the Nigerian National Policy on the Environment which has been revised twice in 2010 and 2016.
[5] The events that led to the revolution in the legal framework of environmental protection in Nigeria.
[6] Ratification by Nigeria of some international legal instruments on the improvement of the environment.
[7] See **sections 7.4** and **7.5** of **Chapter 7** of this thesis.
[8] PS Tolbert and LG Zucker, 'The Institutionalization of Institutional Theory' in SR Clegg and C Hardy (eds), *Studying Organization: Theory & Method* (SAGE Publications 1999) 169, 178.

for instance, of compliance and enforcement of environmental regulation, can encourage the government efforts to secure state legitimacy of its regulatory systems.[9] However, on the part of the organisations, to gain legitimacy, organisations would have had to comply with practices that juxtaposed managerial expectation.

A scrutiny of the institutional theories discussed above,[10] reveals the ease with which the presence or otherwise of these principles that underpin institutional theories in compliance and enforcement can be traced. This trail will be approached from the concepts of regulation and organisational institutionalisation.[11]

The notion of institutionalising compliance and enforcement is drawn from the very definition of institutionalisation stated above which is the process of infusing an organisation with value such as what is considered right or wrong in its operations or work, beyond its technical requirements. This infusion is usually because of the environment in which the organisation exists and carries on business. The infusion of values ideally would bring about changes in organisational structure, organisational culture, goals, processes and programmes or missions.[12] These changes, however, vary in response to technical conditions. The only idea common to all usages of the term 'institution' is that of some sort of establishment of the relative permanence of a distinctly social category.[13] For this research, the focus will be on the area of compliance and enforcement processes in environmental regulation.

[9] Z Wang, 'Government Work Reports: Securing State Legitimacy Through Institutionalization' (2017) 229 The China Quarterly 195.
[10] Rational choice institutionalism, Historical institutionalism, Normative institutionalism and Sociological institutionalism.
[11] See **sections 4.4** and **4.1.1** below.
[12] P DiMaggio and W Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48 (2) American Sociological Review 147, 149.
[13] EC Hughes, 'The Ecological Aspect of Institutions' (1936) 1(2) American Sociological Review 180.

DiMaggio and Powell identified three mechanisms by which institutional isomorphic[14] change can occur namely *power (coercive isomorphism), attraction (normative isomorphism)* and *mimesis (mimetic isomorphism).*[15] In addition to these listed mechanisms, Beckert extended these conditions to include a fourth mechanism called *competition.*[16]

Coercive isomorphism stems from formal and informal pressures or political influence from other actors on which an organisation depends for resources to function effectively and the expectations from the society within which it exists and functions.[17] It is argued that the existence or non-existence of this form of isomorphism can either make the target organisation better or worse in its business practices. For example, if there is pressure on the organisation for better performance, the organisation will improve. If the pressure on the organisation for better performance is weak or non-existent, the organisation will not improve on its performance. *Normative isomorphism* is linked with professionalism where for instance external actors may persuade an organisation to imitate its peers by requiring it to perform a specified task in a specified manner or actors from different fields or locations may feel drawn toward the same institutional models because the external models are perceived as adequate or superior solutions to the regulatory difficulties to be addressed. The distinction between normative and mimetic isomorphism is the conscious, voluntary or deliberate emulation in normative isomorphism.[18] *Mimetic isomorphism* is a form of imitation that results from

[14] *Isomorphism* is a mechanism through which an organisation exhibits change. Hawley describes *isomorphism* as a constraining process that forces one unit to resemble other units that face the same set of environmental conditions. Hannan and Freeman have argued, based on Hawley's definition, that isomorphism can occur because organisational decision-makers learn appropriate responses and adjust their behaviour accordingly. It is submitted that this process is not usually as straightforward as it appears because the interests of individual actors differ and the interests of actors is the foundation of such decisions which usually takes time to harmonise. See generally AH Hawley, 'Human Ecology' in DL Sills (ed), *International Encyclopaedia of Social Sciences* (Macmillan 1968) 328; MT Hannan and J Freeman, 'The Population Ecology of Organisations' (1977) 82 (5) American Journal of Sociology 929.

[15] P Frumkin and J Galaskiewicz, 'Institutional Isomorphism and Public Sector Organizations' (2004) 14 (3) Journal of Public Administration Research and Theory 283, 285.

[16] J Beckert, 'Institutional Isomorphism Revisited: Convergence and Divergence in Institutional Change' (2010) 28 (2) Sociological Theory 150, 152.

[17] DiMaggio and Powell (n 12) 150.

[18] DiMaggio and Powell (n 12) 152.

standard responses to uncertainty, where actors react to doubt regarding the effects of institutional rules. Here, imitation is driven not by persuasion but by confusion as to the right solution to adopt in a problematic situation.[19] *Competition* as a mechanism for institutional isomorphic change presupposes the effective operation of an evolutionary selection process or where an organisation assumes that other organisations compete with each other in providing favourable institutional conditions. It has been argued however that competition as a mechanism of isomorphic change can be ambivalent i.e. cause divergence and convergence simultaneously.[20]

From the Nigerian experience, it is safe to say that the concept of institutionalising compliance and enforcement through organisational institutionalisation has not been applied in the petroleum sector and is practically non-existent. The explanation for this may be that the operation of the petroleum sector thrives in an environment ridden with corruption and corrupt practices[21] thereby making the organisation isomorphise what it naturally finds in the surrounding environment which is a total disregard for codified environmental regulations.

However, the applicability of the historical institutional theory can be traced to the genesis of the steady decline or the downward spiral of effective regulation of the petroleum sector in Nigeria which was from the inception of the sector. The sector which began operations in the late 1950s commenced operations on the framework of archaic laws[22] which even at that point, could not cater to the obvious negative consequences of the operations of the sector. Regardless of this drawback, petroleum exploration commenced and continued for over five decades while

[19] DiMaggio and Powell (n 12) 151.
[20] J Beckert (n 16) 152.
[21] See for example PA Donwa, CO Mgbame and OM Julius, 'Corruption in the Oil and gas Industry: Implication for Economic Growth' (2015) 11(22) European Scientific Journal 212; AO Izekor and C Okaro, 'Effect of Corruption on Crude Oil Revenue Earnings in Nigeria (1996-2015)' (2018) 5(1) International Journal of Innovative Research and Advanced Studies 9; BK Obioma, 'Corruption Reduction in the Petroleum Sector in Nigeria: Challenges and Prospects' (2012) 3(15) Mediterranean Journal of Social Sciences 98.
[22] See for example Oil Minerals Ordinance 1904, the Petroleum Act 1969, Mineral Oil (Safety) Regulations 1963, Oil in Navigable Waters Act 1968 etc.

the sector still operated under the framework inherited from the pre-colonial era.[23] Besides, the Nigerian government has not found the homogeneity to review the regulations in line with global best practices thereby exposing the sector to varying and worsening degrees of operational impunity with the double effect of environmental destruction and endangerment of human lives within the host communities.[24]

From the discussion so far and the nature of the concepts already examined, it would appear straightforward to decide what regulatory strategy to adopt. However, the decision is not as direct as it portends. *First*, the decision on the best regulatory strategy to adopt is largely dependent on the context of the organisation. *Second*, the extent of the complexity of the environmental problems sought to be tackled, further illuminates the limitations of the application of any single regulatory strategy in the context of compliance and enforcement. Accordingly, an excellent regulator would invoke a combination of different theories, strategies and tools in different circumstances to the extent that they possess the statutory powers to do so as there are no existing rules that stipulate a single template for regulatory excellence.[25]

4.1.1 Organisational institutionalism in the context of compliance and enforcement (formal and informal organisations)

An organisation is a kind of social system that has an unequivocal collective identity (a name or distinctive character), an exact roster of members, a programme of activities, procedures

[23] This is evident from the struggle with the lack of political will by the relevant political actors to boldly confront the obvious inadequacies of these archaic laws regulating the sector.

[24] OH Yakubu, 'Addressing Environmental Health Problems in Ogoniland Through Implementation of United Nations Environment Program Recommendations: Environmental Management Strategies' (2017) 4(2) Environments 28; BR Konne, 'Inadequate Monitoring and Enforcement in the Nigerian Oil industry: The Case of Shell and Ogoniland' (2014) 47 Cornell Int'l LJ 181.

[25] N Gunningham, *Compliance and Enforcement of Environmental Regulation: What makes an Excellent Regulator?* Discussion Paper for the Penn Program on Regulation's International Expert Dialogue on "Defining Regulatory Excellence", March 19-20 2015 University of Pennsylvania Law School <https://www.law.upenn.edu/live/files/4383-gunninghamdiscussion-draftmarch-2015pdfpdf> accessed 12 September 2018.

(including a calendarised schedule and goals) and replacement procedure.[26] It usually comprises of a set of persons with an identifying characteristic and a set of relationships established among these people following their interactions.[27] Therefore an organisation operates by consciously creating arrangements to achieve goals by collective means[28] and can be used as tools by those who control it to mobilise immense ideological and practical resources. However, the context in which an organisation operates can shape its nature.[29] Dawson identified six key characteristics or elements of an organisation.[30] These include people,[31] strategies/tactics,[32] technology/hardware,[33] environment,[34] structure[35] and culture.[36] It is argued that an organisation can also be construed as a wide concept that includes formal and informal entities. This is in line with the concept of institutions because institutions are organisations, and these are made up of individuals departments, groups and businesses just like government agencies, businesses, NGOs and interested groups.[37]

The concept of organisations has been in existence for as long as mankind has existed. Organisations started as families or groups of hunters evolving into tribes, kingdoms and empires.[38] This evolution was largely a result of the need for collaboration and the principle of

[26] T Caplow, *Principles of Organisation* (Harcourt, Brace & World 1964) 383, 1.
[27] JET Eldridge and AD Crombie, *A Sociology of Organisations (RLE: Organizations)* (Routledge 2013) 220, 22.
[28] P Thompson and D McHugh, *Work Organisations: A Critical Introduction* (Second edn, Macmillan International Higher Education 1995) 459, 3.
[29] ibid 59.
[30] S Dawson, *Analysing Organisations* (Third edn, Macmillan International Higher Education 1996) 328, xxiii.
[31] These are associated with the organisation by their attitudes, values, aspirations and experience of different types of work.
[32] These constitute the plans and policies for such areas as product range, price, structure, personnel and technical innovation and change.
[33] These consist of hardware and information technology for production processes, machinery, materials and products.
[34] This delineates the environment within which an organisation's goods and services are supplied, from which its resources are obtained, and which provides the source of attempts to regulate its activities.
[35] This is depicted by the roles and relationships as seen in organisational charts, job descriptions, form and content of control systems and administrative procedures.
[36] This is the shared beliefs and values which create distinctive patterns of thinking and feeling within the organisation.
[37] JC Lammers and JB Barbour, 'An Institutional Theory of Organisational Communication' (2006) 16 (3) Communication Theory 356, 358.
[38] A Shutab and R Karni, *The Dynamics of Supply Chain [38]and Process Management* (Springer 2010) 281, 19.

division of labour, to thrive in a world where scarce resources determine what can be achieved either by individuals or groups. Shutab and Karni differentiated between formal and informal organisations noting that formal organisations are premised on a clear definition of responsibility, authority and accountability, while informal organisations are premised on common interests, common beliefs, social values, feelings, tradition etc.[39] Organisations in this context are viewed as institutional actors as far as their constituent units create and encourage values and interests that are embedded in the environment in which they operate and not just as machines implementing goals and values defined by a resource provider.[40] Having seen the institutionalisation process as one which infuses value beyond the technical requirements of an organisation, the concept of organisational institutionalisation proposes that once an organisation is infused with these values, they are no longer regarded as disposable tools in compliance and enforcement but are preserved by the actors[41] in that particular sector because embodying those values makes the organisation acquire a distinct identity and character structure.[42] These actors include regulated entities, regulators and other stakeholders in the particular sector.

Inter-organisational intervention can also infuse an organisation with values beyond its stated functionality and further consolidate its original stated norms and reduce the organisation's reliance on those particular actors that previously had made their initial functions unachievable.[43] In some instances, the degree of control by the government through laws policies or resource allocation is used to measure the degree of institutionalisation in an

[39] ibid 20.
[40] P Selznick, 'Foundations of the Theory of Organisation' (1948) 13 (1) American Sociological Review 25.
[41] These sector actors include regulated entities and other stakeholders in the petroleum sector.
[42] WR Scott, 'Institutional Theory Meets Organisation Studies', *Institutions and Organizations: Ideas, Interests, and Identities* (4th edn, SAGE Publications 2013) 21, 24.
[43] LG Zucker, 'Institutional Theories of Organization' (1987) 13(1) Annual Review of Sociology 443, 454. For example, funding actors.

organisation.[44] For example in the National Oil Spill Detection and Response Agency (NOSDRA) case in Nigeria,[45] a higher degree of control over the ability of the agency to perform the function of its core objectives is established through the judiciary. Since the agency is still dependent on the relevant actors like the government for funding, the oil companies for data gathering, expertise and technologically advanced equipment for monitoring and detection of non-compliance, the tendency of interference is high, and this impacts the compliance and enforcement powers of the agency.[46]

The organisation, when infused with value in its surrounding environment, gradually blends into and becomes more like the environment and other surrounding organisations while acting on the values already infused through individual actors that represent the organisation. This is the process called *homogenisation* and is captured in the concept of *isomorphism*.[47]

The environmental protection responsibility of the government is to protect the environment where any business that has the likelihood of impacting negatively on the sustainability of the human and natural environment is carried on. This responsibility is discharged through the establishment and implementation of environmental protection policies, laws and standards that are in alignment with global best practices and adapted to suit the jurisdiction[48] and the effective compliance and enforcement which these laws, policies and strategies enjoy. Environmental law scholarship has over the years discussed compliance and enforcement

[44] K Senge, 'The 'New Institutionalism' in Organization Theory: Bringing Society and Culture Back In' (2013) 44 (1) The American Sociologist 76, 81-82. The discussion on Resource Dependence theory is one of the theories that led to the development of the organisation theory along with the contingency theory, population ecology theory, and transaction cost theory.

[45] *National Oil Spill Detection and Response Agency (NOSDRA) v Mobil Producing Nigeria Unlimited (ExxonMobil)* (2018) LPELR-44210 (CA).

[46] This however leans more towards interference rather than intervention as the main aim is to muscle the organisation into submission to the standards of the resource providing actor.

[47] See **section 4.1** above for the discussion on *Isomorphism*.

[48] However, these laws, policies and strategies will only be of literary values if not matched with compliance and enforcement.

strategies that have stood the test of time.[49] These strategies have been adopted and proved to work when adapted to a particular jurisdiction with due consideration of the socio-economic and political maturity of such jurisdiction.[50] It is imperative to note that regulatory instruments possess four vital characteristics namely *target, regulator, command* and *consequences.*[51]

The *target* is usually the entity sought to be regulated and to which the consequences of non-compliance will be applied, typically, a business concern or facility.[52] The *regulator* is usually the government, non-government, standard-setting body or industry trade associations to which the target belongs or subscribes, that creates and enforces the regulation.[53] The *command* is the instruction that the regulator gives the target to do or refrain from doing, typically categorised into means and ends command. The means command otherwise known as technology, design specification standards, stipulates or prohibits the application or adoption of a determined means of achieving compliance and the ends command or performance standards requires the target to achieve or avoid a given result without specifying the means through which it can be achieved.[54] The c*onsequence* refers to the result or effect of compliance or non-compliance and the response of the regulator to the target. The consequence can be positive (subsidies, tax holidays, or regulatory exemptions for compliance) or negative (fines or sanctions for non-

[49] See for example the regulatory strategies of advice and persuasion, rules and deterrence, smart regulation, responsive regulation, next generation compliance etc. N Gunningham and D Sinclair, 'Smart Regulation' in Peter Drahos (ed), *Regulatory Theory: Foundations and Application* (Oxford Legal Studies 2017); N Gunningham and C Holley, 'Next-Generation Environmental Regulation: Law, Regulation and Governance' (2016) 12 The Annual Review of Law and Social Science 273; L Paddock and others (ed), *Compliance and Enforcement of Environmental Law*, vol IV (Edward Elgar Publishing 2017) 288; JV Stein, 'International Law: Understanding Compliance and Enforcement' in RA Denemark (ed), *The International Studies Encyclopaedia* (Blackwell Publishing 2010) 1.

[50] N Gunningham, 'Enforcing Environmental Regulations' (2011) 23(2) Journal of Environmental Law 169, 172.

[51] C Coglianese, 'Engaging Business in the Regulation of Nanotechnology' in CJ Bosso (ed), *Governing Uncertainty: Environmental Regulation in the Age of Nanotechnology* (Routledge 2010) 46.

[52] In the case of Nigeria and for the purpose of this research, the target is the oil sector operatives such as multinational corporations.

[53] In the case of Nigeria and for the purpose of this research, the regulator is the government or its regulatory agencies.

[54] These are laws, policies, standards and other agreements subscribed to by the government for which compliance is required.

compliance).[55] The following part of this chapter discusses the application of the concept of institutionalisation from the perspective of a regulatory agency.

4.1.2 Institutional framework for environmental regulation in Nigeria

As earlier stated, environmental protection regulation in Nigeria did not receive the early attention it deserved.[56] However, when it finally did, the government went on to establish regulatory agencies with the responsibility of enforcing the environmental laws. Some agencies are not strictly environmental regulation agencies, but they have environmental regulation mandates in the laws or policies establishing such agencies.[57] It is pertinent to note that there are as many environmental regulation enforcement agencies as there are environmental laws. It is argued that this is one of the barriers facing the regulatory architecture of the petroleum sector in Nigeria as discussed in **Chapter 5** of this thesis.[58]

Some of the relevant regulatory agencies, which will be discussed below, include; Federal Ministry of Environment,[59] Department of Petroleum Resources (DPR),[60] National Environmental Standards Regulation and Enforcement Agency (NESREA), National Oil Spill Detection and Response Agency (NOSDRA), Nigerian Nuclear Regulatory Authority,[61] Federal Ministry of Water Resources,[62] National Bio-Safety Management Agency,[63] Energy

[55] The capacity to devise institutions and procedures adequate to its problems is perhaps the chief mark of a civilised society LL Fuller, *The Morality of Law* (Yale University Press 1969) 262.
[56] N Ezenwa-Ohaeto, BE Ewulum and E Okaphor, 'An Appraisal of the Impact of the National Oil Spill Detection and Response Agency on Environmental Pollution in Nigeria' (2020) 4 African Journal of Constitutional and Administrative Law 48, 50.
[57] For example, the s 3 (1) (f) (i) (iii) and (vi) of the Nigeria Security and Civil Defence Corps Act Laws of the Federation of Nigeria 2007 empowers the Civil Defence Corps to arrest, investigate, and handover to the Nigeria Police for further investigation and prosecution of any person who is involved in any criminal activity, chemical poisoning or nuclear waste poisoning and oil spillage, power transmission and oil pipelines NIPOST cables, water board pipes or equipment vandalism.
[58] See **sections 5.2.1** and **5.2.3** of **Chapter 5** of this thesis.
[59] http://environment.gov.ng/
[60] www.dpr.gov.ng
[61] http://www.nnra.gov.ng/
[62] http://www.waterresources.gov.ng/
[63] http://nbma.gov.ng/

Commission of Nigeria,[64] National Orientation Agency (NOA),[65] Nigeria Security and Civil Defence Corps (NSCDC), and Nigeria Ports Authority (NPA). It is important to examine some of these agencies because many of them are not strictly environmental regulatory agencies however, they possess environmental regulatory mandates under the enabling laws establishing such agencies.

4.1.3 Evolution of environmental regulatory agencies in Nigeria

While examining some environmental and petroleum sector laws,[66] it was observed that the constant effort of the Nigerian government to address the environmental problems faced in the petroleum sector by way of legislation is not in doubt. However, the institutional framework for the regulation of the operations of the sector has failed so far in some vital aspects of environmental regulation. *First*, the institutional framework has failed to stem the egregious practices in the operations of the petroleum sector. *Second*, it has failed to ensure that actors responsible for environmental damage comply with the requirement for environmental clean-up of impacted sites where it is recommended or ordered by the courts. *Third*, it has failed to secure and enforce adequate compensation for environmental pollution and land acquisition or appropriate sanctions.[67] This part of this thesis takes a brief look at the journey so far of how the institutional framework for environmental regulation developed to where and what it is today.

4.1.4 Federal Environmental Protection Agency (FEPA)

A discussion on environmental regulatory agencies cannot be complete without a mention of the foundation of the environmental regulatory regime in Nigeria. Although FEPA is defunct

[64] http://www.energy.gov.ng/
[65] http://www.noa.gov.ng/
[66] See **section 6.3.1 (a) – (d)** of **Chapter 6** of this thesis.
[67] CN Okeke, 'Africa and the Environment' (1996) 3 (1) Annual Survey International & Comparative Law 37, 46.

and its enabling legislation repealed, it is seen in the environmental law scholarship of Nigeria as the agency that started it all.[68]

When oil was discovered in Nigeria in the late 1950s not much thought was given to the negative consequences of the resource. For this reason, the government of Nigeria has since been playing catch-up in its effort to effectively regulate the sector by responding to environmental problems in an *ad-hoc* manner.[69] Its effort has been characterised by environmental laws, standards and policy framework which still require more effort to make them more effective. The evolution of environmental regulatory agencies in Nigeria can best be described as being reactive rather than proactive. In the course of examining the environmental regulatory agencies, it might hard to draw a fine line between the environmental protection laws and the environmental regulations enforcement agencies as both are joined in name and substance. The law established and named the agencies and all their functions and powers derive from the law. The institutional framework for the enforcement of environmental regulation did not just start, but it evolved.

Following the dumping of toxic wastes in Koko town, Nigeria, it was clear that the existing laws did not specifically provide for issues of environmental pollution. Therefore, the Harmful Wastes (Special Criminal Provision) Decree[70] was promulgated to cure that oversight.[71] However, implementation was another vital arm of the struggle that was not given much thought. This decree facilitated the establishment of the Federal Environmental Protection

[68] PA Aidonojie and others, 'Environmental Law in Nigeria: A Review on its Antecedence, Application, Judicial Unfairness and Prospects' (2020) 1(2) Archive of Science & Technology 212, 216; H Ijaiya and OT Joseph, 'Rethinking Environmental Law Enforcement in Nigeria' (2014) 5 Beijing Law Review 306, 308; MT Ladan, 'Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' (2012) 8(1) Law Environment and Development Journal (LEAD) 118, 119.

[69] Acting only after the damage has been done to the environment and in most cases, long after the effect of the environmental problems have set in. For example, the move to create multiple environmental laws after the toxic waste incidence in Nigeria. AA Ibrahim and others, 'Environmental Impact Assessment in Nigeria-A Review' (2020) 8(3) World Journal of Advanced Research and Reviews 330, 331.

[70] Harmful Wastes (Special Criminal Provision) Decree Decree No 42 of 1988 of Nigeria.

[71] CC Nwufo, 'Legal Framework for the Regulation of Waste in Nigeria' (2010) 4(2) African Research Review 491, 499.

Agency (FEPA)[72] by the promulgation of the Federal Environmental Protection Agency Decree.[73] FEPA was then charged with the responsibility of environmental protection and management.[74] Following this action, the Nigerian government proceeded to organise an international workshop on the environment, resulting in the formulation of a National Policy on the Environment.[75] The government went further to encourage states of the federation through FEPA to create their own State Environmental Protection Agencies (SEPA).[76]

4.1.5 Department of Petroleum Resources (DPR)

The DPR was established and developed over the years to carry out many functions under the directive of the Minister of Petroleum Resources.[77] The functions include ensuring compliance with petroleum laws, regulations and guidelines in the oil and gas sector, supervise and monitor the operations of the sector, ensure health, safety and environment, maintain records on the sector operations, advise government and its agencies on the sector, process sector applications for licences, leases and permits, ensure timely payment of revenues to government and maintain a reliable data repository.[78] While these functions appear straightforward, it creates a major overlap in regulatory agency functions because almost every function listed above is

[72] Now defunct and replaced by National Environmental Standards Regulation and Enforcement Agency (NESREA)

[73] Now repealed by the NESREA Act Cap N36 Laws of the Federation of Nigeria 2007. Decree no 58 1988, 59 of 1992 of 1992 and 14 of 1999 (as amended) comprising of 42 sections and 7 schedules. As much as it would be in order to just refer to FEPA in passing since it is obsolete, it will however, render the discussion incomplete not to expound on how much the enforcement regime of environmental regulation enforcement was jump-started by the establishment of FEPA.

[74] F Doherty, 'History of FEPA in Nigeria' (2016) <http://drfunmilayodoherty.blogspot.com/2016/06/history-of-fepa-in-nigeria.html> accessed 31 October 2018.

[75] ibid.

[76] AD Adekunle, 'In Search of Partners in a Context of Multiple Regulators: The Perspective of an Operator in Nigeria Oil Industry' A paper presented at the International Seminar on the Petroleum Industry and the Nigerian Environment Abuja, Nigeria 1998 1.

[77] DPR, 'In the Beginning' (2018) <https://www.dpr.gov.ng/history-of-dpr/> accessed 31 October 2018. DPR has the statutory responsibility of ensuring compliance to petroleum laws, regulations and guidelines in the oil and gas Industry. The discharge of these responsibilities involves monitoring of operations at drilling sites, producing wells, production platforms and flow stations, crude oil export terminals, refineries, storage depots, pump stations, retail outlets, any other locations where petroleum is either stored or sold, and all pipelines carrying crude oil, natural gas and petroleum products, while carrying out the following functions, among others, culled from www.dpr.gov.ng/functions-of-dpr/ .

[78] C Ikporukpo, 'The Challenge of Oil Spill Monitoring and Control in Nigeria' (2020) 8(6) Journal of Environmental Monitoring and Analysis 202, 203.

replicated in one or more other environmental regulatory agency functions.[79] However, the DPR is the technical department through which the federal government maintains overriding monitoring and control of the activities and operations of the petroleum sector in Nigeria.[80]

4.1.6 National Oil Spill Detection and Response Agency (NOSDRA)

NOSDRA was established by the NOSDRA Act of 2006 to monitor and regulate Tiers 1 and 2 oil spills as well as coordinate, implement and review the National Oil spill Contingency Plan (NOSCP).[81] The agency carries out its statutory objectives by performing some actions. *First*, to establish a national operational organisation that ensures a safe, timely, and appropriate response to all oil pollution as well as hazardous and noxious substances in the petroleum sector.[82] *Second*, to establish a mechanism to monitor and assist or where expedient direct response, including the capability to mobilise the necessary resources to save lives, protect the environment, and clean up impacted sites to the best practicable extent.[83] *Third*, to maximize the effective use of the available facilities and resources of corporate bodies, their international connections and oil spill co-operatives.[84] It is submitted that the reliance by NOSDRA on the facilities of corporate bodies (especially those involved in petroleum operations) to implement appropriate oil spill response, is an indictment of whatever conclusion the agency will reach regarding the complicity of such companies in environmental harm matters. This is because

[79] National Environmental Standards Regulation and Enforcement Agency (NESREA) Act Cap N36 Laws of the Federation of Nigeria 2007, S 7 (a) – (m)
[80] SM Ibrahim, PJ Bills, and J Allport, 'Improving the Capacity of Institutions to Strengthen the Management of National Oil and Gas Resources' (224th International Academic Conference on Engineering, Technology and Innovation (IACETI) Saudi Arabia 23 – 24 August 2017) 6, 1.
[81] National Oil Spill Detection and Response Agency Act Cap N63 Laws of the Federation of Nigeria 2006. s 5. The Federal government of Nigeria by this elaborate document indicated its preparedness to tackle oil spill incidents and the associated environmental problems in Nigeria based on such international standards presented by conventions such as the OPRC 90 (International Convention on Oil Pollution Preparedness, Response and Co-operation) as ratified by Nigeria. The NOSCP highlights all the human and material resources required to fight oil spill incidents and established links with foreign organisations that can be called upon in case where internal resources are inadequate.
[82] NOSDRA Act (n 45) s 5 a.
[83] NOSDRA Act (n 45) s 5 c.
[84] NOSDRA Act (n 45) s 5 d. Such as Clean Nigeria Associates (CNA) in implementing appropriate spill response.

NOSDRA would have compromised its position and cannot reasonably be expected to be objective in the exercise of its functions and objectives having received and accepted assistance from such corporate bodies.

Other responsibilities of NOSDRA include to carry surveillance and ensure compliance with all existing environmental legislation in the petroleum sector relating to the prevention, detection and general management of oil spills, oily wastes and gas flare, enforce compliance with the provisions of international agreements, protocols, conventions and treaties relating to oil and gas and oil spill response management.[85] The agency also is to ensure that all oil industry operators in Nigeria subscribe to and be *bonafide* members of Clean Nigeria Associates (CNA).[86] The law establishing NOSDRA empowers it to levy penalties unilaterally and upon conviction for some offences in the NOSDRA Act.[87] However, in a 2018 case, NOSDRA was stripped of its power to fiscally penalise offenders who failed to report a spill within 24 hours or to clean up the oil spill.[88]

It is contended that the agency is only focused on the oil companies as oil spill perpetrators and did not envisage the contribution of third parties such as oil pipeline vandals,[89] criminal

[85] Ikporukpo (n 78) 203.

[86] NOSDRA Act (n 45) s 6 a, b and f. However as at the time of this research, only 15 companies are certified members of the Clean Nigeria Associates (CNA). Clean Nigeria Associates (CNA), 'Member Companies' (2018) <https://www.cleannigeria.org/about/member-companies> accessed 3 August 2020. CNA is a non-profit organisation and a cooperative formed in 1981 due to increasing awareness to the need to maintain sustained capability to effectively combat oil spill, exhibit effective preparedness and speedy response capability to members' tier 2 oil spill. The organisation claims to have responded to 109 oil spills of various magnitudes and in diverse terrains from 1989 till date.

[87] NOSDRA Act (n 45) s 6 (2) and (3).

[88] *National Oil Spill Detection and Response Agency (NOSDRA) v Mobil Producing Nigeria Unlimited (ExxonMobil)* (2018) LPELR-44210 (CA). In this case, the court of appeal in Nigeria held that regulatory agencies (in this case NOSDRA) cannot impose fines without due recourse to the courts, a decision that was ignored by the federal high court of a later case of *NOSDRA v SPDC* on the Bonga oil spill. This issue and decision of the court, in this case, will be further discussed in **Chapter 6, section 6.4.5.**

[89] Pipelines vandalism implies the drilling, breakage or destruction of oil pipelines to steal petroleum products or in furtherance of sabotaging government. See AC Okoli and S Orinya, 'Oil Pipeline Vandalism and Nigeria's National Security' (2013) 13 (5) Global Journal of Human Social Science and Political Science 67, 67. This trend has peaked in Nigeria since the early 1990s where an estimated 628 reported cases of oil pipelines vandalism were recorded between 1995 and 1999 the highest number of 497 occurring in 1999 alone. See NNPC Special Committee on the Review of Petroleum Product Supply and Distribution-SCRPPD (2000) 4.

elements, and other individuals who also cause oil spills.[90] It is argued that in the course of vandalism, oil is spilt into the environment and generally has the same effect as the oil spilt by any other source. It is curious, however, how the opportunity to make a decisive pronouncement on pipeline vandalism was missed especially because the NOSDRA Act was enacted in 2006 over ten years since the first incidence of oil pipeline vandalism was recorded.[91]

4.1.7 National Environmental Standards Regulation and Enforcement Agency (NESREA)

NESREA[92] is the major enforcement agency in environmental matters and is empowered to enforce compliance with laws, guidelines, policies and standards on environmental matters.[93] The NESREA Act further empowers the agency to carry out activities necessary for the performance of its functions, prohibit processes and use of equipment or technology that undermine environmental quality, monitor compliance with set standards, policies, legislation and guidelines and enforce such standards through compliance monitoring against any violator, conduct public investigations on pollution and the degradation of the environment and natural resources in the areas of biodiversity, forestry, ozone layer depletion, hazardous wastes, marine and wildlife pollution, sanitation and in such other environmental matters other than in the oil and gas sector as are necessary for the efficient performance of the functions of the agency.[94]

[90] KK Ezeibe, 'The Legislative and Institutional Framework of Environmental Protection in the Oil and Gas Sector in Nigeria – A Review' (2011) 2 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 39, 51.
[91] It has been mooted that the network of collaborators in the large-scale oil theft of crude oil in Nigeria has created serious challenges to regulation by the federal government in the operations of the oil sector. E Akpomera, 'International Crude Oil Theft: Elite Predatory Tendencies in Nigeria' (2015) 42(143) Review of African Political Economy 156, 163.
[92] Following the failure of FEPA in its main function of enforcement of environmental regulation, the FEPA Act was repealed by the NESREA Act which consequently established NESREA. National Environmental Standards and Regulations Enforcement Agency (NESREA) Act Cap N36 Laws of the Federation of Nigeria 2007.
[93] Functions of the agency as set out in s 7 of the NESREA Act.
[94] Ezeibe (n 90).

Ezeibe opined that the oil and gas sector being a tertiary producer of environmental hazards, required special attention and treatment in the environmental protection regime in every country on the face of the globe.[95] However, NESREA with its primary functions stated above exercises its environmental regulatory functions to the exclusion of the *oil* and *gas sector*.[96] This translates to the fact that the petroleum sector from where the highest sources of pollution and environmental degradation stem currently in Nigeria appears to be protected from the enforcement powers of NESREA because of the exclusion of the *oil* and *gas sector* from its regulatory jurisdiction. It appears that NESREA inherited the numerous drawbacks of FEPA[97] because it begs the question as to why the government whose duty it is to protect the Nigerian environment as enshrined in the Constitution of the Federal Republic of Nigeria 1999,[98] passed up the opportunity of doing so under the NESREA Act. It is believed that if this opportunity was leveraged upon, it would have provided a vital step towards effective petroleum sector regulation.

4.1.8 Nigeria Security and Civil Defence Corps (NSCDC)

The NSCDC established by the NSCDC Act [99] is a paramilitary establishment that is tasked with the power *inter alia* to arrest with or without a warrant,[100] detain, investigate and institute legal proceedings for chemical poison, oil spillage, nuclear waste, poisoning.[101] This power is exercised by or in the name of the Attorney-General of the Federation and in line with the provisions of the Constitution of the Federal Republic of Nigeria against any person who is reasonably suspected to have committed an offence under the enabling Act involving any

[95] Ezeibe (n 90) 39.
[96] NESREA Act (n 174) s 7 (g), (h), (j), (k) and s 8 (g), (k), (n) and (l).
[97] MT Ladan, 'Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' (2012) 8 (1) Law Environment and Development Journal (LEAD) 118, 120.
[98] S 20 of the Constitution of the Federal Republic of Nigeria 1999.
[99] Nigeria Security and Civil Defence Corps (NSCDC) (Amendment) Act Laws of the Federation of Nigeria 2007.
[100] ibid s 3 (1) f.
[101] ibid s 3 (1) (f) (ii).

power transmission lines, or oil pipelines, NIPOST cables, equipment, Water Board pipes or equipment vandalism.[102] However, in the course of the exercise of these powers, the NSCDC resorted to unconventional methods that have harmed the environment.[103] One of such instances was when in an attempt to discourage pipelines vandals in Rivers State Nigeria, officials of the NSCDC destroyed illegal refineries by setting them on fire and releasing poisonous fumes into the atmosphere resulting in the presence of soot in the atmosphere in the capital city of Port Harcourt.[104] In the course of this operation, tonnes of illegally mined diesel and premium motor spirit (PMS) was also discharged into the river resulting in marine and aquatic pollution.

4.1.9 Nigerian Ports Authority (NPA)

The concept of the Nigerian Ports Authority was initiated as early as 1909 towards the provision of facilities for ocean-going vessels and has gradually evolved since then.[105] The Nigerian Port Authority was eventually established as a continuous Public Corporation by the Ports Act of 1954[106] to address the institutional weakness. This weakness bordered on lack of coherent policy framework because ports development only happened on an *ad-hoc* basis. Consequently, development was driven by changes in the level and demand of sea-borne trade with the functions of providing and operating necessary facilities in ports and maintaining, improving and regulating the use of the ports; and to provide for other connected matters.[107]

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[102] ibid s 3 (1) f (i) - (vi).
[103] C Akasike, 'NSCDC Destroys 156 Illegal Refineries in Rivers' (2017) <https://punchng.com/nscdc-destroys-156-illegal-refineries-in-rivers/> accessed 3 November 2018.
[104] K Ebiri and T Todo, 'WHO, UNEP Investigate Cause of Soot in Rivers State' (2018) <https://guardian.ng/news/who-unep-investigate-cause-of-soot-in-rivers/> accessed 3 November 2018. The NSCDC had carried out this action in furtherance of curbing the vandalism of oil pipelines the effect of which has caused civil society groups to float the ***#StopTheSoot*** movement which has attracted international attention.
[105] EO Oyatoye and others, 'Application of Queueing Theory to Port Congestion Problem in Nigeria' (2011) 3(8) European Journal of Business and Management 24, 25.
[106] Now Nigeria Ports Authority (NPA) Act Cap 126 Laws of the Federation of Nigeria 2004.
[107] www.nigerianports.gov.ng

In addition to its statutory functions, the NPA is also mandated to control pollution arising from oil or any other substances from ships using the ports limits or their approaches.[108] It is further empowered to receive reports through the Chief fire officer of any leakage of oil during loading or discharging and if it constitutes a hazard, he reserves the right to suspend such loading or discharge until repairs have been carried out.[109] In the event of an oil spill or discharge on the wharf, the responsible party is to take action to recover the oil and prevent its escape into harbour waters.[110]

Although the NPA is not a direct petroleum regulation enforcement agency, it is one of the agencies specifically mentioned and included by the National Oil Spill Contingency Plan (NOSCP) to be mandatorily engaged by NOSDRA in the event of a major or disastrous oil spill. To emphasise its relevance as an indirect environmental regulation enforcement agency, penalties are provided in the enabling act for contravention of its provisions.[111]

4.2 Analysis

The concept of institutionalisation and the theories that underpin it promote a more accurate understanding of the relationship between organisation and behaviour towards the law because behaviour is a function of rules and incentives.[112] The significance of institutionalisation is in the need to direct the mercurial and fickle nature of the constituent parts of an organisation towards achieving a collective purpose, promoting balance in the efforts at achieving regulatory excellence.

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[108] NPA Act Cap 126 Laws of the Federation of Nigeria 2004 s 7 (i).
[109] Regulation 17 Nigerian Ports Authority Petroleum Wharf (Apapa) Bye Laws, a subsidiary legislation to the NPA Act Cap 126 Laws of the Federation of Nigeria 2004.
[110] Regulation 34 ibid. The regulation, however, does not stipulate how or within what time frame this was to be done.
[111] Failure to report discharge of oil/mixture – 2,000 USD, Minor pollution covering an area up to $50m^2$ – 15,000 USD, Major pollution covering an area more than $50m^2$ – 50,000 USD and Dumping of refuse into surrounding water – 14,000 USD. Nigerian Ports Authority. 'Prevention and Control of Marine Incidence and Pollution' (2017) <http://nigerianports.gov.ng/health-safety-and-environment-services/> accessed 3 November 2018.
[112] PA Hall and RC Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44 Political Studies 936, 950.

As noted earlier, institutionalisation is both the implementation of the process and the internalisation of new practices[113] or infused values beyond the technical requirements of the organisation and both must be completed for institutionalisation to take place.[114] Organisations that have institutionalised norms, standards and values become tools that form the basic framework for individual actions in the day to day operations of such organisations, no longer easily disposed but preserved by the sector in which they exist and carry on business thereby creating the needed motivation to act in the desired way. The policy choices of an organisation in internalising norms, standards and values either from inception or in the course of the development of the organisation determines the subsequent behaviour of the organisation when confronted with the law.

It is established that the existence of laws alone is not a guarantee that the laws will be effective toward the achievement of its stated goals and purposes.[115] Material, human and other resources are required to give effect to the laws.[116] It is expected that laws made to regulate a particular sector will be complied with by the organisations operating in that sector, failing which enforcement will apply hence the provision for enforcement parameters. In an ideal situation, that should solve the problem. However, the expectation of regulators to use regulatory agencies to give effect to the laws did not consider the fact that individual departments or businesses make up these organisations and more often they do not receive, assimilate, interpret and uniformly respond to issues.

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[113] C Dambrin and others, 'Control and Change - Analysing the Process of Institutionalisation' (2007) 18 Management Accounting Research 172, 173.
[114] ibid 176.
[115] P Kellett, 'Securing High Levels of Business Compliance with Environmental Laws: What Works and What to Avoid' (2020) 32(2) Journal of Environmental Law 179, 180. More elements come together to drive organisation and public behaviour towards environmental law such as policy choices through a combination of laws, regulatory approaches and market signals.
[116] OJ Olujobi and T Olusola-Olujobi, 'Comparative Appraisals of Legal and Institutional Framework Governing Gas Flaring in Nigeria's Upstream Petroleum Sector: How Satisfactory?' (2020) Environmental Quality Management 1.

4.3 Conclusion

This chapter argued that the meaning of institutionalisation in the context of this research and the various institutional theories that underpin it reflects the concept of an organisation. The chapter further argued that the application of the relevant institutional theories in compliance and enforcement agencies in national and international law justify the position that the institutionalisation of compliance and enforcement will bring about the much needed gradual but incremental changes to the effect of environmental regulatory efforts by the regulator. Considering the institutionalisation of compliance and enforcement in international and national law, this chapter argued that infusing value in the laws, standards, policies and conventions generated and ratified by signatories and further domesticated in the various national laws of such signatories, further strengthens the effort to regulate both at the international and national levels.

The next chapter explores the instruments, tools and mechanisms harnessed by the regulatory agencies to execute their regulatory mandate and considers how conceptually strong these regulatory instruments, tools and mechanisms are and the alternative regulatory strategies that may be adopted where there are weaknesses in the existing ones.

Part B

4.4 Regulatory institutionalism in the context of compliance and enforcement

This part of this chapter sets out the options that can be adopted into the regulatory architecture of the petroleum sector of Nigeria to achieve effective environmental regulation where they are absent. The enquiry into how to measure the effectiveness or otherwise of these strategies is resolved in the discussion of the various ways of measurement achieved through compliance and enforcement management.

Regulatory agencies play a significant role in the environment essential for enterprise promotion.[117] For a law to be institutionalised, it must be characterised by legal instruments appropriate to the social and economic justifications for their application and the intended impact on the regulated sector, and the procedures or processes by which the instruments are formulated and applied.[118] For laws to be established and infused with value, due consideration must be given to the social and economic condition for its application to achieve the desired impact on the regulated sector. Therefore, regulatory institutionalism connotes infusing regulations and regulatory structures with values in and beyond the functional requirements of the regulatory structure by promoting a conducive environment for the operation and implementation powers of regulatory agencies and their regulations.

When environmental regulation is breached, the relevant regulatory agency in charge of implementing the regulation would promptly respond to the breach to mitigate the effect of the breach and proceed against the offender immediately according to the specified law and procedure. For example, in Nigeria, where there are issues of public health violation, the Ministry of Environment is responsible for any response action to be adopted. During the 2014 Ebola outbreak in Nigeria, the public health professionals implemented all the public health protection protocols that were established by the Federal Government of Nigeria.[119] At the state level, the Environmental Sanitation Authority is the department in the state Ministry of Environment made up of public health professionals responsible for this. Although this has not

[117] A Ogus, 'Regulatory Institutions and Structures' (2002) 73 (4) Annals of Public and Cooperative Economics 627, 627.
[118] ibid 628.
[119] F Shuaib and others, 'Ebola Virus Disease Outbreak - Nigeria, July-September 2014' (2014) 63(39) Morbidity and Mortality Weekly Report 867, 868.

been effectively implemented in the petroleum sector, the NOSDRA Act makes provisions for this kind of situation.[120]

The process of regulatory institutionalism faces the same dilemma regarding the application of institutional theory because the laws governing the sector are not adequately infused with value beyond its stated expression. The stipulated laws are breached constantly without consequences thereby bolstering the offenders to continue on their path of operational impunity.[121]

4.4.1 Compliance and enforcement in environmental regulation

After exploring the concept of institutionalisation of compliance and enforcement in the previous chapter, this section discusses some relevant compliance and enforcement strategies and how they were developed and modified to become what they are in practice currently. This section serves to link organisational and regulatory institutionalisation discussed in **Chapter 2** and show how the institutionalisation of compliance and enforcement can be achieved through the application of appropriate regulatory strategies.

It is believed that an effectively implemented social regulation which includes environmental regulation, fulfils the social objectives of such regulation and only effective enforcement can reinforce the survival and implementation of such social regulation.[122] How this can be done to achieve effective and efficient policy outcome, restore and maintain social confidence is a question of regulatory style and the appropriateness of punishment (enforcement strategy) or

[120] National Oil Spill Detection and Response Agency Act Cap N63 Laws of the Federation of Nigeria 2010 S 6 (2) and (3) of the NOSDRA Act requires an offender (oil spiller) to promptly report an oil spill incident and penalises failure to clean up such impacted sites. The implementation of this provision is dependent on the report of the offender because more often than not, the NOSDRA lacks the requisite facilities to detect oil spills and can only act when an offender reports or the victim's reports.

[121] Such laws as the Associated Gas Re-injection Act and the policy on the plan to stop gas flaring in Nigeria which has seen the government shift the effective date continuously over the years thereby permitting incessant gas-flaring and a steady pollution of the atmospheric environment in Nigeria with dire consequences on human health.

[122] Social regulation is defined by the OECD Glossary of statistical terms to be a set of rules that protect public interests such as health, safety, the environment, and social cohesion. See OECD, *Regulatory Reform: A Synthesis*, (OECD 1997) 40, 11.

persuasion (compliance strategy).[123] These are the two strategies that have dominated the debate on environmental regulation.[124]

The decision of what regulatory strategy to adopt can be based on the increasing influence and success enjoyed by these alternative approaches. Some of these strategies which have been identified in academic literature and will be discussed below, include *Rules* and *Deterrence*, *Advice* and *Persuasion*, *Criteria based regulation*, *Responsive Regulation*, *Smart Regulation*, *Risk-Based Regulation* and *Self-regulation* and *Meta Regulation*.[125] The regulator (in this case, the government through their regulatory agencies) decides which of the strategies to adopt after assessing the strengths and weaknesses therein.

4.4.2 Rules and deterrence

There is the assumption that many organisations or individuals will not comply with the law, standards or policies unless there are specified consequences for non-compliance.[126] The proponents of the rules and deterrence strategy assumed that regulated entities were amoral calculators that would take costly measures to meet public policy goals only when they are specifically required by law to do so. The likelihood of harsh punishment if non-compliance is detected makes it economically irrational to be non-compliant. This strategy was one of the many options that emanated from the challenge of how and where regulatory organisations

[123] Compliance strategy is a mechanism that reviews the implementation of an actor's obligation and the aim is to facilitate, promote and safeguard the implementation of regulations by identifying implementation and compliance difficulties, analysing the main causes of the problems and formulating and applying the most appropriate solutions. N van Woudenberg, 'Compliance Mechanisms: A Useful Instrument' (2004) 34 (4-5) Environmental Policy and Law 185.
[124] N Gunningham, 'Enforcement and Compliance Strategies' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 120, 121.
[125] N Gunningham, 'Enforcing Environmental Regulations' (2011) 23(2) Journal of Environmental Law 169, 173.
[126] J Jackson and others, 'Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions' (2012) 52 (6) British Journal of Criminology 1051, 1052.

should intervene in the affairs of regulated entities to ensure compliance and facilitate enforcement.[127]

The rules and deterrence strategy underscores a coercive, formal and adversarial style of enforcement and the sanctioning of rule-making behaviour which assumes that regulated entities are rational actors capable of responding to incentives and that if offenders are frequently detected and adequately punished with sufficient severity, such offenders and others, will be deterred from future violations.[128] Fiorino noted that the objective of this strategy was to control behaviour with prohibitive rules, laws, standards and policies which elicited deterrence from the regulated entity as the primary mode of influencing behaviour.[129] The effect of this strategy, however, differed when applied to large corporations in comparison to small and medium-sized ones.[130]

The rules and deterrence strategy relied more on a system of rules that achieved results in industrial nations in the past decades. It increasingly became unsuitable in a rapidly changing world because the deterrence impact of tough enforcement became weaker especially in industries that had been subject to substantial regulation for a considerable period and were reputation-sensitive.[131] This regulatory strategy was criticised because it was rigid, costly, inhibited innovation and increasingly diminished returns in environmental regulation.[132] In the new era of increasingly complex, diverse, interdependent and technologically advancing

[127] C Holley and D Sinclair, 'Compliance and Enforcement of Water Licences in NSW: Limitations in Law, Policy and Institutions' (2012) 15 (2) The Australasian Journal of Natural Resources Law and Policy 149, 154.
[128] Gunningham (n 125) 174. This strategy was widely practiced by the United States Environmental Protection Agency which sees enforcement as part of encouraging environmental actors who are regulated to meet their environmental obligations.
[129] DJ Fiorino, 'Rethinking Environmental Regulation: Perspectives on Law and Governance ' (1999) 23(2) Harvard Environmental Law Review 441, 459.
[130] F Haines, *Corporate Regulation: Beyond "Punish or Persuade"* (Clarendon Press 1997) 269.
[131] N Gunningham, 'Beyond Compliance: Next Generation Environmental Regulation' Paper presented at the Current Issues in Regulation: Enforcement and Compliance Conference convened by the Australian Institute of Criminology in conjunction with the Regulatory Institutions Network, RSSS, Australian National University and the Division of Business and Enterprise, University of South Australia. Australian Institute of Criminology, Melbourne, 2 September 2003) 2.
[132] ibid.

petroleum sector, a more collaborative, flexible and performance-based regulatory system is required.[133] However, it may sound rather presumptuous to assume that the rules and deterrence strategy has outlived its usefulness and this thesis is in no way suggesting that. Command and control remain the central pillar of environmental pollution control legislation.[134]

The rules and deterrence strategy exists in the environmental regulatory regime of Nigeria from the provisions of the various legal and regulatory instruments that prohibit unfriendly environmental practices in the petroleum sector of Nigeria. The National Environmental Standards Regulation and Enforcement Agency (NESREA) undertakes programmes for the control of any substance, practice, process or activity which is anticipated to be dangerous to the sustenance of the ozone layer[135] and provides for a fine of two million naira against any corporate body that violates that provision.[136] Other environmental matters where violations are prohibited by the agency and for which various fines are provided include improved environmental sanitation,[137] protection of land resources and watershed quality such as natural watershed, coastal zone, dams and reservoir,[138] discharge of hazardous substances into the environment.[139] The fines were intended to create a deterrent to such violations however, this has not been as effective in Nigeria. For example, gas flaring persists in the Nigeria petroleum sector.[140]

[133] DJ Fiorino, 'Regulating for the Future: A New Approach for Environmental Governance' in DA Mazmanian and ME Kraft (eds), *Toward Sustainable Communities: Transition and Transformations in Environmental Policy* (2nd edn, MIT Press 2009) 63, 65. Some of the reasons are that the problems faced by regulators in the past have changed as the definition of these problems has transformed from a narrow to a more global scene thereby making this strategy unsuitable for the current challenges of environmental protection. Changes in economic conditions and relationships and institutional landscape also contributed to the necessity for a change in regulatory style.
[134] S Bell and others, *Environmental Law* (9th edn, Oxford University Press 2017) 809, 26.
[135] National Environmental Standards Regulation and Enforcement Agency (NESREA) Act Cap N36 Laws of the Federation of Nigeria 2007 S.21 (2).
[136] NESREA Act S 21 (3).
[137] NESREA Act S 25.
[138] NESREA Act S 26.
[139] NESREA Act S 27 (1).
[140] Olujobi and Olusola-Olujobi (n 116) 6.

The issue of environmental protection in the petroleum sector still envisages reprehensive behaviour that requires more than just compliance strategies to secure and sustain compliance behaviour.[141] Faure suggests that major parts of environmental criminal law are not codified *per se* in many legal systems[142] rather they consist of provisions of an administrative nature. These statutes have as their main function the enforcement of compliance with administrative obligations.[143] Such environmental statutes still require some form of sanction to create deterrence. In Nigeria, the Federal Environmental Protection Council is responsible for the environmental impact assessment or an environmental impact review of projects that are executed. Where a project is found to likely have adverse effects on the environment, an order will be published in the Gazette prohibiting any action in furtherance of that project.[144] However, where the provisions of such an order are violated or likely to be violated, the council may secure an injunction from a court of competent jurisdiction restraining the same.[145]

4.4.3 Advice and persuasion

This strategy emphasizes cooperation and conciliation and is characterised by bargaining, education and negotiation with the option of enforcement as a last resort or the regulated entity remains obdurate.[146] The procedures followed by those adopting this strategy are informal. Regulators educate and persuade regulatees or offenders into complying with the law, explaining what the law demands and the reasons for the legislative requirements. Patience and understanding underpin this strategy,[147] which is considered as an open-ended and long-term venture as the regulators discuss how improvements can best be attained.

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[141] Such behaviour can border on harmful acts done to the environment and environmental crimes.
[142] M Faure, 'Environmental Crime' in N Garoupa (ed), *Criminal Law and Economics* (Edward Elgar Publishing 2009) 320.
[143] ibid. See also the United States Clean Water Act 1972 s 1319 on Federal Enforcement.
[144] Environmental Impact Assessment (EIA) Act Cap E12 Laws of the Federation of Nigeria 2004 s 51 (1).
[145] ibid s 52 (1).
[146] N Gunningham, 'Negotiated Noncompliance: A Case Study of Regulatory Failure' (1987) 9 (1) Law and Policy 69, 70.
[147] BM Hutter, 'Variations in Regulatory Enforcement Styles' (1989) 11 (2) Law and Policy 153, 155.

Environmental regulatory agencies such as NOSDRA and NESREA in Nigeria incorporate the advice and persuasion strategy in their functions. NOSDRA provides training and drill exercises to ensure readiness to oil pollution preparedness, response and management of oil spills.[148] The agency also provides advisory services, technical support and support for research and development in the development of methods, materials and equipment for oil spill detection and response.[149] NESREA as part of its functions creates public awareness and provides environmental education on sustainable environmental management, promotes private-sector compliance with environmental regulations and generates and publishes data gathered from the exercise of its functions.[150]

This strategy impacts differently on differently-motivated regulated entities. It may be positive for corporate leaders but not for reluctant compliers or the recalcitrant.[151] It is believed that regulated entities may comply even if they will not be found out and punished if they do not.[152] However, pure advice and persuasion or compliance-oriented strategies can result in intolerable laxity and encourage complacency, and fail to deter others thereby discouraging improved regulatory performance among better industry actors if it is perceived that offenders are allowed to go unpunished.[153] The various regulatory schools of thought are still divided over the overall impact of pure rules and deterrence strategy on the one hand and pure advice and persuasion regulatory strategy on the other.[154]

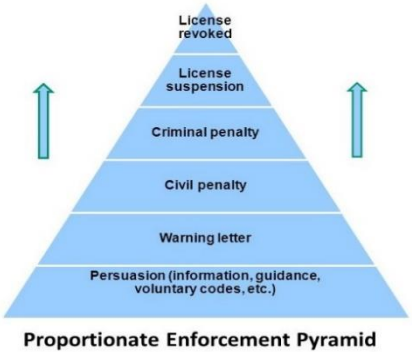
[148] National Oil Spill Detection and Response Agency (NOSDRA) Act Cap N63 Laws of the Federation of Nigeria 2010, S 5 (f).
[149] ibid S 5 (g).
[150] NESREA Act S 7 (l).
[151] Gunningham (n 124) 124.
[152] SA Shapiro and RS Rabinowitz, 'Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA' (1997) 49 (4) Administrative Law Review 713.
[153] ibid 720.
[154] As Gunningham describes both strategies as two polar extremes and hypothetical constructs unable to be found in their purest forms

4.4.4 Responsive regulation

The attempt at social regulation has increasingly faced resistance from regulated entities as it has become more obvious that a pure command and control system of regulation is less effective than it used to be. Organisations fall into the categories of non-compliant and compliant[155] and strategies have been developed that adequately punish offenders while simultaneously encouraging and rewarding compliant ones.[156] The impasse, however, is to determine what strategy to apply. The assumption that organisations may need more encouragement by the threat of enforcement to comply, might create a hostile culture of resistance to regulation.[157] The solution to this problem was proffered by Ayres and Braithwaite in the adoption of the enforcement pyramid strategy styled *responsive regulation*[158] where regulators apply advisory and persuasive measures at the bottom then mild administrative sanctions at the middle and punitive sanctions at the top.[159]

Figure I

[155] As noted earlier in **section 4.1.1**, an organisation is a kind of social system that possesses persons, strategies, technology, environment, structure and culture see S Dawson, *Analysing Organisations* (Third edn, Macmillan International Higher Education 1996) 328, xxiii.
[156] Gunningham (n 124) 126.
[157] E Bardach and RA Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Temple University Press 1982) 375.
[158] The theory of the responsive regulation strategy was based on nine theories put forward by Braithwaite; (1) Think in context, (2) Listen actively and structure dialogue that allows stakeholders' participation, (3) Engage those who resist with fairness by harnessing their resistance as an opportunity for regulatory design improvement, (4) Praise those who show commitment by supporting and nurturing innovation, (5) Preference for collaborative capacity building and education, (6) Make known the sanctions that may be escalated to but only as a last resort, (7) Network pyramidal governance by engaging wider networks of partners as the pyramid is ascended, (8) Advocate active responsibility, resorting to passive responsibility when active responsibility fails, (9) Learn, evaluate how well and at what cost outcomes have been achieved and communicate lessons learned in the process. J Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 (3) University of British Columbia law Review 475, 476.
[159] I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1995) 205.



Source: Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1995).

The idea behind responsive regulation is that the regulator should be more responsive to the conduct of the regulated entities to determine whether more or less intervention is required or how the regulated entities are regulating themselves first before any intervention is introduced.[160] Responsive regulation implies a situation where a dialogic regulatory style is employed. Here the regulators show the regulated entities that their style of enforcement response will increase or escalate if their compliance expectation is not met. This is done by applying coercive or punitive strategies until there is total compliance using state regulation alone.[161] The problem of responsive regulation, however, is to maintain institutional integrity while noting the new problems, new forces in the environment, new demands and expectations and responding accordingly.[162] Responsive regulation is considered conducive for developing countries because such countries have less compliance capacity and this makes responsive regulation attractive as it offers a potential alternative to developing countries as a strategy that utilizes cheaper forms of social control.[163]

This regulatory strategy is not widely applied in Nigeria in the format described above. However, it has been applied in instances where abatement notices are issued for minor

[160] J Braithwaite, 'Responsive Regulation and Developing Economies' (2006) 34(5) World Development 884, 886.
[161] Ayres and Braithwaite (n 159) 161.
[162] P Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (University of California Press 1994) 550, 336.
[163] Ayres and Braithwaite (n 159).

environmental infractions in environmental sanitation matters and such companies against which the notices are issued are put on regular inspection.[164] Where the infractions are discontinued, the company is cleared to proceed with their business, where the infraction is continued, the regulatory agency obtains a court order to suspend activities or seal and close down such business premises and take other further actions in exercise of its enforcement powers.[165]

Responsive regulation, however, has some limitations that make it inappropriate to adopt as a perfect solution to the deficiencies of the 'punish or persuade' extremes. *First,* escalation and de-escalation on the enforcement pyramid may be more complex than it appears because the effect of escalation or de-escalation of penalty might be unpredictable and may not produce the expected reaction from the regulated entities.[166] Braithwaite in his later work on responsive regulation appears to agree with Haines as he has reviewed the two-step escalation and de-escalation system on the enforcement pyramid.[167] *Second*, the application of the enforcement pyramid strategy may be insufficient unless there is a guaranteed effective information flow between the regulator and the regulated entity based on a meaningful avenue of engagement.[168] *Third*, responsive regulation might not be effective in a jurisdiction where the functions of policy-making, information gathering, monitoring and enforcement are all domiciled in different organisations or agencies (as is the case in Nigeria) because it will be difficult for the regulator to determine at what point to escalate or de-escalate on the enforcement pyramid.[169] *Fourth*, there may be insufficient repeat interaction for the regulator to make an informed decision on the determination of the level of compliance to allocate to a regulated entity. There

[164] Rivers State Environmental Protection and Management Law No. 15 2019 S 46 (1) (a) and (2).
[165] NESREA Act S 30 (f).
[166] Haines (n 130) 219.
[167] J Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 (3) University of British Columbia law Review 475, 483.
[168] C Parker, 'Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime' (1999) 26 (2) Journal of Law and Society 215, 224.
[169] R Baldwin and J Black, 'Really Responsive Regulation' (2008) 71(1) The Modern Law Review 59, 63.

must be evidence of sufficient interaction for the regulator to determine the kind of regulated entity they are dealing with and the regulated entity needs to know and understand the regulatory tools being applied by the regulator and be able to correctly interpret them and respond accordingly.[170]

It can be deduced that regulatory strategies have different effects in different jurisdictions and on different organisations, depending on the existing socio-economic and political construct and regulatory needs of the sector sought to be regulated.[171] These factors must necessarily be considered when deciding on a regulatory style to adopt and the regulator should first consider its strengths before seeking to expand them.

4.4.5 Smart regulation

Regulation was initially thought to be a bipartite process between the government (as the regulator) and the business (as the regulated entity). However, it has become clear that there is a plurality of regulatory forms with other actors influencing the behaviour of regulated entities.[172] Smart regulation is a form of regulatory pluralism[173] which builds on the foundation of responsive regulation in terms of enforcement but takes it a step further and suggests that instead of relying on a single regulatory instrument which in this case is state legislation, the regulator should harness second and third parties as surrogate regulators.[174] This is believed to be cost-effective and offers better policy outcomes because it frees up scarce regulatory

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[170] R Johnstone, 'From Fiction to Fact: Rethinking OHS Enforcement' (Australian OHS Regulation for the 21st Century The Australian National University, National Research Centre for Occupational Health and Safety Regulation & National Occupational Health and Safety Commission, Gold Coast July 20-22) 1, 11 <https://openresearch-repository.anu.edu.au/bitstream/1885/41221/3/WP11.Johnstone.pdf> accessed 11 August 2018.

[171] Braithwaite (n 167) 475, 480.

[172] N Gunningham and D Sinclair, 'Smart Regulation' in P Drahos (ed), *Regulatory Theory: Foundations and Application* (Oxford Legal Studies 2017) 133, 133-134.

[173] Regulatory pluralism refers to a rule-making process that involves a subsection of the public with a high level of interest in and knowledge about a particular rulemaking per C Coglianese, 'Expanding Regulatory Pluralism: The Role for Information Technology in Rulemaking." Working Paper' (2005) <https://pdfs.semanticscholar.org/9861/2cb9111f52129ba19224bd97170cb4288008.pdf> accessed on 11 August 2018.

[174] Braithwaite (n 167) 507.

resources which can be applied to other sectors where alternative government intervention is absent or insufficient.[175] This strategy offers more options to achieve effective regulation. These options can include the use of third parties like NGOs, public and private sector organisations across more instruments such as economic instruments, command and control regulation, voluntarism, information strategies and self-regulation.[176] This facilitates the use of more instruments across the face of the Braithwaite pyramid. It also has the advantage of restoring investor confidence as it reveals that regulators are not alone in the concern for environmental protection and preservation.[177]

The smart regulation strategy advocates the extension of the function of regulation beyond the immediate regulatory expertise of the main regulator to other regulatory partners like NGOs, public and private sector organisations and other professions such as legal practitioners and economists.[178] These professionals are usually more grounded in regulatory issues to act on behalf of the main regulator instead of spending scarce resources of state regulation on the escalation option when there are possible alternative options like those offered by other third-party regulators.[179] Braithwaite believes that even developing countries with weak regulatory strategies, can enrol private and public sector organisations, NGOs and professions as network

[175] This strategy advocates increased participation by members of the public than does the shielded or isolated decision-making by regulatory officials which demands less participation than does participatory democracy however participation that counts in regulatory pluralism is participation by organized interests and experts from outside of government. B van Rooij, RE Stern and K Fürst, 'The Authoritarian Logic of Regulatory Pluralism: Understanding China's New Environmental Actors' (2016) 10 (1) Regulation & Governance 3, 4.
[176] Gunningham and Sinclair (n 172)140. Under the command-and-control instrument, technology standards and performance standards are employed. Under the economic instrument, taxable emission and resources permits and taxes, supply side incentives, and legal financial liability ae applied. Applying self-regulation implies that the organisation is given the opportunity to regulate the behaviour of its members to promote compliance. In the voluntarism instrument, government facilitates and coordinates the organisation to embrace voluntary agreement to voluntarily comply with mutual interests as the motivating factor. Information strategies is also an instrument applied to encourage compliance this instrument includes education and training, environmental reporting, freedom of information, proactive public disclosure, pollution incentives and product certification.
[177] Braithwaite (n 167) 507.
[178] Gunningham and Sinclair (n 172) 135.
[179] J Braithwaite, T Makkai and VA Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (Edward Elgar Publishing 2007) 372, 103.

partners in this strategy[180] and suggests that even the mere possibility of having the right kind of dialogue[181] can improve compliance and should not be dismissed without being explored. This regulatory strategy utilises some compliance tools such as technical assistance, advice and cooperation to facilitate compliance. Besides, more severe measures can be taken as a last resort where there is repeated failure to comply.[182]

This regulatory strategy exists and is applied in environmental regulation in Nigeria but in a slightly different format. For example, the NOSDRA Act provides for the enlistment and the use of available facilities and resources of corporate bodies, their international connections and oil spill co-operators under the umbrella organisation called Clean Nigeria Associates (CNA) to implement appropriate spill response.[183] The distinction between the type of smart regulation strategy described above and the one practised in Nigeria is that in Nigeria, the government still retains its regulatory powers of enforcement provided in the environmental regulation instruments and does not cede any to the third-party organisation such as CNA. These third parties are only allowed to exercise and apply other forms of compliance tools like training, environmental education, waste management services and technical assistance especially because they own sophisticated technical equipment suitable for prompt response in oil spill situations.[184] Canada practiced smart regulation in the mid-2000s and a few years later the

[180] Such weak developing countries with weak regulatory strategies or plans can still achieve great improvement through the adoption of smart regulation.
[181] When regulatory agencies dialogue with regulatees, it is usually in form of strict directives of what such regulatees are expected to do. However, other professionals that are qualified in alternative dispute resolution, would possess the right skills to persuade and encourage regulatees to comply without compromising their business.
[182] N van Woudenberg, 'Compliance Mechanisms: A Useful Instrument' (2004) 34 (4-5) Environmental Policy and Law 185, 186.
[183] NOSDRA Act (n 109) S 5 (d). Clean Nigeria Associates (CNA) is The Clean Nigeria Associates (CNA), a non-profit Organization and a co-operative of currently fifteen oil producing companies in Nigeria formed to increase awareness in the need to have a better and cleaner environment. The objectives of the company are to promote the science of protecting, preserving and restoring the environment after oil spills.
[184] 'CNA Objectives' < https://www.cleannigeria.org/about/cnaobjectives> accessed 20 March 2019.

European Union also promoted smart regulation as a vehicle to achieve a 'cleaner, fairer and more competitive Europe'.[185]

Smart regulation has two general circumstances where the adoption of an escalation response may be inappropriate. *First*, where serious risk of irreversible loss or catastrophic damage is likely and *second*, where the parties have had insufficient interactions to enable the regulator to make an informed decision as to whether to escalate up the enforcement pyramid or not.[186]

4.4.6 Criteria-based regulation

Under this regulatory strategy, a wide range of regulatory criteria is contemplated and listed in a regulator's compliance and enforcement policy document. Inspectors or decision-makers decide on which intervention strategy to adopt for each organisation.[187] However, the decision depends on the consideration of existing circumstances and the existence of all or some criteria. It has been argued that constitutional principles should underpin enforcement in furtherance of regulation to secure compliance based on the constitutional values of particular democratic systems. This is because constitutional values are mostly shaped by important morals and social values within a community.[188]

In a bid to effect environmental regulation, the decision of what regulatory strategies to adopt remains and the existence of the various regulatory strategies does not solve the dilemma of the choice of which ones to apply in any given circumstance. In response to this dilemma, regulators must consider some ancillary questions[189] or criteria such as the regulatory needs of

[185] Gunningham and Sinclair (n 172) 143-144. See also Danish Ministry of Economic and Business Affairs, The Netherlands Regulatory Reform Group and UK Better Regulation Executive 2010. *Smart Regulation: A Cleaner, Fairer and More Competitive EU*. Copenhagen: Ministry of Economic and Business Affairs.
[186] Gunningham (n 124) 134.
[187] Gunningham (n 125) 177.
[188] K Yeung, *Securing Compliance: A Principled Approach* (Bloomsbury Publishing 2004) 307, 5, 49.
[189] These questions include the seriousness of the violation, is the violator involved a serial or first-time violator, is the environmental impact reversible or not, is the violator exhibiting good faith? Gunningham (n 3) (2011) 23 (2) Journal of Environmental Law 169, 178.

the sector, when deciding what regulatory strategy to apply. Some jurisdictions such as Florida in the United States of America have opted for a mix of both the rules and deterrence strategy and the advice and persuasion strategy thereby creating a balanced approach.[190]

In some jurisdictions, it is assumed that a regulated entity will usually have certain reasons for responding negatively or positively to regulation. The *Principles of Enforcement* in Australia lists some criteria that inspectors or regulators consider when deciding on appropriate enforcement action in proportion to the environmental impact of the alleged offence.[191] In the Netherlands, the decision of what regulatory strategy to apply is made based on the regulatees response to regulation. These responses are summarised and are set out in the *Table of eleven*.[192] The table covers three aspects of responses to regulation or compliance behaviour namely *aspects of spontaneous compliance, aspects of monitoring* and *aspects of sanctions.*[193] These aspects to responses to regulation entail a list of criteria around which some questions are formulated on which answers inspectors or regulators rely as a framework to determine what intervention or regulatory mix to apply in the event of non-compliance.

A weakness of this strategy lies in the fact that it gives the decision-makers wide discretion as to the process by which decisions are arrived at. An advantage of this strategy, however, is that instead of leaning to one extreme or the other as offered by the *punish or persuade* strategies, the application of a criteria-based strategy gives the midway option of weighing various factors

[190] Florida Department of Environmental Protection. 'Hazardous Waste Compliance and Enforcement' (2018) <https://floridadep.gov/waste/permitting-compliance-assistance/content/hazardous-waste-compliance-and-enforcement> accessed 27 August 2018.

[191] Department of Environment and Conservation, 'Enforcement and Prosecution Policy' (Western Australia 2008) 2-3.

[192] AAA van der Schraaf, 'Incentive Framework to Comply with Regulation: The Case of the Netherlands:' (Economic Aspects of Environmental Compliance Assurance: Proceedings from the OECD Global Forum on Sustainable Development Paris 3 December2004) 81, 81.

[193] ibid 83. ***Aspects of spontaneous compliance***: Here, the regulators or inspectors consider the following criteria. The regulatees knowledge of the regulation, cost/benefit ratio of complying with the regulation, degree of acceptance of the regulation, loyalty and obedience and performance of the regulatee during informal monitoring. ***Aspects of monitoring***: here, the following criteria are considered. Informal report probability, monitoring probability, detection probability and selectivity of the inspector. ***Aspects of sanctions***: Here, the probability of sanctions and severity of sanctions is the considered criteria.

before exercising the discretion of what intervention to apply. This can improve compliance in the sense that organisations will not feel targeted and resist compliance and enforcement efforts because they will be convinced that each situation is dealt with on its circumstance. For example, if an organisation does not possess the capacity to comply, the regulator will consider that circumstance in deciding on how to respond to such instance of non-compliance.[194]

4.4.7 Risk-based regulation

In the course of regulation, agencies responsible for regulation find that they have more to do and more challenges to face than available time and resources permit.[195] As a result, alternative measures are being developed such as risk-based regulatory strategies as a framework for the management of regulation resources and reputation of the regulators.[196] This regulatory strategy refers to the targeting of regulatory resources such as inspection and enforcement resources based on the analysis of the degree of risk that the organisation's activities pose to the regulator's ability to achieve its regulatory objectives.[197] In determining how regulators intervene in the affairs of the regulated entity, this strategy promotes the application of the principles of identifying, assessing and controlling environmental risks that may be common to the regulated entity's line of business.

An example of a risk-based regulatory strategy for environmental protection can be found in the United Kingdom. The United Kingdom Environment Agency Compliance and Enforcement Policy implies that the primary determinant of what intervention strategy to apply is an assessment of the level of environmental risk their action poses.[198] Interventions are

[194] Shapiro and Rabinowitz (n 152) 729.
[195] J Black and R Baldwin, 'Really Responsive Risk-Based Regulation' (2010) 32(2) Law and Policy 181, 181.
[196] Baldwin and Black (n 169) 65.
[197] N Gunningham, 'Compliance, Enforcement, and Regulatory Excellence' (2017) RegNet Research Paper No. 124 School of Regulation and Global Governance 1, 3.
[198] ibid 5.

applied through a variety of compliance tools such as *Operator Risk Appraisal (OPRA), Compliance Assessment Plans (CAPS) and Compliance Classification Scheme (CCS).*[199]

According to Black, the risk-based regulatory strategy is a systematic strategy for the management of personnel, decisions and scarce regulatory resources.[200] Under this strategy, regulated entities are risk-rated by their activities, inclination to, and the likely impact of their non-compliance[201] on the regulator's ability to achieve its objective of environmental protection for instance. If the organisation is one that regularly fails to comply with regulations, the regulator will rank it as a high-risk organisation in deciding on what regulatory approach to apply.

An advantage of this is the provision of a systematic framework that permits regulators to relate their enforcement activities to the achievement of objectives. Another advantage is that it aids the regulator in the prioritisation of what and where to apply scarce resources, targeting the highest risks thereby protecting the regulator's reputation and legitimacy. It also provides a platform for the evaluation of new regulatory challenges and new risks.[202]

The strategy also raises some challenges. Since the strategy focuses resources on regulatory priorities based on the assessment of the regulatory manager, the regulator is faced with the consequences of such decisions which may be political or legal. Often, the focus of this strategy is usually on known risks which can make the regulator fail to detect new or developing risks

[199] The Operator Risk Appraisal (OPRA) applied by the regulator to objectively assess the risks from a regulated entity's activity, Compliance Assessment Plans (CAPS) adopted to facilitate the compliance and enforcement process and the Compliance Classification Scheme (CCS) which provides consistency across different regulatory regimes in the reporting of non-compliance instances. See N Gunningham, 'Enforcing Environmental Regulations' (2011) 23(2) Journal of Environmental Law 169, 181.
[200] J Black, 'Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis' (2012) 75(6) The Modern Law Review 1037, 1053.
[201] Baldwin and Black (n 169) 66.
[202] ibid 66.

during risk assessment and this can negatively impact compliance and enforcement efforts.[203] However, to avoid this, it has been suggested that risk assessment should always include random inspection.[204] This holds the potential of uncovering new or developing risks and risk creators and act as a deterrent to non-compliance while promoting compliance as inspections can be randomly done.[205]

The tendency is also high for the regulator to ignore lower levels of risks which when left to accumulate over time, can create cumulative and more serious risks. For example, the risk of minor spills during the transportation by road of petroleum products or the risk of accidental fire from pipelines sited close to residential or commercial areas and the risk of siting small petroleum storage facilities in residential areas. Each aspect of a risk-based framework involves a complex set of choices that regulators have to consider and address while adopting this strategy. These risks include the risks that the regulators will identify as requiring immediate attention; the indicators and methods of assessment of those risks and priority risks.[206] The regulators will also have to decide on how the implementation of the risk-based framework will be managed, its justification and communication and their preparation to respond to changes and, the level of risk or failure they are prepared to accept.[207] There is ultimately the danger of applying scarce resources to focus on individual regulated entities instead of a more comprehensive and holistic target of raising the level of compliance within the regulated community.

[203] ibid 67. This can also negatively impact on the reputation of the regulator as it will appear to be unable to detect and manage minor upcoming risks thereby eroding the confidence reposed in it to detect and manage any risk at all.
[204] P Hampton, 'Reducing Administrative Burdens: Effective Inspection and Enforcement' (2005) Hampton Review 1, 32 para 2. 38.
[205] Black and Baldwin (n 195) 206.
[206] Baldwin and Black (n 169) 66.
[207] J Black and R Baldwin, 'When Risk-Based Regulation Aims Low: A Strategic Framework' (2012) 6(2) Regulation and Governance 131, 132.

The position occupied by the petroleum sector in the economic and political landscape of Nigeria and the attention it has generated within and outside the country places the petroleum sector at the top of the risk assessment ladder of the regulators of the sector. This is noticeable from the number of laws, standards and guideline and regulatory agencies all directed towards the regulation of the petroleum sector.[208] Different licences, leases and permits are also required in the operation of the petroleum sector, the grant of these licences creates a requirement for regular monitoring and inspections to ensure maintenance of standards and compliance with laws and that operations are carried on within the terms of the licences, leases and permits issued.[209] This concentration on the petroleum sector did not make provision for another form of risk that has grown within the sector, the risk of oil pipeline vandalism.[210] As discussed earlier in this chapter, the government of Nigeria established the NSCDC to tackle the menace of oil pipeline vandalism.[211] It is argued that the NSCDC has in the course of executing its mandate, carried out acts that endanger the environment as well. One instance is the dumping of seized illegally refined petroleum products in waterways in Rivers State of Nigeria.

4..4.8 Meta-regulation and Self-regulation

Meta-regulation describes regulation for self-regulation, relating to corporate self-audits and safety cases where regulatees develop their own rules and reporting system for the regulator to assess.[212] The term has been used in a broader sense, prioritising the role of third parties or network regulators in self-regulation and focusing on how the regulatee should be made penetrable to external values. In other words, a process of regulating the regulator irrespective

[208] See **section 4.1.2** of **Chapter 4**, **section 5.2.1** of **Chapter 5**, **section 6.3.1** of **Chapter 6** and **section 7.4.1** of **Chapter 7** of this thesis.
[209] Petroleum Act Cap P10 Laws of the Federation of Nigeria 2010 see s 2, Paragraphs 1, 5 and 8 of the First schedule.
[210] AC Okoli and S Orinya, 'Oil Pipeline Vandalism and Nigeria's National Security' (2013) 13 (5) Global Journal of Human Social Science and Political Science 67.
[211] See **section 4.1.8** of this chapter.
[212] FC Simon, *Meta-Regulation in Practice: Beyond Normative Views of Morality and Rationality* (Routledge 2017) 232, 2.

of whether they are public agencies, private corporate regulators or third-party regulators.[213] Braithwaite and Parker defined meta-regulation as the regulation of one institution by another, characterising it as *institutional meta-regulation*.[214] This conceptual imprecision is attributable to the fact that there is no generally accepted framework for classifying any regulatory instrument or strategy.[215]

Meta-regulation is about regulatory flexibility, self-regulation and the need to account for third parties' roles in driving policy outcomes in the public interest. This captures a desire to be reflexive about regulation such that rather than regulate social and individual actions directly, the process of regulation itself becomes regulated.[216] Black expresses meta-regulation as management-based regulation, enforced self-regulation or the regulation of an entity's self-regulation. Under meta-regulation in Black's opinion, regulators do not prescribe a compliance model for regulatees but require them to develop their system and demonstrate the same to the regulator.[217] It is a progressive policy design that works effectively with organisations and promotes stakeholder involvement which places the onus on the regulatees to demonstrate compliance rather than placing the onus on the regulator to demonstrate or prove non-compliance.[218] In other words, a set of normative assumptions is laid out for the meta-regulation theory, the key one being morality requiring the regulatee to do what is right based on a consensus of values among the sector stakeholders which will come to be held by the regulatees themselves.[219]

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[213] C Parker, 'Meta-regulation: The Regulation of Self-Regulation', *The Open Corporation: Effective Self-regulation and Democracy* (Cambridge University Press 2002) 245, 15.
[214] C Parker and J Braithwaite, 'Conclusion' in C Parker *et al* (ed), *Regulating Law* (Oxford University Press Oxford 2004) 269, 89.
[215] P Grabosky, 'Meta-regulation' in P Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017) 149, 150.
[216] B Morgan, *Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification* (Routledge 2003) 294, 2.
[217] Black (n 200) 1045.
[218] Black (n 200) 1037.
[219] GG Sollars, 'Meta-Regulation in Practice: Beyond Normative Views of Morality and Rationality by FC Simon' Book Review (2020) 161 Journal of Business Ethics 231, 231.

In contrast to meta-regulation, self-regulation refers to a regulatory strategy where a regulatee imposes commands and consequences on itself at the individual-firm level or through an industry association to which it belongs highlighting the close connection between the regulator (which is internal) and the regulatee and can apply any of the regulatory categories mentioned above.[220]

Codes of conduct developed by government and government-appointed network partners[221] require private firms to engage in environmental and social policy targets beyond their legal requirements.[222] However, Maurer argues that it is dubitable that effective self-regulation can be feasible especially in environmental protection or social standards because experimental evidence is more in favour of the traditional approach such as the rules and deterrence approach, being applied in the promotion of environmental protection or social standards.[223] His rationale is that if it was easy for organisations to impose commands on themselves and abide by them, they would not be doing it as a form of regulation but as a basic legal requirement of the business.[224] Therefore, self-regulation cannot be a substitute for legal regulation especially if it is corporate social responsibility (CSR) based.[225] McCarty, on the other hand, concludes that the regulatory strategies of meta-regulation and self-regulation underpin the vital role of expertise and complexity in regulatory policies as self-regulation may

[220] Ayres and Braithwaite (n 159) 152.
[221] Codes of conduct such as the United Nations global Compact 2015 wherein principles 7, 8 and 9 stipulate that businesses should support a precautionary approach to environmental changes, undertake initiatives to promote environmental responsibility and encourage the development and diffusion of environmentally friendly technologies. United Nations Global Compact, 'The Ten Principles of the UN Global Compact' (2015) <https://www.unglobalcompact.org/what-is-gc/mission/principles> accessed 19 August 2018.
[222] R Maurer, 'Can CSR-based Self-Regulation Be a Substitute for Legal Regulation? Conclusions from Public Goods Experiments' (2017) 3 Journal of Self-Regulation and Regulation 1, 18.
[223] ibid.
[224] ibid.
[225] ibid 12. He believes that national governments and company associations are so intensely promoting self-regulation because of their self-interests.

mitigate policy uncertainty because the threat of public regulation can cloud the firm's incentive to self-regulate.[226]

Self-regulation has been criticised for its weak standards, ineffective enforcement, and mild and non-transparent punitive processes. It commonly lacks many of the virtues of a conventional state regulation such as rigidity and punitive sanctions. It is seen also as a process that is not visible, credible and does not provide the same degree of accountability and lacks rigorous application and strong sanctions enough to deter other potential offenders.[227]

This application of this regulatory strategy has not been noticed in Nigeria. The closest regulatory strategy to this strategy is the operational policies of the sector operatives on health, safety and environment (HSE). These policies are required by law to be documented and the Department of Petroleum Resources (DPR) specifically monitors compliance on HSE.

4.4.9 Next generation compliance

It is trite that enforcement not only improves compliance but deters violators, however, regulatory agencies grapple with the challenge of trying to achieve their stated goals within their limited resources.[228] Regulatory agencies have continuously encountered the challenge of how they can best achieve environmental regulatory outcomes within their resource limitations. This has become a particularly vexing problem, as public budgets continue to shrink without a commensurate reduction of regulatory responsibilities.[229] Next-generation compliance is applied to resolve this issue and is achieved by using advancement in technology and pollution monitoring and designing permits and regulations that are easier to implement to reduce

[226] N McCarty, 'The Regulation and Self-Regulation of a Complex Industry' (2017) 79 (4) The Journal of Politics 1220, 1232.
[227] N Gunningham, 'Investigation of Industry Self-Regulation in Workplace Health and Safety in New Zealand' (2011) <http://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-04/NG_investigation-industry-self-regulation-whss-nz_0.pdf> accessed 20 August 2018 1, 9.
[228] C Giles, 'Next Generation Compliance' in LeRoy Paddock and Jessica A. Wentz (eds), *Next Generation Environmental Compliance and Enforcement* (Environmental Law Institute 2014) 22, 23.
[229] Holley and Sinclair (n 127).

pollution and enhance compliance.[230] The next generation compliance initiative comprises five key elements *Regulation and permits design, advanced monitoring, electronic reporting, transparency* and *innovative enforcement*.[231] It is implemented through the states and other non-federal actors such as regulated entities, environmental and community NGOs and courts. The receptibility of the next generation compliance initiative by relevant actors is vital to the success of the initiative.[232]

Under this strategy, rules are created with compliance strategies built in and making it self-implementing and easier and attractive for regulated entities to comply with.[233] It requires compliance programmes and rules that work well and achieves results without requiring court actions by employing clarity and simplicity. These strategies include advanced monitoring technology, electronic reporting, increased transparency and innovative enforcement strategies[234] which would be more effective in the real world[235] considering the advancement in technology. Global information infrastructure which allows for the easy and speedy capture and diffusion of information, satellites, remote sensing, drones, real-time monitoring and reporting, mobile handheld monitoring devices, innovative civic data collection, developments

[230] LL Bergeson, 'Next Generation Compliance and Its Implications for Industry' (2016) 26 (1) Environmental Quality Management 107.
[231] DL Markell and RL Glicksman, 'Next Generation Compliance' (2015) 30 (3) Natural Resources & Environment 22, 22.
[232] ibid 24.
[233] Example of this was exhibited in the emission reduction plan in automobiles in America where auto manufacturers were required to install emission control equipment in automobiles and certify them as meeting the standard before the cars were even bought. This solved the problem of requiring millions of car users buying and installing the equipment individually and expending scarce resources in detecting and punishing offenders. The regulator only needed to worry about regulation of a smaller number of manufacturers. This plan was adopted in 2013 where the EPA proposed air pollution control rule for oil and gas producers. Energy extraction companies were made to buy compliance-ready models of air pollution control equipment manufactured by certified air pollution control equipment manufacturers who in turn report their sales to the EPA. The extraction companies also report their purchase of the compliance-ready models of the equipment and compliance monitoring is done by comparing the sales and purchase reports. Although this creates a more effective and efficient way to monitor compliance in that sector, a further step of advanced monitoring through information technology is required to ensure the proper use of the equipment.
[234] Giles (n 228).
[235] ibid. the rules were structured to promote compliance as could be seen from the simplicity, transparency, self and third-party certification and generally designed to make compliance the default.

in data analytics and "big data," are all tools that are employed in next-generation compliance models.[236]

Giles points out that while tough environmental enforcement efforts had worked in the past to control environmental pollution and will continue to be essential, more can be accomplished by moving compliance programmes into the 21st century.[237] This is because environmental pollution and other environmental violations are not always easily visible to the naked eyes and have not in any way decreased in the danger they portend to the human and physical environment.[238] She further noted that smaller sources of pollution have also proliferated to create a bigger destructive environmental impact. These problems gave rise to the need for a more reliable and drastic plan of action in environmental regulation.

However, in the light of the success of this strategy in the United States, the USEPA still emphasises the importance of enforcement as being the backbone of the environmental protection process as next-generation compliance innovative approaches also work in enforcement through the use of advanced monitoring systems to detect violators and target the use of scarce enforcement resources.[239]

It has become imperative in environmental regulation in Nigeria that an accurate database of environmental impacts is developed in the enforcement and compliance efforts of the government. Recently, the DPR in a bid to create a more conducive business environment, create value for all stakeholders and optimise government take from hydrocarbon, launched real-time crude oil and LNG tracking initiatives[240] for extensive monitoring and real-time data

[236] N Gunningham and C Holley, 'Next-Generation Environmental Regulation: Law, Regulation and Governance' (2016) 12 The Annual Review of Law and Social Science 273, 282.
[237] C Giles, 'Next Generation Compliance' (2015) 45 Environmental Law Reporter News and Analysis 10205, 10205.
[238] Giles (n 228) 22.
[239] Giles (n 228) 22, 26.
[240] Some of the activities that will be tracked are National production monitoring team (NPMS), crude oil and NLNG tracking, accelerated lease renewal process among other things.

gathering through information technology and infrastructure deployment.[241] NOSDRA in partnership with some regulated entities created a database of oil spill sites and incidents called the Nigerian oil spill monitor.[242] This platform grants public access to current official data on oil spills collected by NOSDRA by relying on the voluntary engagement and support of oil companies to provide the logistics, quantity estimates, soil/water samples and clean up operations.[243] This data gathering and partnership aim to show which oil companies are fulfilling their legal responsibilities and identify high risk and priority areas.[244] Data generated by the partner organisations are used to project where specific regulatory intervention is required. The main criticism of the partnership between NOSDRA and the oil companies in this data gathering is that it hints at the unreliability of the generated data because a regulated organisation may not necessarily report itself when it becomes a violator.

4.5 Compliance management in environmental regulation

Environmental regulatory efforts will be meaningless if it does not improve compliance.[245] It has been opined that compliance management (which includes compliance measurement or assessment of the effect of different regulatory strategies on regulatory compliance) faces some challenges such as gauging compliance, measuring inspection or monitoring regulatory interactions applied at any time and the ability to predict the outcome of an alternative regulatory strategy.[246] The typical approach for compliance management is reliance on the regulated entity's report of its compliance behaviour or the inspectors' perception of compliance. However, that has proved unreliable as the tendency to tender reports that favour

[241] 'DPR makes Giant Steps in the Oil and Gas Sector: Launches Real Time Crude Oil and LNG Tracking' https://www.dpr.gov.ng/dpr-makes-giant-strides-in-the-oil-and-gas-sector/ accessed 20 March 2019.
[242] www.oilspillmonitor.ng
[243] ibid.
[244] This is in line with ss 5 (b) and (c) NOSDRA Act (n 109).
[245] A Iannuzzi Jr, *Industry Self-Regulation and Voluntary Environmental Compliance* (Lewis Publishers 2016) 200, 4.
[246] PJ May and SC Winter, 'Regulatory Enforcement Styles and Compliance' in C Parker and VL Nielsen (eds), *Explaining Compliance: Business Response to Regulation* (Edward Elgar 2011) 222, 233.

the regulated entity contrary to the facts, always presented itself. This challenge has confronted regulators and the search for compliance management approaches persists.[247] The European Union (EU) proposed a solution to its member states to tackle this challenge. These include *compliance assurance, compliance promotion, compliance monitoring and assessment*, and *follow-up* and *enforcement*.[248] It is important to note that these examples of compliance management strategies from the EU are not intended to be copied and transplanted into the compliance and enforcement regime in Nigeria but may be adopted and modified to suit the environmental regulatory needs of Nigeria.

4.5.1 Compliance assurance

Under the EU requirement that member states owe a duty to each other to co-operate in good faith towards the achievement of EU objectives,[249] the European Commission suggested some actions to ensure compliance assurance. Some of these actions include improving transparency and accountability of the regulatory agencies on how significant risks are addressed, encouraging greater participation of competent authorities in environmental compliance networks, monitoring and promoting compliance and by taking credible follow-up action and taking further steps to ensure an effective system of financial security for environmental

[247] European Commission, 'Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: European Union Actions to Improve Environmental Compliance and Governance' (2018) <http://ec.europa.eu/environment/legal/pdf/COM_2018_10_F1_COMMUNICATION_FROM_COMMISSION_TO_INST_EN_V8_P1_959219.pdf> accessed 1 September 2018 1. For instance, the European Union (EU) in its communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, proposed action plans to improve environmental compliance and governance.

[248] In the EU communication however, compliance promotion and compliance monitoring is subsumed in compliance assurance.

[249] European Commission 2018 (n 247) 2.

liabilities.[250] In Nigeria the DPR under the EGASPIN guidelines[251] requires sector operatives to file annual returns and reports of audit of their operations, health, safety and environment standards and other activities exhibiting compliance with environmental regulatory laws, standards and permits and also requires them to apply to renew these licences, leases and permits when due.

4.5.2 Compliance promotion

Similarly, there is a range of strategies to promote compliance, including awareness campaigns and use of guidance documents and online information tools such as frequently-asked-questions (FAQs), follow-up to breaches and liabilities which can include administrative action (e.g. withdrawal of a permit), use of criminal law and action under civil law (remediation after damage from an accident using liability rules) and contractual law (e.g. measures to require compliance with nature conservation contracts). Under the EU commission action plan, all these interventions represent "compliance assurance".[252] This compliance management strategy is present in Nigeria and is implemented by the DPR. As mentioned earlier,[253] DPR is seized with the power to process and issue operational licences, leases and permits granted by the Minister for Petroleum Resources, to organisations that are willing to carry on business in the petroleum sector.[254] This power which extends to monitoring of such operations to ensure compliance, also allows the DPR to withdraw such licences, leases and permits where there is non-compliance with environmental laws or the terms of such permits. Compliance promotion

[250] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Union Environmental Implementation Review: Common Challenges and How to Combine Efforts to Deliver Better Results' (2017) <http://ec.europa.eu/environment/eir/pdf/full_report_en.pdf> accessed 2 September 2018 1, 24.
[251] The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) issued in 1991 and revised in 2002, 2016 and 2018. See DS Olawuyi and Z Tubodenyefa, *Review of the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)* (Institute for Oil, Gas, Energy, Environment and Sustainable Development (OGEES Institute), Afe Babalola University, Ado Ekiti, Nigeria MFP-04-014, 2018) 1.
[252] European Commission 2018 (n 247) 2.
[253] See **section 4.1.5** of this chapter.
[254] Petroleum Act Cap P10 Laws of the Federation of Nigeria 2010, See s 2 (1) (a), (b), (c), (2) and (3).

is also achievable under the NESREA Act through environmental education on sustainable environmental management and creation of public awareness.[255]

4.5.3 Compliance monitoring and assessment

Compliance monitoring identifies and characterises duty-holder conduct and detects and assesses any non-compliance, using environmental inspections and other checks. Compliance monitoring includes all the activities by regulatory agencies and the regulated community to gather information to determine the compliance status of a regulated entity and can involve using various kinds of checks, including inspections for permitted activities, surveillance for possible illegal activities, investigations for crimes and audits for systemic weaknesses.[256]

An example is the United States EPA which employs the compliance mechanism of self-policing otherwise known as the *Audit Policy*. The audit policy is described as 'systematic and objective reviews of an entity's operations and [environmental] practices focusing on their environmental performance.'[257] *Inter alia*, the Audit policy is used to confirm compliance with environmental regulations, evaluate environmental management systems effectiveness and or risk assessment from regulated and unregulated materials and practices.[258]

While the audit policy spells out a series of conditions for an organisation's eligibility for adoption, it is used by the government as a mechanism to encourage compliance. This is done by reducing penalties for non-compliance or outright violations of environmental regulation.[259] There is however no guarantee that the government will simply accept such audit reports without carrying out its independent supervision.[260] Proponents of the policy believe in its

[255] NESREA Act S 7 (l).
[256] European Commission 2018 (n 247).
[257] S Stafford, 'Voluntary self-policing and the US Audit Policy' in L Paddock, DL Markell and NS Bryner (eds), *Compliance and Enforcement of International Law* (5th edn, Edward Elgar Publishing 2016) 21.
[258] ibid.
[259] ibid 23.
[260] ibid 24.

effectiveness in encouraging compliance with environmental regulations while opponents consider it as detrimental since it removes the apprehension of financial penalty for non-compliance and removes the incentive to comply.[261] Stafford, however, further differentiates between *self-policing* and *self-reporting* in the sense that the former involves an entity notifying the authorities of its violation of environmental regulations, while the latter denotes an entity furnishing authorities with information about its activities that may not necessarily involve a violation.[262] Other countries practising the Audit Policy include Norway and Mexico.

The International Network for Environmental Compliance and Enforcement (INECE) has noted that most countries employ traditional environmental regulatory voluntary programmes and non-regulatory voluntary programmes as well as compliance promotions programmes to encourage compliance culture.[263] The difference is that the former is not mandatory while the latter embodies compliance assistance activities that encourage compliance. This is achieved through education and promotional activities and compliance incentive activities such as policies and programmes which provide benefits to entities that can achieve certain environmental compliance objectives.[264]

INECE further notes that some of the compliance assistance programmes include education and technical assistance where the regulated entity is given information about the regulatory requirements so that the concept, obligations, timelines and responsibilities are well understood.[265] This form of assistance is done through training and on-site technical assistance. Financial assistance is also a vital factor in environmental regulations compliance as the cost implication can be a hindrance to compliance ability. In this case, some international

[261] ibid 22.
[262] ibid.
[263] International Network for Environmental Compliance and Enforcement, *Principles of environmental compliance and enforcement handbook* (C Wasserman and J Gerardu eds, International Network for Environmental Compliance and Enforcement 2009) 134, 5.
[264] ibid.
[265] ibid.

organisations and national development aid agencies provide the needed funds to assist entities to achieve compliance.[266] Compliance incentives such as auditing policies (as discussed above),[267] recognition programs and public information all encourage compliance.[268] This can be seen in the monitoring powers of DPR. NOSDRA also carries the special function of surveillance, reporting and alerting regarding oil spillages as provided by the NOSDRA Act.[269]

These activities provide evidence and data for measuring environmental improvements. Compliance monitoring thrives on the principle that *first*, self-awareness and self-monitoring will guide regulated entities to take preventive measures to ensure compliance and *second*, a credible likelihood of detection by regulators is necessary for deterrence.[270]

The purpose of compliance assessment is *first*, to check compliance of regulated entities with relevant environmental legal requirements, including with directly applied regulations, conditions in permits or any other legal obligations that are applicable. *Second*, to monitor the impact of regulated entities on the environment to determine whether further regulatory effort is required (including more inspections, notices or permit variations) to secure compliance with environmental legal requirements.[271]

In the decision of what regulatory instrument or plan of action to adopt, the choice of an appropriate regulatory strategy must depend on a preliminary factor. It will depend on the justification for the intervention before the decision of which instrument to adopt or which to avoid can be made.[272] It is conceded that regardless of the existence of regulatory instruments, serious and pervasive corporate misdeeds persist and are often labelled as compliance

[266] Ibid 37.
[267] ibid 38.
[268] ibid 39.
[269] NOSDRA Act (n 109) S 7 (b).
[270] Iannuzzi (n 245) 5.
[271] C Theron, *Sustainability in Practice: Managing Compliance with Environmental and Human Rights Law in Organisations Sustainability in Practice* (Institute of Environmental Management and Assessment 2018) 222, 41.
[272] A Ogus, 'Regulatory Institutions and Structures' 73(4) Annals of Public and Cooperative Economics 627, 629.

failure.[273] This compliance failure in an organisation ideally activates a compliance process through compliance management of monitoring and assessment to query and evaluate this recorded compliance failure.[274] According to Root, this compliance management process covers prevention, detection, investigation and remediation and while they are distinct tasks, they can be activated simultaneously.[275]

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4.5.4 Non-compliance

Non-compliance includes a failure to implement substantive obligations such as reduction of Green House Gases, or a failure to fulfil procedural requirements such as carrying out an environmental impact assessment preparatory to a project or to fulfil institutional obligation such as filing a report with an international organisation. Non-compliance occurs when a

[273] V Root, 'The Compliance Process' (2019) 94 Indian Law Journal 203, 219.
[274] ibid 220.
[275] ibid 227 - 228.
[276] A Ogus, 'Regulatory Institutions and Structures' 73(4) Annals of Public and Cooperative Economics 627, 629.
[277] Root (n 273) 219.
[278] ibid 220.
[279] ibid 227 - 228.

regulated entity fails to meet one or more of these obligations.[280] Generally, non-compliance occurs for different reasons including lack of institutional, financial or human resources and knowledge of how obligations are construed.[281]

On the part of the regulated entity, however, non-compliance may happen for different reasons such as confusion as to the level of existing intergovernmental relationship, poor understanding of the rules and lack of receptibility and investment, opportunism, criminality and corruption, weak enforcement of environmental laws and lack of awareness of existing environmental laws.[282] Even when funding is available, local authorities sometimes lack human resources and know-how for compliance. Inadequate knowledge and access to data or unreliable data cause implementation problems in many regulated entities. This is further complicated by weak compliance assurance mechanisms such as enforcement mechanisms and compliance monitoring through effective and proportionate sanctions. Non-compliance raises challenges of implementation, enforcement and conflict resolution.[283]

While it has been noted that regulatory excellence is attainable, where appropriate regulatory strategies are applied by excellent regulators, it is argued that regulatory excellence in itself has no uniform definition.[284] Therefore, scholars have had to look at the attributes of an excellent regulator to distil the definition of regulatory excellence. For example, Metzenbaum and Vasisht noted that an excellent regulator is an adequately funded regulator that wisely

[280] T Higdon and D Zaelke, 'The Role of Compliance in the Rule of Law, Good Governance, and Sustainable Development' (2006) 3(5) Journal for European Environmental & Planning Law 376, 378.
[281] P Sands and others, *Principles of International Environmental Law* (Third Edition edn, Cambridge University Press 2012) 926, 135.
[282] PA Ogar and others, 'An Assessment of the Role of Enforcement in Promotion of Compliance to Environmental Standards in Ibadan Metropolis, Oyo State, Nigeria' (2020) 8(7) Global Scientific Journals 1741, 1743.
[283] Sands et all (n 281) 172
[284] C Nwapi, 'The Achievement of Regulatory Excellence in the Oil and Gas Industry in Nigeria: The 2017 National Oil and Gas Policy' (2019) Journal of Energy and Natural Resources Law 91, 99.

manages its resources and effectively navigates its external relationships to act even under difficult circumstances to further its mission.[285]

Regulatory agencies especially in Nigeria, appear to be powerless in the face of non-compliance for diverse reasons such as ineffective coordination among local, regional and national authorities, lack of administrative and human resources capacity and insufficient funding.[286] These prevent the authorities from preparing and implementing investment projects and can be an obstacle to the proper implementation of environmental laws. For example, the responsibilities of monitoring and enforcement of environmental laws are often spread among different authorities without sufficient coordination.[287] As the discussion on environmental regulations in Nigeria progresses in Part B, instances of non-compliance will be highlighted.

Second, Gunningham's model of compliance and enforcement leans toward a regulatory mix of cooperative and adversarial strategies where a compliance strategy is valuable to encourage and facilitate compliance while the enforcement strategy reminds regulated entities to review their compliance efforts is implemented by securing compliance with rules by regulated entities.[288] In this sense, the primary objective of a compliance system will be to repair while the primary objective of an enforcement system is retribution, thereby supporting the application of punishment for any harm done.

The dilemma of determining where and how to intervene in the affairs of regulated entities such as multinational oil companies lies in the fact that the parameters for effectively applying enforcement rules are largely hampered by problematic state of affairs such as inadequate legal sanctions and the fact that regulated entities have good economic motivation for non-

[285] SH Metzenbaum and G Vasisht, 'What Makes a Regulator Excellent? Mission, Funding, Information, and Judgment' in C Coglianese (ed), *Achieving Regulatory Excellence* (Brookings Institution Press 2017) 145, 145.
[286] AO Noah and others, 'Corporate Environmental Accountability in Nigeria: An Example of Regulatory Failure and Regulatory Capture' (2020) 11(1) Journal of Accounting in Emerging Economies 70, 85.
[287] This is evident in the enforcement powers scattered among different regulatory authorities in Nigeria such as NESREA, NOSDRA and DPR etc.
[288] Gunningham (n 124) 141.

compliance.[289] It is argued that while this stand does not discount the place of enforcement in environmental regulation, it presents a nuanced picture that recognises the importance of environmental regulation with the flavour of both compliance and enforcement.[290] This is evident in the discussions in **section 3.2 of this chapter** when in defining compliance, the act of enforcement is included as part of the process of securing compliance[291] and in defining enforcement, 'compelling observance or compliance with a law, rule or obligation' is referred to as enforcement.[292]

Forth, the various regulatory strategies wherein relevant theories of institutionalisation have been applied successfully also show that where an organisation internalises the norms, standards and policies in its compliance efforts and maintains this path, compliance will be promoted and sustained during its operations. The changes brought about by compliance efforts can be seen in the evolution, accidents and design experienced by an organisation to achieve its regulatory aims.[293] It is conceded that compliance and enforcement mechanisms at the international and national levels are similar but the effects vary largely because of the enforcement policies. However, the literature on the various regulatory strategies suggests that there is no one-size-fits-all approach to the regulation as the various strategies display both strengths and weaknesses in the response of the organisations to its application.[294]

4.6 Conclusion

It has been noted that the rules and deterrence regulatory strategy is often combined with different regulatory strategies to secure the most effective forms of environmental

[289] K Hawkins, 'Bargain and Bluff: Compliance Strategy and Deterrence in the Enforcement of Regulation' (1983) 5(1) Law and Policy Quarterly 35, 37.
[290] ibid 39. However, enforcement is resorted to when all else fails.
[291] T Amodu, *The Determinants of Compliance with Laws and Regulations with Special Reference to Health and Safety* (London School of Economics and Political Science for the Health and Safety Executive RR638, 2008) 1 <http://www.hse.gov.uk/research/rrpdf/rr638.pdf> accessed 19 February 2018.
[292] *Oxford Dictionary of English* (3rd Revised edn, Oxford University Press 2010) 2112.
[293] B Waterhout, *The Institutionalisation of European Spatial Planning* (IOS Press 2008) 229, 18.
[294] ibid 4.

regulation.[295] However, the decision of what regulatory strategies to combine and implement is dependent on the context and the complexity of the environmental problems sought to be addressed. This is because there are many variables including the option to do nothing, and it will not make any academic sense to generalise about what and when a particular strategy or combination of strategies is likely to succeed or fail. As Gunningham posited, 'an excellent regulator must invoke different tools and strategies to engage effectively with different *sectors* and different circumstances to the extent that they have the statutory powers to do so.[296] The problems of the different regulatory strategies can be overcome by building on their strengths while compensating for their weaknesses because regulated entities have a variety of motivations and capabilities that speak to their decision to comply or not.[297] The fact that the socio-economic and political construct of each jurisdiction differs also plays a vital role in the compliance and enforcement outcomes.

[295] Gunningham (n 197) 13.
[296] Gunningham (n 197) 13. The many dependent variables can also include external pressures, skills, capabilities and motivation of regulated organisations as such the characteristics of the regulated organisation and the resources available to the regulator will play a big role nature of their relationship with each other.
[297] N Gunningham (n 124) 120.

CHAPTER 5

Barriers to the institutionalisation of the values that support compliance and enforcement

Introduction

Presently, several environmental protection laws exist either in general environmental instruments or in sector-specific laws aimed at the regulation of the petroleum sector and the environment in Nigeria.[1] There is not one single legal instrument that contains all the environmental and petroleum sector laws in Nigeria, the laws are scattered across different legal instruments.[2] This has made it difficult to monitor which law applies in any given situation and what agency is responsible for the implementation of these laws. This drawback raised some barriers to the institutionalisation of the necessary values that support compliance and enforcement and has in some cases, occasioned non-compliance from the operators of the petroleum sector. **Section 5.1** unravels the motivation for compliance or non-compliance with environmental regulation. This paves the way for the analyses of these barriers in **section 5.2**. These barriers fall into the categories of *legal, non-legal* and *institutional barriers*. Flowing from the barriers discussed, **section 5.3** analyses the environmental rule of law and the general attitude to the rule of law by both the regulator and regulated entities while highlighting the cost of environmental non-compliance in **section 5.4**. The chapter concludes by evaluating the barriers hindering compliance and enforcement in **section 5.5.**

In considering the barriers faced by the petroleum sector actors in their bid to reach compliance and enforcement decisions, it is imperative to investigate why regulated entities decide to

[1] NL Usman, 'Environmental Regulation in the Nigerian Mining Industry: Past, Present and Future' (2001) 19(3) Journal of Energy & Natural Resources Law 230, 231.

[2] This is evidenced in the number of legal instruments that carry environmental regulation provisions in the Nigerian legislative system. Examples of some of these legal instruments are Petroleum Act, Oil Minerals Act, Oil in Navigable Waters Act, Associated Gas Re-Injection Act, National Oil Spill Detection and Response Act, National Environmental Standards Regulation and Enforcement Agency Act etc.

comply or not comply with environmental laws.[3] In Nigeria, it is a settled fact that the activities of the petroleum sector have heavily impacted the human and natural environment because petroleum operations account for most of the environmental damage in Nigeria presently.[4] An organising assumption of environmental law is that the sector (in this case, the petroleum sector) is the primary agent of environmental harm because businesses will aim to keep operating costs as low as possible, placing commercial targets above environmental protection values.[5] In Ogoni land, for instance, the human and natural environment suffered from actions preparatory and ancillary to petroleum production even before the actual exploration commenced.[6] Some of these actions include land survey and clearance for seismic lines, the establishment of seismic and drilling camps, and relocation of existing settlements for infrastructure construction purposes,[7] drilling for oil regardless of discovery, site preparation and actual drilling for oil that is susceptible to spills during production and transportation or equipment failure.[8] It is argued that effective regulation of petroleum operations will undoubtedly effectively manage the impact of such operations on the environment.

5.1 To comply or not to comply

Compliance establishes the minimum standard to operate legally,[9] therefore petroleum sector operators, especially on the business side, spend some percentage of their funds on programmes

[3] In the context of this thesis, regulated entities refer to corporate bodies which the environmental laws target and envisage to regulate such as companies involved in the operations of the petroleum sector and allied businesses in the upstream, midstream and downstream sectors. In other words, regulated entities, operators and oil companies are used interchangeably in this thesis and refer to the same thing.
[4] KSA Ebeku, 'Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria' (2003) 12(2) Review of European, Comparative and International Environmental Law 199, 200.
[5] K Hawkins, 'Enforcing Regulation: Robert Kagan's Contribution - And Some Questions' (2013) 38(4) Law & Social Inquiry 950, 958.
[6] United Nations Environment Programme, 'Environmental Assessment of Ogoniland' (2011) 24 <https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf> accessed 6 July 2019.
[7] For example, the relocation of Finima Town in Bonny Local Government Area of Rivers State, Nigeria for the the purpose of building the Nigeria Liquified Natural Gas industrial and residential areas in 1992.
[8] United Nations Environment Programme, 'Environmental Assessment of Ogoniland (n 6).
[9] T Cory and MR Green, 'Cost of Environmental Non-Compliance' (2017) <https://www.envstd.com/the-cost-of-environmental-non-compliance/> accessed 8 July 2019.

that are intended to improve the perception of the public, of their environmental protection effort. However, in other business sectors, operators are reluctant to increase their expenditure on environmental protection programmes, as they believe it is negatively affecting the profitability of their business operations.[10] This preference for the sustenance of profits has come under analysis because the sanctions levied against such operators when they are found to have violated environmental laws could come at a high cost[11] and impact the cost of doing business.[12] There is a dilemma on whether or not to increase environmental expenditure (e.g. funds set aside to deal with environmental emergencies) and jeopardise their return on investment.[13] A solution to this could be an increase in the operator's investment in research and development of sustainable ways of doing business with a less negative impact on the environment that will require more environmental expenditure.[14]

In Nigeria, it has been opined that this investment in research and development could produce better ideas and options of compliance models for better service delivery because the growing literature on environmental damage in Nigeria[15] tells the story of dissatisfaction with the current level of compliance and enforcement in the petroleum sector. However, not all petroleum sector operators experience this problem. It is argued that regulated entities involved in operations that are likely to impact the environment comply or do not comply with

[10] ibid.
[11] Usman (n 1) 232.
[12] See generally, N Gunningham, RA Kagan and D Thornton, *Shades of Green: Business, Regulation, and Environment* (Stanford University Press 2003) 210; L Axelrad and RA Kagan, *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism* (RA Kagan and L Axelrad eds, University of California Press 2000) 438.
[13] W Xiao and others, 'Investment in Environmental Process Improvement' (2019) 28(2) Production and Operations Management 407.
[14] TH Kim and B Kim, 'Firm's Environmental Expenditure, R&D Intensity, and Profitability' (2018) 10(6) Sustainability MPDI 1, 9.
[15] SI Omofonmwan and G Osa-Edoh, 'The Challenges of Environmental Problems in Nigeria' (2008) 23(1) Journal of Human Ecology 53; CT Isife, 'Environmental Problems in Nigeria - A Review' (2012) 4(1 & 2) Sustainable Human Development Review 21, 30; B Adebayo, 'Major New Inquiry into Oil Spills in Nigeria's Niger Delta Launched' (2019) <https://edition.cnn.com/2019/03/26/africa/nigeria-oil-spill-inquiry-intl/index.html> accessed March 16 2020.

environmental legislation, policies or standards for different reasons.[16] In other words, compliance behaviour is more complex, subtle and suffused with ambiguity in relation to legal instruments.[17] Understanding the drivers of compliance and non-compliance with laws regulating the petroleum sector can help regulators act in ways that can ultimately promote effective regulation of the petroleum sector.[18] Some of the motivation for compliance and factors that encourage non-compliance form part of the discussion in the following sections.

5.1.1 Compliance motivation

The motivation for compliance with environmental laws, policies and standards, vary with different regulated entities depending on the size and volume of their business. The level of compliance falls into three categories. Some operators just do enough to meet the regulatory standards; others go over and beyond while others do less.[19] Regardless of the motivation for the compliance decision, compliance always falls into these categories. Regulated entities may comply with environmental regulations for fear of detection and subsequent sanction or because they feel a civic duty to comply or feel social pressure to comply. However, these reasons for compliance are subject to the regulated entity's willingness and ability to comply.[20]

Scholarly literature has debated whether deterrence works in achieving compliance. While some scholars maintain that, the severity and certainty of punishment do not affect compliance

[16] E Ostrovskaya and J Leentvaar. 'Enhancing Compliance with Environmental Laws in Developing Countries: Can Better Enforcement Strategies Help?' (9th INECE International Network for Environmental Compliance and Enforcement Conference British Columbia, Canada 20 June 2011) 1, 7.
[17] Hawkins (n 5) 960.
[18] International Network for Environmental Compliance and Enforcement, *Principles of Environmental Compliance and Enforcement Handbook* (C Wasserman and J Gerardu eds, International Network for Environmental Compliance and Enforcement 2009) 124, 19.
[19] J Wu, 'Environmental Compliance: The Good, the Bad, and the Super Green' (2009) 90 (11) Journal of Environmental Management 3363, 3363. In a study conducted on 411 Oregon facilities, 55.2% of the facilities indicated that they over-complied by at least one standard while 5.8% indicated that they had violated at least one standard regarding their 2004 compliance level with regulatory standards on water pollution, solid and hazardous wastes, and hazardous air emissions in a survey.
[20] RA Kagan, N Gunningham and D Thornton, 'Explaining Corporate Environmental Performance: How Does Regulation Matter?' (2003) 37(1) Law & Society Review 51, 52.

decisions,[21] others have canvassed the limited effect of deterrence on compliance behaviour especially when compliance cost is low.[22] However, another dimension to this debate maintains that insensitivity to punishment is limited but only to some aspects of deterrence to the extent that the probability of detection is ranked above the severity of the sanction.[23] Pratt and Turanovic opined that the celerity or the promptness of sanction upon violation of a regulation and detection of the violation makes the deterrent effect more useful and just and produces more compliance behaviour.[24] Winter and May,[25] offer explanations as to what motivates compliance behaviour.[26] They noted that compliance does not just occur but is usually motivated by some factors which are described as[27] normative and social motivations, knowledge of the rules, ability to comply with rules and the capacity to comply with the rules. Peterson and Diss-Torrence agree on these types of motivation for compliance.[28] In this debate, however, the fact remains that deterrence still plays a role in the decision to comply or not to comply.

It has been opined that some other factors influence the decision to comply with or violate environmental laws.[29] Such factors include market forces, regulatory pressure and personal values and beliefs of upper management towards environmental stewardship.[30] In some cases,

[21] PH Robinson and JM Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2002) 24(2) Oxford Journal of Legal Studies 173, 205.
[22] D Thornton, NA Gunningham and RA Kagan, 'General Deterrence and Corporate Environmental Behavior' (2005) 27(2) Law & Policy 262, 275, 282; J Braithwaite and T Makkai, 'Testing an Expected Utility Model of Corporate' (1991) 25 (1) Law and Society Review 7.
[23] Robinson and Darley (n 21) 183.
[24] TC Pratt and JJ Turanovic, 'Celerity and Deterrence' in DS Nagin, FT Cullen and CL Jonson (eds), *Deterrence, Choice, and Crime: Contemporary Perspectives* (Routledge 2018) 24, 25.
[25] SC Winter and PJ May, 'Motivation for Compliance with Environmental Regulations' (2001) 20 (4) Journal for Policy Analysis and Management 675.
[26] ibid.
[27] ibid at 676, 677, 678, 679, 680.
[28] K Peterson and A Diss-Torrance, 'Motivation for compliance with environmental regulations related to forest health' (2012) 112 Journal of Environmental Management 104, 106.
[29] K Murphy and others, 'Why People Comply with COVID-19 Social Distancing Restrictions: Self-interest or Duty?' (2020) Australian & New Zealand Journal of Criminology 1, 3; B Pavlikova, L Freel and JP van Dijk, 'To Comply or Not to Comply: Roma Approach to Health Laws' (2020) 17(9) International Journal of Environmental Research and Public Health 3087, 3090.
[30] J Wu and TM Wirkkala, 'Firms' Motivations for Environmental Overcompliance' (2009) 5(1) Review of Law and Economics 399, 401.

the decision to comply has been seen as a business decision or overall business strategy. For example, the business strategy could be for influencing the government to formulate regulatory policies that could be easy for a select few to comply with while shutting out other businesses for inability to comply thereby giving the select few a competitive advantage over others.[31] Another example would be when government policy is formulated to allow the participation of companies that possess certification in certain standards for petroleum sector operations like offshore oil drilling.[32] Where such certification is expensive to acquire, only big companies with a solid finance base can achieve such certifications. Such government policy will effectively shut out other financially less fortunate companies from participating in operations requiring such certification standards.[33]

In some quarters, compliance can be unintentional and occasioned by technological advancement and innovation adopted in the business model of the regulated entity.[34] Regulated entities can also comply with environmental regulations to appeal to environmentally conscious consumers who are willing to patronise entities that incorporate green practices in their operations.[35] Other regulated entities or companies that are more mindful about their reputation comply with environmental regulations to pre-empt stricter regulations in the future and gain a competitive advantage over other regulated entities. Such companies that are mindful of their reputation make compliance decisions when liability threats and pressure

[31] E Galdeano-Gómez, J Céspedes-Lorente and J Martínez-del-Río, 'Environmental Performance and Spillover Effects on Productivity: Evidence from Horticultural Firms' (2008) 88 (4) Journal of Environmental Management 1552, 1555.
[32] Oil and gas pipelines regulations made pursuant to the Petroleum Act Cap P10 Laws of the Federation of Nigeria 2010.
[33] Department of Petroleum Resources, *Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)* (Department of Petroleum Resources (DPR) Lagos, Nigeria 1991) 313, 3, 44, 61, 71, 110, 120. The guidelines stipulate specifications for exploration and development operations, production operations, terminal operations, hydrocarbon processing operations, Oil and gas transportation specification, marketing operations and standardisation of environmental abatement procedures.
[34] WE Oates, PR Portney and AM McGartland, 'The Net Benefits of Incentive-Based Regulation: A Case Study of Environmental Standard Setting' (1989) 79(5) American Economic Review 1233.
[35] Wu (n 19) 3364.

mounts from environmental activists and other concerned bodies.[36] For example, companies that are involved in the downstream petroleum sector with direct contact with consumers are mindful of the purity of the final petroleum products sold to the consumers.[37] Animura notes that the response to the threat of liability and pressure to comply is different when the violation is likely to attract extensive media coverage. Therefore, the threat of bad press may deter the regulated entity from violating environmental regulations but may not motivate it to comply.[38]

Winter and May suggest that three types of compliance motivation – i.e. calculated, normative and social compliance motivation encourage regulated entities to make pro-environment compliance decisions[39] as confirmed by Peterson and Diss-Torrance.[40] Feldman suggests five other motivations for compliance. These are incentive-driven, reason-driven, socially-oriented, morality-oriented and citizenship-oriented motivation.[41] For this discussion, the various types of compliance motivation will be discussed together especially as some are offshoots of others and they re-enforce and support each other.

i. Calculated motivation

Regulated entities that are motivated under this head are those that conclude that the benefits of compliance, including avoiding sanctions, exceed the cost of compliance including the options to comply or not to comply.[42] For example, the occurrence of natural gas in association

[36] WRQ Anton, G Deltas and M Khanna, 'Incentives for Environmental Self-Regulation and Implications for Environmental Performance' (2004) 48(1) Journal Environmental Economics and Management 632, 636.
[37] Some of these operators include those involved in the distribution of petroleum products.
[38] TH Arimura, A Hibiki and H Katayama, 'Is a Voluntary Approach an Effective Environmental Policy Instrument? A Case for Environmental Management Systems' (2008) 55(3) Journal of Environmental Economics and Management 281, 282.
[39] Winter and May (n 25) 676.
[40] Peterson and Diss-Torrance (n 28) 106.
[41] Y Feldman, 'Five Models of Regulatory Compliance Motivation: Empirical Findings and Normative Implications' in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar Publishing 2011) 335.
[42] Winter and May (n 25) 676; GS Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 The Journal of Political Economy 169, 178.

with crude oil when it is extracted is prevalent in the upstream petroleum sector in Nigeria.[43] The natural gas is flared largely because alternative disposal methods are more expensive than the penalty payable for flaring the gas[44] hence this informs the decision of the operator to flare gas.[45] While some literature claims that the consideration for the likelihood of detection and the possibility of sanctions go together in shaping the compliance decision of a regulated entity, it is not always the case.[46] The perceived risk of detection is ranked more important than the likelihood and severity of sanctions in the shaping of the motivation for reaching a compliance decision.[47] This motivation is similar to the incentive-driven motivation as it is based on a cost-benefit calculation where the regulator focuses on deterring the violators and provides incentives to the compliant regulatees.[48]

ii. ***Normative motivation***

This type of motivation also referred to as internal or intrinsic motivation is supported by internalised values, based on one's sense of moral obligation to comply with a given regulation.[49] Under this motivation, regulated entities comply with the law based on two related sets of considerations. *First,* the general moral principles that encompass the sense of civic duty to comply with laws and conform to general ideological values. *Second,* a set of

[43] N Anosike, A El-Suleiman and P Pilidis, 'Associated Gas Utilization Using Gas Turbine Engine, Performance Implication—Nigerian Case Study' (2016) 8(3) Energy and Power Engineering 137, 137.
[44] Regulation 13 (1) and (2) of the Flare Gas (Prevention of Waste and Pollution) Regulation 2018 made pursuant to the powers of the Minister for Petroleum Resources to make regulation in s 5 of the Associated Gas Re-Injection Act Cap A26 Laws of the Federation of Nigeria 2004. See A Okoye, 'Tax-deductible Flare Gas Penalty Payments in Nigeria: Context, Responsibilities and Judicial Interpretation' (2020) Journal of Energy & Natural Resources Law 1, 5.
[45] EO Obanijesu and others, 'Air-borne SO2 Pollution Monitoring in the Upstream Petroleum Operation Areas of Niger-Delta, Nigeria' (2009) 31(3) Energy Sources, Part A 223, 224.
[46] WB Gray and JT Scholz, 'Analyzing the Equity and Efficiency of OSHA Enforcement' (1991) 13 Law & Policy 185, 199; RJ Burby, PJ May and RC Paterson, 'Improving Compliance with Regulations: Choices and Outcomes for Local Government' (1998) 64(3) Journal of American Planning Association 324.
[47] Peterson and Diss-Torrance (n 28) 105.
[48] Feldman (n 41) 335.
[49] X Zhao and Y Qi, 'Why Do Firms Obey?: The State of Regulatory Compliance Research in China' (2020) 25(2) Journal of Chinese Political Science 339, 340; VL Nielsen and C Parker, 'Mixed Motives: Economic, Social, and Normative Motivations in Business Compliance' (2012) 34 (4) Law & Policy 428, 433.

considerations that encompasses the evaluation of rule appropriateness or value of regulation.[50] In this consideration, acceptance and consequent obedience of the law is dependent on the reasonableness of the law, style of implementation, the extent of compliance by other regulated entities and fairness of regulators in the application of enforcement.[51] The petroleum sector in Nigeria plays host to several foreign companies from developed countries such as Shell, Total, Mobil, Agip, Chevron etc.[52] Such companies operate within established environmental laws out of a sense of civic duty and value placed on laws in their home states.[53] Unfortunately, when such companies do business in less developed jurisdictions, the narrative changes.[54] For example, the conduct of Shell Petroleum Development Company in Ogoni land in southern Nigeria is manifestly different from what is obtainable in their country of origin. This has also been the experience in the conduct of Vedanta Resources Plc in Zambia[55] and Vedanta Aluminium Ltd in India.[56]

iii. ***Social motivation***

Social motivation is predicated upon the desire of a regulated entity to earn the approval and respect of the direct recipients of the impact of their actions in the particular sector.[57] This motivation may be borne out of social pressure from other regulated entities, trade associations, external advocacy groups, victims, media and NGOs.[58] For example, the Institute of Public and

[50] Peterson and Diss-Torrance (n 28) 106.
[51] Winter and May (n 25) 678.
[52] O Odera and others, 'Corporate Social Responsibility Reporting of International Oil Companies in Nigeria' (2020) 36(1) International Journal of Ethics and Systems 131, 136.
[53] M Charles and PL Billon, 'Corporate Accountability and Diplomatic Liability in Overseas Extractive Projects' (2021) 8 The Extractive Industries and Society 467, 475.
[54] Business and Human Rights Resource Centre. 'Find Companies' (2020) <https://www.business-humanrights.org/en/find-companies> accessed 14 August 2020.
[55] CT Brown, 'Will Remediation Ever Be Enough? The Environmental Pollution Tragedy' (2019) 5(2) International Journal of Law 28, 29; E Blanco, 'Vedanta, A long Awaited Landmark in Extra-territorial Tort Litigation Against Parent Companies: Reflections on Jurisdiction' (2019) 16(1) Manchester Journal of International Economic Law 101.
[56] LA Kaushal, 'A Case Study on Vedanta Alumina Ltd (VAL) Orissa India: State and FDI versus Democracy?' (2017) 8(22) Valahian Journal of Economic Studies 107, 109.
[57] VL Nielsen and C Parker, 'Mixed Motives: Economic, Social, and Normative Motivations in Business Compliance' (2012) 34 (4) Law & Policy 428, 432.
[58] Peterson and Diss-Torrance (n 28)106.

Environmental Affairs, a Chinese activist group, maintains an air and water pollution database of factory environmental violations in China.[59] This database is used as evidence to show that suppliers of big brands are polluting rivers and the air in China. Buyers of big brand products such as Nike, Apple etc respond to social and environmental violations of their suppliers by imposing sanctions on their businesses such as fines, reduction of businesses and contract termination.[60]

Some petroleum sector operators in Nigeria face pressure from host communities and interested third parties to act on their obligation to the host communities while carrying on operations in the area.[61] In this case, when any level of compliance is recorded, it is usually in response to the social pressure on the operators and not out of any sense of duty.[62] Some operators come under pressure from their shareholders to maintain a good corporate image in environmental protection matters.[63] It is pertinent to note that while compliance may be achieved as a result of this motivation, it will only be to the extent of securing validation and respect of the target audience without creating an internalised value or sense of public duty to comply.[64]

iv. ***Reason-driven motivation***

This type of motivation proposes that regulated entities look to regulators to ascertain the wisdom of complying with regulation while abstaining from violation.[65] The attention of the regulator in framing the regulation is focused on the understanding of the regulation, therefore,

[59] Y Sun and W Yan, 'The Power of Data from the Global South: Environmental Civic Tech and Data Activism in China' (2020) 14 International Journal of Communication 2144, 2145.
[60] AH Porteous, SV Rammohan and HL Lee, 'Carrots or sticks? Improving Social and Environmental Compliance at Suppliers Through Incentives and Penalties' (2015) 24(9) Production and Operations Management 1402, 1405.
[61] JI Uduji and EN Okolo-Obasi, 'Multinational Oil Firms' CSR Initiatives in Nigeria: The Need of Rural Farmers in Host Communities' (2017) 29(3) Journal of International Development 308, 312.
[62] For example, when companies like Shell Petroleum Development Company, Mobil, Agip, Chevron comply with Nigerian Oil and Gas Industry Content Development Act Cap 125, Laws of the Federation of Nigeria 2010.
[63] Usman (n 1) 231.
[64] J Tyran and LP Feld, 'Achieving Compliance when Legal Sanctions are Non-Deterrent' (2006) 108(1) Scandinavian Journal of Economics 135. In their opinion, law backed by sanctions has not always produced compliance, rather, law backed by non-deterrent sanctions has achieved compliance because it creates normative commitment in the regulated entity.
[65] Feldman (n 41) 338.

the regulation aggregates knowledge to communicate the wisdom of the regulation, which prompts the regulated entity to make a positive compliance decision.[66] For example, non-compliance with the provisions of the Associated Gas Re-injection Act[67] has for so many years been occasioned because the operators do not see the rationale in spending much money to achieve the reinjection process to re-inject unutilised gas and rather pay the statutory taxes and fines to flare the gas instead.[68] This is because the rationale for compliance has not been effectively communicated by the regulator.

v. ***Socially-oriented motivation***

This motivation assumes that compliance motivation is tied to the social identity of the regulated entity where compliance decisions are made based on the regulated entity's expectation that others would make the same decision.[69] This expectation could be because the regulated entity believes that similar regulated entities share the same commitment to the regulation to maintain their commitment to society. Here the focus is on the aversion to being the only one that complies with the regulation.[70] An example of this is seen in the formation of the Clean Nigeria Associates (CNA) a non-profit group and a co-operative of fifteen oil-producing companies formed to increase awareness of the need to have a better and cleaner environment. The objectives of the group are to promote the science of protecting, preserving and restoring the environment after oil spills.[71] Another example of this type of motivation is seen in the impact of the fashion industry on the environment. This impact prompted the founding of several global sustainability campaigns mobilising companies across the fashion

[66] Kagan, Gunningham and Thornton (n 20) 57.
[67] Associated Gas Re-injection Act Cap A25 Laws of the Federation of Nigeria 2004.
[68] ET Aniche, 'An Assessment of the Role of Nigerian State in Enforcing Zero-Gas Flare Regime, 1979-2012: The Imperatives of Environmental Diplomacy' (2015) 7(12) Civil and Environmental Research 29, 33.
[69] Feldman (n 41) 338.
[70] DM Kahan, 'The Logic of Reciprocity: Trust, Collective Action, and Law' (2004) 102(1) Michigan Law Review 71, 73.
[71] Clean Nigeria Associates (CNA), 'Member Companies' (2018) <https://www.cleannigeria.org/about/member-companies> accessed 3 August 2020.

industry towards adopting sustainable materials and practices through their designs, development and supply chains.[72] Some notable global campaigns include the "2020 Circular Fashion System Commitment," introduced by the Global Fashion Agenda and the "Sustainable Clothing Action Plan (SCAP) 2020 Commitment," introduced by the Waste and Resources Action Programme (WRAP).[73]

vi. ***Citizens-oriented and morally-oriented motivation***

This is when regulated entities make positive compliance decisions because the law is made by the sovereign authority of the jurisdiction, which is entitled to create such regulations, regardless of the content of the law.[74] It is contended here that this may not be a good motivation for compliance because it may not create any commitment on the part of the regulated entity. Morality and fairness underpin the *morality-oriented motivation* where a regulated entity focuses on the harm that will be prevented by making a positive compliance decision regarding regulations and this motivation sometimes overtakes self-interest.[75] This research did not reveal the application of these types of motivation.

5.1.2 Factors discouraging compliance

As noted earlier, various reasons are responsible for a regulated entity's decision to comply or not to comply with environmental regulations.[76] This decision varies from one entity to another and while some are objectively held, others are not. Flowing from the discussions on the motivation for compliance with environmental laws, this section considers a few reasons why

[72] JX Wu and L Li, 'Sustainability Initiatives in the Fashion Industry', *Fashion Industry* (IntechOpen 2019) 1, 4.
[73] ibid 5.
[74] Feldman (n 41) 338.
[75] E Fehr and KM Schmidt, 'A Theory of Fairness, Competition, and Cooperation' (1999) 114(3) The Quarterly Journal of Economics 817, 819.
[76] See **section 4.1.1** of **Chapter 4** of this thesis. Where it was argued that an organisation can also be construed as a wide concept that includes formal and informal entities. This is in line with the concept of institutions because institutions are organisations, and these are made up of individuals departments, groups and businesses just like government agencies, companies, NGOs and interested groups. See also **section 4.3.1** above.

some regulated entities do not comply. It is important to point out that sometimes the reasons for non-compliance can stem from the motivation for compliance.

One of the reasons why organisations decide not to comply with environmental laws is because the penalty for violation of a particular law is less than the cost of compliance.[77] The regulated entity assesses the cost of anticipated detection and severity of punishment upon detection against the cost of compliance in its decision to comply or not.[78] It has been noted that this assessment is inadequate to fully explain the decision to comply or not because it ignores the human moral emotions and willingness to comply with a law.[79] Minor violations may flourish due to the enforcement regime applicable in a given jurisdiction while serious violations, which may be few and far apart, are often subjected to threats of harsh punishment.[80] For example, in Nigeria, different oil companies are responsible for different aspects of petroleum operations in the petroleum sector. For instance, where oil company A spills ten barrels of crude oil at the point of extraction and oil company B spills three barrels of crude oil at the point of transportation and all these flow into the rivers destroying the ecosystem, the regulatory agencies may not deem these spills as severe enough to deploy their already stretched resources, hence the build-up of such minor violations.[81] This is compared to when hundreds of barrels of oil are spilt from an oil well blow-out.

[77] Wu (n 19) 3364.
[78] JP Shimshack and MB Ward, 'Regulator Reputation, Enforcement, and Environmental Compliance' (2005) 50(3) Journal of Environmental Economics and Management 519, 528-529.
[79] RA Kagan, N Gunningham and D Thornton, 'Fear, Duty, and Regulatory Compliance: Lessons from Three Research Projects' in C Parker and VL Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar Northampton, MA 2011) 37.
[80] S Rousseau, 'The Impact of Sanctions and Inspections on Firms' Environmental Compliance Decisions' (2008) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1114020> accessed 16 May 2019.
[81] Some of the companies responsible for oil spills in Nigeria include, Shell Petroleum Development Company Limited (SPDC), Chevron Nigeria Limited, Heritage Energy Operational Services Limited, SEPLAT Petroleum Development Company Limited, Eronton Exploration and Production Limited, Nigeria Agip Oil Company, Pipelines and Products Marketing Company etc. Source www.oilspillmonitor.ng

Another reason for non-compliance can be the lack of ability to comply.[82] The ability to comply encompasses the awareness of the law to be complied with and the capacity to comply. It is not enough for the law to be in existence, the law must be brought to the awareness of the company so that compliance becomes a viable option that enables the company to remain in business.[83] For example, the law should not be dependent only on what is technologically and economically feasible but also on available alternative options within a reasonable time.[84] These reasons impact compliance to the extent that compliance decisions are made without considering the ultimate benefit it would have on the environment but rather on the immediate perception and position of the regulated entity.

It is imperative to understand the motivation for compliance and reasons for non-compliance to facilitate the development of a policy to encourage more compliance while reducing non-compliance. This is because voluntary environmental management has been touted as a powerful remedy or alternative to the command-and-control approach of enforcement.[85] It has been mooted that in an ideal world, regulated entities respect environmental laws not out of fear of sanctions, not to receive public support, and appear greener to patrons, rather it should be because companies can gain commercial advantage in ensuring and demonstrating good environmental performance that not only respects the threshold of legislation but also goes beyond the required minimum.[86]

[82] A Lähteenmäki-Uutela and others, 'What explains SECA compliance: Rational Calculation or Moral Judgment?' (2019) 18 (1) WMU Journal of Maritime Affairs 61, 62.
[83] A Nollkaemper, 'Legal Implications of the Obligation to Apply the Best Available Technology' (1993) 26 (5) Marine Pollution Bulletin 236, 238.
[84] ibid.
[85] Wu (n 19) 3363.
[86] A Aragao, 'Environmental Compliance: Opportunities abd Challenges to Ensure Greener Business Performance, Real and Non-Symbolic', *Compliance and Sustainability: Brazilian and Portuguese Perspective* (University of Coimbra Institute for Legal Research 2020) 21, 23.

5.2 Barriers to the Institutionalisation of Values that Support Compliance and Enforcement

The existence of environmental protection laws regulating petroleum operations has not guaranteed the safety of the Nigerian natural and human environment.[87] It is contended here that this may be connected to the fact that most of the environmental laws in Nigeria were made out of exigencies and not because they were properly planned.[88] Identifying and addressing these challenges will help to improve effective compliance and enforcement.[89]

Some scholars have classified the factors that affect compliance and enforcement as legal, non-legal, substantive or procedural factors.[90] Others have added the inadequacy of the environmental laws, the inefficiency of the environmental regulatory agencies to the list of militating factors.[91] The non-legal factors centre around corruption, lack of political will to implement environmental laws, overwhelming dependence on the petroleum sector for income generation to the detriment of other viable sectors of the economy, poor resource allocation, and political interference with the operations of the regulatory agencies, outdated enforcement equipment and poor communication between regulatory agencies leading to role conflicts.[92] Other factors are lack of access to information, lack of public participation in the enforcement process and lack of access to administrative and judicial remedies in environmental matters.[93]

[87] A Nabegu, AB Mustapha and AI Naibbi, 'Environmental Regulations in Nigeria: A Mini Review' (2017) 1(5) International Journal of Environmental Sciences and Natural Resources 1, 2.
[88] A Ogunba, 'An appraisal of the evolution of environmental legislation in Nigeria' (2016) 40(3) Vermont law review 673, 685.
[89] AC Salihu and others, 'Analysis of the Factors Affecting Facilities Compliance to Environmental Regulations in Minna–Niger State, Nigeria' (2016) 45(2) World Scientific News 174, 175.
[90] See for example A Ambituuni, J Amezaga and E Emeseh, 'Analysis of Safety and Environmental Regulations for Downstream Petroleum Industry Operations in Nigeria: Problems and Prospects' (2014) 9 Environmental Law Development 43, 20; MA Polinsky and S Shavell, 'The Economic Theory of Public Enforcement of Law' (2000) 36 Journal of Economic Literature 45.
[91] H Ijaiya and OT Joseph, 'Rethinking Environmental Law Enforcement in Nigeria' (2014) 5 Beijing Law Review 306.
[92] ibid 316.
[93] O Fagbohun, 'Jurisdiction of Nigerian Courts in Environmental Matters: a Note on Shell v Abel Isiah' (2006) 24 (2) Journal of Energy & Natural Resources Law 209, 210.

The legal barriers discuss the various challenges arising out of the existing environmental legislation and policies and judicial pronouncements. While the non-legal barriers discuss social, economic, political challenges as well as institutional barriers. While examining existing literature, these barriers have been blamed for the steady decline of compliance and enforcement.[94] An understanding of these barriers will help to assess whether the existing regulatory regime adequately equips the regulatory agencies to enforce the laws.

5.2.1 Legal barriers

In Nigeria, environmental laws have evolved in the last three decades.[95] The legal factors affecting compliance and enforcement of environmental regulations have been seen in the very instruments that were enacted to regulate the petroleum sector. The legal factors discussed below include conflicting legislative provisions, unenforceable legislative provisions and judicial pronouncements, vague legislative provisions and non-deterrent sanctions within the environmental legislation and policy statements.

i. Conflicting legislative provisions

Conflicts in the provisions of environmental laws and their consequent interpretation by the regulated entities and the regulatory agencies often creates a confusion as to which part of the law to follow or which interpretation of it to adopt for compliance and enforcement. Concerning the non-justiciability of the Constitutional provisions, it is provided in s 20 of the Constitution of the Federal Republic of Nigeria (CFRN)[96] that the 'State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of

[94] OC Eneh, 'Managing Nigeria's Environment: The Unresolved Issues' (2011) 4(3) Journal of Environmental Science and Technology 250; AC Salihu and others, 'Analysis of the Factors Affecting Facilities Compliance to Environmental Regulations in Minna–Niger State, Nigeria' (2016) 45(2) World Scientific News 174, 182; MT Ladan, 'Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' (2012) 8(1) Law Environment and Development Journal (LEAD) 118.
[95] Ogunba (n 88) 673.
[96] Constitution of the Federal Republic of Nigeria (amended) Cap C23 Laws of the Federation of Nigeria 2010 as amended.

Nigeria'.[97] S 13 of the Constitution creates a duty and responsibility in all organs of government, and all authorities and persons, exercising legislative, executive or judicial authority to conform to, observe and apply the provisions of **Chapter 2** of the Constitution.[98] However, s 6 (6) (c) precludes the courts from entertaining or adjudicating on matters seeking the enforcement of the provisions under **Chapter 2** of the Constitution. The section provides that the 'judicial powers vested under the foregoing provisions of this section

> (c)– **shall not**, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution;'

Abdulkadir noted that by this provision, the judiciary is stripped of the power to adjudicate on any matter relating to the enforceability of s 20 thereby rendering this provision non-justiciable.[99] Ako *et al*[100] agree with Abdulkadir that while environmental protection may not be enforceable under the Constitution of Nigeria because the Fundamental Objectives of Directive Principles (FODP) is synonymous with moral rather than legal principles and has been described as mere guiding principles,[101] it can, however, be achieved otherwise.[102] Atsegbua *et al* argued in contrast that the provision is strictly non-justiciable because it had

[97] Chapter 2 on the Fundamental Objectives and Directive Principles of State Policy (hereinafter known as FODP) of the 1999 Constitution of the Federal Republic of Nigeria (hereinafter known as the CFRN) s 20. This provision presupposes the fact that where an infringement of this provision occurs or is likely to occur, a right of redress will normally accrue to any and every citizen of Nigeria likely to be affected by the infringement as set out in s. 46 (1), before high court of a state.

[98] s 13 Constitution of Nigeria 1999.

[99] BA Abdulkadir, 'The Right to a Healthful Environment in Nigeria: A Review of Alternative Pathways to Environmental Justice in Nigeria' (2014) 3 (1) Afe Babalola University Journal of Sustainable Development Law and Policy 118.

[100] A Ako, N Stewart and EO Ekhator, 'Overcoming the (non) justiciable Conundrum: The Interpretation of the Right to a Healthy Environment in Nigeria' in A Diver, J Miller (eds) *Justifiability of Human Rights in Domestic Jurisdictions* (Springer 2016) 123.

[101] EE Okon, 'The Environmental Perspective in the 1999 Nigerian Constitution' (2003) 5 (4) Environmental Law Review 256.

[102] Ako, Stewart and Ekhator (n 100) 13. The rationale for this line of argument is that Nigeria had earlier ratified the charter and incorporated same by virtue of the ACHPR (Ratification and Enforcement) Act, the provisions of the charter (which includes the right to a healthy environment) is applicable in its entirety as the non-justiciability of the constitutional provision, does not preclude the citizens from claiming their rights that are expressly provided for in other legislations or international instruments that have been ratified and incorporated by Nigeria. Ako, Stewart and Ekhator (n 100) 123.

been so judicially pronounced.[103] However, fundamental rights have been expressed to include the right to enjoy the best attainable state of physical and mental health[104] and a general satisfactory environment favourable to their development[105] by the African Charter on Human and Peoples' Rights (ACHPR) which Nigeria has ratified and enacted into its domestic laws.[106] It is concluded that the provision of s 20 of the Nigerian Constitution is justiciable by the interpretation of the fundamental right to life provided for in s 33 of the Nigerian Constitution following the description of human and peoples' rights in **Articles 16** and **24** of the ACHPR. This is the right position as it has since received judicial backing in the case of *Jonah Gbemre v Shell Petroleum Development Company Limited*.[107] Here a Federal High Court held the broad interpretation of the fundamental human right to life as provided for by s 33 of the Nigerian Constitution to include the right to a clean, poison-free, pollution-free and healthy environment and makes that right an enforceable right.[108]

Another conflict is seen in the National Environmental Standards and Regulatory Enforcement Agency (NESREA) Act.[109] NESREA is mandated in s 7 (c) of its law to enforce compliance with provisions of international agreements, protocols, conventions and treaties on the environment. However, Ladan noted that while Nigeria had ratified many international instruments, some were yet to find expression in the law in Nigeria.[110] This he further argued,

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[103] LA Atsegbua, V Akpotaire and F Dimowo, *Environmental Law in Nigeria: Theory and Practice* (Ababa Press 2004) 37. In the case of *Abacha v Fawehinmi* (2000) 6 Nigeria Weekly Law Report (NWLR) (Pt 660) 228, (1981) 2 NCLR 337 (Nigeria) the court held that while the Constitution makes it a duty for the Judiciary to apply the provisions of the Constitution by virtue of s.13 thereof, s 6 (6) c of the Constitution negates the Judiciary's powers to entertain any matter that pertains to whether or not the action of any arm of government is in conformity with the provisions under chapter 2 of the Constitution.

[104] Article 16 of the African Charter on Human and Peoples' Rights

[105] Article 24 of the African Charter on Human and Peoples' Rights.

[106] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9 Laws of the Federation of Nigeria 2010.

[107] *Jonah Gbemre v Shell Petroleum Development Company Limited* [2005] 6 African Human Rights Law Report 152 (NgHC 2005).

[108] ibid Para 5 (3) of the judgement.

[109] National Environmental Standards and Regulatory Enforcement Agency (NESREA) Act Cap N36 Laws of the Federation of Nigeria 2006.

[110] Some of these international instruments deal with matters such as climate change, biodiversity, desertification, forestry, oil and gas, hazardous waste, marine and wildlife and pollution.

subjects the provision to two interpretations.[111] First, the likely interpretation that the agency has the authority to enforce environmental treaties in Nigeria irrespective of its domestication status making Nigeria bound by any treaty that it only ratifies.[112] *Second*, is the likely interpretation that the powers of NESREA will be restricted on the subject, to only international instruments that have been ratified and incorporated into law by Nigeria.[113]

ii. Unenforceable legislative provisions and judicial pronouncements

Nigeria unquestionably has abundant environmental laws many of which are found in judicial pronouncement on environmental cases and a range of different instruments which are not entirely focused on environmental protection.[114] Many of the provisions of these laws are unenforceable as exhibited in the previous section on conflicting legislative provisions.[115]

Since natural gas occurs in association with petroleum at the point of extraction.[116] Operators of the sector resorted to flaring this associated gas when it occurred.[117] In 1979, the Associated Gas Re-injection Decree was promulgated to curtail the flaring of associated gas by compelling every company producing oil and gas in Nigeria to submit preliminary programmes for gas re-injection and detailed plans for implementation of gas re-injection.[118] The legislation is translated in the 2004 Laws of the Federation of Nigeria where[119] s 3 (1) prohibits the

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[111] MT Ladan, 'Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' (2012) 8(1) Law Environment and Development Journal (LEAD) 118, 122.

[112] In line with doctrine of good faith as enunciated by Article 26 of the Vienna Convention on the Law of Treaties and further given judicial backing in the case of *Mojekwu v Ejikeme* (2002) Nigeria Weekly Law Report (Pt. 657) 402, the court relied on an international instrument (Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) that had been ratified by Nigeria but not domesticated) and declared the '*ili ekpe*' custom as discriminatory against women.

[113] Ladan (n 111) 123.

[114] This is a notable weakness of the existing Nigerian environmental law system.

[115] S 20 Constitution of Nigeria 1999.

[116] G Occhiali and G Falchetta, 'The Changing Role of Natural Gas in Nigeria: A Policy Outlook for Energy Security and Sustainable Development' (2018) <https://www.econstor.eu/bitstream/10419/177262/1/ndl2018-010.pdf> accessed 14 July 2019.

[117] K Sluyterman, *Keeping Competitive in Turbulent Markets, 1973-2007 A History of Royal Dutch Shell* (Oxford University Press 2007) 475, 349.

[118] Associated Gas-Reinjection Decree No. 99 1979.

[119] Associated Gas-Reinjection Act Cap A26 Laws of the Federation of Nigeria 2004.

continuous flaring of gas by any extracting company after 1 January 1984.[120] That provision was not enforceable then or now because sub-section 2 of the prohibiting section created a safety net for violators by allowing the Minister for petroleum to issue a certificate of approval to flare gas.[121] Jolaosho agreed that the statutory provisions were unenforceable as the law concurrently allowed both permissible and impermissible flaring of gas.[122] This is regardless of the penalty provision in the following section which stipulates a forfeiture of the concessions granted to the violator in the particular field or fields. The provision further empowers the Minister to order the withholding of all or part of any entitlements of any violator towards the cost of completion or implementation of a desirable re-injection scheme, or the repair or restoration of any reservoir in the field under good oil-field practice.[123]

iii. Vague legislative provisions

The various environmental law provisions contain pronouncements, which are subject to more than one interpretation. Some of these provisions begin with a statement that sets out its aim but concludes with an addendum that dilutes its aim or completely erodes the power it carries. The Petroleum (Drilling and Production) Regulations made under the Petroleum Act 1969[124] provides for the adoption of practical precautions including the provision of up-to-date equipment to prevent pollution, harm or destruction and where any such pollution has occurred, the polluting party is to take prompt steps to control it and *if possible end it*.[125] Some issues arise from this provision. *First*, the definition and understanding of 'practical precaution' is subject to the sector actors' interpretation, ability and willingness to take practical precaution.

[120] s 3 (1) Associated Gas-Reinjection Act Cap. A26 Laws of the Federation of Nigeria 2004.
[121] ibid s 3 (2)
[122] TO Jolaosho, 'The Need for a Rights-Based Polluter-Pays Approach to Gas Flaring (Case in Nigeria)' (2019) 1(1) International Journal of Law 1, 8.
[123] s 4 (1) and (2) Associated Gas-Reinjection Act Cap. A26 Laws of the Federation of Nigeria 2004.
[124] Petroleum Act and the various regulations made there under is still good law in Nigeria even though efforts are on to review it under the Petroleum Industry Governance Bill (PIGB) 2008, 2012, 2017 and recently 2018.
[125] Regulation 25 Petroleum (Drilling and Production) Regulations 1969.

Second, the only practical precaution expressly mentioned in the regulation is the provision of up-to-date equipment. While this is verifiable,[126] it is argued that this can be implemented only where there are regular inspections and monitoring of the equipment that is used in the petroleum sector. However, equipment failure is one of the ways that environmental infractions occur in the petroleum sector in Nigeria especially concerning oil pipelines.[127] Pipeline failures have occurred due to structural problems, operator error, external force damage, control problems and other factors including sabotage and equipment age.[128] *Third*, the regulation requires the polluting party to take prompt steps to control it and if possible, end the pollution. Two oil spill incidents that occurred in Nigeria[129] show how difficult it will be to get polluting parties to take prompt steps to control or end such incidents because there is always some form of disagreement about the actual occurrence of the oil spill, when it started and how long it has been going on.[130] It is common knowledge that when an environmental infraction occasioning pollution occurs, it is not usually practicable to ascertain the occurrence of the act because the regulatory agencies concerned are ill-equipped to detect pollution when it occurs.[131]

The Petroleum Act provides for actions that constitute offences under the law. The provision essentially prohibits anyone from interfering with or obstructing the holder of an oil exploration licence, oil prospecting licence or oil mining lease from exercising any of the rights conferred by the licence or lease.[132] The provisions did not envisage the fact that such obstruction could be to prevent illegality or non-compliance with existing environmental regulations, which if

[126] To ascertain whether their equipment is up-to-date or not.
[127] AA Kadafa, 'Oil Exploration and Spillage in the Niger Delta of Nigeria' (2012) 2(3) Civil and Environmental Research 38, 41.
[128] CH Achebe, UC Nneke and OE Anisiji, 'Analysis of Oil Pipeline Failures in the Oil and Gas Industries in the Niger Delta Area of Nigeria' (2012) 2 International MultiConference of Engineers and Computer Scientists 1, 5.
[129] The Bonga oil spill that occurred at the Qua Iboe terminal in 2015 and the oil well blow out at the Chevron North Apoi Gas Rig in Southern Ijaw in Bayelsa State in Nigeria in 2012
[130] OJ Olujobi, OA Oyewunmi and AE Oyewunmi, 'Oil Spillage in Nigeria's Upstream Petroleum Sector: Beyond the Legal Frameworks' (2018) 8(1) International Journal of Energy Economics and Policy 220, 222.
[131] This is evidenced in the open reliance of NOSDRA on the data collected by oil sector operators and expressed on the oil spill monitor at www.oilspillmonitor.ng
[132] s 13 Petroleum Act.

allowed to proceed, may occasion a far more dangerous situation than the licenced acts sought to be protected. This also implies that acts of non-compliance arising out of the execution of a lease or a licence can be protected under this provision of the Petroleum Act while anyone who seeks to obstruct such act of non-compliance will be penalised.

Another instance of vague legislative provisions is the application of international instruments in Nigeria. The 1999 Constitution of Nigeria provides that any international agreement entered into by Nigeria will have to be ratified and enacted into law by the National Assembly of Nigeria for it to carry the force of law.[133] Nigeria being a party to international environmental agreements, treaties and protocols, has ratified some of these instruments yet there remains a large number of such instruments that have not been ratified.[134] In this situation, compliance and enforcement of such international instruments may not be achievable. NESREA is mandated by law to enforce compliance with provisions of international agreements, protocols, conventions and treaties on the environment.[135] It is contended that while Nigeria has ratified many international instruments, a lot of them still lacked expression in the laws of Nigeria.[136] In the cases of *Jonah Gbemre* and *Abacha v Fawehinmi*, the Courts in Nigeria have relied on the provisions of international instruments to interpret the fundamental rights provided in the Constitution of Nigeria, however, the legislations have not been amended to reflect this position.

[133] S 12 (1) Constitution of Nigeria 1999.
[134] For example, the Safety and Health in Mines Convention, 1995 (No 176) relating to health and Safety in mines, came into force on 5 June 1998, and adopted at the 82nd Geneva ILC commission in June 1995 and the Prevention of Major Industrial Accidents Convention, 1993 (174) relating to the prevention of major industrial accidents and came into force on 3 June 1997 and adopted at the 80th Geneva ILC commission in June 1993. It is important to note that not all international agreements, treaties and protocols require the two-step process of signature and ratification to be in force. Some bilateral treaties come into force at the point of signature, thereby not requiring further ratification. This was the position of the ICJ in the case of *Cameroun v Nigeria* [2002] ICJ Reports, paras. 265–268. The opposite was the case in *Medical and Health Workers' Union of Nigeria (MHWUN) v Minister of Health & Productivity & Ors*, (2005) 17 NWLR pt. 953 p. 120.
[135] NESREA Act s 7 (c)
[136] Ladan (n 111) 118. Some of these international instruments deal with matters such as climate change, biodiversity, desertification, forestry, oil and gas, hazardous waste, marine, wildlife and pollution.

The wholesome failure of this piece of legislation to effectively regulate the petroleum sector is seen in the exclusion of the '*oil and gas*' sector from the regulatory purview of NESREA[137] and domiciling it in another legislation which lacks the primary equipment and data to regulate the sector, is curious.[138] However, in November 2018 the NESREA Act was amended[139] to review the penalties provided in the law by the establishment and enforcement of administrative penalties and permit the search of premises without a warrant and the inclusion of the Federal Ministry of Health in the composition of the Governing Council of the Agency.[140] It is contended here that while the NESREA Act needed a review, the review still did not give NESREA the authority to carry out enforcement in petroleum sector violations.

The minister charged with the responsibility for matters incidental to oilfields and oil mining in Nigeria is empowered by the Oil Pipelines Act[141] to grant permits to survey routes for oil pipelines and licences to construct, maintain and operate oil pipelines upon application and payment of due application fees.[142] The law requires regulated entities to adopt all practicable precautions to prevent land and water pollution.[143] The licences granted under this legislation carry some conditions which if violated would constitute an offence under the law. Where this happens, the violator will be required in writing within three months to remedy the breach or

[137] NESREA Act s 7 (g), (h), (j), (k), (l).
[138] NOSDRA Act.
[139] NESREA (Establishment) Amendment Act 2018.
[140] NESREA, 'Press Briefing on NESREA (Establishment) (Amendment) Act, 2018' (2019) <https://www.nesrea.gov.ng/nesrea_events/press-briefing-on-the-nesrea-establishment-amendment-act-2018/> accessed 15 June 2019.
[141] Oil Pipelines Act Cap O7 Laws of the Federation of Nigeria 2010.
[142] s 2 and s 3 (a) and (b) Oil Pipelines Act Cap O7 Laws of the Federation of Nigeria 2010.
[143] Regulation 25 of the Petroleum (Drilling and Production) Regulations pursuant to the Petroleum Act Cap P10 2010. See also NA Onyekuru, 'Environmental Regulations and Nigeria's Economic Decision on the Niger Delta Crisis: The Way Forward' (2011) 2 (2) Asian Journal of Experimental Biological Sciences 336, 338.

risk the licence being revoked by the minister.[144] However, while some oil licenses and leases have been revoked, no revocation has been made on the grounds of environmental violation.[145]

The Oil Pipelines Act stipulates that when an offence is committed by corporate bodies in connivance with any of its officers, the officer and the corporate body shall both be liable to be proceeded against and punished accordingly.[146] It is clear that oil pipelines in Nigeria transport raw crude oil, gas and other petroleum products across states and geo-political zones in Nigeria and in some cases across the Nigeria border to neighbouring countries. Under s 32 of the Oil Pipelines Act, if any offence is committed, the law does not stipulate what the penalty will be applied or a means by which this penalty can be measured.[147] The law simply created the offence but without a corresponding penalty.

The existing environmental legislation in Nigeria is impressive even for a developing country like Nigeria. However, it is contended here that the existence of these laws which do not make provisions for the reconciliation of vague provisions, will make such laws more of a liability than an asset to the extent of compliance and enforcement. The petroleum sector involves operations which if not properly managed can lead to harmful acts which can create environmental problems that would require prompt action to repair. However, if such valuable time is spent on trying to ascertain or interpret where the law stands in such situations, the resultant effect on the environment and other prior unaffected areas could become worse.

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[144] Oil Pipeline Act s 27 (1) and (2).

[145] 'Nigeria: Petroleum, Pollution and Poverty in the Niger Delta' (2009) <https://www.amnesty.org/download/Documents/44000/afr440172009en.pdf> accessed 29 May 2019; OJ Olujobi and OA Oyewunmi, 'Annulment of Oil Licences in Nigeria's Upstream Petroleum Sector: A Legal Critique of the Costs and Benefits' (2017) 7(3) International Journal of Energy Economics and Policy 364.

[146] Oil Pipelines Act S 32.

[147] Oil Pipelines Act s 32 provides thus 'Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of any director, manger, secretary or other similar officer of the body corporate, or any person purporting to act in any such capacity, he as well as the body corporate, shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.'

iv. Non-deterrent legislative provisions

Most of the laws relating to environmental regulation in the petroleum sector in Nigeria carry provisions that set out offences and the corresponding penalties that will apply when violated. While this is ideal in any regulatory legislation, a closer look at the penalty provisions in the laws has shown that most of such punitive provisions do very little to create a deterrent in the offending party. This is because most of the sanctions are reduced to penalties in form of paltry sums and scarcely has there been a recorded conviction culminating in a jail term sentence for offences against these laws.[148] For example, the NESREA Act is empowered to make regulations for the enhancement of Federal water quality[149] among others and a violation attracts a fine of ₦ 50,000 (approximately £ 96)[150] or one year jail term upon conviction and a further sum of ₦ 5,000 (approximately £ 9.6) for every day the offence subsists in the case of an individual offender and ₦ 500,000 (approximately £ 965) upon conviction and ₦ 10,000 (approximately £ 19) for every day the violation subsists for a corporate body.[151]

The situation is practically the same throughout the legislation regarding the discharge of hazardous substances.[152] For instance, s 6 of the Oil in Navigable Waters Act[153] stipulates a fine of ₦ 2,000 (approximately £3.90) for the discharge of crude oil, fuel, lubricating oil or heavy diesel oil into prohibited sea areas (s 1), discharge of oil into waters of Nigeria (s 3) and installation of equipment in ships to prevent pollution (s 5). Under the Associated Gas Re-Injection Act,[154] where a company continues to flare gas produced together with oil (associated gas), the penalty is forfeiture by the company of its concession in the particular fields in which

[148] It is noteworthy that the only provisions for imprisonment in the environmental laws only referred to individual offenders as opposed to corporate bodies that violate the same provisions.
[149] NESREA Act S 23 (1).
[150] This estimate is made at the prevailing Central Bank of Nigeria foreign exchange rate of ₦ 518/£ as at 3 January 2021.
[151] NESREA Act s 23 (3) and (4).
[152] NESREA Act s 27 (3).
[153] Oil in Navigable Waters Act Cap O6 Laws of the Federation of Nigeria 2010.
[154] Associated Gas Re-injection Act Cap A25 Laws of the Federation of Nigeria 2010.

the offence was committed.[155] So far, no forfeiture has been recorded to that effect, rather the government has continued to extend the terminal date for gas flaring in Nigeria and gas flaring. This has been because the implementation of the law regulating gas-flaring has not been successful.[156]

Regardless of the obvious harm done to the environment and the huge loss of revenue, gas-flaring has continued unabated in Nigeria.[157] The recent extension to the gas-flaring deadline was in 2017 when the Federal government shifted the terminal date to 2020.[158] Apart from deciding that dealing in petroleum products without a licence is a criminal offence in the case of *M V Long Island v Federal Republic of Nigeria*[159] where the licence tendered by the MV Long Island was found to have expired, there has not been an actual licence forfeiture. In 2017 a court ordered the temporary forfeiture and transfer of operations of a long-disputed oilfield owned by SPDC and AGIP Eni among others, pending when the Nigerian anti-graft agency concludes investigation of the acquisition in 2011 of the oil prospecting licence (OPL) 245.[160] It is contended that the forfeiture penalty in the Associated Gas Re-injection Act has not been applied against any offender even in the face of continuous flaring of associated gas.[161]

In the Associated gas re-injection Act, the Minister of petroleum resources in Nigeria is vested with the power to grant waivers to companies that flare gas.[162] The minister exercises this

[155] S 4 (1) of the Associated Gas Re-injection Act Cap A25 Laws of the Federation of Nigeria 2010.
[156] OJ Olujobi, 'Analysis of the Legal Framework Governing Gas Flaring in Nigeria's Upstream Petroleum Sector and the Need for Overhauling' (2020) 9(8) Social Sciences 132, 133.
[157] JO Ighalo, WP Enang and QA Nwabueze, 'Re-evaluating the Problems of Gas Flaring in the Nigerian Petroleum Industry' (2020) 147 World Scientific News 76, 78.
[158] KO Mrabure and BO Ohimor, 'Unabated Gas Flaring Menace in Nigeria. The Need for Proper Gas Utilization and Strict Enforcement of Applicable Laws' (2020) 46 (4) Commonwealth Law Bulletin 753, 761.
[159] *M V Long Island v Federal Republic of Nigeria* (2018) LPELR (CA) 24
[160] Reuters, 'UPDATE 2-Nigeria Court Orders Temporary Forfeiture of Shell, Eni Oilfield in Corruption Probe' (2017) <https://www.reuters.com/article/nigeria-oil/update-2-nigeria-court-orders-temporary-forfeiture-of-shell-eni-oilfield-in-corruption-probe-idUSL5N1FG757> accessed 18 October 2018.
[161] See s 4 (1) and (2) of the Associated Gas Re-injection Act Cap A25 Laws of the Federation of Nigeria 2010. See OJ Olujobi and T Olusola-Olujobi, 'Comparative Appraisals of Legal and Institutional Framework Governing Gas Flaring in Nigeria's Upstream Petroleum Sector: How Satisfactory?' (2020) Environmental Quality Management 1, 3.
[162] Associated Gas Re-injection Act s 3 (2) (a).

power by levying meagre fines against the companies that flare gas. It is argued that since one of the major culprits in the above discussion is usually multinational corporations,[163] the stipulated fines are easy for them to pay. This is because the fines are so small that no dent is made in the profits of such corporations, hence the lack of deterrence especially if such entities are the recalcitrant types.[164] Konne noted that the persistent violations of Nigerian environmental laws by operators is due to derisory sanctions in the laws and standards and without real consequences for environmental violations, there is little motivation for compliance from sector operators.[165]

However, Mba *et al* hold the view that in the last decade, third parties are now more culpable in environmental pollution through sabotage of petroleum installations and equipment causing more environmental pollution.[166] This position is arguable in the sense that before the discovery of petroleum in Nigeria there were no records of oil spill incidents. It is contended here that when the petroleum sector was almost non-existent and the Nigerian economic focus was on trade and agriculture, there were hardly any instances of environmental degradation from petroleum sector operations.[167] However, the extensive and continuous exploration and exploitation of oil have caused significant environmental consequences over the years since oil was discovered in Nigeria.[168]

[163] W Akpan, 'Between Responsibility and Rhetoric: Some Consequences of CSR Practice in Nigeria's Oil Province' (2006) 23(2) Development Southern Africa 223, 227; KSA Ebeku, 'Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria' (2003) 12 (2) Review of European, Comparative and International Environmental Law 199, 199.
[164] Olujobi (n 156) 137.
[165] BR Konne, 'Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland' (2014) 47 Cornell Int'l LJ 181, 196.
[166] IC Mba and others, 'Causes and Terrain of Oil Spillage in Niger Delta Region of Nigeria: The Analysis of Variance Approach' (2019) 9 (2) International Journal of Energy Economics and Policy 283, 287.
[167] PB Eregha and IR Irughe, 'Oil Induced Environmental Degradation in the Nigeria's Niger Delta: The Multiplier Effects' (2009) 11(4) Journal of Sustainable Development in Africa 160, 160.
[168] A Nwozor, 'Depoliticizing Environmental Degradation: Revisiting the UNEP Environmental Assessment of Ogoniland in Nigeria's Niger Delta Region' (2020) 85(3) GeoJournal 883, 886; S Okpan and P Njoku. 'Evaluation of Corruption and Conflict in Nigerian Oil Industry: Imperative for Sustainable Development' (2019) 5(4) Journal of Sociology and Anthropology Research 14, 18.

Other legal regulatory inadequacies exist in the regulatory jurisdiction provisions[169] of the NESREA Act. These include weak enforcement provisions such as its prosecutorial powers, procedural impediments to judicial enforcement and *locus standi*[170] and monetary penalties imposed by the law for non-compliance with the provision of the law.[171] The only mention of the prosecutorial powers of NESREA in the NESREA Act for violation is to the effect that the agency can set up mobile courts subject to the provisions of the 1999 Constitution and in collaboration with other judicial authorities.[172] Regarding these inadequacies or inconsistencies in the law, some issues readily come to mind.

First, the prosecutorial powers of NESREA are very limited to the extent of the law establishing the agency regarding the petroleum sector because of the exclusion of oil and gas from the jurisdiction of NESREA.[173] *Second*, the law did not create any offence of the violation of the various functions of the agency in ss 7 and 8. The law did not expressly state that the failure of a regulated entity to comply with the enforcement provisions and directives would constitute an offence under the Act.[174] Instead, the law made a general pronouncement in s 31 prohibiting the obstruction of an officer of the agency in the exercise of his duties under the Act punishable by fines.[175]

Third, the Act empowers the agency to make regulations setting specifications and standards to protect air quality and protection of the atmosphere in Nigeria, ozone protection, noise, federal water quality standards, effluent limitations, environmental sanitation, land resources

[169] Ladan (n 111) 123. The inclusion of the term 'oil and gas' under s. 7 (c) of the NESREA Act among the list of international instruments on the environment to be enforceable by the agency, is contradictory especially as other subsections of s. 7 under the functions of the agency expressly excluded 'oil and gas' from its regulatory purview. Other provisions that exclude oil and gas from its regulatory purview are s 7 (g), (h), (j), (k), and (l).
[170] ibid.
[171] OF Oluduro and O Oluduro, 'Oil Exploitation and Compliance with International Environmental Standards: The Case of Double Standards in the Niger Delta of Nigeria.' (2015) 37 Journal of Policy and Globalisation 67.
[172] S 8 (f) NESREA Act.
[173] This is evident from the express provision of the NESREA Act excluding oil and gas from the regulatory and prosecutorial purview of the agency.
[174] NESREA Act s 7 (a) – (m) and s 8.
[175] NESREA Act s 31.

and watershed quality and discharge of hazardous substances[176] and any violation of such regulations constitutes an offence under the Act.[177] Interestingly, these issues over which NESREA is empowered to regulate are far more coherent. However, they may be redundant because the standard of proof and quantum of evidence required to prosecute such environmental issues and may not be issues that a mobile court can effectively determine.[178] The Federal High Court in Nigeria has jurisdiction to try matters on mines and minerals including oilfields, oil mining, geological surveys and natural gas.[179] Consequently, if the agency makes regulations regarding the discharge of hazardous substances from oil and gas operations, for instance, the mobile court stipulated by the Act would lack the jurisdiction to hear and determine such matters.[180]

The regulatory agencies still lack the appropriate facilities to carry out monitoring and quick response functions such as specialised boats and helicopters and other high-tech equipment and the requisite constant training and capacity building.[181] These could enable the agencies to act in furtherance of the law to create the missing deterrent behaviour in regulated entities.[182] The weak prosecutorial powers of the regulatory agencies and limited capacity to carry out their monitoring functions under the law has the potential to embolden regulated entities to continue in their subtle violation of environmental laws. It is argued that this boldness comes from knowing that the requisite power to successfully prosecute such violations is essentially lacking thereby tempting other hitherto compliant organisations to reduce compliance progressively.

[176] NESREA Act ss 20 - 27
[177] This is stipulated in the relevant provisions authorising the Act to make such regulations.
[178] NESREA Act Ss 21 – 27. The issue of mobile courts is extensively discussed in **Chapter 6** under **section 6.4.2 (a)** and **(b)** (Failure of state environmental courts and mobile courts) of this thesis.
[179] See s 251 (1) (n) of the Constitution of the Federal Republic of Nigeria 1999.
[180] Fagbohun (n 93) 211.
[181] Oluduro and Oluduro (n 171) 67.
[182] IE Osumgborogwu and CN Chibo, 'Environmental Laws in Nigeria and Occurrence of Some Geohazards: A Review' (2017) 2 (4) Asian Journal of Environment and Ecology 1.

5.2.2 Non-legal barriers

Some of the non-legal factors that affect compliance and enforcement in Nigeria include social, economic, political etc. and border on the general understanding and appreciation of the environmental needs of the Nigerian environment. This section discusses these factors and attempts to highlight the constituent factors that make up these classes. It is important to note however that although these factors are non-legal, they impact the effectiveness of the legal provision regarding compliance and enforcement from the standpoint of both the regulator and the regulated entity.

i. Economic barriers

The petroleum sector in Nigeria boasts of a robust business environment, that brings investors together from different nations.[183] The Nigerian government also got involved to secure its economic interests in the sector as the chief host.[184] While this appears to be a rational step to take in the direction of securing and maintaining its sovereignty over its natural resources, it creates the problem of the willingness to effectively implement the environmental regulations that govern the petroleum sector.[185] This is because where there is an infraction that involves operators of the sector; it invariably includes the Nigerian government through its representative such as the Nigeria National Petroleum Corporation (NNPC).[186]

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[183] Such as the United Kingdom (Shell Petroleum Development Company), United States of America (Chevron has its headquarters in the United States of America. www.chevron.com), China (Addax Petroleum which is part of the Chinese Sinopec group www.addaxpetroleum.com; Nexen Inc. one of the Chinese companies under the Chinese National Offshore Oil Corporation (CNOOC) www.nexencnoocltd.com), Norway (Statoil is the largest Norwegian oil company and is responsible for the Agbani exploration project in Nigeria. The company changes its name in May 2018 from Statoil to Equinor www.equinor.com) and Brazil Petrobas has its focus on oil, gas and alternative energy sources. www.petrobas.com).

[184] This involvement is through the Nigerian National Petroleum Corporation (NNPC) in joint venture arrangements with other companies like Total, Elf etc.

[185] PO Okonmah, 'Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta' (1997) 41(1) Journal of African Law 43, 47.

[186] F Uwakwe and JN Aloh, 'The Role of the Principles of Public Participation in Petroleum Development Contracts in Developing Countries' (2020) 2(3) International Journal of Comparative Law and Legal Philosophy 81, 85.

Since the discovery of oil and gas in Nigeria, the petroleum sector has taken over the country's attention to the detriment of other viable sectors that had supported the vast economy of Nigeria before this discovery and Nigeria's independence.[187] Nigeria had a robust agricultural and trade sector that did not involve oil and gas.[188] However, when the discovery was made, Nigeria took advantage of the 'oil boom' and back then, the Nigerian economy was better for it as it would have been difficult to relegate a sector that progressively accounted for about 90% of the foreign exchange earnings.[189] Unfortunately, this overwhelming dependence on the petroleum sector for income generation to the detriment of other viable sectors of the economy[190] undermined the serenity of the healthy environment enjoyed by Nigeria before the discovery of oil and gas. While some concerns about the operations of the petroleum sector were raised, not much attention was given to it because of the huge economic gains that accrued to the country.

Nigeria has grown to attain an enviable position in the world as the largest oil-producing country in Africa, held the largest crude oil reserves on the continent[191] and the thirteenth largest oil producer in the world which accounted for 80% of government revenue and 95% of export receipts and 90% of foreign exchange earnings.[192] The significant contribution of the petroleum sector to the country's economy necessitated increased attention on the best strategies for regulating the operations of the sector.[193] At the same time, oil exploration activities and oil spills caused degradation to land and marine ecosystems with adverse impacts

[187] IA Paul, 'Petroleum and Nigeria's Economy: A Paradox of Global Reality since 1956' (2014) 4(16) Research on Humanities and Society Sciences 94, 97.
[188] ibid 94.
[189] B Faturoti, G Agbaitoro and O Onya, 'Environmental Protection in the Nigerian Oil and Gas Industry and *Jonah Gbemre v. Shell PDC Nigeria Limited*: Let the Plunder Continue?' (2019) 27(2) African Journal of International and Contemporary Law 225.
[190] Ijaiya and Joseph (n 91) 306.
[191] 'Top 20 Oil Producing Countries in Africa' (2017) <https://www.africanvault.com/oil-producing-countries-in-africa/> accessed 30 January 2018.
[192] M Watts, 'Resource Curse? Governmentality, Oil and Power in the Niger Delta, Nigeria' (2004) 9 (1) Geopolitics 50.
[193] GO Odularu, 'Crude Oil and the Nigerian Economic Performance' (2008) (1) Oil and Gas Business 29 <http://ogbus.ru/eng/authors/Odularo/Odularo_1.pdf> accessed 19 July 2017.

on the indigenes of the host communities.[194] To date, Nigeria's economy depends on foreign exchange earnings from the sale of crude oil and natural gas.[195]

Individuals and companies were arbitrarily allocated oil blocks, which yielded a large amount of profit.[196] An oil block is a location with multiple oil wells containing extractible crude oil. Various governments in Nigeria have promised to solve the problem of arbitrary allocation of oil blocks without following due process. For example, during the military rule in Nigeria, oil blocks were allocated to top military officers.[197] When the civilian government took over power under the leadership of General Olusegun Obasanjo (Retired.), he revoked 11 of such allocated oil blocks and declared that the process of allocation will be made open and transparent. Towards the end of his tenure as president, however, some more arbitrary allocations were made.[198] These actions were all possible because the office of the Minister of Petroleum[199] in the above-mentioned instances was curiously held by the President or leaders of the respective governments at the time which ought not to be so.[200]

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[194] A Gaughran, 'Nigeria: Hundreds of Oil Spills Continue to Blight the Niger Delta' (2018) <https://www.amnesty.org/en/latest/news/2015/03/hundreds-of-oil-spills-continue-to-blight-niger-delta/> accessed 30 January 2018.

[195] II Onwuazombe, 'Human Rights Abuse and Violations in Nigeria: A Case Study of the Oil-Producing Communities in the Niger Delta Region' (2017) 22 Annual Survey of International & Comparative Law 115, 116.

[196] An oil block is a location with multiple oil wells containing crude oil that can be extracted. Allocation of oil blocks translates to the grant of Oil Licence or Lease by the Minister of Petroleum as empowered by the Petroleum Act.

[197] S Okpan and P Njoku, 'Evaluation of Corruption and Conflict in Nigerian Oil Industry: Imperative for Sustainable Development' (2019) 5(4) Journal of Sociology and Anthropology Research 14, 19.

[198] OA Cletus, 'Politics of Oil Block Allocation and the Nigerian Economy' (2020) 5(1) Journal of Forensic Accounting and Fraud Investigation 221, 224.

[199] The discretionary powers of the Minister of petroleum resources under the Petroleum Act include allocation of oil blocks (or power to grant licences) as well as the power to grant an oil exploration licence, oil prospecting licence or an oil mining lease to a company incorporated in Nigeria. The Minister of petroleum resources also reserves the right to revoke any licence or lease granted if the Lessee or Licensee becomes controlled by any citizen other than a citizen of Nigeria, if the Lessee or Licensee is not conducting operations continuously or under the work programme approved for the licence or lease, fails to comply with the provisions of the Petroleum Act, fails to pay due rent or royalties or furnish reports on the operations of the lease or licence. See generally ss 2, 2 (1) (a), (b), (c), of the Petroleum Act and Paragraph 24 (1) (a) and 25 (1) (a) (i) and (ii) and (b) – (d) of the first schedule of the Petroleum Act Cp P10 Laws of the Federation of Nigeria 2010.

[200] Cletus (n 198) 231; See SO Usman, 'The Opacity and Conduit of Corruption in the Nigeria Oil Sector: Beyond the Rhetoric of the Anti-Corruption Crusade' (2011) 13(2) Journal of Sustainable Development in Africa 294, 300.

This arbitrary system of allocation of oil blocks makes it difficult to implement environmental regulations because that would mean more scrutiny into the allocation process, business practices and will invariably truncate the free flow of income into the coffers of the government and private pockets.[201] This is one risk the Nigerian government is not in a hurry to take because all the other sectors of the economy that would have supported the financial health of the country while the petroleum sector is being fixed, have been allowed to suffer and go extinct because of the heavy reliance on the petroleum sector.[202]

The operators of the oil sector are under pressure to maximize oil production because the relegation of the agricultural sector to the background has created imbalances for the Nigerian economy.[203] Therefore, regulation only barely occurs and is usually ineffective. Consequently, they adopt substandard environmental practices in their field operations that cause environmental pollution and degradation to thrive because of low level or non-compliance.[204]

Nigeria depends on the petroleum sector for energy generation in addition to other sources and this has contributed to the increase in the extraction and consumption of petroleum products. This high dependence on the sector means the increase of activities in the exploration, production, refining, storage, transportation and decommissioning processes which all pose human and environmental risks.[205] Unfortunately, deficiencies in compliance and enforcement have created significant barriers to effective planning and development.[206] In 2019, a member of the Nigerian Senate sponsored a bill to introduce electric cars in Nigeria to de-emphasize

[201] SO Usman, 'The Opacity and Conduit of Corruption in the Nigeria Oil Sector: Beyond the Rhetoric of the Anti-Corruption Crusade' (2011) 13(2) Journal of Sustainable Development in Africa 294, 296.
[202] DO Olayungbo, *Asymmetric Effects of Oil Revenue Shocks on Government Spending Composition and Productive Sectors: New Evidence from Nigeria* (Wiley Online Library 2019) 18, 15.
[203] I Aigbedion and SE Iyayi, 'Diversifying Nigeria's Petroleum Industry' (2007) 2(10) International Journal of Physical Sciences 263, 269.
[204] II Onwuazombe (n 195) 117.
[205] A Ambituuni, J Amezaga and E Emeseh, 'Analysis of Safety and Environmental Regulations for Downstream Petroleum Industry Operations in Nigeria: Problems and Prospects' (2014) 9 Environmental Development 43, 44.
[206] RJ Burby, PJ May and R C Paterson, 'Improving Compliance with Regulations: Choices and Outcomes for Local Government' (1998) 64(3) Journal of American Planning Association 324, 331.

fossil fuel operated vehicles in Nigeria.[207] The motion to introduce the bill was denied and this was attributed to the fact that the plan to explore alternative energy sources in Nigeria is still very much in its infant stage.[208] However, it has been suggested that the revenue-driven economic interest in the petroleum sector has continuously intervened in the political process to review the current environmental regulatory regime.[209]

ii. Social barriers

Flowing from the above, while the economic fortunes of the country improved, ironically this did not trickle down to the host communities where the deleterious effects of the operations of the petroleum sector were a reality.[210] Oil spills and gas flaring were identified as the main causes of environmental pollution and degradation.[211] Consequently, this systematically destroyed the livelihood of some of these host communities thereby creating a situation where the younger indigenes who are capable of making a living could no longer be adequately engaged in their usual sustenance activities.[212] The effect of the deterioration of the environment is now apparent in the many negative events plaguing the region where the environmental problems are most evident.[213] These include gender parity issues, concerns of indigenous people and erosion of their culture and ancestral lands. Following the systematic destruction of farmlands and river courses, there was less access to traditional forms of

[207] The Electric Cars (Introduction) Bill 2019, SB, 726 sponsored by Senator Ben Murray-Bruce.
[208] A Ogbonna, 'Breaking: Senate Rejects Bill to Phase out Petrol Cars, Adopt Electric Ones' (2019) <https://www.vanguardngr.com/2019/04/breaking-senate-rejects-bill-to-phase-out-petrol-cars-adopt-electric-ones/> accessed March 16 2020.
[209] Nabegu, Mustapha and Naibbi (n 87) 2.
[210] This has made some writers question Why oil wealth has failed to translate into rapid economic growth and increased standard of living for majority of Nigerians. Why oil has become a catalyst for violent conflicts in the country? What roles oil-availability and other factors play in the propensity to civil disobedience among the people of the Niger Delta? How Nigeria can escape from the oil curse. Per A Oyefusi, 'Oil-dependence and Civil Conflict in Nigeria' (2007) <https://core.ac.uk/download/pdf/6250435.pdf> accessed 31 May 2019.
[211] UNEP, 'Strengthening Environmental Governance' (2018) <https://www.unenvironment.org/regions/africa/regional-initiatives/strengthening-environmental-governance> accessed 19 October 2018.
[212] Such as fishing and farming and animal husbandry. The inability to continue in their sustenance was a result of environmental damage from petroleum operations in these localities.
[213] Faturoti, Agbaitoro and Onya (n 189) 226.

employment such as farming, fishing, traditional medicine practice and trading. Younger people especially males, who could still work, found employment in casual jobs with the petroleum sector operatives.[214] It has been observed that women have not benefitted much from petroleum industry operations because it has not fulfilled women's cultural, material, social or environmental needs.[215] The jobs in the petroleum sector are labour intensive and require more physical energy than the traditional fishing and farming and triggered occupational migration by men, this makes it difficult for women to find the same kind of jobs thereby relegating women to their other domestic roles.[216] Therefore, understanding the links between gender parity, poverty and environmental issues and addressing these issues appropriately can promote proper environmental development outcomes.[217] It is argued that the social impact of this is that it robs the young people both male and female of the opportunity to make a living for themselves and be responsibly occupied thereby leaving them idle and susceptible to delinquent acts including crime and militancy.[218]

The prevalence of poor environmental practices also caused an increase in poor living conditions and severe health challenges.[219] The consequent underdevelopment of host communities in Nigeria due to oil exploration activities make it near impossible to access proper medical care and other social amenities which exposes more women to maternal

[214] FA Fatusin, A Aribigbola and GA Adetula, 'The Impact of Oil and Gas Pollution on Female Gender in Ilaje, Niger Delta Region of Ondo State Nigeria' (2010) 32(3) Journal of Human Ecology 189, 191.
[215] ibid 191.
[216] ibid 192.
[217] Sustainable Development Network, *Linking Gender, Environment and Poverty for Sustainable Development: A Synthesis Report on Ethiopia and Ghana* (The International Bank for Reconstruction and Development/World Bank P125713, 2012) 1, 15.
[218] AO Babatunde, 'The Contradictions of Riches: Petro-Business and the Impoverished Local People in Nigeria's Niger Delta' in ES Bogoro, M Meyer and ND Danjibo (eds), *Readings in Peace and Conflict: Essays in Honour of Professor I O Albert.* (Institute for Peace and Strategic Studies, University of Ibadan. 2019) 737, 746; N Nwogwugwu, AO Emmanuel and C Egwuonwu, 'Militancy and Insecurity in the Niger Delta: Impact on the Inflow of Foreign Direct Investment to Nigeria' (2012) 2(1) Journal of Business and Management Review 23, 25.
[219] LK David and T Bodo, 'Environmental Pollution and Health Challenges of the Ogoni People, Rivers State, Nigeria.' (2019) 3(2) International Journal of Advanced Research and Publications 28, 30.

mortality.[220] It is argued that lack of appropriate sanctions when environmental degradation occurs, emboldens the culprits and undermines the rights of the victims. Such rights include the right to adequate health facilities.[221] This calamitous history of pollution from oil spills, gas flares and oil well fires can be seen in Ogoniland.[222]

The effect of this environmental problem of pollution due to a low level of compliance or non-compliance with environmental laws in the region where the petroleum operations take place in Nigeria is obvious from the underdevelopment of the region. There has been a corresponding increase in militant activities characterised by violence, conflict, civil unrest, poverty and exposure to health hazards.[223] It is contended that the negative impact of these militant activities can be felt in the fact that the oil companies now operating in the petroleum sector prefer to spend more money on the protection and security of their oil-producing facilities and personnel rather than spending money to achieve compliance. Compliance would have the effect of protecting the environment where they operate and consequently reassure the indigenes of a safer environment.

Another dimension to this is the approach adopted by the government security agencies to deal with the activities of militants.[224] In some instances, the regulated entities cause more problems

[220] OB Oghenetega, OA Ojengbede and GR Ana, 'Perception Determinants of Women and Healthcare Providers on the Effects of Oil Pollution on Maternal and Newborn Outcomes in the Niger Delta, Nigeria' (2020) 12 International Journal of Women's Health 197, 200-201.
[221] T Bodo, 'Community Understanding of the Environmental and Socio-Economic Consequences f Petroleum Exploitation in Ogoni, Rivers State, Nigeria' (2018) 2(11) International Journal of Advanced Research and Publications 51, 54.
[222] O Yakubu, 'Addressing Environmental Health Problems in Ogoniland Through Implementation of United Nations Environment Program Recommendations: Environmental Management Strategies' (2017) 4(2) Environments 28, 31.
[223] A Babatunde, 'Environmental Conflict and the Politics of Oil in the Oil-bearing Areas of Nigeria's Niger Delta' (2010) 5(1) Journal of Peace and Conflict Review 1. Militant activities such as protests, attacks on oil and non-oil facilities, sabotage and destruction of oil installations including oil and gas pipelines, kidnapping and killing of the foreign and national staff of oil and gas companies, were limited to oil and gas concerns but lately, these matters of insecurity have spread to other areas where oil and gas activities are non-existent. Politicians, civil servants and business owners are now victims of such acts of insecurity even when they clearly have no links with the petroleum sector.
[224] C Akasike, 'NSCDC Destroys 156 Illegal Refineries in Rivers' (2017) <https://punchng.com/nscdc-destroys-156-illegal-refineries-in-rivers/> accessed 3 November 2018. For example, the Nigeria Security and Civil Defence Corps (NSCDC).

by negotiating with one or more groups from the host communities and neglecting other groups.[225] In other instances, the regulated entities neglect such communities while carrying on the business of petroleum operations.[226] Consequently, these actions only create more conflict and rancour among indigenes of the host communities as some indigenes felt neglected and short-changed while other indigenes benefit from the largesse of the regulated entities.[227]

The consequences of the failure of compliance and enforcement are more apparent in the conflicts between the operators and the local communities. This is usually over causes of oil spills and liability to pay compensation and the failure of the Nigerian government to take adequate measures to mitigate the resultant effects of poor environmental decisions on local communities.[228] It has been suggested that the part played by the Nigerian government in reaction to such protests amounts to the protection and accommodation of the actions of the petroleum sector operatives.[229] For example, the actions of the Nigerian military government in the Ogoni struggle culminated in the execution by hanging of Ken Saro-Wiwa and eight prominent Ogoni indigenes in November 1995.[230]

iii. Political barriers

The petroleum sector plays a vital role in the political affairs of Nigeria. This is not peculiar to Nigeria alone as can be seen in the role it plays in global politics.[231] There is an obvious lack of political will to implement the copious provisions of the environmental laws that exist to

[225] GG Ntor, 'Oil Resource and Violence in the Niger Delta Region in Nigeria: Towards a Plausible Solution' (2020) 1(1) Journal of Conflict Resolution and Social Issues 81, 82.
[226] D Ajayi and C Ikporukpo 'An Analysis of Nigeria's Environmental Vision 2010' (2005) 7 (4) Journal of Environmental Policy and Planning 341, 358.
[227] A Zalik, 'The Niger Delta: 'Petro Violence' and 'Partnership Development'' (2004) 31(101) Review of African Political Economy 401, 406.
[228] A Oyefusi, 'Oil-dependence and Civil Conflict in Nigeria' (2007) <https://core.ac.uk/download/pdf/6250435.pdf> accessed 31 May 2019.
[229] MR Izarali, 'Human Rights and State-Corporate Crimes in the Practice of Gas Flaring in the Niger Delta, Nigeria' (2016) 24(3) Critical Criminology 391, 398. The sector operatives also facilitate government actions in stabilising such situations by providing facilities and equipment such as helicopters and boats.
[230] Ntor (n 225) 84.
[231] H Thompson, *Oil and the Western Economic Crisis* (Palgrave 2017) 114, 94.

regulate the petroleum sector.[232] The Nigerian government by its involvement in the business of the petroleum sector as a regulator and as part-owner of the petroleum interests has consistently looked the other way in matters of compliance and enforcement.[233] This has been identified as one of the reasons for the lax regulatory regime in the petroleum sector in Nigeria.[234] The NNPC represents the Federal government of Nigeria in the Joint Venture petroleum arrangements while the DPR is an agency of the same federal government of Nigeria which regulates and enforces petroleum policies and regulations.[235] It is argued that by this relationship between the federal government of Nigeria and multinational corporations in the petroleum sector, the DPR cannot be objective in its implementation decisions. This is because as noted by the World Bank, the federal government of Nigeria is now in the position to regulate pollution while at the same time being a party and beneficiary of the activities that cause the pollution.[236]

In the political history of Nigeria, it has been opined that the proceeds from the petroleum sector have been the main supplier of election funds and is a major determinant of who leads the country.[237] The obvious lack of political will to take steps to correct the environmental wrongs done to the Nigerian environment is also clear in the struggle to review the main legislation regulating the petroleum sector.[238] This stance has been corroborated by

[232] OJ Olujobi and OM Olujobi, 'Comparative Appraisal of Anti-Corruption Laws: Lessons Nigeria Can Learn from Norway, United Kingdom and United States' Anti-Corruption Strategies' (2020) 11(7) International Journal of Management 338, 344.
[233] This is seen in the constant shifting of the terminal date for gas flaring in Nigeria.
[234] EO Ekhator, 'Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation' (2016) 21(1) Annual Survey of International & Comparative Law 43, 64.
[235] ibid 65.
[236] 'Nigeria: Defining an Environmental Development Strategy for the Niger Delta (Vol. 2)' in *Industry and Energy Operations Division West Central Africa Department* (World Bank Group 1995) 147, 45. This document can also be found at http://documents.worldbank.org/curated/en/506921468098056629/Annexes
[237] This is seen in the diversion of funds accruing to states from petroleum sector earnings. Although this stance remains unverified, however the huge sums of money expended during electioneering campaigns in Nigeria begs the question as to where such massive amounts could possibly come from. AP Chiamogu and UP Chiamogu, 'Financing Electioneering Campaign and Use of State Resources in Nigeria: An Appraisal of the 2015 Presidential Elections' (4th Annual Conference of the Nigerian Political Science Association – South East Zone (NPSA-SE) Imo State University, Owerri Invalid date) 1, 10.
[238] C Terada, 'Recycling Electronic Wastes in Nigeria: Putting Environmental And Human Rights at Risk' (2012) 10(3) Northwestern University Journal of International Human Rights 154, 169.

Transparency International in its assertion that the absence of political will to tackle some of these factors,[239] all add to the problems of ineffective environmental regulation.[240] The Petroleum Act of 1969 is still good law today in Nigeria even though it does little to address the compliance and enforcement problems plaguing the sector. While it is admitted that a bill has been presented to the legislative arm of government for the review of the Petroleum Act, it is yet to be fully passed.[241] Even when the effort has been made of breaking up the bill and passing it piecemeal, there have been barriers to its full implementation as the president of Nigeria has refused to assent to the bill citing some vague reasons.[242] This has continued to expose the petroleum sector to negative practices, which keeps compromising the sanctity of the environment.

5.2.3 Institutional barriers

The Vision 2020[243] committee that was set up to provide a blueprint that would launch Nigeria into the top 20 world economies by 2020, in its report, recognised oil pollution from spills and gas-flaring among others as some of the environmental problems faced by Nigeria.[244] The experience of Nigeria during the operations of the petroleum sector necessitated the need for a regulatory framework to manage the sector. Upon the enactment of some environmental laws,

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[239] Transparency International, 'Transparency International Country Study Report: Nigeria' (2005) <https://www.transparency.org/news/feature/transparency_international_2004_annual_report> accessed 31 May 2019.

[240] Even the world's attention to the Ogoni land oil crises has not motivated the government of Nigeria enough to commence the Ogoni land clean up as recommended by UNEP in 2011.

[241] The Petroleum Industry draft Bill was presented to the National Assembly in Nigeria for consideration and passage and after ten year, the only accomplishment was the breaking up of the bill into bits, passage of some of the bit but a refusal to give assent by the President of the Federal Republic of Nigeria. As it stands today, the Petroleum Act is essentially still good law. See **sections 3.4.1** and **3.6.1** of **Chapter 3** of this thesis.

[242] B Udo, 'Why Buhari withheld Assent to PIGB – Presidential aide' (2018) <https://www.premiumtimesng.com/news/top-news/281790-why-buhari-withheld-assent-to-pigb-presidential-aide.html> accessed March 16, 2020

[243] This is Nigeria's long-term developmental goal designed to propel the country to the league of top 20 economies of the world by the year 2020 by making efficient use of human and natural resources to achieve rapid economic growth and translate economic growth into equitable social development for all citizens across the social, economic, institutional and environmental dimensions.

[244] Nabegu, Mustapha and Naibbi (n 87) 1.

regulatory agencies were established to ensure that the laws are effectively implemented.[245] However, this did not do much to erase the assumption that the existence of laws and corresponding regulatory agencies was all that was required to achieve a regulated petroleum sector. This section of this thesis examines the key factors that are plaguing the agencies that in turn affect the effective compliance and enforcement of environmental laws. These include overlapping functions of statutory regulatory agencies, poor resource allocation, weak institutions, out-dated or inadequate equipment, government interference, armed conflicts, and corruption.

i. Overlapping functions of statutory environmental regulatory agencies

With the creation of multiple environmental regulatory agencies and environmental regulatory laws, the likelihood of overlapping functions became inevitable. Ambituuni *et al* and cited the tendency of overlapping functions of the various statutory regulatory institutions to be one of the major factors affecting compliance and enforcement of environmental laws due to the creation by law, of duplicate functions.[246] Within the petroleum sector, different institutions are responsible for implementing the same legislative provisions.[247] For example, the Department of Petroleum Resources (DPR) supervises and regulates all operations in the oil and gas sector, environmental regulation, standards-setting and safety including ensuring

[245] C Chuks-Ezike, 'Deficient Legislation Sanctioning Oil Spill in Nigeria: a Need for a Review of the Regulatory Component of Petroleum Laws in Nigeria and the Petroleum Industries Bill' (2018) 7(1) International Journal of Environment and Sustainability 30, 31.

[246] Ambituuni, Amezaga and Emeseh (n 205) 54; Nabegu, Mustapha and Naibbi (n 87) 1.

[247] This is seen in Nigeria where three agencies have the responsibility of implementing different provisions of environmental legislations that appeared to overlap each other. National Environmental Standards Regulations Enforcement Agency (NESREA) is mandated to implement the establishment of pollution abatement facilities in s 7 (d) of the NESREA Act, Department of Petroleum Resources (DPR) is empowered to regulate the petroleum sector and determine guidelines for the operation of the petroleum industry (which it set about by creating the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN), and the National Oil Spill Detection Response Agency (NOSDRA) which is the agency responsible for responding to incidents of oil spills.

compliance and enforcement of petroleum laws, regulations and guidelines.[248] NESREA is responsible for the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general and environmental technology including coordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines.[249]

NOSDRA is responsible for preparedness, detection, and response to oil spillages in Nigeria[250] including being responsible for surveillance and ensuring compliance with all existing environmental legislation and the detection of oil spills in the petroleum sector.[251] Ambituuni *et al* conclude that the implication of such overlapping regulatory functions has resulted in conflicting responsibilities for monitoring compliance and enforcement and inconsistent inter- and intra-organisational relationship[252] consequently, causing lengthy bureaucratic processes, waste of resources that has ultimately led to lack of or under regulation.[253]

ii. Non-existent or inaccurate national environmental database

The Nigerian environmental discourse lacks a properly kept national environmental database regardless of whether it is a national database on environmental quality or the record of environmental accidents.[254] Where these records exist, they are not readily accessible because different government ministries, agencies, and companies collect oil spill data. Presently, oil spill data is gathered and organised by NOSDRA and key oil companies operating in the Niger

[248] www.dpr.gov.ng. From the history of the DPR, it can be gleaned that this is a policy-making body under the Federal Ministry of Environment, not specifically created by law but commands more powers over the other environmental regulatory agencies created by law and empowered to implement the environmental legislations in Nigeria.
[249] www.nesrea.gov.ng
[250] www.nosdra.gov.ng
[251] NOSDRA Act 2007, s 6 (1) (a).
[252] Ambituuni, Amezaga and Emeseh (n 205) 55.
[253] ibid 57.
[254] PA Ogar and others, 'An Assessment of the Role of Enforcement in Promotion of Compliance to Environmental Standards in Ibadan Metropolis, Oyo State, Nigeria' (2020) 8(7) Global Scientific Journals 1741, 1743; Ijaiya and Joseph (n 91) 315.

Delta area of Nigeria.[255] The data is in different forms which makes it difficult to analyse and interpret as proper and accurate data.[256] This invariably means that standards set in the various environmental laws based on such data have no verifiable empirical bases and amount to mere speculation.[257] It must be noted here that NOSDRA created an online platform to present this data.[258] However, NOSDRA depends on the data provided by government ministries, agencies, and companies under its supervision, to maintain the information on the online platform.[259] This is because NOSDRA on its own cannot generate such data due to the many institutional challenges it suffers in the exercise of its statutory functions.[260] It is argued that for this reason, the data provided therein is at the discretion of such regulated entities and can be incomplete, inaccurate and unreliable.[261] This is easily understandable because providing accurate data will amount to an admission of guilt of such companies in environmental pollution matters. It is further argued that there are no independent fact-checking bodies to verify the available data because if there were, there would be no need to rely on the data from such regulated entities in the first instance.

It is contended that if such data were to exist, it is expected that it should be gathered, updated, verified and reviewed by one of the many regulatory agencies. Such databases should cover issues like the number and locations of environmental problems like oil spills, causes, severity, impact on the immediate and remote human and natural environment, culprits, victims, actions immediately taken and subsequent planned actions, frequency of occurrence etc.

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[255] Such companies and government agencies like Shell Petroleum Development Company (SPDC) and Nigeria Agip Oil Company (NAOC), statistics published via the Nigerian National Petroleum Corporation (NNPC) and the Department of Petroleum Resources (DPR).

[256] SO, Philip and O Bankole, 'Environmental Statistics: The Situation In Federal Republic of Nigeria, Africa' (1995) <https://unstats.un.org/unsd/ENVIRONMENT/session152env.pdf> accessed 1 June 2019

[257] Nabegu, Mustapha and Naibbi (n 125) 1.

[258] www.oilspillmonitor.ng

[259] www.oilspillmonitor.ng

[260] See **section 5.2.3** of **Chapter 5** of this thesis.

[261] M Watts and A Zalik, 'Consistently unreliable: Oil Spill Data and Transparency Discourse' (2020) 7(3) The Extractive Industries and Society 790,791.

There are some consequences of the lack of an accurate national database. *First,* there is limited knowledge of the existence and location of the appropriate law to apply in similar situations.[262] *Second,* there is little or no opportunity for an on-the-face assessment of the appropriateness of existing policies for the particular situation and when the need may arise for a non-functional policy to be reviewed. *Third,* it is difficult to make future compliance and enforcement plans because of the inaccuracy of the available data. and this cannot provide the support and proper planning for restructuring or development of the environmental condition of the petroleum sector.

iii. Poor resource allocation

Inadequate funding of the regulatory agencies like NESREA, NOSDRA etc is a major challenge militating against the effective execution of their statutory mandates because of its rippling effect on the regulatory agencies and enforcement apparatus.[263] For environmental regulatory agencies to be effective, proper funding is vital.[264] With adequate funding, the regulatory agencies will be able to acquire human and material resources, train their staff and create a better motivation for such staff, mobilise equipment to the location where their expertise and attention are needed, act promptly when required and generate their database of environmental information. Unfortunately, funding is a problem faced by nearly every sector in Nigeria because available funds are usually directed at less important issues like politics and unrealistic remuneration packages for politicians and the general cost of governance.[265] Poor resource allocation consequently negatively impacts the ability of the regulatory agencies to effectively carry out their functions.[266] Some of the effects of poor resource allocation that are

[262] Nabegu, Mustapha and Naibbi (n 87) 2.
[263] IA Aigbe and EO Enakireru, 'Enforcement of Environmental Laws in Nigeria' (2020) 1(1) International Journal of Comparative Law and Legal Philosophy 44, 44.
[264] Ijaiya and Joseph (n 91) 315.
[265] AP Chiamogu and UP Chiamogu, 'Financing Electioneering Campaign and Use of State Resources in Nigeria: An Appraisal of the 2015 Presidential Elections' (4th Annual Conference of the Nigerian Political Science Association – South East Zone (NPSA-SE) Imo State University, Owerri October 17 and 19 2016) 1, 8.
[266] Ladan (n 111) 120.

examined below are outdated enforcement equipment, weak enforcement institutions and corrupt enforcement officers.

a. *Outdated enforcement equipment*

It is no doubt that enforcement in response to non-compliance is expensive and difficult.[267] The challenges reflect where regulatory agencies are not properly equipped to deal with non-compliance and where cooperation among the regulated entities is lacking.[268] This is a consequence of poor resource allocation. The regulatory bodies are run like typical government ministries and enforcement equipment are hardly updated.[269] In a technologically advancing world, analogue or human capital-intensive enforcement styles produce little or no effect in furtherance of compliance and enforcement. This has made the regulatory agencies now rely on the data and response equipment of some regulated entities like the Clean Nigeria Associates (CNA).[270] The main objective of this non-profit organisation is to take fast action against second-tier oil spills in response to its members. The body also minimises the effect of oil spills on the environment, provides technical support for third-tier oil spills in response to requests by the government agencies and non-members.[271]

b. ***Weak institutions***

This is another consequence of poor resource allocation to the regulatory agencies as this makes it impossible to consolidate on any successes achieved by the regulatory bodies in the course of compliance and enforcement of environmental regulations. Weakness in the regulatory agencies speaks to their lack of accountability and integrity in the execution of their statutory

[267] Hawkins (n 5) 954.
[268] N Gunningham and RA Kagan, 'Regulation and Business Behaviour' (2005) 27(2) Law & Policy 213, 214.
[269] Ajayi and Ikporukpo (n 226) 362.
[270] Clean Nigeria Associates (CNA), 'Member Companies' (2018) <https://cleannigeria.org/membercompany.php> accessed 1 November 2018 which was formed by a group of fifteen companies who are active players in the petroleum sector in Nigeria.
[271] ibid

mandate.[272] Staff are easily tempted to let violations go unsanctioned as work conditions like lack of equipment make it increasingly difficult to carry out their functions effectively.[273]

Where a regulatory agency is incapable of sustaining its successes at environmental regulation, the inherent regulatory power is weakened against such regulated entities.[274] This follows the game theory, which is to the effect that when opposing rational decision-makers weigh their choices and it shows a perpetual losing position, the loser is compelled to weaken their powers to accommodate the winner's perspectives.[275] In this scenario, the position of the regulatory agencies is constantly weakened because of poor resource allocation to sustain a standard of monitoring compliance and enforcement. It has been noted that this also feeds the resource curse theory where economies that are based mainly on natural resources tend to develop more slowly than resource-poor countries because weak institutions are not properly equipped to monitor the sector thereby also giving room for corrupt practices.[276]

iv. Corporate Social Responsibility (CSR)

CSR is a practice by regulated entities to embrace the responsibility for its actions that encourages a positive impact through its activities on the environment, consumers, employees, communities, stakeholders and all other members of the public sphere who may also be considered stakeholders or who may be affected by its actions.[277] It is "the ethical principle that

[272] ED Oruonye and YM Ahmed, 'The Role of Enforcement in Environmental Protection in Nigeria' (2020) 7(1) World Journal of Advanced Research and Reviews 48, 55; United Nations Environment. 'Environmental Rule of Law: First Global Report' (2019) <https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y> accessed 29 July 2019, 39.
[273] Ladan (n 111) 120.
[274] KG Kingston and U Frank-Igwe, 'The Negative Effects of Petroleum Gaming on Nigeria's Institutional and Legal Regimes' (2019) 6 (1) Port Harcourt Journal of Business Law 158, 158.
[275] C Cohen, D Pearlmutter and M Schwartz, 'Promoting Green Building in Israel: A Game Theory-based Analysis' (2019) 163 Building and Environment 106227.
[276] United Nations Environment, 'Environmental Rule of Law: First Global Report' (2019) <https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y> accessed 29 July 2019 39.
[277] F Tai and S Chuang, 'Corporate Social Responsibility' (2014) 6(3) Business 117 Fang-Mei Tai and Shu-Hao Chuang. 'Corporate Social Responsibility' (2014) 6(3) Business 117, 118.

an organisation should be responsible for how its behaviour might affect society and the environment".[278] In most cases, regulated entities offer social services to the indigenes of host communities in the hope of assuaging them while operations are going on by engaging in corporate philanthropy, community volunteering, socially responsible business practices, advocacy campaigns, cause-related marketing, corporate social marketing.[279]

Some CSR actions include the provision of school buildings, skills acquisition training facilities, medical facilities, improving irrigation and sanitation, road construction and other social amenities.[280] It is contended that in an ideal situation, these amenities ought to be provided by the government of the country through the state and local government authorities. Leaving the provision of these amenities to CSR signifies a shift of responsibilities from the government to regulated entities as sources of social improvement.[281] However, it would seem convenient for such regulated entities to take over and make provisions for such amenities at far less cost than compliance with environmental laws. For example, it costs far less for a regulated entity to provide medical facilities that would treat respiratory ailments as part of its CSR than it would cost to build a gas-utilisation facility in compliance with anti-gas flaring laws. The impact of the provision of these amenities is that as long as the legal taxes and other charges are paid to the government, and government responsibilities are outsourced, the government is consequently rendered unable to regulate the activities of the petroleum sector

[278] K Peddada and NA Adam, 'Theory and Practice of Corporate Social Responsibility in a Developing Country Context' in S Mugova and PR Sachs (eds), *Opportunities and Pitfalls of Corporate Social Responsibility* (CSR, Sustainability, Ethics & Government, Springer 2019) 101, 103.
[279] ibid.
[280] ibid 102.
[281] U Idemudia, 'Oil Extraction and Poverty Reduction in the Niger Delta: A Critical Examination of Partnership Initiatives' (2009) 90 (1) Journal of Business Ethics 91, 91.

operators[282] while bad operational practices are employed to do business that could potentially impact the environment negatively.[283]

In Nigeria, CSR has been applied mostly when there has been some form of complaint from the host communities expressing their displeasure at the passive attitude of operators of the petroleum sector to the plight of the indigenes of such host communities arising from poor operational practices.[284] Before the adoption of CSR to assuage host communities, petroleum sector operators especially oil companies, opposed anti-pollution protests and complaints on some grounds. It had been contended by such oil companies that oil pollution is not necessarily the worst form of pollution ravaging the human environment and oil pollution does not degrade the environment to the extent largely claimed and that sabotage of oil installations[285] accounts for most cases of oil spills.[286] An opposing view, however, is that age, poor maintenance and neglect of oil installations are significantly responsible for the oil spills.[287]

Regardless of the above discussion, CSR has been seen as a prerequisite for success and not a burden because it strengthens the relationship between regulated entities and stakeholders, enables improvement and promotes innovation, attracts the best industry talents being socially responsible, motivates employees, mitigates risk through effective corporate governance

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[282] J Ferguson, 'Seeing Like an Oil Company: Space, Security and Global Capital in Neoliberal Africa' (2005) 107 (3) American Anthropologist 379, 381.

[283] To avoid such operational practices by applying some CSR standards such as those provided for in the Global Reporting Imitative framework which is a generally accepted framework for reporting on an organisation's economic, environmental and social performance. See K Wilburn and R Wilburn, 'Using Global Reporting Initiative Indicators for CSR Programs' (2013) 4(1) Journal of Global Responsibility 62, 65.

[284] A Oyefusi, 'Oil-dependence and Civil Conflict in Nigeria' (2007) <https://core.ac.uk/download/pdf/6250435.pdf> accessed 31 May 2019.

[285] E Etuk, E Ogbuene and CA Nwadinigwe, 'Sources and Impacts of Oil Spills in the Niger Delta Region of Nigeria' (2020) 2(08) American Journal of Applied Sciences 31, 33; SO Aghalino, 'Corporate Response to Environmental Deterioration in the Oil-Bearing Area of the Niger Delta, Nigeria, 1984-2000' (2009) 11(2) Journal of Sustainable Development in Africa 281, 285.

[286] AS Akinwumiju, AA Adelodun and SE Ogundeji, 'Geospatial Assessment of Oil Spill Pollution in the Niger Delta of Nigeria: An Evidence-based Evaluation of Causes and Potential Remedies' (2020) 267 Environmental Pollution 1, 2.

[287] N Takon, 'Environmental Damage Arising from Oil Operations in Niger Delta of Nigeria: How not to Continually Live with their Specific Impact on Population and Ecology' (2014) 3(9) International Journal of Development and Sustainability 1878, 1884.

framework and enhances the ability to manage stakeholder expectations.[288] Ihugba proposes that CSR should be regulated in Nigeria in an enforceable and transparent process to promote accountability and not left to be only voluntary.[289]

This research agrees with this proposal to the extent that CSR can be regulated and guided to achieve and promote better compliance. For instance, it is argued that other avenues for CSR such as environmental sustainability e.g., recycling, waste management, water management, renewable energy, reusable materials, greener supply chains and reducing paper use can be harnessed by creating CSR standards for proper reporting of Green House Gases emissions, oil spills, better waste management practices and full disclosure on other oil-related accidents. The assessment of environmental performance using appropriate indicators must be included in CSR plans.[290] Instead of shifting government responsibilities to regulated entities under CSR, CSR can complement government efforts. Government agencies can work in collaboration with regulated entities on CSR activities such as community involvement e.g. fund-raising for local charities, sponsoring local events, employment for locals, supporting local economic growth, and engaging in fair trade practices; and ethical marketing e.g. higher value on customers and not trying to manipulate or falsely advertise to potential consumers.[291]

It has been opined that the interaction of the oil and gas industry with high profile regulatory bodies, the UN Global Compact, stock market sustainability indices and the Global Reporting Initiative (GRI) is indicative of the importance of CSR for oil and gas operators.[292] Hence CSR support regarding the environment, should not be voluntary but should be an essential part of

[288] Peddada and Adam (n 278) 102.
[289] BI Ihugba, 'Compulsory Regulation of CSR: A Case Study of Nigeria' (2012) 5 (2) Journal of Politics and Law 68, 77.
[290] A Musa and others, 'Corporate Social Responsibility in Nigeria's Oil and Gas Industry: The Perspective of the Industry' (2013) 3(2) International Journal of Process Management and Benchmarking 101, 110.
[291] Peddada and Adam (n 317) 103.
[292] RH Chowdhury and others, 'Which Dimension of Corporate Social Responsibility is a Value Driver in the Oil and Gas Industry?' (2019) 36(2) Canadian Journal of Administrative Sciences 260, 261.

business practice.[293] CSR if regulated, can meet objectives that produce long-term benefits for all stakeholders, harness business power in a responsible way, integrate social demands and contribute to improved compliance by doing what is ethically correct.[294]

v. Corruption and bad governance

Corruption is the totality of the actions and activities of an individual or group of individuals within a political society that constitutes an injury to the collective interest or impedes service delivery, constitutionally intended for the public.[295] Flowing from the above discussion on the impact of poor resource allocation on compliance and enforcement, the effect of corruption and bad governance has also contributed to the failure of compliance and enforcement. The most dangerous effect that corruption and bad governance has had on compliance and enforcement is the role they both play in leaving all the other challenges in the petroleum sector unaddressed.[296] The funds that are meant to address these issues while they are still at the teething stage usually are syphoned into private pockets or diverted to other less vital uses, leaving government agencies not functioning and public services grounded.[297]

It is important to note that the corruption plaguing the Nigerian petroleum sector is multi-faceted. There is corruption in the management of the entire petroleum sector,[298] mismanagement of revenues accruing to the federal government of Nigeria, mismanagement of the 13% derivation share of oil revenue accruable to the oil-producing states in Nigeria,[299]

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[293] A Musa and others, 'Corporate Social Responsibility in Nigeria's Oil and Gas Industry: The Perspective of the Industry' (2013) 3(2) International Journal of Process Management and Benchmarking 101, 110.
[294] E Garriga and D Melé, 'Corporate Social Responsibility Theories: Mapping the Territory' (2004) 53(1-2) Journal of Business Ethics 51, 65.
[295] O Fagbadebo, 'Corruption and the Challenge of Accountability in the Post-Colonial African States: A Discourse' (2019) 8(1) Journal of African Union Studies 9, 14.
[296] W Ehwarieme and J Cocodia, 'Corruption and Environmental Degradation in Nigeria and its Niger Delta' (2011) 13(5) Journal of Sustainable Development in Africa 34, 36, 44.
[297] ibid 44.
[298] E Oshionebo, 'Mismanagement of Nigeria's Oil Revenues: Is the Nigeria Sovereign Investment Authority the Panacea' (2017) 10 Journal of World Energy Law and Business 329, 329.
[299] TM Ebiede, 'Conflict Drivers: Environmental Degradation and Corruption in the Niger Delta Region' (2011) 1(1) African Conflict and Peacebuilding Review 139, 145.

corruption in the transactions with multinational corporations involved in the petroleum sector[300] and corruption that impacts on compliance and enforcement involving the regulatory agencies in furtherance of their role as regulators.[301] For this research, the focus will be on the corruption impacting compliance and enforcement involving the regulatory agencies.[302]

The prevalence of corruption in the petroleum sector did not start as an elaborate scheme to undermine environmental regulations. Corruption in the petroleum sector grew from the grand and elaborate schemes to divert the proceeds from the operations of the petroleum sector to private pockets[303] Due to the prevalence of corruption, there is a negative and insignificant impact of oil and gas revenue on environmental quality in Nigeria.[304] Unfortunately, this has continued for decades that some writers have concluded that mismanagement of the proceeds of natural resources rather than the lack thereof is the cause of underdevelopment in Africa.[305]

As established earlier in section 4.4.3 (iii), and like most sectors in the Nigerian economy, there is never adequate appropriation of funds to environmental regulatory agencies to effectively carry out the statutory mandate of environmental regulation. This more or less renders the regulatory agencies redundant. The propensity for corruption makes some staff of regulatory agencies susceptible to tempting influences from regulated entities to sidestep the law in favour of such regulated entities. Some officers of the agency harass and threaten regulated entities and extort gratification in exchange for lenient sanctions or waiver of penalties.[306] Some

[300] This is evidenced in the $ 182 Million Halliburton bribery scandal in Nigeria's petroleum sector. See Fagbadebo (n 295) 17.
[301] J Rexler, 'Beyond the Oil Curse: Shell, State Power, and Environmental Regulation in the Niger Delta' (2010) 12(1) Stanford Journal of International Relations 26, 27.
[302] Oruonye and Ahmed (n 272) 55.
[303] Rexler (n 301) 27.
[304] SI Waziri and IM Azare, 'The Impact of Oil and Gas Revenue and Control of Corruption on Environmental Quality in Nigeria' (2020) 3(2) International Journal of Intellectual Discourse (IJID) 396, 405.
[305] SA Ofobruku, CP Sidi and NP Nwakoby, 'Impact of Corruption on the Oil Industry in Nigeria: Implication for Economic Growth' (2020) 18(1) Sahel Analyst: Journal of Management Sciences 33, 40; A Gillies, 'Corruption Trends During Africa's Oil Boom, 2005 to 2014' (2020) 7 The Extractive Industries and Society 1171, 1174-1178; Fagbadebo (n 295) 20.
[306] MT Ladan, *Law of Environmental Protection* (Caltop Publications 1998) 477.

regulated entities circumvent the efforts of the regulatory agencies by using blackmail, intimidation[307] and bribery.[308] It is argued that the prevalence of corruption in the system emboldens some of the regulatory agencies to divert scarce funds meant for equipping and upgrading the equipment of the agencies, to private or other uses. This further renders the regulatory agencies impotent in their statutory roles of securing compliance and effecting enforcement.

Another instance where compliance and enforcement have been impeded is where the threat from government, influential individuals and groups who have business interests is applied to challenge the effective implementation of environmental compliance and enforcement efforts.[309] It is trite that corruption is a major issue in the Nigeria petroleum sector. From the discussion above, it is contended that the effective compliance and enforcement regime of the Nigeria petroleum sector has been diluted by the effect of corruption on the various aspects of the sector because of the rippling effect of corruption and bad governance on the sector and beyond. These derails and delays institutional reforms that could eventually reorganise and effectively regulate the petroleum sector.[310] However, a study has found that control of corruption can have a favourable and important impact on environmental quality because it will improve compliance and enforcement.[311]

5.3 Environmental rule of law and the general attitude to the rule of law

The rule of law has been described as that aspect of the law that envisages a political system where life is organised according to laws that guarantee a good degree of objectivity in

[307] Ijaiya and Joseph (n 91)315.
[308] A Gillies, 'Corruption Trends During Africa's Oil Boom, 2005 to 2014' (2020) 7 The Extractive Industries and Society 1171, 1174.
[309] Ijaiya and Joseph (n 91) 315.
[310] MI Okechukwu, 'Bureaucratic Politics and the Implementation of Liberalisation Reforms in Nigeria: A Study of the Unbundling and Reorganisation of the Nigerian National Petroleum Corporation' (2018) 46(2) Politics and Policy 263, 263.
[311] Waziri and Azare (n 304) 405.

dispensing justice, defending freedom, promoting peace and prosperity because law is a reasonable expression of integrity.[312] It is likened to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.[313] However, the lack of respect for and poor implementation of environmental law and regulatory standards due to the vulnerability of administrative mechanisms such as regulatory agencies are driving forces for the weakness of environmental regulatory efforts.[314] This is because it creates a decline of state authority and public morals and progressive disrespect for the law. When properly understood and implemented the rule of law advances economic, social and environmental development and reinforces their interconnectivity through legal and institutional reforms, protection of rights, access to justice and legal empowerment strategies.[315]

Nigeria practices the application of the rule of law as a democratic nation. The judiciary plays a major role in upholding the rule of law by applying the law without respect for persons.[316] Judicial officers are expected to be courageous, impartial, independent and just and be no respecter of persons regardless of status.[317] It has been recorded often, where highly placed individuals and corporate organisations have acted above the law or not subject to any authority. Although this was characteristic of military rule in Nigeria, it has continued even in

[312] RC Onwanibe, 'The Rule of Law and the Rule of Man' in OC Eze (ed), *Society and the Rule of Law* (Totan Publishers 1989) 171.
[313] I Khan, 'How Can the Rule of Law Advance Sustainable Development in a Troubled and Turbulent World' (2017) 13(2) McGill Journal of Sustainable Development Law 211, 213.
[314] SA Mvondo, 'State Failure and Governance in Vulnerable States: An Assessment of Forest Law Compliance and Enforcement in Cameroon' (2009) 55(3) Africa Today 85, 99.
[315] I Khan and others, 'Shifting the Paradigm: Rule of Law and the 2030 Agenda for Sustainable Development', *Financing and Implementing the Post-2015 Development Agenda: The Role of Law and Justice System* (World Bank Legal Review edn, World Bank Group 2016) 221.
[316] See **section 6.1.2** of **Chapter 6** of this thesis.
[317] EO John, 'The Rule of Law in Nigeria: Myth or Reality?' (2011) 4(1) Journal of Politics and Law 211, 212.

the civilian government.[318] The rule of law has been disrespected in many ways like ignoring court orders,[319] illegal arrests, detention, trial, banning of trade unions and popular organisations, harassment of civil rights campaigners,[320] extrajudicial killings by the government troops etc.

A positive option to tackle this poor attitude to the rule of law in the petroleum sector is to promote the environmental rule of law. Environmental rule of law supports the three pillars of sustainable development – economic, social and environment,[321] and has been described by the United Nations Environment as comprising of three related components. It must be consistent with fundamental rights as it must promote inclusivity, be fairly effectuated and produce accountability in theory and practice.[322] Environmental rule of law can improve compliance and enforcement by interfacing environmental sustainability with fundamental rights and obligations in three ways. *First*, by having the government, civil society, private sector, and the international community focus on the implementation and enforcement of existing environmental protection requirements essential to realising number of human rights.[323] *Second,* improving the institutional practice of respecting and implementing environmental

[318] For example, during the 2019 election in Nigeria, a bullion van was used to transport huge sums of cash into the private residence of citizen of Nigeria. Regardless of petitions from individuals and NGOs in the country for the Economic and Financial Crimes Commission to investigate and prosecute the individual, no action has been taken to that effect till date. V Ufuoma, 'Group Petitions EFCC over Bullion Van seen at Tinubu's House' (2019) <https://www.icirnigeria.org/group-petitions-efcc-over-bullion-van-seen-at-tinubus-house/> accessed March 17 2020

[319] This was the fate of the Plaintiffs in the case of *Jonah Gbemre v SPDC Ltd. & Ors* 2005 6 African Human Rights Law Report 152, where the defendants ignored a court order to stop gas flaring as it was interfering with the fundamental human right to lift, to which the plaintiffs were entitled to.

[320] As was the case in the illegal trial, conviction and execution by the Abacha-led military government, of Ken Saro Wiwa and eight other prominent Ogoni activists in their bid to get the attention of the international community to the devastation wrecked by multinational corporations operating in Ogoni land.

[321] Khan (n 313) 212; United Nations Economic and Social Council. 'Sustainable Development' (2020) <https://www.un.org/ecosoc/en/sustainable-development> accessed March 17, 2020.

[322] United Nations Environment, 'Environmental Rule of Law: First Global Report' (2019) <https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y> accessed 29 July 2019 8.

[323] N Ahuja and others, 'Advancing Human Rights Through Environmental Rule of Law' in Michael Faure (ed), *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing Limited 2019) 13, 16.

rights by strengthening capacity, accountability and policies.[324] *Third,* fostering the political will to implement and enforce existing rights and legal requirements.[325]

Environmental rule of law when effectively applied essentially promotes compliance and enforcement because it reduces corruption and non-compliance in natural resources management such as petroleum sector operations. At the same time, it is unique in its context as it governs the vital link between humans and the environment that supports human lives, society, businesses and life on earth.[326] Environmental rule of law positively impacts environmental protection, strengthens the general rule of law, supports sustainable economic and social development, contributes to peace and security by avoiding and diffusing conflicts and protecting the fundamental rights of people including their environmental rights.[327] All these benefits can directly feed into compliance and enforcement provisions of environmental regulation. Costa Rica is an example of where the benefits of environmental rule of law are realised through the promotion of political consensus over years of implementing strong environmental regulation along with economic development.[328] This is particularly important because Costa Rica is a nation that is heavily dependent on natural resources. This has also resulted in high respect for courts and environmental regulatory institutions in Costa Rica.

It is imperative to note that environmental rule of law has many elements. However, the UNEP has identified seven core elements that promote environmental rule of law and represents the efficient and effective functioning of environmental governance across multiple levels of

[324] ibid.
[325] ibid.
[326] United Nations Environment, 'Environmental Rule of Law: First Global Report' (2019) (n 322) 18.
[327] ibid 17..
[328] K Marius and others, 'Costa Rica: Pioneering Sustainability' in B Stiftung (ed), *Winning Strategies for a Sustainable Future.* (Reinhard Mohn Prize 2013) 81, 89. See also L Zeng, 'Chinese Practice of International Rule of Law: Great Progress in the Past Thirty Years and Growing Challenges Ahead', *Contemporary International Law and China's Peaceful Development* (Springer 2021) 279 on how China's implementation of the rule of law is contributing to turning around China's political, economic and environmental fortunes.

institutions, sectors and actors.[329] The core elements are *Sound laws,*[330]*access to rights,*[331] *institutional integrity,*[332] *clear mandates,*[333] *dispute resolution,*[334] *human rights connection,*[335] c*lear interpretative criteria,*[336] All seven elements discussed above are necessary to promote environmental rule of law.

It has been noted that environmental rule of law and Sustainable Development Goals (SDGs) of the United Nations are mutually reinforcing.[337] This is evident in the fact that many of the SDGs can only be achieved when a safe and healthy environment exists under effective environmental rule of law and the realisation of the SDGs provides a platform to demonstrate environmental rule of law.[338] The United Nations 2030 Agenda for SDGs which were adopted in September 2015[339] has the distinctive feature of acknowledging that access to justice in SDG

[329] C Bruch and others, Environmental Rule of Law: First Global Report (United Nation Environment 2019) 285, 20.
[330] This implies that environmental laws should be fair, clear and implementable and eliminate any issue that has the potential to hinder the fair and equitable implementation of such laws.
[331] These create a level platform for effective civil engagement to allow for public participation in environmental decision-making and readily available access to courts, tribunals, commissions and other bodies when seeking justice. All three rights are mutually reinforcing and essential to the realisation of the environmental rule of law.
[332] Environmental institutions promoting environmental rule of law must exhibit integrity in the execution of their statutory roles demonstrating to the public that existing environmental laws are there to promote environmental benefits for all like social, economic, public health and security.
[333] Since environmental and natural resource management traverses many sectors and involve different ministries, agencies and departments, it is pertinent that institutions be given clear and transparent mandates for effective environmental rule of law. 24.
[334] As proposed in the third access right, the right to justice, an important element of environmental rule of law is guaranteed access to courts or other mechanisms for disputes resolution. These mechanisms which must be fair, impartial, accessible, timely and responsive will increase the likelihood issues of environmental injustice will be addressed. 25.
[335] Human rights and environmental rule of law are inextricably connected because human rights depend on the sanctity of the environment. A degraded environment can be an infringement on the constitutional and human right to life. On the other hand, if constitutional and human rights are properly protected, environmental rule of law will be achieved because environmental harms will be appropriately addressed thereunder 25.
[336] It is important that detailed guidelines that clarify environmental laws and promote a transparent interpretation and application of such laws. This also affords the opportunity for the laws to be tested and reviewed when the need arises. 26.
[337] M Rabinovych, 'Where Economic Development Meets the Rule of Law? Promoting Sustainable Development Goals Through the European Neighborhood Policy' (2020) 2(1) Brill Open Law 140,142. See also A Kreilhuber and A Kariuki, 'Environmental Rule of Law in the Context of Sustainable Development' (2019) 32(3) Georgetown Environmental Law Review 591, 598. Two key features demonstrate examples of how environmental rule of law advances sustainable development by creating an expectation of compliance with environmental law and strengthening general rule of law by increasing trust in the government and holding decision makers accountable.
[338] United Nations Environment, 'Environmental Rule of Law: First Global Report' (2019) (n 363) 226.
[339] United Nations Development Programme, 'Sustainable Development Goals' (2018) <http://www.undp.org/content/undp/en/home/sustainable-development-goals.html> accessed 23 May 2018; Rabinovych (n 337) 141.

16[340] and the environmental rule of law are outcomes and enablers of sustainable development. This understanding is also referenced across the 17 SDGs such as equality, inclusivity, equity, legal frameworks and accountable institutions.[341]

Environmental rule of law promoted by institutions that demonstrate integrity and accountability in the execution of their statutory roles can effectively support the sustainable development of natural resources. It can advance the agenda for equality and social justice and by implication, sustainable development by ensuring that everyone is treated equally before the law and without any form of discrimination, thereby creating a culture of justice.[342] Therefore without compliance, the environmental rule of law has no meaning.[343]

5.4 Cost of environmental non-compliance

While it is easy to look at the cost of environmental non-compliance through the lens of financial implications, it is contended that although the cost of non-compliance can be expressed in figures, its significance goes beyond the numbers.[344] The cost of environmental non-compliance is evident in everyday existence. These costs are seen in health costs where life expectancy is recorded as gradually reducing due to the increasing degradation of living conditions,[345] nature and biodiversity costs where there is a systematic destruction of nature and biodiversity, water and emission costs where the pollution of watercourses and the atmosphere is continuously on the rise thereby increasing the competition for these

[340] The SDG goal 16 is to Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. United Nations Development Programme, 'Sustainable Development Goals' (2018) (n 380).
[341] Rabinovych (n 337) 152-153; Khan (n 313) 212.
[342] Khan (n 313) 214-217.
[343] T Higdon and D Zaelke, 'The Role of Compliance in the Rule of Law, Good Governance, and Sustainable Development' (2006) 3(5) Journal for European Environmental & Planning Law 376, 378.
[344] Cory and Green (n 9).
[345] O Yakubu, 'Addressing Environmental Health Problems in Ogoniland Through Implementation of United Nations Environment Program Recommendations: Environmental Management Strategies' (2017) 4 (2) Environments 28, 32.

resources.[346] There are many approaches to measuring non-compliance. Some of them include law enforcement records, indirect observation, self-reporting, direct observation, direct questioning, indirect questioning, forensics and modelling.[347]

More often than not, the costs of environmental non-compliance are not physical or immediately visible, but they are felt in everyday living.[348] Other more easily relatable costs of environmental non-compliance exist and include the legal fees incurred for prosecution or defence of lawsuits by victims of environmental non-compliance, NGOs, and other concerned third parties on the one hand and regulated entities on the other hand. Regardless of how the lawsuits end, both parties incur legal costs. There is also reputational cost, loss of revenue and time, loss of employees due to unsafe work conditions and loss of licence or operational permit.[349]

5.5 Evaluation of the barriers hindering compliance and enforcement

In line with this research, some scholars agree that the existing compliance and enforcement model in Nigeria has not catered to the environmental regulatory needs of the Nigerian petroleum sector, as they believe that there is still a lot to be done to achieve effective compliance and enforcement of environmental laws of the petroleum sector in Nigeria.[350] The various challenges discussed above have contributed to making compliance and enforcement

[346] Rexler (n 301) 27.
[347] JN Solomon, MC Gavin and ML Gore, 'Detecting and Understanding Non-compliance with Conservation Rules' (2015) 189 Biological Conservation 1, 2; MC Gavin, JN Solomon and SG Blank, 'Measuring and Monitoring Illegal Use of Natural Resources' (2010) 24(1) Conservation Biology 89, 91-95.
[348] For example, the issue of climate change. The effect of climate change in recent times is because of decades of systematic destruction of the environment without a corresponding response to such acts of environmental non-compliance.
[349] Cory and Green (n 9).
[350] U Etemire and NU Sobere, 'Improving Public Compliance with Modern Environmental Laws in Nigeria: Looking to Traditional African Norms and Practices' (2020) 38(3) Journal of Energy & Natural Resources Law 305, 327; C Chuks-Ezike, 'Environmental Crime Liability of the Nigerian Government in Its Oil Pollution Menace' (2018) 2(2) Environmental Risk Assessment and Remediation 1, 5; NF Stewart, 'A Proposal of Reforms for Effective Environmental Management in Nigeria' (2017) 1(1) Ajayi Crowther University Law Journal 1, 5; AC Salihu and others, 'Environmental Compliance of Facilities in Minna-Niger State, North Central Nigeria' (2015) 2 (10) Research Journali's Journal of Geography 1.

efforts in Nigeria weak. The barriers stem from all the pillars that should support compliances efforts such as the law, the government and institutions upon which compliance and enforcement efforts should thrive including compliance motivation.

Bruce and Ken noted that regulators often carry out some activities to manage environmental regulation to encourage compliance and discourage non-compliance.[351] These activities, which also address the barriers of compliance and enforcement, usually involve three main elements. *First,* encouraging compliance through continuous education, information, support and incentives and controls such as licence and permit conditions. *Second,* monitoring compliance through regular and random inspections, audits, patrols, information and intelligence gathering. *Third*, responding to noncompliance by investigating suspected breaches of the law and enforcing the law by imposing sanctions such as warnings, prosecution and revoking licences.[352] However, these can only be effective where the motivation for compliance is properly understood and appropriately responded to by both the regulator and the regulated entities.

The barriers discussed in this chapter are not peculiar to Nigeria. The United Nations passed a resolution[353] authorising the United Nations Secretary-General to issue a technical report identifying and assessing possible gaps in the implementation of international environmental law and environment-related instruments to strengthen implementation and establish an Open-Ended Working Group (OEWG) to consider the report and possible options to address the gaps and a possible international instrument to achieve this.[354] This report adopted a broad interpretation of what constitutes a gap in international environmental law. It further identified

[351] A Bruce and S Ken, *Effectiveness of Compliance Activities: Departments of Primary Industries and Sustainability and Environment.* (Government Printer, Victorian, 2012) 186, 2.
[352] ibid.
[353] UNGA, 'Towards a Global Pact for the Environment' UN Doc A/RES/72/277 (10 May 2018) (Resolution 72/277).
[354] C Voigt, 'How a 'Global Pact for the Environment' could add Value to International Environmental Law' (2019) 28(1) Review of European Community and International Environmental Law 13, 16.

and assessed regulatory and governance gaps in international law and environment-related international legal instruments[355] that lack environmental protection objectives and purpose but still interact and interlink with environmental issues directly or indirectly. Although the report is non-binding, it can provide a guide for a country like Nigeria.

It is conceded that by law, environmental regulation in Nigeria is the responsibility of the federal government because the ownership and control of all petroleum[356] is vested in the Federal government of Nigeria.[357] However, it is contended that this position makes compliance and enforcement efforts more susceptible to the various challenges discussed above considering the social, economic and political construct of Nigeria. This will not promote the much-needed effective implementation of laws regulating the Nigerian petroleum sector. Under some United States environmental regulations, for instance, the responsibility of environmental regulation is shared between the federal government and states[358] where the federal government authorises the states to implement environmental regulations. This research agrees that environmental decision-making by states may offer better a solution in circumstances where the environmental problem is less than national in scope but extends beyond individual state boundaries.[359] This can potentially decentralise the burden of federal environmental regulation and consequently expand the influence of states to implement federal

[355] Such as International trade investments, international property, Human Rights, peace and security, migration, disaster management and armed conflict which translate to some of the major causes of the challenges to compliance and enforcement of environmental regulations at national and global levels.
[356] S 1 Petroleum Act 2010.
[357] S 1 Petroleum Act 2010
[358] H Sigman, 'Letting States do the Dirty Work: State Responsibility for Federal Environmental Regulation' (2[358] Rexler (n 340) 27.
[358] Solomon, Gavin and Gore (n 347) 2; MC Gavin, JN Solomon and SG Blank, 'Measuring and Monitoring Illegal Use of Natural Resources' (2010) 24(1) Conservation Biology 89, 91-95.
[358] For example, the issue of climate change. The effect of climate change in recent times is because of decades of systematic destruction of the environment without a corresponding response to such acts of environmental non-compliance.
[358] Cory and Green (n 9).
[358] Etemire and Sobere (n 350) 327; Chuks-Ezike (n 245) 5; NF Stewart, 'A Proposal of Reforms for Effective Environmental Management in Nigeria' (2017) 1(1) Ajayi Crowther University Law Journal 1, 5; Salihu and others (n 89) 110.
[359] T Dinan and N Tawil, 'Solving Environmental Problems with Regional Decision—Making: A Case Study of Ground—Level Ozone' (2003) National Tax Journal 123, 123.

standards of environmental regulation and bring compliance and enforcement monitoring closer to the states.

5.6 Conclusion

In this chapter it is was deduced that the decision to comply or not to comply with environmental laws is ultimately subject to the regulated entity's ability and willingness to comply.[360] The conventional assertion that a stricter enforcement policy framework can guarantee compliance, does not necessarily hold true.[361] However, to be able to comply, regulated entities have to possess the ability to comply with regulations, understand how to comply, have the capacity to comply and be willing to comply.[362] This is because when aligned to the business sector, a well-designed and enforced environmental law produces huge benefits[363] and these requirements are complementary and not mutually exclusive as it has been noted that regulation aims to do more good than harm.[364]

Research in this area has shown that earlier writers tend to blame the weaknesses of environmental laws on the government, the regulatory agencies and corruption, for the ineffective implementation of the laws.[365] However, this chapter argued that effective compliance and enforcement requires a holistic plan where all stakeholders have a part to play to bring effective regulation to fruition. This is because, in an ideal situation, environmental laws are made by the legislature, implemented by the executive and interpreted by the judiciary.

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[360] Nollkaemper (n 83) 238.
[361] C Cheng and Y Lai, 'Does a Stricter Enforcement Policy Protect the Environment? A Political Economy Perspective' (2012) 34 (4) Resource and Energy Economics 431.
[362] Bruce and Ken (n 351) 2.
[363] P Kellett, 'Securing High Levels of Business Compliance with Environmental Laws: What Works and What to Avoid' (2020) 32(2) Journal of Environmental Law 179, 179.
[364] H Beales and others, 'Government Regulation: The Good, The Bad, & The Ugly' (2017) <https://regproject.org/wp-content/uploads/RTP-Regulatory-Process-Working-Group-Paper.pdf> accessed 27 October 2020 16.
[365] JL Short, 'The Politics of Regulatory Enforcement and Compliance: Theorizing and Operationalizing Political Influences' (2019) Regulation & Governance 1, 18; M Aklin and others, 'Who Blames Corruption for the Poor Enforcement of Environmental Laws? Survey Evidence from Brazil' (2014) 16(3) Environ Econ Policy Stud 241, 252.

It is usually easy to overlook the other actors in this ‘ideal situation’. These actors include the indigenes of the host communities where these laws are required to be implemented and usually, victims of the acts of non-compliance and other concerned third parties like NGOs and other groups. The general notion is that the concerns of these other actors are addressed under the operators’ CSR plan, often, this is not the case.

CHAPTER 6

Institutionalising compliance and enforcement of environmental regulation in the Nigerian petroleum sector: The role of the Judiciary

Introduction

Legal and institutional environmental regulation frameworks at the international and national levels incorporate enforcement and compliance dimensions.[1] Regardless of these frameworks, studies have shown that environmental compliance and enforcement has continued to face implementation barriers[2] for the many reasons discussed in **Chapter 5**. Consequently, the existence of environmental laws does not reflect the value that the laws ought to practically add to compliance and enforcement efforts.[3] Since environmental regulation is a function of law and policy, this chapter examines the role of the judiciary in the improvement of compliance and enforcement to promote the effectiveness of the legal and institutional frameworks. This discussion examines the various functions of the judiciary through which environmental compliance and enforcement can be achieved including interpretation and review of law, adjudication in national and extraterritorial courts, panels and commissions and monitoring environmental regulatory agencies for improved compliance and enforcement performance.

[1] A Heyes, 'Implementing Environmental Regulation: Enforcement and Compliance' (2000) 17(2) Journal of Regulatory Economics 107, 108.

[2] ED Oruonye and YM Ahmed, 'The Role of Enforcement in Environmental Protection in Nigeria' (2020) 7(1) World Journal of Advanced Research and Reviews 48, 49; IM Alumona and KM Onwuanabile, 'Environmental Insecurity in Nigeria' in OO Oshita, IM Alumona and FC Onuoha, (eds), *Environmental Insecurity in Nigeria Internal Security Management in Nigeria* (Palgrave Macmillan 2019) 181, 203.; CO Ugwuoke, SO Ameh and E Ogbonna, 'Criminal Justice System and the Conflicts of Environmental Safety in Nigeria' (2017) 4(20) Advances in Social Sciences Research Journal 143, 151.; KSA Ebeku, 'Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria' (2003) 12(2) Review of European, Comparative and International Environmental Law 199.

[3] DL Grove, 'The "Sentinels" of Liberty? The Nigerian Judiciary and Fundamental Rights' (1963) 7(3) Journal of African Law 152.

Section 6.1 highlights the powers and jurisdiction of courts that have jurisdiction to entertain cases emanating from the petroleum sector and other environmental matters. **Section 6.2** identifies the compliance and enforcement components in environmental rights (human right to a clean and healthy environment and the rights of nature) and how access to courts can improve the quest for effective compliance and enforcement of environmental regulation. **Section 6.3** highlights the ways through which the judiciary can intervene to give force to the legislative provisions regarding environmental rights in Nigeria. The effectiveness of the role of the judiciary in Nigeria is hampered by the challenges faced by the judiciary in the process of playing this role as discussed in **section 6.4.** However, the conviction in this chapter is that the judiciary can be a vital vehicle towards achieving effective petroleum sector regulation in Nigeria if the steps discussed in **section 6.5** are applied.

The significance of this chapter is *first*, to the effect that petroleum sector operations should be held to a standard of compliance and enforcement that is promoted by a judiciary that complements the regulatory effort of the Nigerian government. *Second*, cases arising from petroleum sector operations are pending in other jurisdictions because the Nigerian judiciary in its present form is not meeting the demand for fair hearing and adequate representation for victims of environmental harm. *Third*, to examine the judiciary in the light of an institution that provides redress to victims of environmental harm. Also, to examine the judiciary as an institution that operates to shape the behaviour of organisations, by a practice that can bring incremental changes in the organisation and structural changes in the regulation and processes of business.

6.1 The Judiciary in Nigeria

The judiciary is the third arm of government, responsible for the administration of justice deriving its powers from the legal instruments establishing it and setting out parameters for its

operation.[4] The judiciary defends, upholds and promotes the rule of law including environmental rule of law[5] by interpreting the law, creating case law, providing judicial reviews, entertaining public enquiries and sentencing issues.[6]

The judiciary in Nigeria comprises superior courts of record and the lower courts. The Constitution of Nigeria makes express provisions for the establishment, hierarchy,[7] jurisdiction and composition of the superior courts of record. The superior courts of record are the Supreme Court,[8] the Court of appeal,[9] the Federal High Court,[10] State High Court,[11] Customary Court of Appeal of a State,[12] Sharia Court of Appeal of a State[13] and the National Industrial Court.[14] The lower courts make up the second category of courts and include Magistrate Courts, District Courts, Area Courts, Customary Courts, Sharia Courts, Juvenile Courts and Military Courts or Court-martial. The functions of the courts include interpretation of laws, adjudication, exercising supervisory and judicial review functions over administrative and executive

[4] I Abdullahi, 'Independence of the Judiciary in Nigeria: A Myth or Reality?' (2014) 2(3) International Journal of Public Administration and Management Research (IJPAMR) 64, 66. The Judiciary operates through the law, the courts, statutory regulatory agencies and issuance of realistic pronouncements and timelines.
[5] C Voigt and Z Makuch, 'Courts and the Environment: An Introduction', *Courts and the Environment* (Edward Elgar Publishing 2018) xii, xii. Environmental rule of law consists of adequate and implementable laws, access to justice and information, public participation, accountability, transparency, liability for environmental damage, fair and just enforcement, and human rights. See DV Wright, 'Environmental Rule of Law: In Need of Coherence in Contested Terrain' (2020) 15(1) McGill International Journal of Sustainable Development Law and Policy 1, 7.
[6] B Dickson, 'Apex Courts and the Development of the Common Law' in P Daly (ed), *Apex Courts and the Common Law* (University of Toronto Press 2019) 36; AO Oluwadayisi, 'The Role of the Judiciary in the Application of Peacebuilding Theory and Methods to Election Dispute Resolution in Nigeria' (2016) 45 Journal of Law, Policy and Globalization 138, 140; SB Yu, 'The Role of the Judge in the Common Law and Civil Law Systems: The Cases of the United States and European Countries' (1999) 2(2) International Area Review 35, 38. J Sokefun and NC Njoku, 'The Court System in Nigeria: Jurisdiction and Appeals' (2016) 2(3) International Journal of Business and Applied Social Science 1, 2.
[7] MT Ladan, 'Nigeria's Judiciary and Governance: Roles, Functions and Power' (Lecture delivered to the Executive Intelligence Management Course Institute for Security Studies, Abuja 22 March 2017) 1, 4.
[8] Constitution of the Federal Republic of Nigeria 1999 Cap C23 Laws of the Federation of Nigeria 2010, s 230 (1).
[9] s 237 (1) Constitution of Nigeria 1999.
[10] s 249 (1) Constitution of Nigeria 1999.
[11] s 270 (1) Constitution of Nigeria 1999.
[12] s 280 (1) Constitution of Nigeria 1999.
[13] s 275 (1) Constitution of Nigeria 1999.
[14] s 6 (5) Constitution of Nigeria 1999, (Third Alteration) Act, 2010 which came into effect on the 4th day of March 2011.

bodies.[15] The superior courts listed above represent the destination of various criminal and civil disputes including environmental cases.

Chart I: Classification of Nigerian Courts

1. Supreme Court of Nigeria (Apex court)
2. Court of Appeal
3. Federal High Court

} Courts relevant to petroleum sector litigation

4. National Industrial Court
5. High Court of the Federal Capital Territory
6. High Court of a State
7. Sharia Court of Appeal of the Federal Capital Territory
8. Sharia Court of Appeal of a State
9. Customary Court of Appeal of the Federal Capital Territory
10. Customary Court of Appeal of a State
11. Magistrates' Court of the Federal Capital Territory and the States
12. Area Courts in FCT and some States
13. Sharia Courts in some states
14. Customary Courts in FCT and some States

} Other Courts

6.1.1 Powers and jurisdiction of the Judiciary in Nigeria

Judicial power has been defined differently by different scholars. While Ladan defined it as the classes of cases over which a court of law has jurisdiction.[16] Nwabueze defined judicial power, as the power that the state exerts in the administration of public justice in contradistinction from the power it possesses to make and execute laws.[17] However, Ladan advocates caution in the application of the terms 'powers' and 'jurisdiction' as he attempts to make a distinction between judicial power and jurisdiction. In furtherance of this, he notes that judicial power is not automatically exercised by every court upon which it is vested because every court has its jurisdiction set out by the Constitution.[18] It is argued that both definitions cover all the inherent

[15] SA Fagbemi and AR Akpanke, 'Environmental Litigation in Nigeria: The Role of the Judiciary' (2019) 10(2) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 26, 29.
[16] Ladan (n 7) 18.
[17] BO Nwabueze, *Judicialism in Commonwealth Africa: The Role of Courts in Government* (St Martin's Press 1977) 19.
[18] Ladan (n 7) 18.

powers and jurisdictions of the judiciary under the Constitution[19] as such the terms 'judicial power' and 'jurisdiction' are used synonymously and thus refer to the same thing.[20]

The judiciary through the superior courts of record in Nigeria derives its powers from the provisions of the Constitution of the federal republic of Nigeria.[21] The powers of the judiciary include the exercise of judicial jurisdictions conferred by the Constitution in the interpretation and application of the law to enable it to administer justice and resolve disputes between parties.[22] These powers extend to all the inherent powers of a superior court of record in Nigeria.[23] All matters between persons, governments, authorities[24] and any other persons[25] and all actions and proceedings related to them are also covered under the powers.[26] With such constitutional backing, the judiciary appears to have all it requires to operate without fear or favour.[27] It is argued that with this constitutional latitude, it is expected that the judiciary would be independent in its operations, however, it has been noted that the independence of the judiciary is under constant threat by internal and external forces in many countries,[28] including Nigeria.[29] This is evident in the fact that just as the law expressly provides for the extent of the

[19] S 6 (6) a of the Constitution of Nigeria 1999.
[20] EM Joye and KI Igweike, *Introduction to the 1979 Nigerian constitution* (MacMillan Publishing Company. 1982).
[21] s 232 (1) and s 233 (1) Constitution of Nigeria1999, provide for the jurisdiction of the Supreme Court; s 240 (1) provides for the jurisdiction of the Court of Appeal and s 251 (1) provides for the jurisdiction of the Federal High Court.
[22] Ladan (n 7) 19.
[23] S 6 (6) a of the Constitution of Nigeria 1999.
[24] Curiously, the Constitution interprets 'authority' to include government. See s 318 Constitution of Nigeria 1999. It is assumed that since the term government had already appeared in the provision, 'authority' here would serve to mean other agencies of government.
[25] The Nigerian Constitution does not define person; therefore, it is assumed that the term includes legal and non-legal persons.
[26] S 6 (6) b of the Constitution of Nigeria 1999.
[27] Y Mittal, 'Independence of the Judiciary: An Epitome of 'Rule of Law' in India' (2018) 1 (2) Journal of Constitutional Law and Jurisprudence 1, 4.
[28] MM Baylson and others, 'Judicial Independence Under Attack: A theory of Necessity' (2019) 168 (1) University of Pennsylvania Law Review Online 1, 1. The government shutdown was initiated by the President of the United States of America in response to disagreements with Congress over the 2019 appropriation bill. The shutdown which lasted for thirty-five days, affected federal employees and government agencies including the judiciary.
[29] Especially in Africa, North America and Asia. See F Rinke, M Castillejos-Aragón and A Natarajan, 'Judicial Independence Under Threat' a paper presented at the Global Conference in Strasbourg, 5-6 December 2018, 10. In Nigeria, the recent removal from office of the Chief Justice of Nigeria Walter Onnoghen without due process, has been flagged by the UN Special Rapporteur on the Independence of judges and lawyers Diego Garcia-Sayan

powers of the judiciary, it also limits the powers of the judiciary on some issues. For example, in the Constitution of Nigeria, the power of the judiciary does not extend to any enquiry into whether any act, omission, law or judicial decision conforms with Chapter 2 of the Constitution, the Fundamental Objectives and Directives of State Policy[30] which includes environmental protection matters.[31]

The 1999 Constitution of Nigeria mandates the state in s 20 to protect and improve the environment and safeguard the water, air and land, forests and wildlife of Nigeria.[32] The duty and responsibility of all organs of government to conform to, observe and apply the provisions of Chapter 2 of the Constitution under which s 20 falls was further confirmed in the Constitution in s 13.[33] Curiously, s 6 (6) (c) of the same Constitution precludes the courts in Nigeria from entertaining any question or adjudicating on matters seeking the enforcement of the provisions under Chapter 2 of the Constitution[34] rendering S 20 non-justiciable. For this reason, environmental activists and victims of environmental harm seek alternative ways to achieve this constitutional right by relying on other legal instruments like the African Charter on Human and Peoples' Rights (ACHPR)[35] and extraterritorial courts for legal redress.[36]

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as a threat to judicial independence. United Nations. 'Nigeria: Judicial Independence under Threat, warns UN Human Rights Expert' (2020). <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24152&LangID=E> accessed 23 March 2020. Other instances of interference and threat to judicial independence can be seen in the constant and flagrant disobedience of court orders especially by multinational corporations.

[30] See S 6 (6) (c) of the Constitution of Nigeria 1999 regarding Chapter 2 thereof.

[31] As provided by s 20 of the 1999 Constitution of the Federal Republic of Nigeria.

[32] S 20 the state shall protect and improve the environment and safeguard the water, air and land, forests and wildlife of Nigeria.

[33] S 13 it shall be the duty and responsibility of all organs of government, and of all authorities and persons exercising legislative, executive and judicial powers, to conform to, observe and apply the provisions of **Chapter 2** of the Constitution.

[34] S 6 (6) (c) the judicial powers vested in accordance with the foregoing provisions of this section shall not except as otherwise provided for by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

[35] African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act Cap A9 Laws of the Federation of Nigeria 2004.

[36] SI Azubuike and O Songi, 'A Rights-based Approach to Oil Spill Investigations: A Case Study of the Bodo Community Oil spill in Nigeria' (2020) 1(1) Global Energy Law and Sustainability 28, 35; R Ako, N Stewart and

Article 24 of the ACHPR provides that all peoples shall have the right to a general satisfactory environment favourable to their development, which essentially replicates the intention of s 20 of the Nigerian Constitution. For example, victims now find it easier to seek to enforce their fundamental right to life (including the right to live in a healthy environment) by relying on the provisions of the ACHPR. In the case of *Jonah Gbemre v SPDC Ltd. & Ors,*[37] the Federal High Court recognised that environmental degradation could give rise to a violation of human rights. Therefore, a citizen can rely on Articles 4, 16 and 24[38] of the ACHPR to enforce environmental rights[39] because the broad interpretation of the fundamental human right to life as provided for in s 33 of the Nigerian Constitution[40] includes the right to a clean, poison-free, pollution-free and healthy environment and is enforceable as provided for by the ACHPR.[41]

Resorting to courts in foreign jurisdictions to seek justice when it proves elusive in Nigeria has its merits and demerits.[42] Instituting actions in courts in foreign jurisdictions can yield positive

EO Ekhator, 'Overcoming the (non) justiciable Conundrum: The Doctrine of Harmonious Construction and the Interpretation of the Right to a Healthy Environment in Nigeria' in Alice Diver and Jacinta Miller (eds), *Justiciability of Human Rights Law in Domestic Jurisdictions* (Springer 2016) 123, 126; EO Ekhator, 'The Impact of the African Charter on Human and Peoples' Rights on Domestic Law: A Case Study of Nigeria' (2015) 41(2) Commonwealth Law Bulletin 253, 269; EO Ekhator, 'Improving Access to Environmental Justice Under the African Charter on Human and Peoples' Rights: The Roles of NGOs in Nigeria' (2017) 22(1) African Journal of International and Contemporary Law 63.

[37] See **sections 5.2.1 (i)** and **(iii)** of **Chapter 5** of this thesis.

[38] **Article 4**. Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right. **Article 16 (1)** Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) State Parties to the present Charter shall take the necessary measure to protect the health of their people and to ensure that they receive medical attention when they are sick. **Article 24.** All people shall have the right to a general satisfactory environment favourable to their development.

[39] **Article 4** of the Charter provides for the inviolability of human being, the right of every human being to respect for his right and the integrity of his person, Article 16 provides for the right of every individual to enjoy the best attainable state of physical and mental health and Article 24 provides that the right to a general satisfactory environment for development is a human right. All these rights can be violated if the environment is subjected to any degree of harm or damage.

[40] S 33 (1) Every person has a right to life, and no one shall be deprived of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.

[41] *Jonah Gbemre v Shell Petroleum Development Company Limited* [2005] 6 African Human Rights Law Report 152 (NgHC 2005). See paragraph 5 (3) of the judgement.

[42] EO Popoola, 'Moving the Battlefields: Foreign Jurisdictions and Environmental Justice in Nigeria' <https://items.ssrc.org/...environments/moving-the-battlefields-foreign-jurisd...> accessed 19 August 2019.

results[43] such as providing alternative pathways to achieve what is otherwise inaccessible in Nigeria.[44] Another advantage is that it guarantees the impartiality of the judiciary in any given case.[45] However, this move can present some challenges as well. Prospective litigants must ensure that all other local remedies have been exhausted before they can approach some regional courts.[46] Other disadvantages of seeking access to court in other jurisdictions are the high cost of litigation and jurisdictional challenges as some courts may not have the power to hear and determine some cases. This challenge of the high cost of litigation is resolved by engaging and collaborating with established environmental and human rights groups who are willing to provide funding for legal services.[47]

The attraction of seeking justice in other jurisdictions has been further cemented in the case of *Vedanta Resources Plc. and Another v Lungowe and Others.*[48] In that case, the UK Supreme Court held that UK courts can assume jurisdiction in certain circumstances, over cases instituted in UK Courts by non-UK citizens against both foreign subsidiary and the UK parent company in cases of human rights violation outside of the UK.[49] The case was instituted in the UK court and although the defendants vehemently opposed it on grounds of jurisdiction and

[43] *Wiwa v Royal Dutch Petroleum Company* (2002) WL 319887 (SDNY 2002); *Friday Alfred Akpan and Vereniging Milieudefensie vs. Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd*, District Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580. These cases show that victims of environmental injustice in Nigeria can successfully sue multinational corporations in foreign jurisdictions. An example of such rights groups includes Friends of the Earth International that collaborated with Friday Alfred Akpan to successfully sue Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd.

[44] For instance, four women have sued Shell in Netherlands claiming compensation and a public apology for Shell's complicity in the arrest, unlawful detention and execution of their husbands in 1995. This would have been impossible in a Nigerian court because the Military Government in power at the time supervised the illegal arrest, detention and subsequent execution of the 9 Ogoni activists.

[45] EO Ekhator, 'Improving Access to Environmental Justice Under the African Charter on Human and Peoples' Rights: The Roles of NGOs in Nigeria' (2017) 22 (1) African Journal of International and Contemporary Law 63, 73.

[46] Article 50 of the African Charter on Human and Peoples' Rights.

[47] Popoola (n 42).

[48] *Vedanta Resources Plc. and Another v Lungowe and Others* [2019] UKSC 20.

[49] The UK Supreme Court rationale for this decision was that considering some factors such as competence, capacity and integrity of Zambia's justice system, evidence abounds that the Zambian claimants would almost certainly not get access to justice if the claims were pursued in Zambia.

their willingness to submit to the jurisdiction of the Zambian Courts, they lost the bid to revert jurisdiction to Zambian Courts at the High Court, the Court of Appeal and the Supreme Court. The Court reasoned that a parent company should take responsibility for harms caused by its subsidiaries and affirmed that England is the proper place to hear the claim because substantial justice is guaranteed where the claimants have access to appropriate legal representation which is unlikely in a Zambian Court.[50]

In the case of *Okpabi and others (Appellants) v Royal Dutch Shell Plc and Another (Respondents),*[51] the issue before the UK Supreme Court was to determine whether there was a triable issue on the face of the appellants' case. To decide, the court had to determine whether a common law duty of care was owed by the respondent. The court held that whether a duty of care existed depended on the extent to which, and how, the parent company availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of its subsidiary. In this case, that duty existed and raised a real issue to be tried. It is contended that this decision implies that rural communities who have suffered environmental harm due to the activities of multinational corporations can bring an action in the original jurisdiction of their parent companies. It is argued that international and regional courts have come to play a significant role in the pursuit of the enforcement of fundamental human rights arising from environmental activities in Nigeria.

It has been noted that the right to justice is the right to defend and assert one's rights on the terms of equality with others and by the process of law.[52] To do this, however, access to court is essential. While access to court in environmental matters may have been restricted by the

[50] TV Ho, 'Vedanta Resources Plc and Another v Lungowe and Others' (2020) 114(1) The American Journal of International Law 110, 113; PT Sambo, 'Vedanta Resources PLC and Konkola Copper Mines PLC v Lungowe and Others 2019 UKSC 20' (2019) 2(2) SAIPAR Case Review 5.
[51] *Okpabi and others (Appellants) v Royal Dutch Shell Plc and Another (Respondents)* [2021] UKSC 3, On appeal from: [2018] EWCA Civ 191.
[52] Popoola (n 42).

1999 Nigerian Constitution as discussed in this section, it is contended that the existence of alternative options in form of other laws and foreign courts is comforting. Access to court provides a fair stage to seek justice which can provide a means to encourage compliance and strengthen regulatory agencies to execute their legitimate functions.[53]

From the foregoing discussion, it appears that there is a conflict between the Nigerian Constitution and the ACHPR but this is not the case. The position of the law is that where there is an inconsistency between the Constitution and national law, the Constitution supersedes the national law.[54] It is contended that this perceived inconsistency does not arise because the ACHPR does not fall into this category. The Nigerian Courts look to the provisions of the ACHPR to determine the parameters of the 'human right to life which the Nigerian Constitution failed to provide in s 33.[55] Therefore, the fundamental right to life provided for by the Nigerian Constitution in s 33 is reinforced by Articles 4, 16 and 24 of the ACHPR Act.[56] This was also the stance of the Supreme Court in the case of *Abacha v Fawehinmi*[57] when it relied on the definition of a treaty in the Vienna Convention on the Law of Treaties.[58] However, where there is any inconsistency between any other national law and the ACHPR Act (which was enacted from an international treaty into the laws of Nigeria), the ACHPR supersedes that national law

[53] J Ebesson, 'Access to Justice at the National Level: Impact of the Aarhus Convention and European Union Law' in M Pallermaerts (ed), *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing 2011) 245, 247.

[54] S 1 (3) of the Constitution of the Federal Republic of Nigeria 1999 Cap C23 Laws of the Federation of Nigeria 2010 As amended *Abacha v Fawehinmi* (2000) 6 NWLR Pt 660; See also the English case of Higgs & Anor v Ministry of National Security & Ors [2000] 2 WLR 1368; EO Okebukola, 'The Application of International Law in Nigeria and the Façade of Dualism' (2020) 11(1) Journal of International Law and Jurisprudence 15, 20.

[55] *Jonah Gbemre v SPDC* (n 41) page 20 of the judgement; This was the stand of the Supreme Court of India in the case of *Unni Krishnan v State of Andhra Pradesh and Others* [1993] SCR (1) 594.

[56] *Jonah Gbemre v SPDC* (n 41) page 30 of the judgement. **Article 4**. Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right. **Article 16 (1)** Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) State Parties to the present Charter shall take the necessary measure to protect the health of their people and to ensure that they receive medical attention when they are sick. **Article 24.** All people shall have the right to a general satisfactory environment favourable to their development.

[57] *Abacha v Fawehinmi* [2000] 6 NWLR Pt 660, 340 para B.

[58] Vienna Convention on the Law of Treaties 1969 Article 2.

because it possesses international flavour and enjoys the status of an international treaty to the extent of other national laws.[59]

6.1.2 The role of the Judiciary in the institutionalisation of compliance and enforcement

Matters of compliance and enforcement are usually expressed in legislation or other policy documents. Often, the role of the judiciary ordinarily crystallises from such legal instruments and this role has become more active.[60] For this reason, the role of the judiciary in this section is analysed from international and national points of view. The rationale behind examining the role of the judiciary in the institutionalisation of the values that support compliance and enforcement of environmental regulation from both points of view is that environmental harm could have transboundary effects and judicial proceedings that address such violations can also have international dimensions.[61] A symbiotic relationship between national and international judicial practices can be beneficial in the development of judicial processes and procedures.[62]

a. International developments on the role of the judiciary

The role of the judiciary in improving compliance and enforcement has been emphasised at the international level. For instance, the Rio declaration in Principle 10 on environment and development[63] has underscored the vital role of the judiciary in environmental protection by

[59] *Oshevire v British Caledonian Airways* (1990) 7 NWLR Pt 163, 519 – 520; EO Okebukola, 'The Application of International Law in Nigeria and the Façade of Dualism' (2020) 11(1) Journal of International Law and Jurisprudence 15, 20; AO Enabulele and AO Ewere, 'Can the Economic Community of West African States Community Court of Justice Enforce the African Charter Replicas of the Non-Justiciable Chapter II Human Rights Provisions of the Nigerian Constitution against Nigeria?' (2012) 1(2) International Human Rights Law Review 312, 315. The author opined that because of the status of the ACHPR Act in Nigeria, Nigeria cannot plead the provisions of her constitution to evade her international legal obligation under the ACHPR, the revised treaty of ECOWAS and the Protocol of the ECOWAS Community Court of Justice.

[60] K Raustiala, 'The Participatory Revolution in International Environmental Law' (1997) 21 Harvard Environmental Law Review 537, 578.

[61] Regulation 47, *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements* (United Nations Environment Programme (UNEP) 2006) 792, 675.

[62] KJ Markowitz and JJA Gerardu, 'The Importance of the Judiciary in Environmental Compliance and Enforcement' (2012) 29(2) Pace Environmental Law Review 538, 549.

[63] United Nations Conference on Environment and Development, Rio de Janiero, Braz., June 3-14, 1992, See Chapter 39 of Agenda 21 of the Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1), Annex I (Aug. 12, 1992). The Chapter sought to bring clarity on international legal instruments and mechanisms to achieve sustainable development.

encouraging participating governments to establish effective access to judicial and administrative institutions and procedures for legal remedies.[64] On a broad note, Principle 10 of the Rio Declaration promotes three fundamental rights. These are the rights of access to information, access to public participation and access to justice. The declaration also codified the idea that environmental compliance and enforcement efforts can support sustainable development by strengthening the rule of law and good governance.[65] Following this stance, it is contended that cooperation through formal and informal networks can help resolve environmental problems, create efficiencies in the development of tools and programs and create a level playing field for all stakeholders.

In furtherance of the implementation of Principle 10 of the Rio Declaration,[66] the Special Session of the UNEP Governing Council and Global Ministerial Environment Forum (GMEF) adopted the Bali Guidelines.[67] This is a set of Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The Bali guidelines were inspired by the 1998 United Nations Economic Commission for Europe (UNECE) Aarhus Convention.[68] The Governing Council of the United Nations Environment Programme (UNEP) acknowledged the key role of the Judiciary in ensuring that environmental law and law in the field of sustainable

[64] Principle 10 of the Rio Declaration - Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided; T Okonkwo, 'Environmental Constitutionalism in Nigeria: Are We There Yet?' (2015) 13 The Nigerian Juridical Review 175, 191.

[65] Markowitz and Gerardu (n 62) 541.

[66] See footnote 64.

[67] Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters. Adopted by the Governing Council of UNEP, UNEP/GCSS.XI/11, Decision SS.XI/5, part A of 26 February 2010.

[68] U Etemire, 'Insights on the UNEP Bali Guidelines and the Development of Environmental Democratic Rights' (2016) 28(3) Journal of Environmental Law 393, 394. United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Environmental Decision-making, and Access to Justice in Environmental Matters (Aarhus, Denmark 25 June 1998).

development feature prominently in academic curricula, legal studies and training at all levels, in particular among judges and others engaged in the judicial process.[69]

In furtherance of the efforts of the Rio convention, countries in Latin America came together to adopt a legal instrument aimed at implementing Principle 10 thereof. In March 2018, member states of the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) adopted a regional agreement[70] on Access to Information, public participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazu agreement).[71] The Escazu agreement is also inspired by the Aarhus Convention.[72] It is contended that these actions provide the platform for the judiciary in participating countries to improve their role in environmental regulation by promoting compliance and enforcement.

It is also important to highlight the initiative by the World Commission on Environmental Law of the International Union for the Conservation of Nature (IUCN). It has established a Compliance and Enforcement Specialist Group which aims to promote the fair and effective implementation of international and national legal frameworks designed to protect human rights related to the environment, promote conservation and the sustainable use of biodiversity, and move towards Environmental Rule of Law and Environmental Justice across the globe.[73] It is contended that the achievement of the goals of this specialist group lies largely on the shoulder of the judiciary at the national and international level.

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[69] Report of the Global Judges Symposium on Sustainable Development and the Role of Law UNEP/GC.22/INF/24 Paragraph 11 Annexure 1 titled The Johannesburg Principles om the Role of Law and Sustainable Development 1, 5.

[70] S Stec and J Jendrośka, 'The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings' (2019) 31(3) Journal of Environmental Law 533, 534.

[71] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (March 4, 2018, UN ECLAC, UNTC C.N.195.2018 TREATIES-XXVII.18 (Escau Agreement). This agreement will come into force on the 22nd of April 2021.

[72] United Nations Economic Commission for Europe. 'Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (Aarhus, Denmark June 25 1998).

[73] WCEL, 'Our Work: Compliance and Enforcement' (2020) <https://www.iucn.org/commissions/world-commission-environmental-law/our-work/compliance-and-enforcement> accessed 14 December 2020.

Since these international and regional groups are a cluster of developed and developing countries, it is argued that considering the compliance and enforcement initiatives of such international and regional groups could facilitate uniform development of the compliance and enforcement architecture of countries that make up the various groups and encourage other countries that have not yet done so, to adopt these compliance and enforcement measures.

b. *National developments on the role of the judiciary*

The rationale for the analysis of the role of the judiciary at the national level is that in developing compliance and enforcement strategies, countries can adopt an increasingly collaborative system by drawing inspiration from each other and international initiatives towards improving environmental compliance and enforcement.[74] For example, countries in West Africa can collaborate to protect human health, limit greenhouse gas emissions, conserve biodiversity and wildlife, and manage natural resources for sustainable development. The role of the judiciary at the national level can also be shaped and supported by lessons from the initiatives of international and regional bodies at delineating the role of the judiciary in improving compliance and enforcement.[75]

The role of the judiciary in Nigeria, a common law jurisdiction, does not differ much from other common law jurisdictions.[76] It includes being a watchdog of the constitution, the dispenser of justice, acting as the last resort of the common-man and championing human rights, rule of law, democratic values and good governance.[77] The judiciary aims to hold

[74] G Baldwin and others, 'International Compliance and Enforcement Networks: The Critical Role of Collaboration in Environmental Protection' in G Pink and R White (eds), *Environmental Crime and Collaborative State Intervention* (Palgrave Macmillan, London 2016) 21, 21.
[75] See **section 7.2.1** of **Chapter 7** of this thesis.
[76] J Sokefun and NC Njoku, 'The Court System in Nigeria: Jurisdiction and Appeals' (2016) 2(3) International Journal of Business and Applied Social Science 1, 2.
[77] Ladan (n 7) 4.

everyone at par before the law[78] and achieve all the above through the courts with the cooperation of all the various officers of the court to achieve effective justice delivery.[79]

Another vital role of the judiciary is to ensure that the other arms of government act within their respective jurisdictions. Therefore, the judiciary becomes a check on the other arms of government and maintains the doctrine of separation of powers as was exhibited in the case of Senator *B. C. Okwu v Senator Wayas.*[80] In this case, the Court maintained its neutrality by refusing to interfere in the internal workings of the legislature. However, in the case of *Senate of the National Assembly v Tony Momoh*[81] the Court in overruling a similar objection, held that 'when the national assembly in the exercise of its constitutional powers involves a citizen of Nigeria who is not a member of the legislature, the matter ceases to be an internal affair of the Senate and the court can interfere if the matter is justiciable and the House has acted inappropriately.' In these two instances, the judiciary effectively distinguished between its role as a check on issues within the legislative arm which it deems an internal issue and issues between the legislature and a private Nigerian citizen, in which the judiciary can lawfully intervene.

The role of the judiciary in institutionalising compliance and enforcement of environmental regulation can be seen in the express or implied wordings of the laws sought to be enforced.[82] It also includes administration of environmental litigation, promotion of compliance by enforcing the law, influencing societal good behaviour towards the environment, furthering the

[78] *Bello v Governor of Gombe State* (2016) 8 NWLR Pt 1514, 219; *Abdulkareem v Lagos State Government* (2016) 15 NWLR Pt 1535, 177.
[79] Ladan (n 7) 7.
[80] *B C Okwu v Senator Wayas* (1981) 2 NCLR 522. There the court refused to be drawn into the adjudication of a matter regarding the internal workings of the legislative arm of government since no violation of the provisions of the constitution of Nigeria was proved.
[81] *Senate of the National Assembly v Tony Momoh* (1983) 4 NCLR 269, 294. There the court refused to be drawn into the adjudication of a matter regarding the internal workings of the legislative arm of government since no violation of the provision of the Constitution of Nigeria was proved.
[82] Such as the NOSDRA and NESREA Acts.

development of legal concepts through judgements, serving as a check on executive inaction and protecting the rights of victims of environmental harm.[83] As Brian Preston J[84] noted

> "The judiciary has a role to play in the interpretation, explanation and enforcement of laws and regulations. … Increasingly, it is being recognized that a court with special expertise in environmental matters is best placed to play this role in the achievement of ecologically sustainable development."[85]

It is argued that the position of the judiciary as an adjudicatory body can be utilised in consolidating compliance and enforcement mechanisms and ensuring that they are adhered to and practised by making such court orders where the opportunity presents itself.[86] One such opportunity can be where compliance and enforcement provisions are vague, the judiciary can clarify such provisions.[87] For example, in Pakistan and Netherlands, Courts have ordered specific performance by the government for the creation of new government entities that will regulate greenhouse gases more stringently where the governments are not doing enough to fight climate change.[88]

Before the initiation of environmental and petroleum sector-related litigation in Nigeria, efforts were made through the establishment of environmental laws, policies and standards to regulate activities involving the environment.[89] However, environmental harm prevailed since the protection of the environment was not the focus of such environmental laws, policies and

[83] B Kante and I Rummel-Bulska, 'The Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development' (Application of Environmental Law by National Courts and Tribunals United Nations Environment Programme, Geneva 31 August – 1 September 2006) 1, 4.
[84] Chief Judge of the Land and Environment Court of the State of New South Wales, Australia, the first EC established as a superior court of record in the world.
[85] B Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 Pace Environmental Law Review 396, 398.
[86] See the cases of *Jonah Gbemre v Shell Petroleum Development Company Nigeria Ltd*. No. FHC/B/CS/53/05 [2005] and *Oronto Douglas v Shell Petroleum Development Company* (1992) 2 NWLR (Pt 591) 466.
[87] PF Hemen and U Uguru, 'Oil Exploration, Environmental Degradation, and Future Generations in the Niger Delta: Options for Enforcement of Intergenerational Rights and Sustainable Development through Legal and Judicial Activism' (2019) 34 Journal of Environmental Law & Litigation 185, 199-200.
[88] RV Percival, 'The "Greening" of the Global Judiciary' (2017) 32(2) Journal of Land Use & Environmental Law 333, 344.
[89] Such as the enactment of the Public Health Act 1917 (repealed) and s 245 Criminal Code Act 1916 which is still good law and now CAP C38 Laws of the Federation of Nigeria 2004.

standards rather, securing the economic gains of the natural resources was the focus of those laws, policies and standards.[90] It is believed that the judiciary can play a vital role in correcting this position. For instance, when the need for the interpretation of such environmental laws arises, the judiciary can interpret them to highlight the intent of such legislative provisions. This is especially possible in the role of the judiciary as the guardian of the laws of Nigeria.[91] This role has been achieved by interpreting legal provisions and uncovering the literal and implied intent of the draughtsman. The judiciary can further play this role by ensuring that the provisions of the Constitution and other legal instruments are given the force of law by exhibiting judicial activism[92] and filling the gaps in these instruments to fulfil the legislative purpose.[93]

Judicial activism is popular in countries with or without common law traditions.[94] While judicial activism may be an attractive option to fill the gaps in the law, it has been warned that this power should be exercised with caution because it could violate the principle of separation of powers.[95] This is because it is feared that the judiciary could become dangerous if it ever exercised both executive and legislative powers.[96] It was opined that instead of rewriting the law when faced with interpreting a bad law, the right thing to do would be to return it to the

[90] A Adegoroye, 'The Challenges of Environmental Enforcement in Africa: The Nigerian experience' (Proceedings of the Third International Conference on Environmental Enforcement Oaxaca, México April 25 1994) 43, 44; O Fagbohun, 'Jurisdiction of Nigerian Courts in Environmental Matters: A Note on *Shell v Abel Isiah*' (2006) 24(2) Journal of Energy & Natural Resources Law 209, 219. See JA Ayoade and AA Akinsanya, *Nigeria's Critical Election: 2011* (Lexington Books, 2012) 348, 277.

[91] *Attorney General Abia State v Attorney General of the Federation of Nigeria & 35 Ors.* (2007) SC 146; See also Sokefun and Njoku (n 76) 3.

[92] It is imperative to note that the stand of the judiciary and the doctrine on separation of powers has constantly come under question when the judiciary started leaning on judicial activism to dictate what the law ought to be on certain matters. K Roosevelt, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (Yale University Press 2006) 262.

[93] NS Okogbule and CT Brown, 'Social and Economic Rights and Transformative Constitutionalism in Africa: Imperative of Expanding the Frontiers of Judicial Activism' (2019) 16(2) US-China Law Review 52.

[94] I Amarini, 'Implementation of Judicial Activism in Judge's Decision' (2019) 8(1) Jurnal Hukum dan Peradilan 21, 24.

[95] Okogbule and Brown (n 93) 55; Alexander Hamilton and others, *The Federalist* (Hackett Publishing 2005) 1, 452.

[96] C Bolick, 'The Proper Role of Judicial Activism' (2019) 42(1) Harvard Journal of Law & Public Policy 1, 4.

legislature.[97] However, a core rule of statutory interpretation underpinned by the doctrine of separation of powers holds that if there are two competing ways to interpret a statute, the judge must interpret it in a way that makes the law valid rather than interpret it in a way that makes the law invalid.[98]

While small gains have been made in this regard on the role of the judiciary in improving compliance and enforcement in Nigeria, there is still room for improvement on the foundation laid in Principle 10 of the Rio Declaration, as elaborated in the Bali Guidelines.[99] It is argued that the roles of interpretation of the law, judicial review and entertainment of public enquiry of the judiciary can effectively target compliance whilst the roles of promoting and upholding of environmental rule of law, creation of case law, sentencing function and orders as to costs and other remedial orders can target effective enforcement. This is because it is not every court in Nigeria that has jurisdiction to hear and determine cases bordering on environmental issues. It is important to discuss which courts can entertain such matters because the issue of jurisdiction is so fundamental to any case before a court of law as it is a condition precedent to any action before a court of law in Nigeria.[100]

6.1.3 Courts with jurisdiction to entertain environmental matters from the Nigeria petroleum sector.

In the creation of courts in the Nigerian judicial system, different courts are conferred with jurisdiction in different matters.[101] Before a court can assume jurisdiction in any matter before

[97] ibid.
[98] DP Langhauser, 'Executive Regulations and Agency Interpretations: Binding Law or Mere Guidance-Developments in Federal Judicial Review' (2002) 29(1) Journal of College & University Law 1, 13.
[99] ET Bristol-Alagbariya, 'The Concept, Principle, Law and Developmental Practice of Environmental Democracy towards Sustainable Development in Resources-Rich Communities of Developing Countries: Focus on Nigeria's Oil Producing Delta Region' (2020) 94 Journal of Law Policy & Globalization 53, 70.
[100] Sokefun and Njoku (n 76) 1. See also *Abubarkar v Usman* (2009) 6 NWLR Pt 1136, 93-94.
[101] Constitution of the Federal Republic of Nigeria 1999 Chapter VII The Judicature.

it, the matter must be 'properly brought'[102] before the court. In Nigeria, the Federal High Court is imbued with the jurisdiction to hear and determine matters of mines and minerals, including oilfields, oil mining, geological surveys and natural gas.[103] Some conditions must be fulfilled for a case to be initiated in the Federal High Court. These conditions, which relate to jurisdiction over the subject matter, include a properly constituted court regarding the judicial officers. The subject matter must be within the court's jurisdiction and the action must be initiated by due process of law.[104] While other conditions that relate to procedural jurisdiction include *locus standi*, authorisation to sue where the suit is in a representative capacity, service of pre-action notice where applicable and initiating a case by the right procedure.[105] Instituting an action wrongly or in the wrong court can rob a proper party of audience before such court or void such cases *ab initio*.[106]

Victims of environmental harm face many challenges in trying to access courts in the hope of securing environmental justice. These include high cost of litigation, poverty and ignorance, *locus standi*, delay in justice delivery, technicalities in the law, cumbersome judicial process, the multiplicity of environmental legal instruments etc.[107] These challenges have consistently watered-down the confidence of victims of environmental harm. Due to these challenges, environmental cases are now taken to courts that are outside the shores of Nigeria.[108] Some of

[102] For a case to be properly brought before a court, it entails following due process to institute the matter as they are a condition precedent to the determination of such matters. Such processes are mandatory as held by the Nigerian Supreme court in the case of *Yahaya v The State* (2002) 2 M.J.S.C 103.
[103] S 251 (n) Constitution of Nigeria 1999.
[104] Sokefun and Njoku (n 76) 4.
[105] Sokefun and Njoku (n 76) 5.
[106] RA Mmadu, 'Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from *Kiobel*' (2013) 2 (1) Afe Babalola University Journal of Sustainable Development Law and Policy 149, 153. Determination of jurisdiction is a fundamental issue in any legal proceeding before a court of law and there are various determinants of the issue of jurisdiction. The Supreme Court in the case of *Abu v Odigbo* (2001) 7 M.J.S.C 87, 91 held that the claims contained in the plaintiff's statement of claim before the court is what determines jurisdiction, while the competence of a proceeding or court to hear a matter is a fundamental one that cannot be waived see *Menakaya v Menakaya* (2001) 8 M.J.S.C 50.
[107] JG Frynas, 'Problems of Access to Courts in Nigeria: Results of a Survey of Legal Practitioners' (2001) 10(1) Social & Legal Studies 379, 389, 392, 395.
[108] Popoola (n 42).

the courts that have entertained such cases are the Courts of the United Kingdom[109] and the African Commission on Human and Peoples' Rights and the Economic Community of West African States (ECOWAS) Community Court of Justice subject to exhausting local avenues to remedy the injustice.[110] While this is a welcome development, such courts do not always enjoy jurisdiction in every matter that comes before them. This was exhibited in the case of *Socio-economic Rights and Accountability Project (SERAP) v President of the Federal Republic of Nigeria & Ors*.[111] In that case, the court held that while it had jurisdiction to entertain the case, its jurisdiction was only to the extent of the Federal Government of Nigeria being parties to ECOWAS treaties and its agency the Nigeria National Petroleum Company (NNPC) but not over the other Multinationals and proceeded to strike their names off the lawsuit.[112] The significance of that case, however, was in the fact that it further confirmed that access to court in pursuit of environmental justice in furtherance of compliance and enforcement of petroleum laws could be found beyond the Nigerian judiciary regardless of the limitations therein.[113]

The issue of jurisdiction gained practical significance in the case of *Shell Petroleum Development Company (Nigeria) Ltd v Abel Isaiah*.[114] The facts of that case are that during the repairs of an oil pipeline dented by a fallen tree, oil flowed freely unto the respondents' farmlands, streams and fishponds. The respondents (as plaintiffs) instituted an action in the High Court of Rivers State claiming compensation for permanent damage and loss to plant, marine and domestic life. Compensation was awarded in the sum of ₦ 22,000,000 (Twenty-two million Naira, approximately £ 48,888) which decision was upheld on appeal to the Court of Appeal. However, upon further appeal to the Supreme Court, on whether the Court of Appeal

[109] *Okpabi v Royal Dutch Shell and Others* (n 51). See also **section 6.1.1** of this Chapter.
[110] Article 50 of the African Charter on Human and Peoples' Rights.
[111] *Socio-Economic Rights and Accountability Project (SERAP) v President of the Federal Republic of Nigeria & Ors* ECW/CCJ/APP/08/09.
[112] The proceedings of this case reaffirm the impartiality of the judiciary in the case in question. Ekhator (n 45) 73.
[113] These limitations have been discussed on page 8 of this thesis.
[114] *Shell Petroleum Development Company (Nigeria) Ltd v Abel Isaiah* (2001) 5 S.C (Pt 11) 1.

was right in holding that the trial court had jurisdiction to hear the matter, the Supreme Court allowed the appeal and set aside the judgement of the Court of Appeal and State High Court because the High Court lacked jurisdiction to hear the case.[115]

While this is the position of the law since it was the decision of the Supreme Court, State High Courts are still attempting to share jurisdiction with the Federal High Court regardless of the provision of the Constitution granting the Federal High Court exclusive jurisdiction in minerals and mining matters in s 251 (1) (n). This was the situation in *Chevron Nigeria Limited v Nwuche & Ors*[116] However, the Court of Appeal held rightly that the Abia State High Court lacked the jurisdiction to hear the case since the Constitution has granted exclusive jurisdiction in minerals and mining matters to the Federal High Court.

It is discernible from the foregoing discussion that victims of environmental harm in Nigeria have increasingly found audience before courts in other jurisdictions when access to courts in Nigeria have proved impossible. It is argued that this trend is likely to continue until challenges hampering access to courts in Nigeria in environmental and petroleum sector-related cases, are addressed.[117]

[115] The respondents contended that the cause of action arose before the jurisdiction of the court was ousted by Decree No 60 of 1991 and cannot be held to be subject to it. However, the Supreme Court in its considered opinion held that the issue of jurisdiction is a fundamental one and can be raised at any time during the proceedings and whenever it is successfully raised, nullifies and proceeding caught by it. The jurisdiction of the State High Court was ousted by the Federal High Court (Amendment) Decree No 60 of 1991 of Nigeria and was later suspended by the Decree No 16 of 1992 and the jurisdiction of the Federal High Court was restored by the Constitution (Suspension and Modification) Decree in S 230 (1) Constitution (Suspension and Modification) Decree No 107 of 1993 This jurisdiction was upheld in the 1999 Nigerian constitution in S 251 (n) over mines, minerals (including oilfields, oil mining, geological surveys and natural gas. It is contended here that while the issue of jurisdiction was the main issue for determination before the Supreme Court, there was no consideration for the holistic issue that was the extensive environmental damage on the respondents' properties due to the repairs on the crude oil pipeline of Shell Petroleum Development Company Limited. Justice did not appear to have been served in the circumstance.

[116] *Chevron Nigeria Limited v Nwuche & Ors* CA/PH/420/2005), [2016] NGCA 101.

[117] This has been exhibited as recently as in the case of *Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents),* [2021] UKSC 3, On appeal from: [2018] EWCA Civ 191.

6.2 Locating compliance and enforcement mechanisms in realising environmental rights

It is settled that not only is it important to protect human rights to life, private life and property but it is also expedient to preserve the right of the environment itself to be protected especially from the activities of humans.[118] Environmental victims are those of the past, present or future generations who are injured or likely to be injured as a consequence of changes to the chemical, physical, microbiological, or psychosocial environment, brought about by deliberate or reckless, individual or collective, human acts or omission.[119] It is contended that although this expression appears to be anthropocentric on the face of it, the term environmental victims could cover humans, animals, species, the environment, nature and natural resources.[120] The discussion in this section further breaks down the specific areas where compliance and enforcement need to be concentrated in the overall discussion of its institutionalisation.

6.2.1 Human right to a clean and healthy environment and the Rights of Nature (RoN)

Two main approaches support the environmental rights discourse; the anthropocentric approach (human rights to a clean and healthy environment) and ecocentric approaches (rights of nature).[121] The anthropocentric approach holds the view that nature in all its forms exists for

[118] A Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2007) 18(3) Fordham Environmental Law Review 471, 473.
[119] C Williams, 'Environmental Victims: Arguing the Costs' (1997) 6 (1) Environmental Values 3, 7.
[120] Rob White emphasised on identifying issues of environmental harm including how to define who or what is an environmental victim by exploring the three justice-based approach to environmental harm to wit environmental justice, ecological justice and species justice. See R White, *Environmental Harm: An Eco-Justice Perspective* (Policy Press 2013) 216, 8. This position is increasingly being legislated upon in some jurisdiction and is growing.
[121] SCG Thompson and MA Barton, 'Ecocentric and Anthropocentric Attitudes Toward the Environment' (1994) 14(2) Journal of Environmental Psychology 149, 149; Boyle (n 118) 473: KE MacDonald, 'A Right to a Healthful Environment–Humans and Habitats: Re–thinking Rights in an Age of Climate Change' (2008) 17(4) European Energy and Environmental Law Review 213, 216; B Lewis, 'Environmental Rights or a Right to the Environment: Exploring the Nexus Between Human Rights and Environmental Protection' (2012) 8(1) Macquarie Journal of International and Comparative Environmental Law 36, 37.

man's benefit, entitling man to its manipulation to his benefit[122] and should be protected because of its value in maintaining or enhancing the quality of life of humans.[123] While this approach is seen as the prevalent ideology around the world an permeates academia and domestic and international governance,[124] it has been criticised for being ethically wrong and at the root of ecological crises.[125]

The ecocentric approach recognises intrinsic value in all life forms and their surrounding ecosystems, holding that nature cannot be reduced to what promotes human well-being.[126] It is seen as the key to sustainable natural resources as it has a wider scope than the human-centred environmental approach with long term effects on the natural environment.[127] This approach has also been strongly advanced by the Earth Charter that recognised that all beings are interdependent and every life form has values regardless of its worth to human beings.[128] Ecocentrism has been criticised for being 'anti-human'.[129] It has been contended that while ecocentrism has not always been popular among environmentalists, it has challenged the anthropocentrism narrative.[130] Presently, both the ecocentric and anthropocentric approaches exist in environmental law scholarship.[131]

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[122] V De Lucia, 'Beyond Anthropocentrism and Ecocentrism: A Biopolitical Reading of Environmental Law' (2017) 8(2) Journal of Human Rights and the Environment 181, 184.
[123] Thompson and Barton (n 121) 149.
[124] W Washington and others, 'Why Ecocentrism is the Key Pathway to Sustainability' (2017) 1(1) The Ecological Citizen 35, 38.
[125] H Kopnina and others, 'Anthropocentrism: More than just a misunderstood problem' (2018) 31(1) Journal of Agricultural and Environmental Ethics 109, 123; H Washington, *Human Dependence on Nature: How to Help Solve the Environmental Crisis* (Routledge 2013) 184.
[126] N Humaida, 'The importance of Ecocentrism to the Level of Environmental Awareness for Sustainable Natural Resources' (IOP Conference Series: Earth and Environmental Science IOP Publishing, 15 August 2019) 1, 2; JJ Bruckerhoff, 'Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights' (2007) 86(3) Texas Law Review 615; XS Camargo, 'The Ecocentric Turn of Environmental Justice in Colombia' (2019) 30(2) King's Law Journal 224.
[127] ibid; See also C Williams, 'Wild Law in Australia: Practice and Possibilities' (2013) 30(3) Environmental Planning and Law Journal 259-284.
[128] NL Dresser, 'How Shall the Trees Clap If They Have No Hands?' (2021) 42(2) Consensus 1, 3.
[129] M Hansche and S Meisch, 'Rights for Rivers' in H Schübel and I Wallimann-Helmer (eds), *Justice and Food Security in a Changing Climate* (Wageningen Academic Publishers 2021) 356, 357; Washington and others, (n 124) 38; WJ Smith, *The War on Humans* (Discovery Institute Press 2014).
[130] R White, 'Ecocentrism and Criminal Justice' (2018) 22(3) Theoretical Criminology 342, 343.
[131] Humaida (n 126) 2.

a. Human right to a clean and healthy environment

The protection of human rights has assumed an important dimension in international legal frameworks and has featured in international legal rules such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations Protect, Respect and Remedy Framework 2008.[132] In 1968 the United nations acknowledged that technological changes could threaten the fundamental rights of human beings,[133] and the United Nations Education, Science and Cultural organisation (UNESCO) organised an intergovernmental conference on the rational use and conservation of the resources of the biosphere.[134] Following these developments, a declaration was adopted in 1969 on Progress and Development in the Social Arena which explored the interdependence of the protection of the environment and human rights.[135] Consequently, the right to a clean environment was formally recognised in 1972 for the first time by the United Nations.[136] Human rights include the right to a clean and healthy environment among others and therefore are enforceable in furtherance of environmental protection.[137]

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[132] UN Human Rights Council, *Protect, Respect and Remedy: A framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 7 April 2008, A/HRC/8/5 3<https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 9 December 2020, 3, 13 and 27; The Protect, Respect and Remedy Framework, a non-binding document specifically establishes three pillars: The duty of the state to protect against human rights abuses by third parties, the corporate responsibility to respect human rights and greater access by victims of human rights abuses to effective judicial and non-judicial remedies. See PD Cameron and MC Stanley, *Oil, Gas, and Mining: A sourcebook for Understanding Extractive Industries* (International Bank for Reconstruction and Development/The World Bank 2017) 298, 263. This framework is significant because it is on record that indigenes of host-communities where extractive activities take place have been victims of human rights abuses due to activities of the extractive industry and its direct impact on the environment. See the United Nations Environment Programme. 'Environmental Assessment of Ogoniland' (2011) <https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf> accessed 6 July 2019.

[133] United Nations General Assembly Res. 2398, U.N. Doc. AL.553/Add. 1-4 (1968).

[134] UNESCO Res. 2.3131 and 2.34/4 (1968).

[135] United Nations General Assembly Res. 2542, U.N. Doc. A/7833, A/L 583 (1969).

[136] Untied Nations conference on the Human Environment (Stockholm Conference) 1972. See Stockholm Declaration U.N. Doc. A/CONF.48/14/Rev. 1, at 4.

[137] United Nations. 'What are Human Rights?' (2019) <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx> accessed 13 November 2019. Human rights are universal and inalienable, interdependent and indivisible, equal and non-discriminatory and entail both rights and obligations. See the United Nations Universal Declaration of Human Rights 1948. A Ibrahim, 'A Human

In a final report to the United Nations Human Rights Council in 2018, 16 Framework Principles on Human rights and the Environment was presented by John Knoxx.[138] Framework Principle 10 stipulates that states should provide access to effective remedies for violations of human rights and domestic laws concerning the environment highlighting the vital role of the judiciary in upholding the human rights to a clean and healthy environment.[139] While the report is non-binding, it sets out the duties and obligations of those responsible, provides member states with a platform for negotiation and cooperation and encourages them to ratify human rights agreements which can potentially become binding and reciprocal. Regional developments on the human rights to a clean environment were recorded following the above.[140]

Human right to life is guaranteed by the Nigerian Constitution[141] but this right lacked interpretation regarding its extension to the human right to a clean and healthy environment and the courts in Nigeria have turned to the interpretation of this right in the ACHPR.[142] It is argued that a decisive and active role by the Nigerian judiciary to interpret this right directly from the Nigerian constitution thereby making it justiciable will improve compliance and enforcement because of the significance of the Constitution to the Nigerian citizen.

Rights Approach to Environmental Protection: The Case of Ethiopia' (2009) 1 Contemporary Legal Institutions 62, 66; J Knox, *Report of the Special Rapporteur on the issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (HRC/37/59)* (United Nations Human Rights Council, 2018) 4, Para 11.

[138] JH Knox, (Special Rapporteur on Human Rights and the Environment), Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, U.N. Doc. A/HRC/37/59 (26 February – 23 March 2018). N Stump, 'UN Framework Principles on Human Rights and the Environment: A Catalyst for Grassroots-Centred US Reform?' (2018) 4 Oxford Human Rights Hub Blog 1, 1.

[139] ibid 13.

[140] For example, the African Charter on Human and People's Rights (ACHPR) incorporated the contents of the United Nations resolutions. in Article 24 (right to a general satisfactory environment). See MO Ikeke, 'The African Charter's Right to a General Satisfactory Environment and Socio-economic Development: An Eco-philosophical Discourse' (2020) 3(2) Journal of African Studies and Sustainable Development 50, 51; The European Parliamentary Conference on Human Rights in relation to the right to life, paid attention to the right to a pure and healthy environment. M Thorme, 'Establishing Environment as a Human Right' (1990) 19(2) Denver Journal of International Law and Policy 301, 304; See also C Binder, 'A European Human Rights Perspective on National Sustainable Development Institutions' in M Szabó, CM Cordonier-Segger and A Harrington (eds), *Intergenerational Justice in Sustainable Development Treaty Implementation. Advancing Future Generations Rights through National Institutions* (CUP 2021).

[141] S 33 Constitution of Nigeria 1999.

[142] *Jonah Gbemre v SPDC* (n 41).

Some of the weaknesses of the human right to a clean and healthy environment are *first*, it is anthropocentric and fails to consider other concepts such as the rights of nature and other non-human centred approaches and the interests of future generations.[143] *Second*, the existence of this right does not guarantee its enforcement because enforcement is dependent on several factors.[144] *Third*, this right can also promote non-sustainable and inequitable exploitation and use of natural resources.[145] This is because the target of this approach could very easily focus more on harnessing natural resources to strictly meet the needs of citizens rather than meeting the needs of citizens sustainably.

b. Rights of Nature (RoN)

While it is settled that the rights of human victims of environmental harm ought to be protected under the law,[146] another pertinent question is whether those are the only victims of environmental harm whose rights deserve protection and preservation.[147] Following the definition of victims of environmental harm by Shelton above, it is submitted that since harm can occur from changes to the chemical, physical, microbiological, or psychosocial environment, nature and natural resources also exist in the environment and can suffer harm from these changes. Therefore, it is contended that nature and natural resources can also be

[143] P Toussaint and AM Blanco, 'A Human Rights-based Approach to Loss and Damage Under the Climate Change Regime' (2020) 20(6) Climate Policy 743, 750. Other weaknesses include inadequacy of available remedial measures, vagueness of some of the terms used in human rights instruments etc.

[144] Some of these factors include the perception of the rule of law by those who hold the power of enforcement, capacity and willingness to enforce. See M Broberg and H Sano, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – An Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22 (5) The International Journal of Human Rights 664, 673.

[145] M Broberg and H Sano, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – An Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22 (5) The International Journal of Human Rights 664, 673; S Hickey and D Mitlin, 'The Potential and Pitfalls of Rights-based Approaches to Development', *Rights-based Approaches to Development: Exploring the Potential and Pitfalls* (Kumarian Press Sterling, VA 2009) 209, 225.

[146] ibid.

[147] It has been argued that other victims of environmental harm exist and have been left behind by policy and law-making thereby rendering them invisible and silenced in the search for justice. See M Hall, *Environmental Harm: The Missing Victims?*, vol 90 (Centre for Crime and Justice Studies 2012) 1.

victims and the right to be protected and preserved extend to them and other potential victims of such environmental harm.[148]

RoN are rights that nature and natural resources possess, as distinct from the right of humans to a healthy environment and this can be a reformulation and expansion of existing human rights and duties in the context of environmental protection.[149] Some of the sources of the RoN and natural resources include case law,[150] the Constitution and other legal instruments.[151] In some jurisdictions like India, New Zealand, Ecuador, Brazil, Columbia, Bolivia etc, nature is accorded legal rights[152] and consequently the right to be protected just like corporations and human under human rights laws and the right to enforce such environmental rights under the law.[153] Stone has noted that until the rightless thing receives its right, we cannot see it as anything but a *thing* for the use of 'us' – those who are holding the rights at the time.[154] Barker has even proposed the codification of RoN in a new Constitution for the United Kingdom.[155]

[148] M Hall, *Environmental Harm: The Missing Victims?*, vol 90 (Centre for Crime and Justice Studies 2012) 1.
[149] D Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28(1) Stanford Journal of International law 103, 107 D Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28(1) Stanford Journal of International law 103, 117.
[150] As in the Indian cases of *Maharaj Singh v Indian Oil Corporation (1999) A. I. R. 81; M. I. Builders v. Radhey Shyam Sahu M.C. [1999] A.I.R. SC 2468; Mehta v Kamal Nath* (1997) 1 S.C.C. 388.
[151] Constitution of the Republic of Ecuador 2008 Chapter 7, Articles 71, 72 and 73; Te Urewera Act 2014 of New Zealand; Constitution of Brazil 1993.
[152] Examples are New Zealand's Whanganui River was granted rights of personhood in 2017, India's Ganges River, Article 71 of the 2008 Constitution of Ecuador, essentially provides that nature has the right to integral respect for its existence and the maintenance and regenerations of its life's cycle's structure, functions and evolutionary processes. Examples of jurisdictions that have also recognised the legal rights of nature include Bolivia (Law of the Rights of Mother Earth and the Framework Law of Mother Earth and Integral Development for Living Well 2012); Columbia (A 2018 Supreme Court decision held the Columbian Amazon to be a subject of rights based on the Columbian Constitutional's Courts ruling that Atrato River had legal rights to be protected, conserved and restored); India (The 2018 Uttarakhand High Court decision declaring the animal kingdom to legal entities with rights, duties and liabilities of a living person); and the United States of America where Tamaqua Borough in Pennsylvania recognised the rights of natural communities and ecosystems in a 2006 ordinance) see G Chapron, Y Epstein and JV Lopez-Bao, 'A Rights Revolution for Nature' (2019) 363(6434) Science 1392, 1393
[153] CD Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (Oxford University Press 2010) 264.
[154] ibid 3.
[155] G Barker, 'A New Constitution for the UK needs 'Rights of Nature' at its Heart' (2019) <https://www.opendemocracy.net/en/opendemocracyuk/a-new-constitution-for-the-uk-needs-rights-of-nature-at-its-heart/> accessed 7 November 2019.

It is argued that the significance of this attention on the RoN and the issue of legal standing can be extended to nature and the natural world in Nigeria. If nature and the natural world are accorded rights, it is believed that it will put a check on how man interacts with nature as these rights will be considered in such interactions. Such considerations can be in form of complying with environmental laws, policies and standards. Therefore, if compliance and enforcement of petroleum laws are effectively observed, the environmental rights of human beings and nature alike can easily be realised. Furthermore, if RoN are recognised, it will lead to stronger laws and judicial pronouncement on such laws will reinforce its effectiveness.

c. Challenges of Rights of Nature (RoN)

While some gains have been made by the countries that have taken the lead in establishing RoN, challenges remain on the full realisation of the effect of these RoN. These challenges have been recorded in jurisdictions that have taken steps to establish RoN in legal instruments and policies such as Bolivia and Ecuador.[156] One of the challenges is that it is difficult to assess how far the courts will go on the issue of enforcement of such rights. This is because the concept of RoN being relatively new and emerging has not been rigorously tested before the courts to establish precedents.[157] This has occasioned conflicting court judgements on RoN litigation. Like every other law, in the jurisdiction where the RoN have been codified, the challenges of compliance and enforcement remain due to the lack of political will to enforce compliance with the laws.[158] This is because governments still place the exploitation of natural resources for gains over the protection of nature and the natural world. There is a conflict between the government's duty to ensure the right to life by the provision of basic amenities

[156] S Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature.' (2016) 5(1) Transnational Environmental Law 113, 143.
[157] CR Giraldo, 'Does Nature Have Rights? Successes and Challenges in Implementing the Rights of Nature in Ecuador' (2013) <https://constitutionnet.org/news/does-nature-have-rights-successes-and-challenges-implementing-rights-nature-ecuador> accessed 4 December 2020.
[158] ibid

and the protection and preservation of nature and the natural world within its domain because often, the government relies on the proceeds from the exploitation of natural resources to provide basic amenities for its citizens.[159]

The challenges to RoN also come from individuals and small businesses as they fear that such rights will occasion a multiplicity of lawsuits threatening their businesses and livelihood.[160] Critics have also opposed the concept of RoN because they believe that existing legal and statutory frameworks adequately cater to environmental concerns and new laws stipulating new rights are not required.[161]

d. Rights of Nature (RoN) in Nigeria

In Nigeria, the right to a clean and healthy environment although provided for in the Constitution[162] has been seen to be non-justiciable[163] unless by an alternative pathway such as under the African Charter on Human and Peoples Rights (ACHPR) or in a court in a foreign jurisdiction.[164] It is also a fact that many environmental pollution cases have been lost due to technicalities[165] and this has prompted such victims to seek access to courts through other options like regional and international instruments such as the African Commission on Human and Peoples' Rights and the Economic Community of West African States (ECOWAS)

[159] ibid
[160] OA Houck, 'Noah's Second Voyage: The Rights of Nature as Law' (2017) 31(1) Tulane Environmental Law Journal 1, 29.
[161] C McDonough, 'Will the River Ever Get a Chance to Speak? Standing Up for the Legal Rights of Nature' (2020) 31(1) Villanova Environmental Law Journal 143, 161.
[162] S 20 of the Constitution of Nigeria 1999 requires the government of Nigeria to protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria and s 33 (1) which guarantees the right to life of every citizen of Nigeria.
[163] See s 6 (6) c of the Constitution of Nigeria 1999 which essentially prevents any enquiry into any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution (under which a protected environment is provided for in the Constitution).
[164] Articles 4 which provides for the right to life and 24 which provides the right to a general satisfactory environment.
[165] *Oronto Douglas v Shell Petroleum Development Company Limited & Ors* (1998) LPELR-CA/L/143/97 Law Pavilion Electronic Law Report- Court of Appeal. Some of the oil pollution related cases arising from some Ogoni communities fall into this category.

Community Court of Justice and jurisdictions such as the United Kingdom and the Netherlands.[166] While this effort has yielded some positive results, it still has not expressly produced a pronouncement on the rights of nature and the natural world *per se* to be protected specifically in Nigeria. It is argued that an outright pronouncement on the RoN and the natural world can very easily provide an alternative avenue to seek redress in court in the event of environmental pollution. Therefore, it is believed that realising the RoN and the natural world to be protected and preserved, can support the move for more effective environmental regulation.

A judicially recognised RoN and the natural world resources to be protected and preserved and the human right to a healthy environment can work simultaneously to promote effective compliance and enforcement because humans have an interconnectedness with the natural world and should acknowledge the RoN to exist, persist and maintain its vital cycles.[167] Furthermore, it is argued that establishing the RoN in Nigeria, will encourage operators of the petroleum sector to seek and adopt more sustainable ways of carrying out their operations because any environmental infraction will no longer only be an injury to persons but also an injury to nature and the natural world both of which would be actionable.

It is argued here that the effort at promoting compliance and enforcement of environmental law in Nigeria is anthropocentric because of the following. *First*, the RoN and the natural world to be protected are still not recognised under the Nigerian legal system as the provision for the protection, preservation and safeguard of the environment was only made in the Nigerian Constitution impliedly for the benefit of the citizens.[168] *Second*, the RoN was considered but

[166] Popoola (n 42).
[167] Borràs (n 156).
[168] S 20 Constitution of Nigeria1999.

only to the extent of protecting the human right to life in a healthy environment.[169] However, following the footsteps of the judiciary and the legislature in India, New Zealand, Ecuador and Brazil, the judiciary in Nigeria can institutionalise compliance and enforcement by expanding the interpretation of the human right to health to also include the RoN and natural resources to be protected.[170] The judiciary can achieve this by indicating in its judicial pronouncements that a disregard for the RoN to be protected could be construed in the same way as a violation of the human right to life. It is imperative to note that the countries listed above have used the recognition of the rights of nature to protect some aspects of nature that is vital such as rivers. Therefore, it is argued that Nigeria can follow suit by recognising such rights to protect its petroleum and other natural sectors in judicial pronouncements and legislative instruments.

e. Key argument

Environmental rights accrue both to humans and progressively to nature and the natural world. However, more scholars have written about the environmental rights of human beings than the rights of nature and the natural world.[171] This is because the recognition of the rights of nature and the natural world is incipient and is gradually spreading to different jurisdictions as the awareness of the significance of rights of nature grows. Individual countries are progressively conferring such rights on nature and natural resources within their domain.[172]

While the scholarship on the human right to a clean environment is settled, the literature on the rights of nature is emerging. Human rights have since been constitutionalised in countries around the world, however, RoN have not received equal attention in Constitutions around the

[169] See *Jonah Gbemre* and *Oronto Douglas'* cases. It is noteworthy that the judgement of the Court in Jonah Gbemre's case in favour of the plaintiffs was completely ignored by the defendants and nothing was done to enforce it. The Plaintiffs on the other hand gave up trying to pursue the enforcement of the judgement due to the financial implications involved.
[170] D Erin, 'Environmental Constitutionalism in Defense of Nature' (2018) 53 Wake Forest Law Review 667, 671.
[171] Shelton (n 149) 107; Washington and others (n 124) 38.
[172] Example India, Ecuador and Colombia.

world. The countries that have recognised RoN have done so in their Constitutions[173] while others have done so in judicial decisions.[174] It is argued that a recognition of strong and justiciable RoN can help the judiciary in Nigeria to play its role in the implementation of compliance and enforcement of such rights. Integrating such rights in the Constitution or other legislation has the potential to lead to stronger laws that could include better compliance and enforcement provisions the more such provisions are tested in court.[175] However, Constitutional amendments to include these rights is not an easy process as most constitutions are not easily amended.

In Nigeria, the process of constitutional amendment is labourious and fraught with many pitfalls because of the multi-tribal nature of the country. This makes judicial recognition of RoN a more attractive and attainable option in Nigeria presently. This was successful in the recognition of the human right to a clean and healthy environment as a constituent part of the human right to life provided in the Nigerian Constitution.[176]

6.2.2 Access to courts as a means to promote effective environmental compliance and enforcement

The right to defend and assert one's right based on equality and the process of law is the right to justice.[177] When this right is breached, it can be enforced through the courts. Therefore, it follows that the judiciary plays a direct role in ensuring access to courts in furtherance of justice by victims of environmental harm.[178] This is because while access to justice depends on several

[173] The Ecuadorian Constitution established rights of nature in three articles of Chapter 7 of its 2018 Constitution. Article 71 'Nature or Pacha Mama', Article 72 'Nature's right to be restored' and Article 73 'State's duty to apply preventive and restrictive measures that could lead to the extinction of species, destruction of ecosystems and permanent alteration of natural cycles'. Borràs (n 156) 134.
[174] See the Indian cases of *Maharaj Singh v Indian Oil Corporation* (1999) A. I. R. 81; *M. I. Builders v. Radhey Shyam Sahu M.C.* [1999] A.I.R. SC 2468; *Mehta v Kamal Nath* (1997) 1 S.C.C. 388.
[175] E Chianu, "The Horse and Ass Yoked: Legal Principles to Aid the Weak in a World of Unequals." Inaugural Lecture Series. *91st Inaugural Lecture Series at the Akin Deko Auditorium, University of Benin, Nigeria on 20th September* (2007) 125, 131.
[176] As was held in *Jonah Gbemre's* case.
[177] Popoola (n 42).
[178] TH Marshall, 'Citizenship and Social Class' in J Manza and M Sauder (eds), *Inequality and Society: Social Science Perspectives on Social Stratification* (W.W. Norton and Co 2009) 148.

factors such as literacy, legal aid etc, unfettered access to courts to enforce effective compliance and enforcement of environmental laws can create the opportunity to correct or mitigate poor environmental and administrative decisions and encourage government authorities to do their job.[179] However, it is important to note that the judiciary faces some challenges in facilitating access to justice and other institutional and economic factors also contribute to limit this access as discussed in the *third* point in **section 6.3.3** below.

From the history of environmental litigation in Nigeria, it is contended that the reason why victims of environmental harm go to court is to secure remediation and compensation for violation of environmental and petroleum sector laws occasioning harm.[180] However, it is argued that more can be achieved through environmental litigation besides remediation and compensation such as securing compliance and enforcement of existing laws relating to the petroleum sector. The judiciary as an institution can create awareness and insist on compliance and enforcement of petroleum laws through court orders with legitimate and realistic timelines, as this would expound on and then constitute the law.[181] The opportunity to do this was missed in the case of *Oronto Douglas v Shell Petroleum Development Company Ltd and Ors* which was instituted to enforce compliance with the provisions of the Environmental Impact Assessment Act.[182] The court held that the plaintiff lacked the *locus standi* to institute the action because he did not disclose sufficient interest in the case.[183] It is argued that court orders for compliance and enforcement of petroleum sector regulation must not necessarily target

[179] Ebesson (n 53) 247.
[180] *Shell v Farah* (1995) 3 NWLR (Pt 382) 148; *Bodo Community & Others v The Shell Petroleum Development Company of Nigeria Limited* [2014] EWHC 958; *Friday Alfred Akpan v Royal Dutch Shell PLC* etc. in these cases, actions were decided as tort claims and orders as to costs were made. In *Jonah Gbemre v Shell Petroleum Development Company Ltd* (Suit No FHC/CS/B/153/2005, the scenario was different as the plaintiff approached the Federal High Court seeking five declaratory relief and no monetary relief.
[181] As Lord Denning noted that this one of the ways through which the judiciary can make laws. See GS Ogbodo, 'Environmental Protection in Nigeria: Two Decades After the Koko Incident' (2009) 15(1) Annual Survey of International & Comparative Law 1, 11.
[182] Environmental Impact Assessment Act Cap E12 Laws of the Federation of Nigeria 2004.
[183] *Oronto Douglas v SPDC* (n 165).

petroleum law violators alone but ought to address the shortcomings of the regulators and regulatees as well.

It has been opined that the challenge of environmental law is not the creation of new laws rather the challenge is ensuring effective compliance and enforcement with existing laws and this can be achieved through improved environmental regulation and access to courts for judicial remedies.[184] The bane of petroleum sector regulation in Nigeria presently is that compliance has not been promoted in legal instruments.[185] While regulatory instruments in Nigeria are rich in enforcement provisions, they have not equally promoted compliance.[186] It is argued that even the existing enforcement provisions in the law are themselves be-devilled with loopholes and ambiguities that make it practically impossible to achieve effective enforcement.[187]

It is believed that where the judiciary orders compliance or specific performance, such orders would usually be made after due consideration and deliberation of the ramifications of making such orders effective. For example, In *Jonah Gbemre's* case, the court ought to have considered the feasibility of the defendants having the capacity to cease gas flaring before making such an order.[188] Where compliance and enforcement have judicial backing, it will discourage the proliferation of environmental harm perpetrated by operators of the petroleum sector in Nigeria. Therefore, ease of access to court increases the chances of securing compliance and enforcement by court order. It is argued that to avoid this, more operators would prefer

[184] GR Pring and CK Pring, 'The Future of Environmental Dispute Resolution' (2020) 40(1) Denver Journal of International Law and Policy 482, 483.
[185] This is clear from the literature examined so far in the cause of this research.
[186] This is clear from the enforcement provisions of regulatory instruments like the NESREA Act, NOSDRA Act, EIA Act etc.
[187] See for example the case of *NOSDRA v Mobil Producing Nigeria Unlimited* were the Court of Appeal stripped the NOSDRA of the legal right to impose fines for violation of the provisions of the NODSRA Act.
[188] See **Sections 3.4.3** of **Chapter 3** this thesis and **6.3.3** of this chapter. It is argued that before a court orders compliance or enforcement of any law, it should consider whether the responsible regulatory agency has the capacity to enforce its orders. This will reduce the incidence of court orders turning into paper tigers.

compliance with environmental laws to going through the court process only to be ordered to still comply.

6.2.3 Institutionalising compliance and enforcement in environmental litigation in Nigeria through the judiciary

Environmental litigation in Nigeria is not strange. Victims of negative impacts of petroleum sector operations have at different times proceeded against multinational corporations and other parties who operate in the petroleum sector in Nigeria with varying results.[189] This is due to various challenges of access to court faced by these victims in their quest for justice. The purpose of environmental litigation is to interpret environmental laws to determine rights and liabilities, punish offenders and discourage or discontinue injurious environmental practices that are harmful to the human and natural environment thereby protecting the environment among others.[190] However, environmental litigation is vital for other reasons as well such as inducing the regulator to implement environmental laws, policies and standards and present an important strategy for holding culpable environmental offenders responsible for their poor environmental decisions and consequences of their actions.[191]

The significance of the judiciary in environmental matters in Nigeria has grown and cannot be overemphasised. Before the period that underscored environmental awareness, the existing environmental laws were not tested before the judiciary because the law at that time was not developed enough to envisage issues of environmental harm due to pollution from the

[189] For example, multinational corporations have proceeded against NOSDRA, and have at different times and before different courts secured conflicting judgement regarding the authority of the regulatory agency to unilaterally impose fines against such companies for violation of the provisions of the NOSDRA Act. See *Exxon Mobil v NOSDRA* (2018) LPELR-44210 CA.

[190] Fagbemi and Akpanke (n 15) 29; JM Wilcox, 'The Role of Environmental Groups in Litigation' (1985) 10 Adelaide Law Review 41, 47; J Chu, 'Vindicating Public Environmental Interest: Defining the Role of Environmental Public Interest Litigation in China' (2018) 45 Ecology Law Quarterly 485, 531.

[191] EP Amechi, 'Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, in Ensuring Access to Justice for Victims of Environmental Degradation' (2010) 6(3) Law Environment and Development Journal 320, 322.

petroleum sector operations. A few decades into petroleum operations, the judiciary was called upon to determine issues bordering on the operations of the petroleum sector and actions of the operators of the petroleum sector because the laws had evolved.[192] The constitutional provision of the duty of the government of Nigeria to guarantee the protection of the environment[193] has been discussed in **Chapter 5** of this thesis.[194] The judicial battle that ensued regarding the interpretation and application of that section is settled to the extent of securing enforcement of the provision through the alternative pathway of other legal and binding instruments.[195] The Constitution of Nigeria which is accorded the status of the *grund norm* and considered the organic and fundamental law of the country[196] ought not to suffer this fate. While this position remains, there has been an exponential growth in the number of major national and international environmental legislation bordering on petroleum sector operations since the 1972 Stockholm conference.[197] This growth can easily be attributable to the increased environmental awareness among nations.

It is contended therefore that if the law is tested more before the judiciary, there will be more opportunity for the law to be referred to and applied by the judiciary. When the court orders compliance and enforcement of environmental laws and validly pins responsibility on the liable party, a deterrence culture is created in potential violators thereby contributing to compliance and enforcement crystallising progressively.

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[192] This is obvious from the pace at which petroleum sector laws are enacted in Nigeria from the 1950s until date.
[193] S 20 of the Constitution of Nigeria 1999 stipulates the duty of the government to protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.
[194] See **section 5.2.1 (i)** of **Chapter 5** of this thesis.
[195] *Jonah Gbemre v SPDC* (n 41); African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 2004.
[196] T Okonkwo, 'Environmental Constitutionalism in Nigeria: Are We There Yet?' (2015) 13 The Nigerian Juridical Review 175.
[197] E Emeseh, 'Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria' (2006) 24 Journal of Energy and Natural Resources Law 574, 575.

The Judiciary under the Nigerian legal system is replete with opportunities to promote the compliance and enforcement of its petroleum laws. While It has been opined that the statutory introduction of a general class action litigation regime, which is hitherto non-existent in Nigeria, can promote the implementation of petroleum sector laws through compliance and enforcement,[198] the main drivers of access to courts can also be improved. The judiciary can further validate this if their constitutional duty and obligation are exercised to adjudicate such class action litigation.[199]

Public interest litigation is another avenue to institutionalise compliance and enforcement of environmental regulation through the judiciary. It has been noted that courts in Nigeria have entertained cases seeking to enforce the right to life based on actual wrongful death and damages.[200] However, the courts have not entertained such cases with public interest environment dimension seeking to tackle life-threatening environmental act or omission.[201] The Supreme Court of Nigeria has anticipated this by upholding the standing of NGOs in environmental cases with public interest dimension in the case of *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation*.[202] In Nigeria, public interest litigation has the potential to ensure that constitutional principles are put into practical effect while increasing public awareness and encouraging victims of environmental harm to seek redress.[203]

[198] KK Anele, 'Human Rights Class Action against Corporations in Nigeria: Problems and Prospects' (2019) 6(3) European Journal of Comparative Law and Governance 273, 273.
[199] S 13 Constitution of Nigeria 1999.
[200] A Babalola, 'The Right to a Clean Environment in Nigeria: A Fundamental Right' (2020) 26(1) Hastings Environmental Law Journal 3, 9.
[201] ibid.
[202] *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation (NNPC)* [2019] 5 NWLR 518, 587 and 597.
[203] CC Ajibo and others, 'Sustainable Development Enforcement Conundrum in Nigeria: Challenges and Way Forward' (2020) Commonwealth Law Bulletin 1, 14.

Public interest litigation has found legislative backing in the Fundamental Rights (Enforcement Procedure) Rules, 2009 (FREP).[204] The rules made pursuant to s 46 (3) of the 1999 Constitution of the Federal Republic of Nigeria recognise public interest litigation to activate the fundamental human rights principles under the Constitution and the ACHPR Act.[205] The rules empower the courts[206] to apply and interpret the Constitution, human rights laws, other international instruments and the FREP Rules in a liberal manner to advance the rights and freedoms guaranteed by the ACHPR and the Universal Declaration of Human Rights by its objectives set out in the preamble to the rules.[207] Other powers stipulated by the preamble to the rules include enhancing access to justice, especially for the poor, the illiterate, the uninformed, the vulnerable, the incarcerated and the unprotected.[208] The above discussion has laid out some of the avenues available through the judiciary in Nigeria to promote the compliance and enforcement of environmental regulation. Public interest litigation has been practised in India, Pakistan and Bangladesh and just like judicial activism, public interest litigation has been activated because of the failure of the government in environmental regulation.[209]

[204] NF Stewart, 'Challenges and Opportunities in Implementing Environmental Constitutionalism in Nigeria' in E Darin and JR May (eds), *Implementing Environmental Constitutionalism: Current Global Challenges* (Cambridge University Press 2018) 180, 190. Preamble 3 (e) of the Fundamental Rights (Enforcement Procedure) Rules, 2009 (FREP) provides that The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates, or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following: (i) Anyone acting in his own interest; (ii) Anyone acting on behalf of another person; (iii)Anyone acting as a member of, or in the interest of a group or class of persons; (iv) Anyone acting in the public interest, and (v) Association acting in the interest of its members or other individuals or groups.
[205] ACHPR Act (n 35).
[206] S 1 of the preamble to the Fundamental Rights (Enforcement Procedure) Rules 2009.
[207] S 3 (a), (b) I – ii of the Preamble to the Fundamental Rights (Enforcement Procedure) Rules 2009.
[208] S 3 (d) of the preamble to the Fundamental Rights (Enforcement Procedure) Rules 2009.
[209] J Razzaque, 'Linking human Rights, Development, and Environment: Experiences from Litigation in South Asia' (2006) 18(3) Fordham Environmental Law Review 587, 588.

6.3 Judicial intervention in environmental constitutionalism

Environmental constitutionalism refers to the application of Constitutional provisions to safeguard and protect the environment and environmental rights of citizens by ensuring that the government carries out its responsibility of improving and protecting the environment.[210] It traverses the vast coverage of constitutional law, international law, human rights and environmental law which recognise that the environment is a proper subject for protection in the wording of the Constitution and ought to be backed by the judiciary.[211] Nations have progressively turned to environmental constitutionalism to demonstrate their intention to promote effective environmental regulation by engraining environmental protection provisions in the texts of their Constitutions.[212] This constitutional expression has been known to have some advantages. *First*, the strengthening of the environmental laws of such countries, new environmental laws and regulations are checked for consistency with the constitutional provisions on the environment. *Second*, it provides a safety net that fills the gaps in environmental law, creates a duty of accountability on the part of the government and allows increased public participation in environmental matters.[213] When environmental laws are given constitutional backing, they become more durable than other non-entrenched rights.[214] Environmental provisions that find expression in the wordings of the Constitution acquires normative superiority over the provisions of other domestic legislations and the public is more likely to identify with such constitutionally provided environmental laws.[215] Where environmental rights are constitutionalised, other environmental rights in other domestic

[210] T Okonkwo, 'Exposition on the Stance of the Judiciary on Environmental Constitutionalism: Evidence from India and Nigeria' (2018) 7(1 & 2) International Journal of Advanced Legal Studies & Governance 26, 31.
[211] JR May and E Daly, 'Global Environmental Constitutionalism', *Global Environmental Constitutionalism* (Cambridge University Press 2014) 414.
[212] DR Boyd, 'The Constitutional Right to a Healthy Environment' (2012) 54(4) Environment: Science and Policy for Sustainable Development 3, 6.
[213] ibid 13.
[214] E Daly and JR May, 'Comparative Environmental Constitutionalism' (2015) 6(1) Jindal Global Law Review 9, 21.
[215] ibid.

legislation will serve to complement the rights in the Constitution rather than contradict them.[216]

The reliance on environmental constitutionalism poses some challenges as well. In dealing with environmental constitution provisions, courts need to develop or interpret new concepts to determine the scope measure and quality of the meaning of such concepts.[217] On the positive side, while doing this, the courts will invariably be propounding social values which the public may relate to more than rights.[218] The challenges of litigation are exacerbated in environmental constitutional cases, such as issues of costs, need for technical expertise and the quantum of evidence. Environmental constitutional cases also raise fundamental questions of policy choices because they pit human rights claims against each other.[219] For example, effectively stopping gas-flaring in Nigeria to improve the air quality at the expense of the economic benefit of the continuous mining of crude oil and associated gas. It is argued that compliance and enforcement of environmental regulation can be improved with the intervention of the judiciary in addressing and finding a balance in the advantages and disadvantages of environmental constitutionalism.

Unfortunately, in Nigeria, the effect of environmental constitutionalism is limited by the same constitution that embodies it.[220] The efforts of the judiciary at resolving the constitutional glitch has resulted in opposing judicial decisions by courts of coordinate jurisdiction.[221] It is further argued that this may be because the judiciary has continued to place technicality above

[216] ibid.
[217] JR May and E Daly, *Global Judicial Handbook on Environmental Constitutionalism* (Third edn, United Nations Environment Programme (UNEP) 2019) 1, 49.
[218] ibid 103.
[219] ibid 49.
[220] By s 6 (6) c of the Constitution of Nigeria 1999, the judiciary is precluded from enquiring into any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental Objectives and Directive Principles of State Policy which includes the state obligation in S 20 of the Constitution of Nigeria 1999 which places the responsibility of environmental protection and improvement on the state. See also **section 5.2.1 (i)** of **Chapter 5** of this thesis.
[221] See the cases of *Fawehinmi v Abacha* (1996) 9 NWLR Part 475 710 and *Jonah Gbemre v SPDC*.

substance in considering the totality of an environmental case before it, especially in cases emanating from the petroleum sector. This was exhibited in the case of *Oronto Douglas v Shell Petroleum Development Company Limited & Ors*.[222] In that case, which was to ensure compliance with the provision of the Environmental Impact Assessment Act,[223] the case was dismissed because it was held that there was no cause of action as the plaintiff did not allege a specific legal right violated by the defendants and did not have 'sufficient interest' in the subject matter.[224] Sufficient interest is an interest that is peculiar to the plaintiff as opposed to an interest that the plaintiff shares in common with other members of the public.[225] This stand was taken even though it had been settled that a plaintiff can be accorded the standing to bring an action if he can show that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of.[226] It has been argued that the trial judge did not consider the fact that the substance of the suit was of common and general interest to the citizens of Nigeria[227] and in furtherance of the human right to a clean and safe environment as enshrined in the African Charter on Human and Peoples' Rights.[228]

The participation of Nigerians in their government is assured by the same Constitution of Nigeria that prioritises the security and welfare of the citizens.[229] This brings *Oronto Douglas* well within the definition of a person who has sufficient interest in the subject matter and whose

[222] *Oronto Douglas v SPDC* (n 165).
[223] Environmental Impact Assessment Act Cap E12 Laws of the Federation of Nigeria 2004.
[224] The plaintiff sought three reliefs; a declaration that the defendants cannot lawfully commission, carry out and operate their Liquefied Natural Gas Projects without first complying with the Environmental Impact Assessment Act 1992; a declaration the Attorney General of the Federation (5th Defendant) is bound to require the 1st, 2nd and 3rd Defendants (Shell, NNPC and NLNG) to make public the Environmental Impact Assessment report to any NGO and communities likely to be impacted by the project in line with the law; and an injunction restraining the 4th Mobil Producing Nigeria Unlimited (4th Defendant) from commencing or commissioning the LNG Project or any activity thereon pending a proper Environmental Impact Assessment of the project certified by the Attorney General of the Federation (5th Defendant) in line with the law.
[225] GU Ojo and T Nosa, 'Access to Environmental Justice in Nigeria: The Case for a Global Environmental Court of Justice' (2016) <https://www.foei.org/wp-content/uploads/2016/10/Environmental-Justice-Nigeria-Shell-English.pdf> accessed 18 June 2019, 4.
[226] JG Frynas, 'Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria' (1999) 43(2) Journal of African Law 121
[227] Okonkwo (n 196) 206.
[228] ibid.
[229] S 14 (2) c Constitution of Nigeria 1999.

constitutional right to a healthy environment is likely to be violated. It is believed that had this suit been decided otherwise, it would have been authoritative precedence to the stance of the judiciary on compliance and enforcement in the petroleum sector in Nigeria. It is contended that the judiciary in Nigeria can still rely on the powers offered by S 13 of the same Constitution to institutionalise compliance and enforcement in judicial pronouncements.[230] The judiciary can achieve this by activating its duty and obligation under that section to conform to, observe and apply the provisions of the Constitution. It is argued that while environmental constitutionalism is an ideal way to promote environmental rights, not much can be achieved through it especially if such constitutional provisions are couched in the way it is expressed in the Constitution of the Federal Republic of Nigeria except by alternative pathways.[231]

6.3.1 Criminal prosecution of petroleum sector offences

Environmental crime describes any illegal activity that harms the environment with serious human health and social impacts as well as on the human and natural environment.[232] In the context of this thesis, an environmental crime includes oil spill pollution, gas flaring pollution, indiscriminate and illegal oil and other harmful waste disposal methods and harmful environmental practices arising out of and in the course of the operations of the petroleum sector in Nigeria.[233] In Nigeria, the prosecution of offenders for these environmental crimes by the petroleum sector operators in the actual sense of a criminal prosecution is practically non-existent[234] even though evidence abounds as to the above-mentioned environmental crimes by

[230] S 13 of the Constitution of Nigeria 1999 which places a duty and responsibility on all organs of government specifically the executive, legislature and judiciary to conform to, observe and apply the provisions of chapter 2 of the Constitution carrying S 20 thereof.
[231] See **section 5.2.1** of **Chapter 5** of this thesis.
[232] J Wentworth, *'Environmental Crime*' (Houses of Parliament, Parliamentary Office of Science and Technology 2017) 1.
[233] C Chuks-Ezike, 'Environmental Crime Liability of the Nigerian Government in Its Oil Pollution Menace' (2018) 2(2) Environmental Risk Assessment and Remediation 1, 5. In this article, it was argued that the failure of the Nigerian government to regulate the extensive pollution in the petroleum sector contrary to its constitutional mandate to do so could be interpreted as full and wilful permission of the pollution crime.
[234] GE Ezirim, 'Oil Crimes, National Security, and the Nigerian State, 1999 - 2015' (2008) 19 (1) Japanese Journal of Political Science 80, 86.

the operators of the petroleum sector.[235] It is imperative to note that this class of prosecution is distinct from the prosecution of non-oil sector operators and individuals that indulge in oil crimes that impact the environment. These crimes include dealing with or in crude oil, petroleum and petroleum products without lawful authority or licence, crude oil theft from storage facilities or transportation facilities, petroleum products theft and tampering with oil pipelines and other oil facilities.[236] These oil crimes have been provided for under other laws such as the Petroleum Production and Distribution (Anti-Sabotage) Act,[237] Oil in Navigable Waters Act, Petroleum Act etc.

Most environmental litigation cases have been instituted by victims of environmental harm and usually come in the form of a civil suit.[238] It is argued that the prosecution of environmental wrongs both as a civil wrong against victims of environmental harm and as a criminal act against the state in whom the ownership and control of all petroleum in Nigeria is vested for the benefit of the citizens of Nigeria, will create a more effective deterrent and promote compliance and enforcement among the petroleum sector operators.[239] It has been argued that the application of imprisonment terms will constitute sufficient punishment and create effective deterrence as in a jurisdiction like the United States of America.[240] Such imprisonment orders can be made as part of the judgement order or as punishment in contempt of court.[241] It is

[235] O Adewale, 'Nigeria' in AA del Frate and J Noberry (eds), *Environmental Crime, Sanctioning Strategies and Sustainable Development* (United Nations Interregional Crime and Justice Research Institute 1993) 339, 356.
[236] TA Ogunleye, 'Establishing Oil Theft and Other Related Crimes Tribunal for Speedy Trial: Legal Issues and Challenges' (2016) 21(4) IOSR Journal of Humanities and Social Science 20, 21.
[237] Petroleum Production and Distribution (Anti-Sabotage) Act Cap P12 Laws of the Federation of Nigeria 2010.
[238] *Shell v Farah* (1995) 3 NWLR (Pt 382) 148; *Shell v Abel Isaiah* (1997) 6 NWLR (Part 508) 236, *Jonah Gbemre v Shell Petroleum Development Company Ltd* (Suit No FHC/CS/B/153/2005; *Bodo Community & Others v The Shell Petroleum Development Company of Nigeria Limited* [2014] EWHC 958; *Oronto Douglas v Shell Petroleum Development Company Ltd and Ors*; (1999) 2 NWLR (Pt 591); *Friday Alfred Akpan* and Vereniging Milieudefensie *v Royal Dutch Shell PLC* and *SPDC Ltd* District Court of The Hague [2013] ECLI.NL.RBDHA.2013.BY9854 Rechtbank Den Haag, 30-01-2013, C/09/337050/HA ZA 09/1580.
[239] S 1 Petroleum Act Laws of the Federation of Nigeria Cap P10 2004.
[240] C Chuks-Ezike, 'The Use of Imprisonment Terms as a Tool to Sanction Oil and Gas Pollution Offence in Nigeria: A Determination of the Effectiveness of this Tool in the USA' (2019) 3 (1) Environmental Risk Assessment and Remediation 34.
[241] *The Barbuda Council v Attorney General and Others* Civil Appeal No.11 of 2005.

further contended that this will strengthen compliance and enforcement efforts if it is adopted and tailored to suit the Nigerian narrative. However, for the above to be achieved, harmful environmental acts by petroleum sector operators must be codified as environmental crimes committed by such sector operators. Currently, in Nigeria, the penalties for contravention of environmental laws are mostly fines regarding corporate bodies but prison terms are provided for individual offenders.[242]

Some other laws make provisions for some offences relating to acts involving oil and other petroleum products. These laws include the Petroleum Production and Distribution (Anti-Sabotage) Act,[243] Criminal Code Act,[244] Criminal Justice (Miscellaneous Provisions) Act,[245] Miscellaneous Offences Act etc.[246] These laws suffer some shortcomings as it relates to being effectively applied to regulate the activities of petroleum sector operators as discussed below.

a. Petroleum Production and Distribution (Anti-Sabotage) Act

Acts that can harm the environment and constitute environmental crime include illegal oil bunkering, oil theft and sabotage of oil installations, sea piracy (attacks on the facilities and personnel of oil installations and rigs and private individuals), oil pipelines vandalism, fuel scooping, oil attacks on critical oil installations, kidnapping and hostage-taking of oil workers.[247] While the term environmental crime has not been specifically used in any legislation in Nigeria, the Petroleum Production and Distribution (Anti-Sabotage) Act[248] provides for the offence of *sabotage*.[249] However, under that law, these acts of sabotage are

[242] CT Brown and NS Okogbule, 'Redressing Harmful Environmental Practices in the Nigerian Petroleum Industry Through the Criminal Justice Approach' (2020) 11(1) Journal of Sustainable Development Law & Policy 18, 29.
[243] Petroleum Production and Distribution (Anti-Sabotage) Act Cap P12 Laws of the Federation of Nigeria 2010.
[244] Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2004.
[245] Criminal Justice (Miscellaneous Provisions) Act Cap C39 Laws of the Federation of Nigeria 2004.
[246] Miscellaneous Offences Act etc Cap M17 Laws of the Federation of Nigeria 2004, formerly styled Special Tribunal (Miscellaneous Offences) Decree No 20 1984.
[247] Ezirim (n 234), 86.
[248] Petroleum Production and Distribution (Anti-Sabotage) Act Cap P12 Laws of the Federation of Nigeria 2010
[249] ibid s 1.

only construed as such when committed by a person and punishable with 21 years imprisonment.[250] The Act did not define 'Person' to include corporate entities or other petroleum sector operators and therefore cannot be invoked to prosecute corporate entities.

b. Criminal Code Act

S 245 of the Criminal Code of Nigeria provides that any person who corrupts or fouls the water of any spring, stream, well, tank, reservoir or place making it unfit for the ordinary use for its ordinary purpose, commits a misdemeanour punishable with six months imprisonment. While the interpretation section of the law[251] explains who a 'person' is, it provides that 'person' or 'owner' and other like terms, when used regarding property, include corporations of all kinds, and any other association of persons capable of owning property; and also, when so used, include the State. It is argued that this interpretation does not explicitly refer to petroleum sector operators to the extent of s 245 of the Act.

c. *Criminal Justice (Miscellaneous Provisions) Act*[252]

This law makes provisions for the protection of some infrastructures. S 3 prohibits the wilful destruction, damage or removal of any pipeline or connected installation[253] and prevention or obstruction of the free flow of crude oil in any pipeline or connected installation by any person.[254] It is argued that while the penalty for the offence of damage, destruction or removal of a pipeline is stiff and likely to create a deterrent, the penalty for the prevention or obstruction or prevention of the flow of crude oil under the law is inadequate to create any deterrent.[255]

[250] ibid s 2.
[251] S 1 Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2004.
[252] Criminal Justice (Miscellaneous Provisions) Act Cap C39 Laws of the Federation of Nigeria 2004.
[253] S 3 (1) (a) Criminal Justice (Miscellaneous Provisions) Act Cap C39 Laws of the Federation of Nigeria 2004.
[254] S 3 (1) (b) Criminal Justice (Miscellaneous Provisions) Act Cap C39 Laws of the Federation of Nigeria 2004.
[255] Ogunleye (n 236) 22.

The law in its interpretation section[256] failed to define who 'person' includes and cannot be used to regulate the conduct of petroleum sector operators.

d. Miscellaneous Offences Act[257]

This law is an omnibus law that deals with a plethora of actions that are considered unlawful ranging from arson of public buildings, unlawful destruction of public highways, tampering with oil pipelines, importing or exporting of mineral or mineral ore to tampering with electricity installations and postal matters. One of the strong points of this law is that where an offence is attributable to any neglect of a principal officer of a body corporate, the person acting in that capacity shall be deemed to be guilty of the offence as well as the body corporate.[258] The Miscellaneous Offences Act punishes tampering with oil pipelines with life imprisonment[259] and where a body corporate is found guilty of an offence punishable by death or life imprisonment under this law, the Federal High Court may order that the body corporate be wound up and all its assets be forfeited to the Federal Government of Nigeria.[260]

While these laws go a long way to point at the desired criminal legislation regarding petroleum sector operations, it is contended that the various provisions of the above-mentioned laws envisaged the likely culprits to be individual persons or other third parties.[261] The laws either completely ignored the fact or did not consider the possibility that environmental harm could occur from other sources such as bad business practices, carelessness or neglect, oil spill from outdated or malfunctioning machinery or oil installations or non-compliance with regulations. Compliance and enforcement can be improved if these laws are given more force by including

[256] S 9 Criminal Justice (Miscellaneous Provisions) Act Cap C39 Laws of the Federation of Nigeria 2004.
[257] Miscellaneous Offences Act Cap M17 Laws of the Federation of Nigeria 2004, formerly styled Special Tribunal (Miscellaneous Offences) Decree No 20 1984
[258] S 3 (1) Miscellaneous Offences Act Cap M17 Laws of the Federation of Nigeria 2004,
[259] S 1 (7) (b) Miscellaneous Offences Act Cap M17 Laws of the Federation of Nigeria 2004.
[260] S 3 (2) Miscellaneous Offences Act Cap M17 Laws of the Federation of Nigeria 2004.
[261] See the case of *Federal Republic of Nigeria v MT Asteris and 9 Ors*, Charge No. FHC/L/239C /2015. In this case, 9 persons were convicted of being in possession of crude oil without proper licencing and documentation. Two of the convicts appealed against the judgement and lost.

all the possible offenders in the wordings of the various laws. Further progress can be made by creating special courts to expedite adjudication on such cases and create precedence.[262]

6.3.2 The place of compliance and enforcement in judicial decisions in Nigeria

Environmental litigation emanating from petroleum sector disputes in Nigeria are usually instituted by victims of environmental harm and have been instituted through civil proceedings.[263] The purpose of such suits is usually to secure monetary compensation for environmental harm in form of pollution of farmland, destruction of biodiversity, pollution of rivers and watercourses and general economic destabilisation while seeking various types of injunctions to restrict or stop further abuse on the environment. While some of such litigation succeeds in part, many more suffer defeat on the altar of legal technicalities or procedural irregularities.[264] This has set a precedent that has continued to encourage non-compliance with environmental laws in no small measure.[265] The judiciary is empowered by law in the exercise of their judicial duties to interpret the law, consider a case on its full merit and fill the gaps of legislation in furtherance of compliance and enforcement. It is argued that compliance and enforcement have still not found their rightful place in judicial decisions in Nigeria. When decisions are made by the courts, orders for compliance with the relevant law are hardly made, rather other remedial orders are made. For example, order for compensation, injunction, specific performance etc. This handicap can be attributable to the barriers to the institutionalisation of the values that support compliance and enforcement in Nigeria discussed

[262] Ogunleye (n 236) 26.
[263] See the cases of *Jonah Gbemre v SPDC, Oronto Douglas v SPDC and Others*, *Abel Isaiah v SPDC, Shell v councillor F B Farah NOSDRA v Mobil Producing Nigeria Unltd* etc.
[264] Mmadu (n 106)170; KSA Ebeku, 'Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria' (2003) 12(2) Review of European, Comparative and International Environmental Law 199, 207.
[265] For instance, this was evidenced in the case of *Oronto Douglas v Shell Petroleum Development Company Ltd and Ors*; (1999) 2 NWLR (Pt 591) where it was held that the plaintiff lacked the locus standi to bring the suit against the oil company to ensure compliance with the Environmental Impact Assessment Act Cap E12 Laws of the Federation of Nigeria 2004. This has continued to encourage non-compliance with the law. However, a recent Supreme Court decision in the case of *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation (NNPC) (2019) 5 NWLR (Pt.1666) 518*, the standing of NGOs and other interested third parties to sue in environmental cases was affirmed.

in **Chapter 5** of this thesis and the challenges faced by the judiciary when adjudicating on environmental matters before it as discussed below. It is believed that if orders for compliance and enforcement of the relevant laws are made along with other orders, the effect will not only remediate the wrong complained of but will go further to stipulate the expected behaviour from the violator to forestall further or future violations.

6.3.3 Evaluation of Judicial attitude to non-compliance with petroleum sector-related laws

The judiciary, as an institution and the third arm of government, expectedly plays a strategically vital role in the quest to preserve environmental rule of law. The history of the legal battles and their effect on the compliance and enforcement landscape of the petroleum sector in Nigeria portrays the stand of the judiciary in improving environmental compliance and enforcement in Nigeria.

First, when environmental matters are brought to court, it is usually to ascertain the rights and obligations of victims and culprits of environmental violation.[266] It is believed that the outcome of such matters is the medium through which the attitude of the judiciary towards non-compliance decisions of operators of the petroleum sector in Nigeria can be assessed. For example, the Court in *Jonah Gbemre's* case provided the opportunity to correct some regulatory irregularities in some environmental laws but failed to act proactively to ensure that the order of court was enforced thereby losing the opportunity it hitherto created for a review in the law.[267]

[266] JR May and T Dayo, 'Dignity and Environmental Justice in Nigeria: The Case of *Gbemre v. Shell*' (2019) 25(2) Widener Law Review 269, 283.
[267] B Faturoti, G Agbaitoro and O Onya, 'Environmental Protection in the Nigerian Oil and Gas Industry and *Jonah Gbemre v. Shell PDC Nigeria Limited*: Let the Plunder Continue?' (2019) 27(2) African Journal of International and Contemporary Law 225.

Second, many scholars have taken divergent views on the general attitude of the judiciary in Nigeria in environmental matters before it.[268] Some believe that the judiciary has exhibited sympathy towards victims of poor environmental decisions and have followed a pro-environmental protection approach in its method of adjudication by granting appropriate redress in such cases before the courts.[269] Others hold the contrary view that the judiciary has shown the tendency to be more tolerant of operators of the petroleum sector even when their liability is obvious by deferring to legal technicalities.[270] It is contended that this dichotomy in views may pose a challenge for policymakers to take a decisive stand as to what action needs to be taken or not taken about improving the role of the judiciary or maintaining the status quo.

Third, it is a well-known fact that the mere existence of laws does not guarantee the success of such laws because there is a wall of difference between policy rhetoric and the behavioural practices on ground regarding compliance and enforcement.[271] Many factors have been adduced for the failure of regulatory agencies to effectively enforce environmental laws. Some of these factors include corruption, political and economy-based factors where the resources are lacking or the costs of enforcement outweigh the benefits.[272] In this guise, the enforcer contends that strict enforcement could discourage further and new capital investment decisions by the multinational corporations in the petroleum sector and possibly, transfer of technological knowledge. This can potentially dent the economic contribution of the petroleum sector to the

[268] JG Frynas *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities* (LIT Verlag Münster 2000) 263; KSA Ebeku, 'Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria' (2003) 12(2) Review of European, Comparative and International Environmental Law 199, 199.
[269] ibid 219.
[270] MGA Murgan and H Ijaiya, 'International Principles of Sustainable Development and the Challenges to Environmental Rights Enforcement in Nigeria' (2020) 7(1) Brawijaya Law Journal 82, 91; Mmadu (n 106) 170; KSA Ebeku, 'Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria' (2003) 12(2) Review of European, Comparative and International Environmental Law 199, 207.
[271] Oruonye and Ahmed (n 2) 54.
[272] S Iyengar, N Dolšak and A Prakash, 'Selectively Assertive: Interventions of India's Supreme Court to Enforce Environmental Laws' (2019) 11(24) Sustainability 7234, 7238.

sustenance of the Nigerian economy. However, a proactive stance from the judiciary can help promote the institutionalisation of compliance and enforcement of environmental laws.[273]

Fourth, the failure of enforcement due to economy-based considerations such as the financial gains from the petroleum sector has created a gap in the insistence on compliance and strict implementation of enforcement thereby encouraging a culture of impunity in the sector operatives. In some cases, where court-ordered enforcement fails, the litigants do not report the enforcement failure back to the court.[274] This is largely due to the expenses and bureaucratic and administrative bottlenecks that characterise such follow-up actions. This is the gap sought to be filled by the judiciary.

It is suggested that the judiciary can be more proactive and respond in some ways that can strengthen its role. The Court can take the enforcing authority to task and demand that the laws and decisions of the court be enforced or apply the rule of tactical balancing or selective enforcement.[275] The concept of tactical balancing argues that courts prioritise and balance a range of considerations or adopt different tactical approaches to decision-making, causing them to alternate between challenging and endorsing the exercise of executive power and to do so with varying intensity.[276] This has been applied in courts in India, Mexico, Italy and Brazil.[277]

The Court can also retain oversight mechanisms to ensure compliance with judgements in petroleum sector-related cases by directing the responsible party to return to court with

[273] KSA Ebeku, 'Judicial Contributions to Sustainable Development in Developing Countries: An Overview' (2003) 15 (3) Environmental Law and Management 168, 173.
[274] As it happened in *Jonah Gbemre's* case where the Courts judgement to cease gas-flaring in the community, was completely ignored.
[275] Iyengar, Dolšak and Prakash (n 272) 7235.
[276] D Kapiszewski, 'Tactical Balancing: High Court Decision Making on Politically Crucial Cases' (2011) 45(2) Law & Society Review 471, 486.
[277] Iyengar, Dolšak and Prakash (n 262) 7237; DD Porta, 'A Judges' Revolution? Political Corruption and the Judiciary in Italy' (2001) 39(1) European Journal of Political Research 1, 16; Selective assertiveness has been applied in judicial contestation of military prerogatives in Pakistan. See Y Kureshi, 'Selective Assertiveness and Strategic Deference: Explaining Judicial Contestation of Military Prerogatives in Pakistan' (2020) Democratization 1, 14; Kapiszewski (n 267) 481.

compliance plans, targets and timetables for implementation of court judgements.[278] For instance, in the case of *General Secretary, West Pakistan Salt Mines Labour Union (CBA) Hkewra, Jhelum v The Director, Industries and Mineral Development, Punjab, Lahore,*[279] the Supreme Court of Pakistan appointed an oversight commission to monitor compliance and report back to court on measures needed or adjustments required. In India, the High court of Jammu and Kashmir at Sringar in the case of *M/S Aziz Timber Corp. and Others v. State of Jammu & Kashmir through Chief Secretary and Others,*[280] issued a 'show cause' order regarding contempt of court proceedings when the state was found to have permitted logging in violation of a Supreme Court injunction.[281] The Court can also entertain more cases brought *suo motu*, make cost orders that are realistic and beneficial to victims of environmental harm and monitor the implementation of court orders.[282] However, this should be applied with caution as the danger is there for the judiciary to encroach into the role of the executive.[283]

6.4 Challenges of the Judiciary in the Institutionalisation of compliance and enforcement of petroleum sector laws

The judiciary is not without its share of challenges in the execution of its constitutional mandate regarding the rule of law and enforcement of the fundamental human rights as enshrined in the Constitution of the Federal Republic of Nigeria, which includes the right to life in a healthy environment.[284] However, it must be noted that there are general challenges that the judiciary

[278] D Shelton and A Kiss, *Judicial Handbook on Environmental Law* (CG Weeramantry and others ed, United Nations Environment Programme 2004) 140, 68.
[279] *General Secretary, West Pakistan Salt Mines Labour Union (CBA) Hkewra, Jhelum v The Director, Industries and Mineral Development, Punjab, Lahore* (1994) SCMR 2061.
[280] *M/S Aziz Timber Corp and Others v State of Jammu & Kashmir through Chief Secretary and Others* O.W.P No 568-84/96.
[281] High Court of Jammu and Kashmir at Srinagar O.W.P. No. 568-84/96 Continuing Petition No. 51/96.
[282] It is conceded that the court is *functus officio* once a judgement is given, however, the court can make orders as to the timeline for the obeying the judgement order and the steps to take if the judgment order is not obeyed.
[283] See **sections 6.1.2 (b)** and **6.5.3** of **Chapter 6** of this thesis. See also Okogbule and Brown (n 93) 55; Bolick (n 96) 4; Alexander Hamilton and others, *The Federalist* (Hackett Publishing 2005) 1, 452.
[284] S Varvastian, 'The Human Right to a Clean and Healthy Environment in Climate Change Litigation' (2019) (2019-09) Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper 1, 7;

faces which are not sector-specific and there are other challenges that bedevil environmental law litigation[285] from the petroleum sector. Some examples of the general challenges include delays in court cases, cost of litigation and lawyers' fees, ignorance of the law, remoteness of court location.[286] While examples of sector-specific challenges include the multiplicity of environmental legal instruments, lack of specialised judges, cumbersome judicial process and conflicting judgements from courts of coordinate jurisdiction. Although these challenges are being tackled daily, it would appear that the challenges have reduced the impact of the judiciary on the compliance and enforcement framework of the petroleum sector in Nigeria. It is a fact that the laws regulating the petroleum sector in Nigeria can best be described as inadequate because it does not effectively deal with every aspect of petroleum operations. The judiciary like any other institution is faced with challenges in the exercise of the powers conferred on it by the Constitution of Nigeria[287] as discussed below.

6.4.1 Multiplicity of environmental legal instruments and technicalities in environmental laws

Nigeria is famed for the existence of multiple legal instruments embodying provisions regulating the petroleum sector.[288] While this may appear to be an advantage because it ought to cater to every possible scenario that requires regulation in the petroleum sector, it has worked more as a disadvantage against the effective operation of the judiciary at full capacity as the

KSA Ebeku, 'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Jonah Gbemre v Shell* Revisited' (2007) 16 (3) Review of European Community & International Environmental Law 312, 313. The Constitutional Right to a healthy environment is replicated in other African countries such as Mali, Democratic Republic of Congo, Uganda, Malawi and South Africa.

[285] Fagbemi and Akpanke (n 15) 29.

[286] PO Musa and RO Adeolu, 'An Assessment of the Judiciary on Administration of Justice and Governance in Nigeria' (2020) 18 Journal of Public Administration, Finance and Law 78, 85; B Bazuaye and D Oriakhogba, 'Combating Corruption and the Role of the Judiciary in Nigeria: Beyond Rhetoric and Crassness' (2016) 42(1) Commonwealth Law Bulletin 125, 144; O Oko, 'Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria' (2005) 31(1) Brook Journal of International Law 9, 39.

[287] Voigt and Makuch (n 5) xii.

[288] As discussed in **section 3.4** of **Chapter 3**.

legislation is constantly attacked on grounds of technicality and inadequacy.[289] The multiplicity of the legal instruments has also brought about a multiplicity of environmental regulatory bodies.[290] These regulatory bodies are agencies of government established by specific environmental legislation to enforce the provisions of the existing environmental laws. However, the question has been posed as to whether the proliferation of environmental laws and regulatory agencies has hindered compliance and enforcement of petroleum sector regulation.[291] The answer has been negative therefore, scholars have continued to drum up support for strengthening environmental laws rather than enacting new ones that will consequently create new regulatory bodies.[292]

a. Locus standi

The issue of *locus standi* is arguably one of the challenges of the judiciary in the adjudication of cases because of the narrow meaning that has been accorded this jurisdictional matter by Nigerian courts. *Locus standi* is a Latin phrase that means 'place to stand' and was defined as the right of a party to appear and be heard on the question before the Court or tribunal[293] and focuses on the capacity, interest and competence of the party seeking to bring a complaint before a Court.[294] Further, the Nigerian Constitution under Chapter 4 (Fundamental Human rights) provides that 'Any person who alleges that any of the provisions of this chapter has been, or is likely to be contravened in any state in relation to him may apply to a high court in that state for redress.'[295] While the term *locus standi* was not specifically used in the Constitution, the sufficient interest requirement has been adopted in the determination of the

[289] *Oronto Douglas v SPDC* (n 165).
[290] Some of these agencies include NESREA, NOSDRA, DPR, Ministry of environment etc.
[291] O Mbanefo, 'The Multiplicity of Law Enforcement Agencies and the State of Law and Order in Nigeria: A Case of too many Cooks?' (2019) 1(2) Journal of Social Service and Welfare 20, 28.
[292] ibid 29; Oruonye and Ahmed (n 2) 55.
[293] Per Bello JSC (as he then was) in the case of *Senator Adesanya v President of Nigeria* (1981) 2 NCLR 358.
[294] KO Mrabure, 'Miscarriage of Justice in the Restrictive Application of Locus Standi Under Nigerian Law' (2016) 1(1) Ajayi Crowther University Law Journal 1, 2.
[295] S 46 (1) Constitution of Nigeria 1999.

standing of a litigant to sue.[296] This was expressed in the case of *Bewaji v Obasanjo*[297] that a person must have to be conferred with exceptional and tangible interests, which are justifiable before he can be accorded with *locus standi* in a claim.[298]

It is contended that the issue of standing has robbed victims of environmental harm of access to court because a restrictive interpretation of *locus standi* has been adopted by the Supreme Court of Nigeria.[299] More often than not, the question of standing has been misconstrued and used to subvert justice. It has been noted that the rules of standing in the Nigerian judicial setting should be liberalised and actions decided on the merits of the application before the court. It is further noted that the term 'sufficient interest' should be given a broader meaning to accommodate more classes of persons that can sue on constitutional and public interest grounds.[300] It does appear that this call has been heeded in the case of *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation (NNPC).*[301] In that case, the Nigerian Supreme Court overturned the Court of Appeal's decision which held that the Appellant, an NGO had no locus to bring an action against the NNPC for failing to clean up or reinstate the Ineh/Aku streams/rivers after its corroded pipeline rupture, fractured and spewed its entire contents into the surrounding streams and rivers of Ineh/Aku in Abia State in Nigeria. Before this decision, it has been acknowledged that the general test for determining standing, which focuses on a litigant's interest as envisaged by the 1999 Constitution,[302] posed problems for

[296] See the case of *Busari v Oseni* (1992) 4 Nigeria Weekly Law Report (Pt 257) 589.
[297] *Bewaji v Obasanjo*[297] (2009) 9 Nigeria Weekly Law Report (Pt 1093) 987.
[298] Z Adangor, 'Locus Standi in Constitutional Cases in Nigeria: Is the Shift from Conservatism to Liberalism Real?' (2018) 12(1) The Journal of Jurisprudence, International Law and Contemporary Issues 73, 77; KO Mrabure, 'Application of Locus Standi Under Nigerian Law' (2017) 1(1) Ajayi Crowther University Law Journal 1.
[299] *Adesanya v President of the Federal Republic of Nigeria* (1981) 2 NCLR 358, 372, 380.
[300] Mrabure (n 294) 22.
[301] *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation (NNPC) (2019) 5 NWLR (Pt.1666) 518.*
[302] See ss 46 (1) and 6 (6) (b) of the Constitution of Nigeria 1999.

representative actions and public interest litigation because it referred to the litigant's civil rights and obligations.[303]

Had this decision been made as early as in the case of *Oronto Douglas v Shell Petroleum Development Company Limited & Ors,*[304] the environmental law scholarship on the issue would have been greatly improved. In that case, the lawsuit was dismissed because the Court held that there was no cause of action as the plaintiff did not allege a specific legal right violated by the defendants and did not have 'sufficient interest' in the subject matter.[305] Nevertheless, it is contended that the decision of the Supreme Court in *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation (NNPC)*[306] *is a welcome development as other interest groups specifically NGOs that are stakeholders in the environmental discourse can now institute actions in their right to protect the environment and seek access to court in pursuit of environmental justice.*[307]

6.4.2 Lack of specialised judges

In the practice of the Nigerian judicial system, a general system of law is practised wherein a matter can be heard and decided by any magistrate or judge provided they possess the jurisdiction to do so as provided by law.[308] This presupposes the fact that issues arising out of

[303] TI Ogowewo, 'Wrecking the Law: How Article III of the Constitution of the United States led to the Discovery of a Law of Standing to Sue in Nigeria' (2000) 26(2) Brooklyn Journal of International Law 527.
[304] *Oronto Douglas v SPDC* (n 165).
[305] The plaintiff sought three reliefs; a declaration that the defendants cannot lawfully commission, carry out and operate their Liquefied Natural Gas Projects without first complying with the Environmental Impact Assessment Act 1992; a declaration the Attorney General of the Federation (5th Defendant) is bound to require the 1st, 2nd and 3rd Defendants (Shell, NNPC and NLNG) to make public the Environmental Impact Assessment report to any NGO and communities likely to be impacted by the project in line with the law; and an injunction restraining the 4th Mobil Producing Nigeria Unlimited (4th Defendant) from commencing or commissioning the LNG Project or any activity thereon pending a proper Environmental Impact Assessment of the project certified by the Attorney General of the Federation (5th Defendant) in line with the law.
[306] *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation (NNPC)* [2019] 5 NWLR 518, 587 and 597.
[307] MC Anozie and EO Wingate, 'NGO Standing in Petroleum Pollution Litigation in Nigeria—*Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation'* (2020) Journal of World Energy Law and Business, 1, 8.
[308] See ss 232 (1), 239 (1), 251 (1) n, 257 (1) of the 1999 Constitution of Nigeria.

and in the course of petroleum sector operations can be heard and decided by any judge who is assigned such matters including judges that are completely inexperienced in such matters and lack the expertise, provided such courts have jurisdiction under the law to hear and determine such matters.[309] This was one of the challenges faced by the judge in the case of *Oronto Douglas v Shell Petroleum Development Company Limited & Ors.*[310] It is contended that the Court considered the value of the NLNG project as more important than the fact that the operators of the project were in radical violation of the provisions of sections of the Environmental Impact Assessment Act.[311]

Following the growing rate of specialised courts, more countries are courting the attraction of creating specialised courts to deal with environmental cases as this appears to be improving access to justice for citizens, NGOs and other disadvantaged groups.[312] Creating specialised courts where judges who have judicial specialisation preside over environmental and petroleum sector-related cases will ensure greater coherence in the case-law on the subject matter.[313] The creation of specialised courts and judges proves advantageous in several ways. *First*, it encourages greater efficiency.[314] *Second*, it produces high-quality decisions, better outcome for litigants and greater user satisfaction. *Third*, it enhances the uniformity of decisions in the particular area of law, this consequently reduces the time spent on the hearing and determination of cases as already established familiar principles can be applied subject to the

[309] Okonkwo (n 196) 206; D Shelton, 'Developing Substantive Environmental Rights' (2010) 1(1) Journal of Human Rights and the Environment 89.
[310] *Oronto Douglas v SPDC* (1998) LPELR-CA/L/143/97 Law Pavilion Electronic Law Report- Court of Appeal.
[311] S 2 of the Environmental Impact Assessment Act Cap E12 Laws of the Federation of Nigeria 2004, which places a restriction on public or private projects without prior consideration of the environmental impact of such projects. S 13 (d) of the same law specifically names projects that require a permit or licence to be granted by the federal, state or local government to initiate the project as projects that require environmental impact assessment.
[312] H Gramckow and B Walsh, Developing Specialized Court Services International Experiences and Lessons Learned (The International Bank for Reconstruction and Development/The World Bank 2013) 34, 1.
[313] Judicial specialisation means that Judges have special knowledge of and expertise in a particular area of law. See Gramckow and Walsh (n 303) 3.
[314] G Pring and C Pring, *Environmental Courts & Tribunals: A Guide for Policy Makers* (UN Environment Programme 2016) 120, 13.

particular case.[315] Conversely, some disadvantages also trail the use of specialised courts. *First*, here is the fear that the creation of specialised courts presided over by specialised judges will take away resources from the general court system thereby creating greater pressure on the general courts.[316] *Second*, since specialised judges tend to be a small group in a given jurisdiction, there is the risk of undue familiarity with such judges and other court officers which brings the likelihood of bias.[317]

Scholars of both Nigerian and foreign acclaim have questioned the appropriateness of judges who lack the expertise and experience in environmental and petroleum sector-related cases, presiding over such cases.[318] Considering the level of environmental compliance and enforcement in Nigeria, it is argued that this challenge has negatively impacted the promotion of compliance and enforcement in the petroleum sector in Nigeria through the judiciary. It appears that there is ample opportunity to rectify this challenge through the National Judicial Institute of Nigeria.[319] The institute was set up to promote efficiency, uniformity and improvement of the quality of judicial services in the superior and inferior courts[320] through

[315] YA Krasnova and others, 'Ecological Court as the Guarantee of Protection of Rights of Human and Citizens' (2019) 4(380) Bulletin of National Academy of Sciences of the Republic of Kazakhstan 185, 189; E Hamman, R Walters and R Maguire, 'Environmental Crime and Specialist Courts: The Case for a 'One-Stop (Judicial) Shop 'in Queensland' (2015) 27(1) Current Issues in Criminal Justice 59, 61; Gramckow and Walsh (n 303) 6.
[316] DM Mvogo, 'Addressing Fragmentation and Inconsistency in International Environmental Law Analysis of the Role of Specialised or Treaty Judicial Bodies' (2021) 14(2) Journal of Politics and Law 84, 87.
[317] C Burke, 'Advantages & Disadvantages of Specialized Courts' (2017) <https://legalbeagle.com/8398649-advantages-disadvantages-specialized-courts.html> accessed 14 October 2020; Gramckow and Walsh (n 303) 9.
[318] Okonkwo (n 196) 206; D Shelton, 'Developing Substantive Environmental Rights' (2010) 1(1) Journal of Human Rights and the Environment 89.
[319] www.nji.gov.ng
[320] S 3 (1) National Judicial Institute Act Cap N55 Laws of the Federation of Nigeria 2004.

training, continuing education, conferences and dissemination of information for all categories of judicial officers[321] and their support staff.[322]

Other opportunities exist for the continuous training of judicial officers such as the Institute for Environmental Security[323] established at the Hague in 2002, that provides training of Judges on international environmental law. UNEP has also developed training programmes tailored to suit judicial officers.[324] In Africa, some training institutions exist such as the Judicial Institute for Africa (JIFA)[325] in the University of Cape Town South Africa, the Nigeria Institute of Advanced Legal Studies (NIALS)[326] and the South African Judicial Education Institute (SAJEI).[327] These institutions can organise tailored training for continuing legal education for judicial officers.

6.4.3 Length of proceedings

When an environmental litigation case is brought before a court of law in Nigeria, the duration of the matter can vary anywhere from six to ten years including the time that the matter might go on appeal from the court of first instance.[328] The time-lapse usually contributes to the

[321] Judicial officer has been interpreted to mean a holder of the office of Chief Justice of Nigeria, a Justice of the Supreme Court, the President or Justice of the Court of Appeal, the Chief Judge or Judge of the Federal High Court, the Chief Judge of a High Court of a State and of the Federal Capital Territory, Abuja the Grand Khadi or Khadi of a Sharia Court of Appeal of a State and of the Federal Capital Territory, Abuja the Grand Khadi or Khadi of a Sharia Court of Appeal of a state and of the Federal Capital Territory, Abuja, the President or Judge of a Customary Court of Appeal of a State and of the Federal Capital Territory Abuja and includes the holder of a similar office in any inferior court whatsoever. See s 17 of the National Judicial Institute Act Cap N 55 Laws of the Federation of Nigeria 2004.

[322] S 3 (1) National Judicial Institute Act Cap N55 Laws of the Federation of Nigeria 2004.

[323] http://www.envirosecurity.org/

[324] Such as the UNEP Global Judges Programme to the effect that a worldwide capacity building programme for judiciaries and other legal stakeholders in the field of environmental law. UNEP has also developed training manuals in the application of environmental law by national courts and tribunals, environmental Law, Judges Handbook of Environmental Law, Legal Drafter's handbooks on environmental Law etc. See UNEP, *UNEP Global Judges Programme* (United Nations Environment Programme 2005) 74, 8.

[325] http://www.jifa.uct.ac.za/

[326] https://nials.edu.ng/

[327] https://www.judiciary.org.za/index.php/sajei/governance

[328] Fagbemi and Akpanke (n 15) 29; L McCaskill, 'When Oil Attacks: Litigation options for Nigerian Plaintiffs in U.S Federal Courts' (2013) 22 (2) Health Matrix: The Journal of Law-Medicine 535, 560; O Oko, 'Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria' (2005) 31(1) Brooklyn Journal of International Law 9, 39. See also the case of *Friday Alfred Akpan* and Vereniging Milieudefensie *v Royal Dutch Shell PLC* and *SPDC Ltd* that lasted for at least six years.

dissipation of the subject matter and evidence and makes it practically impossible for the judges to inspect the evidence or visit the impacted site to get a first-hand assessment of the damage. Conversely, the length of proceedings discourages litigants from embarking on the venture irrespective of what the outcome may be.[329] It is contended that the time that is spent in the determination of one lawsuit may be so long that circumstances would have changed substantially by the next time another court will seek to rely on the precedent in the case. This can rob the judiciary of the opportunity to make the much-needed pronouncements that could institutionalise compliance and enforcement.[330]

6.4.4 Cumbersome judicial process

A judicial process like any other process of adjudication can be cumbersome as it is time consuming both on the litigants and the Judiciary. It has been suggested that the technical nature of petroleum sector operations can impede the plaintiff's effort to prove a violation of environmental standards by sector operators.[331] The process can be cumbersome for the litigants because of the location of courts in urban areas making it inconvenient and expensive to access[332] and beyond the reach of the majority of the population, which live in the rural areas and are deprived of access to court and environmental justice.[333] Language can also be a barrier in judicial proceedings. Often, the subject matter of environmental litigation is situated in rural areas where indigenous people live. When a case affects them and they must come to court to give evidence, the services of an interpreter will have to be retained to facilitate the testimony

[329] L McCaskill, 'When Oil Attacks: Litigation options for Nigerian Plaintiffs in US Federal Courts' (2013) 22 (2) Health Matrix: The Journal of Law-Medicine 535, 562.
[330] For example, in *Jonah Gbemre's* case, regardless of the encouraging judgement of the court ordering a cessation of gas flaring in the community, no step was taken to that implement the judgement, the applicant filed for contempt of court against the respondents. The judge was transferred, and the federal government and the respondents took no steps to implement the judgement. With all the militating factors, the applicant ran out of steam to keep chasing the case and the far-reaching judgement was never implemented till date.
[331] Frynas (n 226) 124. This especially true because such superior technical information can only be in the possession of such sector operator.
[332] McCaskill (n 329) 559.
[333] O Okechukwu, 'The Problems and Challenges of Lawyering in Developing Societies' (2004) 35 Rutgers Law Journal 569, 605.

of such witnesses.[334] This can either be too expensive or it can cause delays to the proceedings. It is contended that these contribute to the difficulty to hear and conclude a matter promptly as there can be countless requests for adjournment by the litigants due to being unable to attend court or to produce evidence of their claim. In this sense, court procedure can inadvertently appear to favour such sector operators being proceeded against.[335]

6.4.5 Conflicting court decisions

In Nigeria, judicial decisions on matters of diverse subject matter are made constantly and because there is no real-time tracking of these decisions, it is difficult for the judiciary to track the current stand on any subject matter at any given time essentially because of the volume of litigation.[336] This handicap has thrown the judiciary into the predicament of deciding matters in conflicting directions to statutory provisions or decisions of other courts of competent jurisdiction.

In the case of *NOSDRA v Mobil Producing Nigeria Unlimited (ExxonMobil),*[337] the Court of Appeal affirmed the stripping of NOSDRA's power and authority to unilaterally impose fines for contravention of the offences provision of the NOSDRA act.[338] This decision was made while there was a subsisting court decision affirming that regulatory bodies can impose penalties against offenders who contravene the provisions of its laws in the case of *Moses Ediru v Federal Road Safety Commission and 2 Others.*[339] The two decisions were reached by the

[334] R Muftau, 'Access to Judicial Justice in Nigeria: The Need for Some Future Reforms' (2016) 47 Journal of Law, Policy and Globalization 144,149.
[335] LJ McConnell, 'Establishing liability for multinational corporations: lessons from Akpan' (2014) 56(2) International Journal of Law and Management 88, 90.
[336] Ojo and Nosa (n 225) 7. This is a serious problem that has plagued court proceedings because, till date in Nigeria, court proceedings are recorded in longhand by the presiding judges. This can place undue physical and mental strain on the presiding judge and distract him/her from concentrating and observing the demeanour of the witnesses.
[337] *NOSDRA v Mobil Producing Nigeria Unlimited (ExxonMobil)* (2018) Law Pavilion Electronic Law Report-44210 (LPELR (CA)
[338] S 6 (2) and (3) NOSDRA Act; *NOSDRA v Mobil Producing Nigeria Unlimited (ExxonMobil)* (2018) Law Pavilion Electronic Law Report-44210 (LPELR (CA) in paragraph C of page 9 of the judgement.
[339] *Ediru v Federal Road Safety Commission and 2 Others* (2016) 4 NWLR Part 1502, 209.

Court of Appeal and it is the practice and law that the later decision in time remains the law until it is overturned at the Supreme Court or the Court of Appeal overrules itself. It is the practice that when there two conflicting decisions on the same subject matter before the Court of Appeal, the Court can elect which one to follow when confronted with a similar case. However, a lower court is bound to follow the decision which is later in time. In this instance the 2018 decision in *NOSDRA v Mobil Producing Nigeria Unlimited (ExxonMobil)* is the later in time and is the position of the law.

However, in the case of *Shell Nigeria Exploration and Production Company Limited (Shell) v National Oil Spill Detection and Response Agency (NOSDRA)*[340] before a Federal High Court, the Court departed from the decision of the Court of appeal in *NOSDRA v Mobil Producing Nigeria Unlimited (ExxonMobil)* and held that NOSDRA can impose sanctions without recourse to the Court. It is argued that this is an anomaly as the Federal High Court is a Court that is lower than the Court of Appeal in hierarchy and ought to follow the latest decision of the Court of Appeal on this subject. It is further argued that this position is sending the wrong signal to both the regulatory bodies and the petroleum sector operators about the ability of a regulatory body to enforce compliance in line with its enabling laws without going through the rigours of environmental litigation.[341] This is because there are two subsisting and conflicting decisions on the unilateral enforcement powers of regulatory agencies.

6.4.6 Violation of court orders

While judicial remedies are attractive and beneficial, the enforceability thereof makes them more meaningful, reassuring and preferable.[342] Judicial remedies are multifarious and only

[340] *Shell Nigeria Exploration and Production Company Limited (Shell) v National Oil Spill Detection and Response Agency (NOSDRA)* Unreported.
[341] This stance is further confirmed where the judiciary reached two conflicting decision on the subject matter of the import of s 20 of the Constitution of the Federal Republic of Nigeria in the cases of *Abacha v Fawehinmi No 2* and *Jonah Gbemre v SPDC*.
[342] JA Dada, 'Judicial Remedies for Human Rights Violations in Nigeria: A Critical Appraisal' (2013) 10 Journal of Law Policy and Globalisation 1, 3.

courts imbued with jurisdictional competence can award them. Another challenge facing the judiciary in the institutionalisation of compliance and enforcement is the continuous violation of orders of court laid out in judgements.[343] It has been noted that more often than not, the plaintiffs in environmental harm cases are either individuals, communities or NGOs suing on their behalf.[344] These court order violations have sometimes been at the instance of the regulators and some regulated entities.[345] While environmental degradation as a result of petroleum sector operation affects the human right to a healthy environment, disrespect for court orders has been noted as a human right challenge as well.[346] It is argued that when litigants show contempt for court orders, it encourages lawlessness and non-compliance, especially where the judiciary is ridiculed through the flagrant disdain for court orders.[347]

6.4.7 Evaluation of the challenges of the Judiciary

The judiciary like every other institution faces challenges in the execution of its constitutional functions. Looking at the challenges of the judiciary in the effort at improving compliance and enforcement, it can be gleaned from the foregoing that these challenges are not insurmountable and can be positively and effectively addressed.[348] For instance, more specialised training can be provided for judges in the courts that have jurisdiction to entertain matters arising from the petroleum sector for faster resolution time and expert consideration of the issues. Courts can also take proactive steps to ensure that their orders in concluded cases are carried out by the appropriate parties. The Courts can do this by putting a monitoring mechanism in place that

[343] ibid 11.
[344] *Graham Otoko v SPDC* (1990) 6 NWLR 693; *Bodo Community & Others v The Shell Petroleum Development Company of Nigeria Limited* [2014] EWHC 958; *Jonah* Gbemre v Shell Petroleum Development Company Limited & Ors [2005] 6 African Human Rights Law Report 152; *Okpabi* v Royal Dutch Shell and Others [2018] EWCA Civ 191; *Oronto Douglas v Shell Petroleum Development Company Ltd and Ors* (1999) 2 NWLR (Pt 591); *Wiwa* v Royal Dutch Petroleum Company (2002) WL 319887 (SDNY 2002).
[345] *Jonah Gbemre v SPDC* (n 41).
[346] I Adegbite, 'Human Rights Protection and the Question of Good Governance in Nigeria' (2021) 4 Journal of Humanities 11, 15.
[347] CE Ejike, 'Violation of Social Contracts: An Impediment to National Integration in Nigeria' (2020) 4(2) Journal of Philosophy and Public Affairs 82, 96.
[348] McCaskill (n 329) 588.

can facilitate a feedback function.[349] The judiciary can create a databank that records, and tracks decided cases in real-time to ensure that the position of the law on any issue is readily available and accessible. It is argued that the judiciary requires clear and enforceable laws, specialised training, reliable information system, public confidence and the independence to effectively execute their functions.[350]

The response to the challenges of the judiciary as discussed in this thesis does not appear to be far-fetched as these challenges can be surmounted. For instance, on the issue of multiplicity of legal instruments, it is submitted that laws that appear to mirror or overlap the contents of another law can be consolidated into fewer instruments for ease of application by the courts. The creation of specialised courts and the use of specialised judges will go a long way to solve the challenge of the length of time spent by litigants in court over such cases and simplifying the cumbersome judicial process. Where the necessary training for the judiciary is provided utilising technological advancements in real-time tracking of court decisions, the judiciary will be able to keep track of the precedents in that area of law and assist potential litigants to project their legal stand as a prelude to actual litigation.[351] It is contended that the role of the judiciary in the institutionalisation of compliance and enforcement is vital. Therefore, the identified challenges, if addressed, will serve to fortify the place of the judiciary in the institutionalisation effort and enthrone a sustainable human rights culture in Nigeria.[352]

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[349] R Murray and others, 'Monitoring Implementation of the Decisions and Judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 African Human Rights Yearbook 150, 154. The African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights both play a variety of roles regarding the monitoring of implementation of their decisions. Such roles include information-gathering; reporting; dialogue with the parties; interpretation and technical assistance; assessment; coordination; and enforcement. See also D Kapiszewski and MM Taylor, 'Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings' (2013) 38(4) Law & Social Inquiry 803, 815; M Burton, 'Judicial Monitoring of Compliance: Introducing 'Problem Solving' Approaches to Domestic Violence Courts in England and Wales' (2006) 20(3) International Journal of Law, Policy and the Family 366, 371-372.

[350] Ajibo and others (n 203) 16; Markowitz and Gerardu (n 62) 545.

[351] Gramckow and Walsh (n 312) 34, 6.

[352] Adegbite (n 346) 21.

6.5 The judiciary as a vital vehicle towards effective petroleum sector regulation

While compliance and enforcement seem to be facing implementation challenges in Nigeria like other jurisdictions,[353] efforts are underway on the international scene to tackle some of the challenges discussed above. The International Network for Environment Compliance and Enforcement (INECE)[354] in its 2011 conference[355] made a call to facilitate continued collaboration among judges, regulators and other key stakeholders towards improving the mechanisms for environmental compliance and enforcement.[356] It is believed that the judiciary has a major input in promoting the environmental rule of law regarding the petroleum sector to ensure that national and international laws are interpreted and applied effectively to regulate the petroleum sector. For instance, the judiciary can influence public perception and knowledge concerning the obligations of petroleum sector operators by constantly collaborating with the regulators[357] to exchange ideas and understand more about how to institutionalise compliance and enforcement, especially in the petroleum sector.

The need for the judiciary to take a more active role in petroleum sector regulation was stressed at the UNEP preparatory meeting in Malaysia in 2011 as captured in the Kuala Lumpur statement.[358] This can be accomplished by addressing the challenges plaguing the judiciary as discussed in this chapter. This action will ensure an independent judiciary and judicial process

[353] Such as in Europe, Asia and other African countries. See S Fulton and AH Benjamin, 'Foundations of Sustainability' (2011) 28(6) Environmental Forum 32, 33; M Aghaei and others, 'Challenges of Implementing and Enforcing Environmental Law in Malaysia' (2011) 3 (6) Interdisciplinary Journal of Contemporary Research in Business 82.
[354] www.inece.org
[355] The 9th International Conference on Environmental Compliance and Enforcement held on 20 – 24 June in British Columbia, Canada with the theme 'Enforcement Cooperation: Strengthening Environmental Governance'.
[356] Markowitz and Gerardu (n 62) 551.
[357] Markowitz and Gerardu (n 62) 554.
[358] H Corell, 'UNEP World Congress on Justice, Governance and Law for Environmental Sustainability' (2012) <https://worldjusticeproject.org/news/world-congress-justice-governance-and-law-environmental-sustainability> accessed 16 September 2019.

which are both vital for the implementation, development and enforcement of environmental law and consequently support the realisation of the environmental sustainability.[359]

The United Nations SDGs is made up of 17 goals that draw up a blueprint to achieve a better and more sustainable future for all. Among other issues, these goals address environmental degradation, peace and justice climate change etc.[360] Goal 16: Peace, Justice and Strong Institutions, targets the promotion of the rule of law which includes environmental rule of law,[361] development of effective, accountable and transparent institutions at all levels,[362] ensure responsive, inclusive, participatory and representative decision-making at all levels[363] and ensure public access to information and protect fundamental freedoms, under national legislation and international agreements.[364] It is contended that the actualisation of the SDG 16 lies on the shoulder of the judiciary in participating countries especially in the area of the realisation of environmental rule of law.

6.5.1 Designation of special courts and speedy disposition of cases

The legal system in Nigeria is one where the same courts hear and determine any and every case regardless of the subject matter and level of expertise of the presiding judge provided the court has the jurisdiction to do so.[365] This has made the courts overburdened with cases of varying subject matter in addition to the number of litigation cases. It is contended that the judiciary can promote the institutionalisation of compliance and enforcement in petroleum sector regulations by creating environmental courts or tribunals through civil and criminal

[359] ibid.
[360] United Nations, 'Sustainable Development Goals' (2020) <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed 14 October 2020.
[361] United Nations, 'Sustainable Development Goals: Goal 16: Peace, Justice and Strong Institutions' (2020) <https://www.un.org/sustainabledevelopment/peace-justice/> accessed 14 October 2020, Target 16.3.
[362] ibid 6.
[363] ibid 7.
[364] ibid 10.
[365] While this system can guarantee that matters regardless of the subject can be heard and determined, it does not guarantee that the matter will be heard with the expertise it requires for proper consideration and determination.

procedure laws, designated to hear and determine matters arising out of and in the course of petroleum operations and other environmental matters.[366]

These courts will be occupied by properly trained judges and other judicial officers in environmental matters to hear and determine such matters.[367] This system of streamlining legal environmental jurisprudence, judicial training and capacity-building will not be strange since it has been tried and tested in many other jurisdictions.[368] Some jurisdictions that followed this path include India, Brazil, Kenya, Indonesia, United Kingdom and New Zealand.[369] For instance, the National Green Tribunal in India came into existence following the judicial activism exhibited by the Indian Supreme court in environmental protection and public interest litigation.[370] Kenya adopted a new Constitution that mandates Parliament to establish High Courts to hear and determine disputes concerning the environment, use and occupation of and title to land *inter alia*.[371]

Therefore, it is believed that the establishment of specialised courts in environmental matters would serve the purpose of institutionalising compliance and enforcement of environmental regulations in the petroleum sector in Nigeria as well as abridging the time spent in court.[372] In

[366] CC Nwufo, 'Legal Framework for the Regulation of Waste in Nigeria' (2010) 4(2) African Research Review 491, 500.
[367] BJ Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26(3) Journal of Environmental Law 365, 377; G Pring and C Pring, 'Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment' (2009) 11 Oregon Review of International Law 301, 320.
[368] GW Pring and C Pring, 'Increase in Environmental Courts and Tribunals Prompts New Global Institute Introduction' (2010) 3 (1) Journal of Court Innovation 11, 13. Interestingly, lack of or the failure of effective compliance and enforcement is one of the factors that necessitated the development of such specialised courts. Other factors include the proliferation of environmental problems, public awareness, unenforced laws, public interest litigation, traditional court failure and emergence of reform-minded leaders 13.
[369] GW Pring and C Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (Access Initiative 2009) 119, 106.
[370] M Rackermann, 'Environmental Justice in India - The National Green Tribunal' (2020) 45(4) Denver Journal of International Law and Policy 471, 472.
[371] Pring and Pring (n 184) 484.
[372] Per Brian Preston J, Chief Judge of the Land and Environment Court of the State of New South Wales, Australia, the first EC established as a superior court of record in the world "The judiciary has a role to play in the interpretation, explanation and enforcement of laws and regulations. … Increasingly, it is being recognized that a court with special expertise in environmental matters is best placed to play this role in the achievement of ecologically sustainable development."

their research, Pring and Pring set out twelve building blocks that are elements of what they believe can form a successful Environmental Court or Environmental Tribunal but noted that they may not be enough to ensure access to courts in environmental cases.[373] These elements include the type of forum; legal jurisdiction; Environmental Court or Environmental Tribunal decision levels; geographic area; case volume; standing; costs; access to scientific and technical expertise; Alternative Dispute Resolution (ADR); competence of Environmental Court or Environmental Tribunal judges and decision-makers; case management; and enforcement tools and remedies.[374]

It is noteworthy that regardless of the attraction to adopt special courts and the growing support for the creation of Environmental Court or Environmental Tribunals, some challenges abound. Arguments as to some of the challenges to setting up such courts include competing area requiring specialisation, fragmentation of the judicial system, training costs and set-up costs, insufficient caseloads etc.[375] Many countries have recently been adopting the use of specialised courts specifically for the adjudication of environmental cases. Some of these countries include India, Brazil, Ecuador, Pakistan etc.

It has been argued that there are other areas of the law that require specialisation more than the environment because internal reforms will suffice to solve the budding environmental problems rather than creating special courts for that purpose. There has also been the argument that eventually there could be insufficient caseload to sustain the established environmental courts and tribunals.[376] Hypothetically, where the environmental courts and tribunals can establish a culture of compliance, there might not be a sufficient caseload to continue to sustain the

[373] Pring and Pring (n 369) 89.
[374] E Woodruff, 'Environmental Courts and Tribunals: How Can Nations Tackle the Growing Demand for Justice on Environmental Issues? (Book review)' (2020) 39(3) Denver Journal of International Law and Policy 553, 553.
[375] Pring and Pring (n 369)17.
[376] Z Minchun and Z Bao, 'Specialised Environmental Courts in China: Status Quo, Challenges and Responses' (2012) 30(4) Journal of Energy & Natural Resources Law 361, 379.

existence of such courts.[377] The opponents of environmental courts have also raised concerns that environmental court judges will overstep their bounds in their application of judicial activism in a resolution of environmental cases.[378] The cost of setting up environmental courts and providing training for the judicial and administrative officers who will preside over such courts are huge and the opponents of environmental court believe that that will be a stretch of an already stretched resource.

It has been noted however that although environmental courts and tribunals like any other system do not provide a one-size-fits-all approach, it has recorded some degree of success in a lot of jurisdictions and has continued to evolve and can still be the alternative to traditional courts systems and decision-making.[379]

6.5.2 Effective prosecution of environmental offences

It is the general view as stated earlier that in Nigeria a higher percentage of environmental harm is attributable to the activities of multinational corporations involved in the petroleum sector operations.[380] From the inception of environmental violations, when very little knowledge was available on the rights of victims of bad environmental decisions[381] to the development of environmental awareness and awareness of the legal rights of victims of environmental harm,[382] the judiciary has grown through the years and developed more courage in tackling sensitive environmental matters. The progressive success of this achievement has come through the pronouncements made by the judiciary in interpreting vague legislative provisions

[377] Pring and Pring (n 369) 17.
[378] Okogbule and Brown (n 93) 55.
[379] A Brigida, 'Around the World, the Environment is Finally Getting its Day in Court' (2018) <https://www.pri.org/stories/2018-04-24/around-world-environment-finally-getting-its-day-court> accessed 2 April 2020.
[380] KSA Ebeku, 'Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria' (2003) 12(2) Review of European Comparative and International Environmental Law 199.
[381] Pre-Koko incident.
[382] The events and developments that followed the dumping of toxic wastes incident.

or filling the gaps created by such legislative provisions.[383] It is believed that the judiciary through the Courts can make landmark decisions that will help to highlight its significant role in environmental regulatory matters concerning the petroleum sector in Nigeria provided such decisions are enforced.

6.5.3 Judicial activism

It is submitted that laws regulating the petroleum sector in Nigeria, while not in short supply, have many defects such as ambiguity, lacuna, inappropriate sanctions and defects in the enforcement powers of the enforcement agencies and technicalities that rob such laws of the powers that it ought to possess.[384] When exercised with caution, judicial activism is one of the potent tools through which these legislative shortcomings can be rectified. Judicial activism is where the courts strike down a law that violates individual rights or transgresses the constitutional boundaries of other branches of government.[385] It is also a philosophy of judicial decision-making where Judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedence.[386]

It has been posited that judicial activism is supported by the failure of political governance culminating in the judiciary stepping up to make policy-making judgements.[387] For example in India where the Delhi and Central governments failed in their duty to implement the Air Pollution Act, the courts intervened and defined measures to be enforced by the government to

[383] *Jonah Gbemre v SPDC* (n 41).
[384] For example, enacting a law regulating environmental standards and specifically exempting the oil and gas sector from the regulatory purview of such law.
[385] Bolick, (n 96).
[386] BA Garner, *Black's Law Dictionary* (9th edn, West Publishing Co. St. Paul 2009) 1015.
[387] Okogbule and Brown (n 93) 54.

improve air pollution problems.[388] In Nigeria, there have been instances of judicial activism[389] where the courts have struck down the provisions of the law and pronounced on the realisation of socio-economic and cultural rights of Nigerian citizens.[390] It is argued that when laws are made, they are not expected to be perfect, as such, there is the comfort that the courts would resolve such legitimate questions appropriately under the law.[391] Therefore, it is believed that the Courts through judicial activism can fill gaps created by legislation, although this must be exercised with caution. This is because judicial activism has some criticisms which include usurping the legislative power of the law-making arm of government and the possibility of the abuse of the power to apply judicial activism.[392]

6.5.4 Accountability of the Judiciary

The judiciary as the third arm of government in Nigeria has been seeking its financial autonomy for many years unsuccessfully.[393] This is because it is believed that if the judiciary is financially independent, it will be more feasible for the judiciary to overcome the interference of the executive and legislative arms of government in its affairs thereby ensuring the independence and accountability of the judiciary. For example, in India, the judiciary is self-appointing and free from legislative and executive powers and interference.[394] This liberty, however, must be exercised with caution to avoid abuse of power. Presently in Nigeria, Judges and the judiciary

[388] M Drefus, 'The Judiciary's Role in Environmental Governance' (2013) 43(3) Environmental Policy and Law 167, 171.
[389] *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission* Suit No. ECW/CCJ/APP/08/08 2009 where the court held that the right to education is enforceable regardless of the provisions of s 6 (6) c of the Nigerian Constitution that makes the Fundamental Objectives and Directive Principles of State Policy non-justiciable.
[390] OF Olayinka, 'Implementing the Socio-Economic and Cultural Rights in Nigeria and South Africa: Justiciability of Economic Rights' (2019) 27(4) African Journal of International & Comparative Law 564; A Ojilere, R Onuoha and T Igwe, 'New Directions for Securing African Women's Right to Property under Customary Law: The Case of Nigeria' (2019) 35(1) Asian Women 95.
[391] Bolick, (n 96) 3.
[392] Okogbule and Brown (n 93) 55; K Roosevelt, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (Yale University Press 2008) 262.
[393] The inability of the judiciary to attain financial autonomy is one of the threats it faces from the executive and a major hurdle to its independence. F Rinke, M Castillejos-Aragón and A Natarajan, 'Judicial Independence Under Threat' a Paper presented at the Global Conference in Strasbourg, 5-6 December 2018, 13.
[394] Drefus (n 388) 171.

are not independent because there is still heavy reliance on the executive for funding and the appointment and promotion of judicial officers is still subject to the appointment and confirmation by the President of Nigeria.[395] For instance, the Federal Judicial Service Commission is the body that advises the National Judicial Council on the nomination of credible persons to be appointed to Federal Judicial Offices such as Justices of the Supreme Court, Courts of appeal and Federal High Courts. The recommended persons are subject to the confirmation of the senate before they can be appointed by the President of the Federal Republic of Nigeria.[396] It is argued that with this much involvement of the executive and legislative arms of government in the appointment of Federal Judicial officers, the danger is always there that such officers may not always be independent in the discharge of their duties.

6.6 Conclusion

In exercise of the interpretative function of the judiciary, it no doubt, has the power to breathe life into the wordings of the law. Lord Denning noted that "In theory, the judges do not make law, they merely expound it. But as no one knows what the law is until the judges expound it, it follows that they make it."[397] However, the process of making the law is constantly hampered by the many challenges faced by the judiciary, which challenges can be addressed to further strengthen the judiciary in its function to make law.

It is contended that while the place of compliance and enforcement is still not grounded in the Nigeria judicial process, the judiciary can still be a viable vehicle towards effective institutionalisation of compliance and enforcement. This can be achieved if the many

[395] s 231 Constitution of Nigeria 1999 on appointment of Chief justice of Nigeria, s 238 on appointment of the President and other members of the Court of Appeal, s 250 on appointment of Judges of the Federal High Court etc.

[396] MA Aliyu, NA Abdullah and HM Anuar, 'An Appraisal of the Constitutional and Regulatory Mechanisms for the Appointment of Judicial Officers in Nigeria and Associated Challenges' (2020) 9 Universiti Utara Malaysia Journal of Legal Studies 91, 100.

[397] GS Ogbodo, 'Environmental Protection in Nigeria: Two Decades After the Koko Incident' (2009) 15(1) Annual Survey of International & Comparative Law 1, 11.

challenges plaguing the judiciary are addressed. It has been noted that Judges throughout the world are desirous of improving their capacity to handle complex environmental cases.[398] This was exhibited by the launch of a new Global Judicial Institute for the Environment (GJIE)[399] at the first World Environmental Law Congress hosted by the chair of the IUCN World Commission on Environmental Law Justice Antonio Benjamin in 2016 in Brazil.[400] The most profound aspect of the judiciary's role in the institutionalisation of compliance and enforcement is the ability to influence public perception because Courts have a strong transformative effect on society and what judges treat as important, a society comes to judge as important.[401]

[398] Percival (n 88) 349.
[399] The activities of the GJIE include Judicial capacity building, technical assistance, education programmes and online knowledge-exchange and knowledge-sharing for judges.
[400] IUCN, 'Judges Establish the Global Judicial Institute for the Environment' (2016) <https://www.iucn.org/commissions/world-commission-environmental-law/our-work-wcel/global-judicial-institute-environment> accessed 14 December 2020.
[401] Markowitz and Gerardu (n 62) 554.

CHAPTER 7

Institutionalising compliance and enforcement in Nigeria: Reform pathways

Introduction

Nigeria has enacted many laws, policies and standards of environmental protection of the petroleum sector over the last two decades.[1] This has been the case. Regardless of the voluminous legal instruments or what they aimed to solve, without effective implementation, they remain unhelpful. This chapter provides a synthesis of the data gathered so far from the literature review in the preceding chapters and sets out some reforms in two parts in response to the research question.[2] *First*, general reforms are discussed having in mind the fact that the issue of compliance and enforcement is relevant in any sector that is regulated. *Second*, the petroleum sector-specific compliance and enforcement reforms tailored to the sector.

The compliance and enforcement reforms discussion in this chapter will be presented together. The rationale for this is that although compliance and enforcement are distinct concepts, they cannot always be treated separately therefore, the mechanisms and tools are often interlinked. It, therefore, presents a nuanced picture that recognises the importance of environmental regulation with the flavour of both compliance and enforcement.[3] This is because in defining compliance, the act of enforcement is included as part of the process of securing compliance[4]

[1] This characterised the era following the dumping of toxic wastes at Koko town in western Nigeria.
[2] Specifically, **Chapters 2, 3, 4** and **5**.
[3] K Hawkins, 'Bargain and Bluff: Compliance Strategy and Deterrence in the Enforcement of Regulation' (1983) 5(1) Law and Policy Quarterly 35, 39. However, enforcement is resorted to when all else fails. A compliance strategy aspires to attain the broad aims of the law rather than sanctioning its breach by requiring some positive accomplishment instead of just abstaining from the act. See N Gunningham, 'Enforcement and Compliance Strategies' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 120, 121.
[4] T Amodu, *The Determinants of Compliance with Laws and Regulations with Special Reference to Health and Safety* (London School of Economics and Political Science for the Health and Safety Executive RR638, 2008).

and in defining enforcement, ‘compelling observance or compliance with a law, rule or obligation’ is referred to as enforcement.

This chapter addresses a four-prong question that provides the foundation for answering the main research question. The *first* question enquires whether compliance and enforcement are attainable in the petroleum sector in Nigeria. In addressing this question, the relevance of some of the institutional theories discussed in **Chapter 2** of this thesis is applied to test whether the petroleum sector laws accommodate compliance and enforcement models capable of supporting the petroleum sector currently and in the future. The *second* question revolves around what should be done to strengthen or institutionalise compliance and enforcement in Nigeria and within its legal system. Therefore, some of the regulatory strategies discussed in **Chapter 4** form the basis for testing the applicability or otherwise of some of the suggestions for institutionalising as well as strengthening compliance and enforcement in the regulatory design of the petroleum sector in Nigeria. It is noteworthy that only the strategies relevant to the social, economic and political construct of Nigeria can promote compliance and enforcement in the context of the Nigerian petroleum sector.

The *third* question seeks to ascertain the steps that need to be taken to institutionalise compliance and enforcement and facilitate its integration into the petroleum sector regulatory system. In addressing this question, the issues raised in **Chapters 5** and **6** will come to play regarding the barriers that have inhibited compliance and enforcement efforts over the years including the roles of the executive, legislature and judiciary in compliance and enforcement promotion and implementation. Since one of the main drawbacks of any regulatory effort is ignorance of the system of regulation,[5] the *fourth* question will address how to structure

[5] SR Monsurat, RM Olalekan and SH Olawale, 'A Deep Dive into the Review of the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act' (2019) 1(4) International Research Journal of Applied Sciences 108.

compliance and enforcement to make it recognisable and accessible. Accessibility here speaks to the ease of access to the information surrounding the compliance and enforcement models and effort. In addressing these questions in this chapter, examples are drawn from other relevant jurisdictions. The steps taken in these jurisdictions to promote compliance and enforcement are examined to ascertain why such solutions are succeeding in other jurisdictions and the lessons Nigeria can draw from such positive results in its compliance and enforcement efforts.

In this chapter, **Section 7.1** recaps the key finding from the preceding chapters for ease of reference to the discussion in each chapter. It highlights the trail of international and regional compliance initiatives from which some nations including Nigeria have drawn inspiration to develop compliance and enforcement tools. In determining whether compliance and enforcement is attainable in the petroleum sector in Nigeria, **section 7.2** attempts to locate compliance and enforcement provisions within the petroleum sector laws and how the challenges in the sector can be addressed by them. **Sections 7.3** and **7.4** set out and discuss the various steps that need to be taken to institutionalise compliance and enforcement in the petroleum sector in Nigeria.

7.1 Link to the key findings of the preceding chapters

Chapter 1 introduced the problem which necessitated this research and discussed its significance, stating the research question, elucidating the background to the research and stating the originality and significant contribution to knowledge of the outcome of this research. This chapter also includes a discussion on the methodology and method applied to carry out this research, the research question on the need to institutionalise compliance and enforcement of environmental regulation of the Nigerian petroleum sector which when adopted, will bring regulatory reality from the wordings of the law to practice.

Chapter 2 discussed the conceptual analysis of the institutionalisation of compliance and enforcement and some of the institutional structures in the regulatory architecture of Nigeria. This chapter analysed the various institutional theories that have been proposed by prominent researchers and which underpin compliance and enforcement and are considered relevant to this research. Institutionalisation is both the implementation of the process and the internalisation of new practices[6] or infused values beyond the technical requirements of the organisation and both must be completed for institutionalisation to take place.[7] Understanding the concept of institutionalisation and the various theories that support it helps clarify the behaviour of an organisation in reaction to law and constituted authority.The chapter further sets out the values that need to be insitutionalised in the various petroleum sector stakeholders to improve compliance and enforcement.

Chapter 3 was divided into two parts. **Part A** sets out the definition of compliance and enforcement and analysis of the institutionalisation of compliance strategies, mechanisms[8] and enforcement tools[9] in environmental regulation while delineating the contextual boundaries of the research. Compliance mechanisms are employed to give effect to these compliance strategies. Sodipo cited variation of licence conditions, implementing the polluter pays principle, legal action, prosecution, injunctions and implementing orders of remedial works as

[6] C Dambrin, C Lambert and S Sponem, 'Control and Change - Analysing the Process of Institutionalisation' (2007) 18 Management Accounting Research 172, 173.
[7] ibid 176.
[8] Compliance strategies include rules and deterrence, advice and persuasion, responsive regulation, smart regulation, criteria-based regulation, and next-generation compliance. Compliance mechanisms include education and training, capacity building, self-inspection and self-audit, industry co-regulation and self-management, fiscal incentives, voluntary approaches, public voluntary programmes, economic instruments, regulatory flexibility and information regulation. See N Gunningham, 'Beyond Compliance: Next Generation Environmental Regulation' (Regulatory Institutions Network, ANU, paper presented at the Current Issues in Regulation: Enforcement and Compliance Conference Melbourne, Australia 2 September 2002) 3, 4, 7, 18.
[9] Enforcement tools include the issuing of licences, permits and registration, the power to enter and search any premises, seizure and detention, suspension of operations by order of the court, fines and imprisonment. See NESREA Act Cap N36 Laws of the Federation of Nigeria 2010 ss 7 (j), 30 (1) a, 30 (f), 30 (g) and 31.

other methods of enforcement.[10] **Part B** traced the evolution of the legal framework for environmental regulation in Nigeria whie highlighting the role of the legislative and executive arms of government in the institutionalisation process and how their roles impact the decision of organisations to comply or not to comply with environmental regulations.

The discussion in **Chapter 4** explored the application of the relevant institutional theories to compliance and enforcement in regulations and organisations or regulatory agencies that operate within the case study sector i.e. how to improve compliance and enforcement in organisations that are involved in petroleum operations and those responsible for the implementation of environmental regulations.[11] It also exxplored compliance strategies, mechanisms and enforcement tools in other jurisdictions and identified where they are found in petroleum sector laws in Nigeria. While it is conceded that various compliance and enforcement strategies exist, the options that have so far been replicated and applied in Nigeria since petroleum operations commenced and the failure of these strategies, is the fulcrum on which this research proceeds to search for the solutions to the failure of compliance and enforcement. This chapter finds that there are alternative compliance and enforcement models in other jurisdictions to manage environmental regulation issues and compliance and enforcement strategies at the international and national levels are similar. However, the impact of the application of these strategies differs because of the different enforcement policies that exist. For this reason, compliance and enforcement models can be adopted and adapted to suit the regulatory requirement of the environmental and petroleum sector in Nigeria including a hybrid of these compliance and enforcement models while paying attention to the inherent

[10] E Sodipo and others, 'Environmental Law and Practice in Nigeria: Overview' (2018) <https://uk.practicallaw.thomsonreuters.com/w-006-3572?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk> accessed 31 October 2018.

[11] See **sections 4.4** and **4.1.1** of **Chapter 4** of this thesis.

strengths and weaknesses thereof. It is argued that while legal instruments exist and establish regulatory agencies, the existence of the laws alone does not guarantee the effective regulation of the environment and the petroleum sector in their current form.[12] This is because regulated entities can also be construed as organisations that are made up of individuals, departments or businesses[13] that receive, assimilate, process, interpret and respond to regulation in different ways.

Some barriers inhibiting compliance and enforcement were identified in **Chapter 3** was discussed in **Chapter 5** setting out the motivation for compliance or non-compliance. This chapter finds that there are factors that motivate a regulated entity to comply with environmental regulations and there are inhibitions that prevent such regulated entities from complying with environmental regulations even when they exhibit the clear intention to comply.[14] To be able to comply with environmental laws, regulated entities have to possess the ability to comply, understand how to comply, have the capacity to comply and willingness to comply.[15] This is because when aligned to the business sector, a well-designed and enforced environmental regulation produces huge benefits.[16]

[12] P Kellett, 'Securing High Levels of Business Compliance with Environmental Laws: What Works and What to Avoid' (2020) 32(2) Journal of Environmental Law 179, 180. More elements come together to drive organisation and public behaviour towards environmental law such as policy choices through a combination of laws, regulatory approaches and market signals. See also OJ Olujobi and T Olusola-Olujobi, 'Comparative Appraisals of Legal and Institutional Framework Governing Gas Flaring in Nigeria's Upstream Petroleum Sector: How Satisfactory?' (2020) Environmental Quality Management 1.

[13] See **section 4.1.1** of **Chapter 4** of this thesis.

[14] Y Feldman, 'Five Models of Regulatory Compliance Motivation: Empirical Findings and Normative Implications' in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar Publishing 2011) 335; K Peterson and A Diss-Torrance, 'Motivations for Environmental Regulation Related to Forest Health' (2012) 112 Journal of Environmental Management 104, 106; SC Winter and PJ May, 'Motivation for Compliance with Environmental Regulations' (2001) 20(4) Journal of Policy Analysis and Management 675, 676.

[15] U Weske and others, 'Using Regulatory Enforcement Theory to Explain Compliance with Quality and Patient Safety Regulations: The Case of Internal Audits' (2018) 18, BMC Health Services Research 62, 63; A Bruce and S Ken, *Effectiveness of Compliance Activities: Departments of Primary Industries and Sustainability and Environment.* (Government Printer, Victorian, 2012) 186, 2.

[16] Kellett (n 12) 179.

Chapter 6 considered the vital role of the judiciary in institutionalising compliance and enforcement of environmental regulations and their impact on the petroleum sector and society at large. Based on the discussions in **Chapters 2** and **3**, **Chapter 6** evaluated the strengths and weaknesses of the existing enforcement tools for environmental regulation in Nigeria through the judiciary. The role of the courts in the adjudication of environmental matters and judicial attitude to environmental litigation[17] was brought to bear by undertaking a case law analysis of matters bordering on the compliance and enforcement of environmental law in the petroleum sector in Nigeria to determine the role of the judiciary in setting the precedence for the effective implementation of environmental regulation.[18] This was achieved by tracing the evolution of the judicial stance on matters of environmental regulation and how this has been received and reacted to by the larger Nigerian society. This chapter finds that the judiciary in Nigeria is torn between upholding environmental laws to the letter and exhibiting sympathy towards the regulated entities considering the significance of the petroleum sector to the economic sustenance of Nigeria. While the judiciary has a major role to play in the institutionalisation of compliance and enforcement, the inherent weaknesses and challenges in the process of playing that role impede the ability to perform without interference. However, it was also found that these weaknesses and challenges are not insurmountable and can be corrected to strengthen the judiciary in its bid to institutionalise compliance and enforcement through the courts.

In summary, this research finds that the existing compliance and enforcement framework for environmental regulation in Nigeria in its current form, cannot serve the environmental

[17] RA Mmadu, 'Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from *Kiobel*' (2013) 2(1) Afe Babalola University Journal of Sustainable Development Law and Policy 149, 155.

[18] It has been mooted that protecting the environment from degradation as a result of the operations of the petroleum sector is another sure path to securing environmental human rights. O Awolowo, 'Environmental Rights and Sustainable Development in Nigeria' (2017) 10 (6) OIDA International Journal of Sustainable Development 17.

regulatory needs of Nigeria's environment and petroleum sector. This failure is attributable to the weakness and inability of the various stakeholders to step up and play their parts to bring collective synergy and stability to the compliance and enforcement architecture required to sustain the environmental integrity of the petroleum sector in Nigeria. This chapter continues to discuss the reforms that necessarily needs to happen to move the Nigerian petroleum sector out of the valley of failed environmental and petroleum sector regulation.

7.2 Compliance and enforcement reforms

7.2.1 International and regional compliance and enforcement initiatives

Throughout this thesis, it has been established that compliance and enforcement have faced hindrances in nearly every regulated sector. For example, economic, financial, agricultural, engineering, transportation, environment, sports etc have all been subjected to regulations which for some reasons have suffered non-compliance and poor enforcement at some point. Therefore, it is conceded that there is an overarching problem in compliance and enforcement in Nigeria and one of the areas where it is obvious is the petroleum sector. However, various reasons abound why organisations are motivated to comply with laws and why in some cases non-compliance is recorded.[19] Some of the motivations for compliance include calculated motivation, normative motivation, social motivation, reason-driven motivation, socially-oriented motivation and citizens-oriented motivation.

Conversely, it has been established that there are petroleum sector-specific barriers to the improvement of compliance and enforcement. These barriers include legal factors, non-legal

[19] See **section 5.1.1** of **Chapter 5** of this thesis. See generally SC Winter and PJ May, 'Motivation for Compliance with Environmental Regulations' (2001) 20(4) Journal of Policy Analysis and Management 675, 676; K Peterson and A Diss-Torrance, 'Motivations for Environmental Regulation Related to Forest Health' (2012) 112 Journal of Environmental Management 104, 106; VL Nielsen and C Parker, 'Mixed Motives: Economic, Social, and Normative Motivations in Business Compliance' (2012) 34 (4) Law & Policy 428, 432; Y Feldman, 'Five Models of Regulatory Compliance Motivation: Empirical Findings and Normative Implications' in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar Publishing 2011) 335, 338.

factors and institutional factors.[20] It is important to note that while these apply to the petroleum sector, they also affect other sectors therefore, some general reforms can help to strengthen the compliance and enforcement efforts being made in the petroleum sector. In furtherance of this, there have been compliance and enforcement initiatives across national, regional and international platforms.

It has been found that despite the increase in environmental laws on the international, regional and national levels, failure to implement and enforce these laws remains one of the greatest challenges to environmental management.[21] It is encouraging to note however that while the search for better compliance and enforcement subsists, the international community has also been crafting some compliance and enforcement initiatives to manage and improve the interactions between humans and the environment.[22] This has been achieved by countries coming together and creating international environmental agencies, negotiating multilateral environmental agreements, undertaking initiatives to protect human health, limit greenhouse gases emissions, conserve biodiversity and wildlife and manage natural resources and sustainable development.[23] Since these initiatives are usually geared towards cooperation and collaboration to further environmental compliance and enforcement, countries such as Nigeria draw inspiration from these initiatives and tailor them to suit their peculiar circumstances. Some of these international establishments are discussed below, highlighting some of the tools created and applied to bridge the implementation gap that exists between policy objectives and

[20] These factors were discussed in **Chapter 5, sections 5.2.1, 5.2.2** and **5.2.3** of this thesis.
[21] United Nations Environment, 'Dramatic Growth in Laws to Protect Environment, but Widespread Failure to Enforce Finds Report' (2019) <https://globalpact.informea.org/news/24012019/dramatic-growth-laws-protect-environment-widespread-failure-enforce-finds-report> accessed 16 April 2020. This was reported in the first ever global assessment of the environmental rule of law.
[22] G Baldwin and others, 'International Compliance and Enforcement Networks: The Critical Role of Collaboration in Environmental Protection' in G Pink and R White (eds), *Environmental Crime and Collaborative State Intervention* (Palgrave Macmillan, London. 2016) 21, 21.
[23] ibid. It was noted that while these are significant steps, challenges still exist as evidenced in loss of biodiversity, climate change, air pollution and worldwide proliferation of waste.

performance. The initiatives by these bodies could play a significant role in institutionalising and strengthening compliance and enforcement of environmental regulation in Nigeria.

a. United Nations Environment Programme (UNEP)

UNEP published a manual on the compliance and enforcement of Multilateral Environmental Agreements (MEA).[24] This is because despite decades of developing environmental treaties, conventions, protocols and other instruments on the management of the relationship between humans and the environment, many countries still struggle to implement their obligations under such instruments.[25] This manual covers issues like compliance and enforcement of MEAs. In the compliance chapter, the manual set out compliance enhancing measures such as the measure under the Kyoto Protocol, the Montreal Protocol, Convention on Biological Diversity, United Nations Framework Convention on Climate Change, Aarhus Convention etc.[26] and provided guidelines on national measures to implement MEAs.

In the enforcement chapter, guidelines are set for the enforcement of MEAs such as the use of *legal tools,*[27] *economic tools,*[28] *voluntary tools*[29] and methods for incorporating international environmental law into national laws and institutional frameworks for the enforcement of such environmental laws.[30] These tools are mutually reinforcing, for instance, the *voluntary tool* utilises an information-based tool that applies information gathering and environmental

[24] UNEP, *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements* (United Nations Environment Programme 2006) 792.
[25] ibid 15.
[26] ibid 117-142.
[27] The *legal tools* provided include codified laws, Acts, statutes, regulations and policies which support compliance and enforcement strategies such as command and control approaches, responsive regulation and liability. Guideline 40 j; UNEP *Manual* (n 24) 299.
[28] The *economic tools* include taxes, tradeable permits (permitted emission rights), subsidies, environmental labelling and public disclosure etc. Guideline 40 g; UNEP *Manual* (n 24) 301.
[29] These include public education, technical assistance, co-management of natural resources like lakes and groundwater to maintain environmental quality; and the promotion of environmental leadership industry and non-governmental organisations. UNEP *Manual* (n 24) 302- 303.
[30] UNEP *Manual* (n 24) 299-315.

performance rating to promote environmental goals thereby building capacity indirectly and generating environmental awareness and directly build enforcement capacity.[31] The *legal tool* utilises the *economic tools* to incentivise or disincentivise behavioural change. Nigeria can draw inspiration from these tools to develop its compliance and enforcement framework through incorporation by re-enactment, incorporation by reference and following in the footsteps of other countries that have tested and proved these tools through adaptive development of implementation legislation.[32] It is pertinent to note that some of these tools are already being applied in Nigeria in form of laws and taxes, however, it is contended that the tools are applied only to the extent of enforcement. More can be achieved if the legal, economic and voluntary tools are applied to compliance as well because they are designed to cater to both compliance and enforcement.

b. World Commission on Environmental Law (WCEL)

The WCEL is a branch of the International Union for the Conservation of Nature (IUCN) that operates a compliance and enforcement specialist group. Part of the goals of this group is to generate, compile and share knowledge on challenges, opportunities and strategies to advance effective compliance and fair enforcement of environmental law, and advance legal perspectives of compliance and enforcement through publications, conferences, events and other capacity-building opportunities.[33] This group utilises the information-based tool of public awareness and education to gather and disseminate information especially from past challenges and experiences to develop strategies to better deal with future challenges on environmental and petroleum sector regulation. Nigeria can adopt this information-based tool to improve its

[31] UNEP *Manual* (n 24) 303.
[32] UNEP *Manual* (n 24) 315-316.
[33] IUCN, 'Compliance and Enforcement Specialist Group' (2020) <https://www.iucn.org/commissions/world-commission-environmental-law/our-work/compliance-and-enforcement-specialist-group> accessed 15 April 2020.

information gathering process to maintain a reliable environmental database.[34] An accurate and constantly updated database can help in proper planning and decision-making as regards the appropriate regulatory strategy to apply.

c. International Network for Environmental Compliance and Enforcement (INECE)

INECE is a global collaborative organisation founded in 1989 that is focused on achieving compliance and enforcement through compliance promotion and enforcement strategies and engages at local, national, regional and international levels.[35] The network is made up of diverse groups of people and organisations[36] who collaborate to improve compliance and enforcement through better cooperation using regulatory and non-regulatory approaches. INECE raises awareness of the importance of compliance and enforcement to sustainable development and so employs the use of compliance promotion and administrative, civil, criminal and judicial enforcement to promote compliance with environmental law.

One of the distinguishing projects of INECE is the project to measure compliance and enforcement through performance indicators.[37] Nigeria can apply this in the assessment of the level of compliance and determine what areas within the enforcement and compliance architecture require reinforcement or complete departure in favour of a more effective strategy.[38]

d. Organisation for Economic Co-operation and Development (OECD)

[34] This was discussed in **section 5.2.3 (ii)** of **Chapter 5** of this thesis.
[35] INECE, 'Who we are' (2020) <https://www.inece.org/about/> accessed 15, April 2020; KJ Markowitz and JJA Gerardu, 'The Importance of the Judiciary in Environmental Compliance and Enforcement' (2011) 29(2) Pace Environmental Law Review 538, 540.
[36] Such as environmental regulators, investigators, prosecutors, judges, law enforcement NGOs, members of the academia, media and employees of international environmental and development organisations.
[37] KJ Markowitz and K Michalak, 'The INECE Indicators Project: Improving Environmental Compliance and Enforcement Through Performance Measurement' (2004) 4(1) Sustainable Development Law & Policy 17, 18.
[38] For example, the review of the allocation of human and financial resources, review of the style of inspection and reporting.

The OECD works to build better policies for better lives by establishing evidence-based international standards and finding solutions to social, economic and environmental challenges. Some key principles and guidance were developed to organise and reform environmental regulatory implementation in its member countries. The compliance assurance system of the OECD is brought to life through the elements of compliance promotion, compliance monitoring and assessment and enforcement.[39] *Compliance assurance* is the application of all available instruments or elements aimed at influencing the behaviour of regulated entities to comply with environmental regulations by promoting voluntary compliance, detect and reverse non-compliance and punish offenders.[40] *Compliance promotion* includes assistance such as education, training, outreach etc, incentives like market instruments and concrete benefits to regulatees that comply with an environmental requirement, and other activities designed to promote the observance of environmental requirement.[41] Here, the OECD advocates that transparency and compliance should be promoted using appropriate instruments such as guidance, toolkits and checklists.[42] *Compliance monitoring* supports regulatory programme implementation by detecting violation and correcting them promptly, providing evidence to support enforcement actions and deter non-compliance. *Compliance assessment* uses knowledge of the regulated community to support compliance assurance strategies and contribute to the evaluation of regulatory programme implementation.[43]

While there are weak compliance and enforcement in environmental regulations in Nigeria, an effectively monitored compliance and enforcement process can easily identify these weaknesses and provide the information required to resolve them. Therefore, Nigeria can adopt

[39] OECD, *Ensuring Environmental Compliance: Terms and Good Practices* (OECD Publications 2009) 210, 24.
[40] ibid.
[41] ibid 48.
[42] OECD, *Regulatory Enforcement and Inspections, OECD Best Practice Principles for Regulatory Policy,* (OECD Publishing 2014) 70, 59.
[43] OECD (n 39) 60.

the compliance assurance, monitoring and promotion toolkit of the OECD and customise it to suit its regulatory needs and address its regulatory shortfalls.

e. International Labour Organisation (ILO) and United Nations Declaration on the Rights of Indigenous Peoples.

There have been steps to encourage compliance and enforcement through consultation with indigenous people. This was exhibited in the International Labour Organisation Indigenous and Tribal Peoples Convention[44] and the United Nations Declaration on the Rights of Indigenous Peoples.[45] The ILO Convention No. 169 carries two key principles among others. *First,* the principles of consultation with indigenous people and their participation in decision-making concerning their well-being through a qualitative process of good faith negotiations. *Second,* dialogue to reach an agreement and achieve consent to proposed measures.[46] The need to consult was emphasised in circumstances before exploration or exploitation of natural resources,[47] relocation,[48] alienation or transmission of indigenous peoples' land outside their communities etc.[49] The ILO convention was crafted to ensure equal enjoyment of rights by indigenous peoples who had been excluded and discriminated against in the course of national development.[50] The Convention emphasised state obligation to protect and recognise indigenous peoples' rights.[51] It has been noted, however, that despite its extensive provisions on the rights of indigenous and tribal peoples the ILO Convention No. 169 suffers the weakness

[44] ILO Convention No. 169 of 1989.
[45] UN General Assembly, 'United Nations declaration on the rights of indigenous peoples', vol 12 (United Nations 2007) Article 6.
[46] As contained in the 2009 report of the Special Rapporteur about human rights and fundamental freedoms of indigenous people to the Human Rights Council (A/HRC/12/34) paragraph 46.
[47] Article 15 (2) ILO Convention No. 169 of 1989
[48] Article 16 ILO Convention No. 169 of 1989
[49] Article 17 ILO Convention No. 169 of 1989
[50] ILO, *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) HANDBOOK For ILO Tripartite Constituents* (International Labour Organisation 2013), 161.
[51] K De Feyter, 'Indigenous Peoples', *Realizing the right to development: essays in commemoration of 25 years of the United Nations Declaration on the Right to Development* (OHCHR 2013) 159, 161.

of failure to give indigenous peoples direct access to its monitoring mechanisms.[52] By the end of 2018, there have been 23 state parties to the ILO Convention No. 169.[53] It is argued that while Nigeria has not ratified the ILO Convention No. 169, it is relevant to Nigeria judging from the series of agitation from the Niger Delta indigenes for direct resource control of the oil rights in the area. The initiative can help the Nigerian government respond better to these demands.[54]

From the foregoing, it can be deduced that compliance and enforcement issues are not just problems for individual countries to worry about because no one country can claim to have all the answers. The international bodies discussed above are usually a cluster of different countries, government and non-governmental organisations, individuals and industry experts who among other objectives have developed compliance and enforcement tools and strategies for their members. The compliance and enforcement tools promoted by these international bodies generally fall into the categories of *legal tools*, *economic tools, access tools,*[55] *technological tools and funding tools*.[56]

While it is conceded that compliance and enforcement are general issues that affect a lot of sectors at the national, regional and international level, many countries are taking steps to strengthen compliance and enforcement where they are weak.[57] It is submitted that since these tools and strategies are put in the public domain, other countries that are not members of such

[52] A Yupsanis, 'ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989–2009: An Overview' (2010) 79 Nordic Journal of International Law 433, 448.
[53] L Swepston, 'Progress Through Supervision of Convention No. 169' (2020) 24(2-3) The International Journal of Human Rights 112, 113.
[54] FT Akinwale, 'The Niger Delta People's Volunteer Force in the Struggle for Resource Control in the Niger Delta' (2021) 1(2) Journal of African Studies 132, 146.
[55] *Access tools* such as access to information, courts, legal aid, access to public participation and consultation, free, prior and informed consent etc.
[56] *Funding tools* to create fund for compliance and enforcement, fund for training, funding for development of technology for cleaner business and operational practices See section 6.2.1 (a) above.
[57] This is evident from the efforts of such countries to come together as seen in the discussion of international organisations, to develop compliance and enforcement tools and strategies to pursue compliance and enforcement.

international bodies can draw inspiration from these tools and tailor them to fit their specific needs to support their compliance and enforcement efforts. for instance, Nigeria is a member of or has representatives in the organisations discussed above therefore, some of the compliance and enforcement initiatives of these organisations can be adopted and tailored to suit Nigeria and applied to improve or strengthen the compliance and enforcement framework in Nigeria.

It is reassuring to know that the efforts at addressing these challenges at the international level bear a striking resemblance to what needs to be done to arrest the challenges plaguing compliance and enforcement in the Nigeria petroleum sector such as identifying and addressing the legal, non-legal and institutional challenges to compliance and enforcement of environmental regulation. However, while it could take much longer to see the results at the international level considering the involvement of diverse state parties and the fact that the basic idea is to broaden participation and deepen commitment, national efforts at identifying and addressing such challenges could produce speedy results.[58]

7.3 Locating compliance and enforcement in the petroleum sector regulation in Nigeria

It has been established in the course of this thesis that Nigeria has a wide range of laws, policies and standards directed at regulating the operations of the petroleum sector.[59] It has also been established that these regulatory instruments contain compliance and enforcement provisions as pointers towards how regulation is to be achieved. However, the question of whether the essence of the much-needed regulation of the environment and petroleum sector operation has

[58] C Voigt, 'How a 'Global Pact for the Environment' could add Value to International Environmental Law' (2019) 28(1) Review of European Community and International Environmental Law 13, 15.
[59] H Ijaiya and OT Joseph, 'Rethinking Environmental Law Enforcement in Nigeria' (2014) 5 Beijing Law Review 306, 308.

been achieved or not is arguably answered in the negative. For example, respect and adherence to regulation, protection of the environment, safer and cleaner business and production practices have still not been attained. To find compliance and enforcement elements, therefore, the legal instruments that express regulatory provisions marked a good place to start the enquiry into the regulatory failure.

7.3.1 Is compliance and enforcement attainable in the petroleum sector in Nigeria?

It has been noted that despite long years of oil production, Nigeria still battles with a lot of petroleum sector-related environmental problems in which the Nigerian government appears to have been complicit.[60] This is largely due to a lack of compliance and enforcement with laid down laws intended to regulate the petroleum sector. In determining the possibility of attaining compliance and enforcement, it is believed that the development of the petroleum sector in Nigeria mirrors the relevant institutional theories discussed in **Chapter 2** of this thesis. However, there is little evidence of the application of these theories in the operations of the petroleum sector.

The institutional theories comprise of the rational choice institutional theory, the historical institutional theory, the normative institutional theory and the sociological institutional theory.[61] To determine whether compliance and enforcement are attainable in the petroleum sector in Nigeria, this section seeks to establish whether compliance and enforcement provisions exist in the petroleum sector regulation. Although this exercise may seem to be obvious, it is still pertinent to specify where some of such provisions exist in the laws and

[60] C Chuks-Ezike, 'Environmental Crime Liability of the Nigerian Government in Its Oil Pollution Menace' (2018) 2(2) Environmental Risk Assessment and Remediation 1, 3. The complicity of the Nigerian government appears to lie in the fact that they are one of the stakeholders in the petroleum business in Nigeria and are therefore jointly liable for the resulting environmental damage from the business. This is made worse by the seeming lack of political will to activate the full power of the various environmental and petroleum-sector laws.
[61] See **section 2.2** of **Chapter 2** of this thesis.

policies regulating the sector. Some of the legal instruments that embody compliance and enforcement provisions are the NESREA Act,[62] NOSDRA Act,[63] EGASPIN,[64] EIA Act[65] etc.

Some of the compliance mechanisms in the NESREA Act are set out in ss 7 (b), 7 (k), 7 (l), 8 (e) of the NESREA Act as discussed in **Chapter 3** of this thesis.[66] While these, the NESREA Act does not go further to provide for direction on how the relevant regulatory agency would proceed to give these provisions the force of law. The NOSDRA Act expresses compliance mechanisms in ss S 5 (c), (f), (m), 6 (a), 7 (b) and (e) as discussed in **Chapter 3** of this thesis.[67] The Environmental Impact Assessment (EIA) Act also contains compliance mechanisms as set out in ss EIA ss 10, 11, 24 as discussed in **Chapter 3** of this thesis.[68] These are ample examples that compliance provisions exist in the laws.

Compliance and enforcement in most cases go together, this is because where compliance does not happen, enforcement is activated. Enforcement in the context of environmental protection is a set of actions taken to achieve compliance and to correct or halt actions that endanger the environment or public health.[69] Enforcement provisions in environmental and petroleum sector-related laws are set out in ss 7 (j), 30 (1) a, 30 (f), 30 (g), 31 and s 8 (f) as discussed in **Chapter 3** of this thesis.[70] The NOSDRA Act provides for the imposition of fines for failure to report and clean up impacted sites and the issuance of notices.[71]

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[62] National Environmental Standards and Regulations Enforcement Agency (NESREA) Act Cap N36 Laws of the Federation of Nigeria 2007.
[63] National Oil Spill Detection and Response Agency Act Cap N63 Laws of the Federation of Nigeria 2006.
[64] Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) is one of the many regulations made pursuant to the powers vested in the Minister for Petroleum by the Petroleum Act and the DPR is responsible for the implementation of the provisions therein.
[65] Environmental Impact Assessment Act Cap E12 Laws of the Federation of Nigeria 2004.
[66] See **section 3.4.3** of **Chapter 3** of this thesis.
[67] ibid.
[68] ibid.
[69] ZO Edo, 'The Challenges of Effective Environmental Enforcement and Compliance in the Niger Delta Region of Nigeria' (2012) 14 (6) Journal of Sustainable Development in Africa 261, 265.
[70] See **section 3.4.4** of **Chapter 3** of this thesis.
[71] NOSDRA Act ss 6 (2), 6 (3), 6 (4). Other enforcement provisions exist in Oil in Navigable waters Act, the Oil Pipelines Act and the Petroleum Act.

Flowing from the above, it is argued that compliance and enforcement mechanisms and tools exist in the provisions of the instruments regulating the petroleum sector in Nigeria. It follows therefore that if effectively implemented, compliance and enforcement can be attainable in the petroleum sector in Nigeria. The effect of the dearth of compliance and enforcement is evident in the relentless environmental degradation pervading the Nigerian environment arising out of and in the course of the petroleum sector operations.[72] The effect is also seen in the multiple lawsuits determined one way or the other and still pending before national and international courts and tribunals.[73]

7.3.2 Addressing petroleum sector challenges through compliance and enforcement

The question has been considered if it is possible to address environmental problems such as those arising out of petroleum sector operations by applying compliance programmes.[74] The fact remains that the sanctity of the health of the environment in Nigeria largely depends on the compliance and enforcement of the laws regulating the petroleum sector.[75] Environmental law envisages the rational use of natural resources and the restraint of abusive practices that increase environmental degradation and decline in the global health of the environment.[76] It is argued that if this is the case, it follows that effective compliance and enforcement is expected to achieve the rational use of natural resources and application of best practices and can address environmental problems.

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[72] MO Enyoghasim and others, 'Oil Exploration and Exploitation in Nigeria and the Challenge of Sustainable Development: An Assessment of the Niger Delta' (2019) 9(4) International Journal of Energy Economics and Policy 369.

[73] EC Okonkwo, *Environmental Justice and Oil Pollution Laws Comparing Enforcement in the United States and Nigeria* (1st edn, Routledge 2020) 288.

[74] ALM de Rosso and others, 'The Confrontation of Environmental Problems Through Compliance' (2019) 6(5) International Journal of Advanced Engineering Research and Science 499.

[75] Considering the reality that the damage experienced in the Nigerian environment comes more from the operations of the petroleum sector and other issues relating to it such as militancy and pipeline vandalism.

[76] de Rosso and others (n 74) 499.

It has been established that laws, regulations and guidelines for petroleum operations exist in the Nigerian petroleum sector laws that contain compliance and enforcement provisions.[77] It is further established that the compliance provisions are over-shadowed by the enforcement provisions that are themselves inadequately implemented due to the barriers discussed in **Chapter 5**.[78]

From the foregoing, it is easy to conclude that while compliance and enforcement provisions exist in the petroleum sector regulations, they are not fully integrated. It is argued that this may have been because operations in the petroleum sector in Nigeria commenced without first considering all the ramifications of exploration and exploitation of the resource.[79] By this step, the policy choices[80] at inception and the commitments that emanated from such policy choices influenced and dictated the subsequent behaviour of all the stakeholders.[81] This fits the import of the historical institutionalism school. Specifically, the regulation that the petroleum sector proceeded on, from the inception of the exploration and production of petroleum will maintain this flawed path until a stronger regulation deflects it.[82]

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[77] Paragraph 25 Petroleum (Drilling and Production) Regulation made pursuant to the Petroleum Act 1969; EGASPIN Part III E paragraph 3.6.4.1 on Disposal of sand and Oily sludge; Petroleum Regulation 1967, Oil Pipelines Ordinance (CAP 145 of 1956) and as amended by the Oil Pipelines Act 1965, Oil in Navigable waters Regulations 1968. See also **sections 3.4.3** and **3.4.4** of **Chapter 3** of this thesis.

[78] For example, Paragraph 25 of the Petroleum Drilling and Production) Regulation made pursuant to Petroleum Act 1969 '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 the pollution of inland waters, rivers, watercourses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or 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.' See also **section 5.2** of **Chapter 5** of this thesis.

[79] This lack of consideration was borne out of the haste to explore the new source of economic boom to the Nigerian economy. AE Ite and others, 'Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria's Niger Delta' (2013) 1(4) American Journal of Environmental Protection 78, 80.

[80] The choice of what aspects of the petroleum business to develop policies on at that time.

[81] This is underpinned by the proposition of the historical institutionalism theory see JW Meyer, 'Reflections on Institutional Theories of Organizations' in R Greenwood and others (ed), *The Sage Handbook of Organizational Institutionalism* (2nd edn, SAGE Publications 2017) 831, 833.

[82] BG Peters, *Institutional Theory: Problems and Prospects* (Institut für Höhere Studien (IHS) 2000).

It is the contention of this thesis that the petroleum sector can acquire value and stability in its environmental regulatory efforts by applying the rational choice institutionalism theory[83] by adopting rules and incentives to influence the behaviour of organisations operating in the petroleum sector. This theory is predicated on the notion that individual organisations pursue their goals efficiently, deciding on a course of action that promises the greatest benefits, based on the understanding of the alternatives before them.[84] Therefore, if the alternatives before them are explicit rules and incentives that encourage their business model, it will motivate compliance, consequently addressing the issues plaguing the sector. Hall and Taylor have noted that this theory can encourage compliance even when there is no enforcement because it would be the rational thing to do.[85]

7.4 Institutionalising compliance and enforcement in the petroleum sector in Nigeria

It has been noted that for legislation to work, it must be well-designed and effectively implemented and enforced, all these requirements are mutually inclusive.[86] Some scholars have agreed that regulators face the dilemma of deciding where and how to enforce regulation in furtherance of effectively implementing and enforcing well-designed legislation.[87] Deciding where to enforce legislation involves the decision as to the best way to allocate scarce regulatory resources such as personnel and machinery for an effective outcome. While deciding how to enforce legislation involves the decision of how to engage with regulated entities to

[83] See **section 2.2.2** of **Chapter 2** of this thesis.
[84] PD Green and J Fox, 'Rational Choice Theory' in W Outhwaite and SP Turner (eds), *Social Science Methodology* (Sage Publications 2007) 269, 270.
[85] PA Hall and RC Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44 Political Studies 936, 951. The analogy is drawn in this article of the rationality of anyone who waits at a traffic light when no one else was around and shows that there are dimensions to the relationship between institutions and behaviour.
[86] N Gunningham, 'Enforcing Environmental Regulations' (2011) 23(2) Journal of Environmental Law 169, 170.
[87] RW Mushal, 'Reflections upon American Environmental Enforcement Experience as it may Relate to Post-Hampton Developments in England and Wales' (2007) 19(2) Journal of Environmental Law 201; C Abbot, 'The Regulatory Enforcement of Pollution Control Laws: The Australian Experience' (2005) 17(2) Journal of Environmental Law 161.

influence how their internal processes can meet regulatory requirements such as the regulatory strategy applied by field inspectors.[88] It is argued that compliance and enforcement can be attainable in the petroleum sector in Nigeria as this is a sector that requires regulation to operate and produce the best results. Much like petroleum operations in any other major petroleum-producing nation, the petroleum sector in Nigeria is guided by various laws seeking to regulate its processes.[89] The continuous existence of the Nigerian petroleum sector for over five decades and the heavy reliance of the country on the petroleum sector as its highest foreign exchange earner, shows the motivation for the sector to remain in existence.[90] For the sector to remain in existence and thrive, it has to do so on a legal and regulatory framework that supports its sustainability and continued existence.

Strategies must be developed that will guide regulators on how to proceed with the task of regulation to promote compliance and enforcement including where and how to apply these strategies.[91] The impasse as to where and how to enforce could be resolved by the adoption of a mix of regulatory strategies including the rules and deterrence, advice and persuasion, responsive regulation, smart regulation, criteria-based regulation, risk-based regulation and next-generation compliance strategies.[92] The following section discusses what needs to happen to institutionalise compliance and enforcement in the Nigerian petroleum sector.[93]

[88] Gunningham (n 86) 171.
[89] This can be gleaned from the many laws enacted in Nigeria to regulate the petroleum sector and operations pertaining to the petroleum sector.
[90] ZA Elum, K Mopipi and A Henri-Ukoha, 'Oil Exploitation and its Socioeconomic Effects on the Niger Delta Region of Nigeria' (2016) 23(13) Environmental Science and Pollution Research 12880.
[91] Gunningham (n 86) 170.
[92] Gunningham (n 86) 171. See **section 4.4.1** of **Chapter 4** of this thesis.
[93] An example of this is the telecommunication sector as well as the electricity sector that are both regulated in Nigeria.

7.4.1 Consolidation of regulatory legal instruments and agencies

The notion of institutionalisation as discussed in **Chapter 2** is the process of infusing an organisation with value and stability beyond the intended functional utility and structure.[94] This process will bring about gradual but incremental changes in the organisation and this change can occur through evolution, accident and design.[95] Institutionalising compliance and enforcement require a comprehensive effort from all petroleum sector stakeholders.[96] This is because to initiate the process of institutionalisation, the key regulatory agencies have to be identified and the process of institutionalisation of compliance and enforcement needs to run on legal and institutional frameworks to make it effective.[97] One such structure is the legal instruments that embody the compliance and enforcement mechanisms and tools. Examples of such legal instruments include laws, policies, standards and other legal regulatory instruments that make provisions for compliance and enforcement and Nigeria has a lot of them.[98] It is argued that this has been the main reason behind the ineffective implementation of these regulatory efforts. Currently, there are specific laws and policies to regulate the petroleum sector.[99] Some provisions exist in other laws that are not specifically made for the petroleum sector, but these provisions concern the regulation of petroleum sector operations resulting in conflicts at the point of implementation or interpretation of such provisions.[100] A consolidation of these laws into one law that will incorporate all the legal instruments that regulate the petroleum sector will bring the regulatory design of the sector into perspective. This

[94] RE Goodin, 'Institutions and Their Design' in RE Goodin (ed), *The Theory of Institutional Design* (Cambridge University Press 1998) 1, 22.
[95] B Waterhout, *The Institutionalisation of European Spatial Planning* (IOS Press 2008) 229, 19.
[96] This includes the regulated entities and the regulators and host communities.
[97] Such structures include regulations, norms, values, culture, institutions etc.
[98] There are so many provisions purporting to regulate the petroleum sector but are scattered in so many legal instruments, that it is easy to overlook the existence of such laws.
[99] NOSDRA, NESREA and EGASPINS as implemented by the DPR. See **sections 4.1.5** and **4.1.7** of **Chapter 4** of this thesis.
[100] See **section 4.1.8** of **Chapter 4** of this thesis.

consolidated law would house all the relevant provision regarding petroleum sector regulation and make it easier for the relevant regulatory agency to know what the law provides concerning any particular act of non-compliance. This can be achieved by the legislature and will require training in legislative drafting to accommodate the needs of the environmental and petroleum sector laws.

In consolidating the laws and regulatory agencies to address the current realities, the theory of historical institutionalism can be applied. This school of thought argues that the policy choices of an organisation at its inception and the established commitments that emanate therefrom will influence and determine the subsequent behaviour of the organisation and will subsist because policies are path-dependent and will maintain the path in which it was launched until a stronger policy decision deflects it.[101] A lot of the laws regulating the petroleum sector were enacted during the infancy of the Nigerian petroleum sector, however, the current reality and the bane of environmental regulatory efforts is the weakness of these laws. Since the petroleum sector has maintained the path on which these archaic laws have set it, stronger and new laws which address the current problems in the petroleum sector can deflect the trajectory of the petroleum sector and set it on a more regulated path.

Another structure on which compliance and enforcement runs is the institutional framework that promotes compliance and enforcement where they exist. Where such institutional framework does not exist, it will need to be established. It has been noted that whilst such framework exists in Nigeria in form of regulatory agencies,[102] it does not cater to the current compliance and enforcement needs of the petroleum sector in practice.[103] Therefore, beyond identifying these key structures i.e. legal instruments and regulatory agencies, these structures

[101] Peters (n 82) 3.
[102] Such regulatory institutions or agencies include NESREA, NOSDRA, DPR, the judiciary etc.
[103] These frameworks exist in laws and regulations of the petroleum sector and laws setting up the enforcement agencies in Nigeria.

would have to be strengthened by adjusting regulatory mandates, developing or strengthening policy statements, developing skills, improving resource allocation and education and awareness.[104] For instance, decision-making frameworks and procedure need to be developed to prioritise regulatory activities such as the prompt deployment of compliance and enforcement resources based on risk assessment of regulated entities.[105] In other words, a framework has to be developed to facilitate quick decisions of what acts of non-compliance to allocate scarce regulatory resources to. Since all acts of non-compliance do not carry the same level of risk,[106] the regulator's decision of where to allocate its scarce regulatory resources is based on an assessment of which acts of non-compliance will most negatively affect its regulatory objectives.

Institutionalising compliance and enforcement from the point of the Nigerian legal system will require pulling together the laws and the regulations scattered across legislations to bring them into perspective and focus and allowing stakeholders to know where to look regarding petroleum sector regulations. For example, China took a giant step towards improving environmental quality and reducing environmental harm by reorganising its former Ministry of Environment Protection into a new Ministry of Ecology and Environment, transferring pollution-related responsibility from several ministries to the new ministry. This move was geared towards tackling overlapping functions of regulatory bodies thereby giving them focus.[107]

[104] Goodin (n 94) 1.
[105] Gunningham (n 86) 170.
[106] For example, some level of risk is not as devastation as others and some risk levels can set off other risks.
[107] A Brettel, 'A Survey of Environmental Deterrence in China's Evolving Regulatory Framework' in R Bingqiang and S Huisheng (eds), *Chinese Environmental Governance: Dynamics, Challenges, and Prospects in a Changing Society* (2013) 21, 21.

Another example is Oman where the Oil and Gas Law (Royal Decree 8/2011) is a key piece of legislation in the oil and gas sector.[108] The decree sets out broad and general obligations for parties granted interests in the hydrocarbon sector and covers pertinent issues such as legal and institutional framework, operations, employment, environment and penalties.[109] The Council of financial affairs and energy resources in conjunction with the Ministry of Oil and Gas are the institutions responsible for regulating the oil and gas sector in Oman. The law is significant for several reasons. It applied to all petroleum substances located in Oman including crude oil and associated and non-associated natural gas[110] and considers both existing and prospective investors in Oman's petroleum sector[111] from whom a performance guarantee is requested.[112] Another important aspect of this new law is the requirement of a security plan to be developed as soon as a commercial discovery has been declared but before the commencement of production.[113]

Nigeria can benefit from the lessons from China and Oman, both are countries with developing economies and high oil reserves. Subject to the necessary alterations, the petroleum laws in Nigeria can be consolidated and brought under a single law with specific provisions to cater to the petroleum sector needs as opposed to the current situation of so many laws purporting to regulate the same sector occasioning overlap of functions and sometimes confusion.[114]

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[108] Royal Decree No 8 of 2011 which law came into effect in February 2011, repealing the existing hydrocarbon legislation and any other regulation that might conflict with the new law including the Royal Decree No 42 of 1974.

[109] Importantly, the law stipulates specific distances allowable for concession operations to take place from human habitation, archaeological or special sites, water wells or any defence establishment. These include pipelines operations.

[110] Royal Decree No 8 of 2011, Article 1.

[111] E Rose, 'Oman's New Oil and Gas Law' (2011) 29(4) Journal of Energy and Natural Resources Law 499, 501.

[112] Royal Decree No 8 of 2011, Article 12.

[113] Royal Decree No 8 of 2011, Article 22. This plan is required to be updated every two years and must be done in coordination with the Royal Oman Police (ROP).

[114] It does appear that this move has been initiated in the plan to review the Nigeria Petroleum Act of 1969, unfortunately, this plan has been marred by legislative and executive bottleneck and delayed the process of reviewing the laws since it was initiated in 2012 under the Petroleum Industry Governance Bill.

Compliance programmes can be established that will promote the application of codes of ethics and conduct for the detection and remediation of irregularities and illegal acts of petroleum sector operators.[115] Examples of this can be seen in compliance programmes established in the Brazilian legal system to combat corruption. The Brazilian Anti-Bribery law[116] established judicial and administrative sanctions for national or foreign legal entities that violate rules of public administration while operating in Brazil through their subsidiaries.[117] The law focuses on the strict liability[118] of legal entities thereby removing the burden of proving liability of such legal entities from individual or communal litigants.[119] However, this does not undermine the liability of individual persons where applicable. It is argued that Nigeria can learn from this example by applying the same principle to multinational corporations that operate in the petroleum sector and relieve the pressure on victims of environmental disasters to prove the liability of such multinational corporations.

7.4.2 Creation of Environmental Courts and Environmental Tribunals to facilitate compliance and enforcement

Access rights as envisaged under the Rio Declaration include the right to access to participate in environmental decision making, access to environmental information and access to justice.120 The discussion under this section involves one arm of the access rights relating to access to justice, in furtherance of the process to institutionalise compliance and enforcement.

[115] TA Rezende, Programas Compliance de sustentabilidade empresarial. 1ª ed. Florianópolis: Habitus, 2018 1, 28.
[116] Brazilian Anti-Bribery law (Law NO 12,846) of 2013.
[117] RS de Oliveira, 'Corporate Criminal Liability: A Possible Path for Brazil in the Fight Against Corruption?' (Masters, University of Minho Law School 2019) 1, 34.
[118] In strict liability offences, the perpetrator's liability against the victim does not need to be proved. A Halim, 'Applying Strict Liability for Environmental Offenses: Indonesian Perspective' (2021) 21(1) Medico Legal Update 59, 60.
[119] A Dantas and LE Alcantara, 'Brazil' in MF Mendelsohn (ed), *The Anti-Bribery and Anti-Corruption Review* (Law Reviews 2019) 33, 37.
[120] Principle 10 of the United Nations Conference on Environment and Development, 'Rio Declaration' (United Nations, Rio de Janeiro 14 June1992).

However, the discussion is limited to access to courts because access to justice is a more extensive discussion that is beyond the scope of this thesis. The other two access rights are discussed later in this chapter.121

The significance of the petroleum sector to Nigeria's economy122 explains the continued fixation of the federal government of Nigeria on increasing the exploitation of the sector including its impressive reservoir of natural gas.123 Along with consolidating the legal and institutional framework on which the petroleum sector can thrive in Nigeria, the creation of environmental courts and tribunals is an important reform of the institutional framework discussed in the previous section in the institutionalisation process.124 Environmental Courts have been differentiated from Environmental Tribunals.125 Regardless of the chosen description, it is argued that when such courts or tribunals are established, they will exist exclusively for the determination of disputes or issues arising out of and in the course of petroleum sector operations.[126]

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[121] In **sections 7.5.2** and **7.5.3**.

[122] JO Effoduh, 'The Economic Development Of Nigeria From 1914 To 2014' (2015) <https://www.casade.org/economic-development-nigeria-1914-2014/> accessed 7 February 2020.

[123] Enyoghasim and others (n 72) 371.

[124] G Pring and C Pring, *Environmental Courts & Tribunals: A Guide for Policy Makers* (UN Environment Programme 2016) 120, 2. As Justice Brian Preston (Chief Judge of the Land and Environment Court of the State of New South Wales, Australia, the first EC established as a superior court of record in the world) noted "The judiciary has a role to play in the interpretation, explanation and enforcement of laws and regulations. … Increasingly, it is being recognized that a court with special expertise in environmental matters is best placed to play this role in the achievement of ecologically sustainable development. Courts exist to ensure that justice is done in matters that are brought to court in lawsuits. The role of the judiciary in the institutionalisation of compliance and enforcement in Nigeria has been discussed in chapter 5. In that chapter, the barriers that inhibit the smooth operation of the judiciary in playing its role in this process were also outlined and discussed. See also **section 6.5.1** of **Chapter 6** of this thesis.

[125] Environmental Courts can 'range from fully developed, independent judicial branch bodies with highly trained staff and large budgets to simple, underfunded village Environmental Courts that handle environmental cases one day a month with rotating Judges'. Environmental Tribunals can 'range from complex administrative-branch bodies chaired by ex-Supreme Court justices, with law judges and science-economics-engineering PhDs, to local community land use planning boards with no law Judges'. See DC Smith, 'Environmental Courts and Tribunals: Changing Environmental and Natural Resources Law Around the Globe' (2018) 36(2) Journal of Energy and Natural Resources Law 137.

[126] CC Nwufo, 'Legal Framework for the Regulation of Waste in Nigeria' (2010) 4(2) African Research Review 491, 500.

It is important to note that there have been efforts in the past and currently as well to resolve the issue of how environmental cases are dealt with in Nigeria like the creation of state environmental courts and proposals by policymakers for specialised courts.[127] However, this attempt begs the question as to whether there was the actual intention to solve the problems encountered in adjudication surrounding petroleum sector-related cases. The attempt also ignored the general and sector-specific challenges faced by the judiciary as discussed in **Chapter 5**. The following section briefly discusses some of the efforts put in place by the Nigerian government concerning environmental and petroleum sector-related cases.

a. State environmental sanitation courts

Following the dumping of toxic waste in Koko town,[128] a lot of activities by the Nigerian government occurred in and around the petroleum sector culminating in the creation of more sector-specific laws and agencies responsible for implementing the laws. Environmental sanitation courts were also established by the state governments in all the states of Nigeria as part of the drive to properly regulate the interaction with the environment.[129] However, this move suffered some shortcomings from the start. *First*, the specific courts were set up to adjudicate on matters of environmental sanitation and public health within states about business premises,[130] not petroleum sector-related problems. The move to set up environmental sanitation courts did not in any way help to solve the problem of environmental harm arising out of and in the course of the operations of the petroleum sector because of their limited

[127] See **section 7.4.2 (a)** below.

[128] B James, 'Waste Dumpers Turning to West Africa' <http://www.nytimes.com/1988/07/17/world/waste-dumpers-turning-to-west-africa.html?pagewanted=all> accessed 19 July 2017.

[129] These were established at the state level as there are no records of a federal environmental sanitation court in Nigeria.

[130] Public Health Law Cap 106 Laws of Rivers State of Nigeria established the Rivers State Environmental Sanitation Court. The environmental sanitation courts possessed the jurisdiction to adjudicate on minor offences relating to private and business premises sanitation and hygiene conditions.

jurisdiction. For example, the following table sets out the limit of awards allowed by the jurisdiction of the magistrates who preside over these state environmental sanitation courts.

Table III: Jurisdiction of Magistrates

S/NO	Magistrate	Award	Committal
		Cost	Imprisonment
1.	Chief Magistrate	Fifty Thousand Naira; (N50,000.00)	Seven (7) years;
2.	Senior Magistrate	Forty Thousand Naira; (N40,000.00)	Five (5) years
3.	Magistrate Grade 1	Thirty Thousand Naira (N30,000.00)	Three (3) years
4.	Magistrate Grade 2	Twenty-Five Thousand Naira (N25,000.00)	Two (2) years

It is argued that the jurisdiction of the Magistrates courts will not suffice to resolve the kind of injuries suffered by the litigants from the operations of the petroleum sector.

Second, the Courts that have jurisdiction over these environmental sanitation matters are magistrate courts[131] which are not superior courts of record in Nigeria and consequently do not possess the requisite jurisdiction to adjudicate on matters arising out of and in the course of the operations of the petroleum sector.[132] For example, in Rivers state of Nigeria a new environmental protection and management law was enacted in 2019[133] which allows environmental cases to be heard and decided by a State High Court designated for that

[131] Public Health Law Cap 106 Laws of Rivers State of Nigeria.
[132] In Nigeria, the Federal High court is imbued with the jurisdiction to hear and determine matters pertaining to mines and minerals, including oilfields, oil mining, geological surveys and natural gas. See S 251 (n) Constitution of the Federal Republic of Nigeria 1999.
[133] The Rivers State Environmental Protection and Management Law No 15 of 2019.

purpose.[134] Again, although the State High Courts are superior courts of record under the Nigerian Constitution, they do not possess the jurisdiction to hear and determine petroleum sector-related cases.[135]

Third, the prosecutors before such magistrate courts under the Public Health Law are not experts in oil sector operations and therefore do not possess the requisite knowledge or expertise to prosecute oil sector-related cases, especially in oil pollution incidents.[136] The prosecutors are usually public health officers from the state ministry of health or environmental health officers from the state ministry of environment. Under the Rivers State Environmental Protection and Management Law, public health or environmental health officers cannot institute an action before the State High Court. Cases are instituted by *fiat*[137] issued to such public health officers by the state Attorney General or by a Legal Practitioner appointed by the State Attorney General and attached to the ministry of health and the ministry of environment.[138] It is argued that the process of securing a fiat will encounter the same administrative bottlenecks prevalent in state administrative processes in Nigeria.

It is pertinent to note that the Rivers State Environmental Protection and Management Law No. 15 of 2019 has within its purview general environmental management over the environment in Rivers State including but not limited to biodiversity conservation,[139] climate change,[140] carbon budgets,[141] environmental impact assessment[142] and oil spillage and pollution control.[143] These

[134] S 62 of the Rivers State Environmental Protection and Management Law No. 15 of 2019.
[135] See S 251 (n) Constitution of Nigeria 1999.
[136] The prosecutors in environmental sanitation courts are usually public health professionals who work in the ministry of health and ministry of environment. They are neither lawyers nor oil industry experts.
[137] This is an official permission granted by the Attorney General authorising a private legal practitioner of a public health officer to prosecute an offender.
[138] S 63 (1) (a) and (b) of the Rivers State Environmental Protection and Management Law No. 15 of 2019.
[139] S 26 of the Rivers State Environmental Protection and Management Law No. 15. of 2019.
[140] S 33 of the Rivers State Environmental Protection and Management Law No. 15. of 2019.
[141] S 34 of the Rivers State Environmental Protection and Management Law No. 15. of 2019.
[142] S 37 of the Rivers State Environmental Protection and Management Law No. 15. of 2019.
[143] S 38 of the Rivers State Environmental Protection and Management Law No. 15. of 2019.

are matters that are covered under federal laws such as NESREA and NOSDRA and over which the Minister for petroleum resources has exclusive powers to make regulations concerning their management. It is argued that the provisions of the state law dealing with these issues are at best redundant as the federal laws supersede state laws on those issues and the state government lacks the powers to legislate over natural resources which are already vested in the Federal Government of Nigeria.[144]

The NESREA Act empowers NESREA to establish mobile courts subject to the provisions of the Nigerian Constitution and in collaboration with relevant judicial authorities to expeditiously dispense cases of environmental regulation.[145] While this is commendable, it is argued that this may not do much in the bid to institutionalise compliance and enforcement for some reasons. *First*, a mobile court will be an inappropriate court to institute or determine any issues relating to petroleum sector operations. This is because of the complex and technical nature of petroleum sector operations and lawsuits arising therefrom.

The United Nations Development Programme (UNDP) construes a mobile court to be formal courts that conduct proceedings in locations other than their home offices, usually in remote areas where no justice services are available.[146] In the practice of the operation of mobile courts in Nigeria, these courts are usually headed by magistrates who do not possess the jurisdiction or the expertise to hear and determine cases arising from petroleum sector operations such as oil pollution incidents. Such jurisdiction is domiciled in the Federal High Courts which is a superior court of record.[147] Again, such court proceedings are held in temporary locations usually outside a designated court hall or premises and are set up for matters that can be decided

[144] s 1 (1) Petroleum Act Cap P10 Laws of the Federation of Nigeria 2004.
[145] S 8 (f) NESREA Act.
[146] See M Rispo, S Bayriyev and I Tschan, *Evaluation of UNDP's Support to Mobile Courts in Sierra Leone, Democratic Republic of Congo and Somalia* (United Nations Development Programme 2014) 1, 4.
[147] See S 251 (n) Constitution of Nigeria 1999.

in a summary manner. *Second*, as stated earlier, jurisdiction over petroleum sector-related cases have been domiciled in the Federal High Court of Nigeria by the Constitution of Nigeria,[148] for this reason, this move was in no way a solution to the issues arising out of and in the course of the operations of the petroleum sector operation especially because of the limited jurisdiction of such mobile courts.

b. Failure of state environmental courts and mobile courts

Flowing from the above discussion, the efforts of the government towards establishing environmental courts to cater to the adjudicatory needs of victims of environmental harm turned out to be inadequate and consequently failed to achieve its aim. It can be deduced that these efforts failed for several reasons. *First*, the designated courts lack the requisite jurisdiction to entertain matter involving mines and minerals (including oil fields, oil mining, geological surveys and natural gas).[149] Magistrate Courts, Mobile Courts and State High Courts have all been named in laws purporting to provide access to Courts to resolve environmental cases. *Second*, the judges and magistrates who preside over these cases are not experts in petroleum sector operations and its allied technical matters. *Third*, there are obvious conflicts in the state environmental laws and federal environmental laws. For instance, the Rivers State Environmental Protection and Management Law[150] makes provisions concerning natural resources whose ownership is vested in the federal government of Nigeria over which the state government lacks the power to legislate.[151]

[148] See S 251 (n) Constitution of Nigeria 1999. See the discussion in **section 7.4.2 (a)** above.
[149] See S 251 (n) Constitution of Nigeria 1999.
[150] Such as between the Constitution and the Rivers State Environmental Protection and Management Law.
[151] See s 1 of the Constitution of Nigeria 1999 and No 39 of the Part I of the Second Schedule of the Constitution of the Federal Republic of Nigeria which stipulates that only the National Assembly can legislate on issues of mines, minerals, including oil fields, oil mining, geological surveys and natural gas.

Fourth, as a rule in the practice of law in Nigeria, all cases are heard by all courts regardless of the subject matter subject to the level of jurisdiction allowed by the law creating such court. For instance, the same Federal High Court that hears and determines revenue, bankruptcy and customs related cases is the same court that hears and determines mines and minerals (including oil fields, oil mining, geological surveys and natural gas).[152] This robs the court of the time that is required to properly adjudicate over specific matters and can consequently stretch the time within which an environmental case lasts in Court. Flowing immediately from this, it also prevents the presiding Judges of such Federal High Courts from gaining the requisite expertise which they would have otherwise gained if there was a concentration of environmental cases in the Court.

Fifth, the remedies that such Courts will be able to award litigants will be inadequate because of their limited jurisdiction. For example, from **Table II** of the monetary and committal jurisdiction exhibited under the state environmental court, it can be seen that the monetary provisions are inadequate and will not remediate whatever injury that may have resulted from the environmental harm especially the kind of harm that would occur from petroleum sector operations. It is argued that for these and other reasons, government efforts at providing access to the Court for the determination of petroleum sector-related cases and consequently improve compliance and enforcement, have failed. It has been noted that the result of this type of adjudication process is usually a win-lose situation as against a win-win, problem-solving approach that can promote compliance and enforcement.[153]

[152] See S 251 (n) of the Constitution of Nigeria 1999.
[153] Pring and Pring (n 132) ix. See **section 7.5.5** of this Chapter.

c. In defence of Environmental Courts and Tribunals in Nigeria

The creation of Environmental Courts and Tribunals to facilitate access to court and aid the administration of environmental justice could promote the institutionalisation of compliance and enforcement. Since the Federal High Court that has jurisdiction over mines and minerals (including oil fields, oil mining, geological surveys and natural gas)[154] is already in existence, this move should be straight forward. All that is required is the creation of more judicial divisions of the Federal High Court and designation of same as Environmental Courts or Tribunals. The advantages of creating such courts are many but *first* and most important among them is that no other subject matter would be tried in the Environmental Court except cases relating to petroleum sector operations and there is the likelihood of both prosecution of offenders and greater use of appropriate sanctions.[155]

Second, such courts will be presided over by judges who are trained or experienced in environmental laws and petroleum sector operations and processes. *Third*, the turn-around time for cases heard and determined by such courts will be reduced drastically.[156] This is because the courts will have more time to devote to environmental cases as opposed to splitting the same time among environmental cases and all other cases that it may entertain as a general court. *Fourth*, this will encourage litigants to institute their cases in Nigeria rather than international courts, commissions or tribunals. This is because they will now have access to Environmental Courts in Nigeria instead of other jurisdictions. This could strengthen the legal scholarship of environmental law in Nigeria, generate revenue for the judiciary and encourage

[154] S 251 (n) of the Constitution of Nigeria 1999.

[155] See R White, 'Environmental Crime and Problem-solving Courts' (2013) 59(3) Crime Law Social Change 267, 269. This is Already being practiced in Lagos State of Nigeria where a Matrimonial Causes Court was created to hear and determine only matrimonial causes cases.

[156] An average environmental law case takes between 6 -10 years to adjudicate on in Nigeria, not considering the time the matter could likely spend on appeal.

the growth of other ancillary businesses akin to litigation.[157] It has been noted that an environmental court or tribunal can determine cases in multiple ways. Instead of handing down judgements in the traditional manner accustomed to general courts, the Environmental Court or Tribunal can practice stakeholder consultation process and employ the use of activists, companies and government institutions in resolving cases.[158]

The use of Environmental Courts and Tribunals have proved to be effective in some jurisdictions[159] including Australia, Brazil and India where there is a highly developed national green tribunal.[160] Scholars of high repute have also contributed to the scholarly literature on Environmental Courts and Tribunals, setting out the strengths and challenges in adopting this system of courts.[161] The judiciary in Nigeria can adopt the environmental court and tribunal system and benefit from this rich literature to avoid the pitfalls of the process of operating one because according to Preston '[s]uccessful Environmental Courts are better able to address the pressing, pervasive and pernicious environmental problems that confront society (such as climate change and loss of biodiversity).[162] In 2016, it was noted that more than 1, 200 national environmental courts and tribunals existed in over 44 countries which number had risen to 1, 500 by March of 2018.[163] It is argued that if the actions discussed above are taken, it will be a

[157] Such as laboratories where tests can be carried out to determine the veracity or otherwise of samples likely to be tendered in evidence before the court.
[158] Per GN Gill in A Brigida, 'Around the World, the Environment is Finally Getting its Day in Court' (2018) <https://www.pri.org/stories/2018-04-24/around-world-environment-finally-getting-its-day-court> accessed 2 April 2020.
[159] Pring and Pring (n 124) 80-81.
[160] GN Gill, *Environmental Justice in India: The National Green Tribunal* (Routledge 2017).
[161] GN Gill, 'The National Green Tribunal: Evolving Adjudicatory Dimensions' (2019) 49(2/3) Environmental Policy and Law 153; Pring and Pring (n 132) 120; B Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 Pace Environmental Law Review 396; DC Smith, 'Environmental Courts and Tribunals: Changing Environmental and Natural Resources Law Around the Globe' (2018) 36(2) Journal of Energy and Natural Resources Law 137.
[162] B Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 Journal of Environmental Law 365, 387.
[163] Pring and Pring (n 124) 120; Appendix A, 80 – 88.

giant step in the direction of addressing the many barriers discussed in **Chapters 5** and **6** of this thesis, inhibiting the legal and institutional framework from achieving effective regulation.

It is argued that following the model of specialised laws like in Brazil,[164] it will be easy to implement a changed system of laws if Nigeria adopts the use of environmental courts and tribunals and successfully reviews its environmental laws to promote compliance and enforcement. Pring and Pring noted that creating specialised environmental courts and tribunals may not by itself guarantee these strengths in such courts but in creating these courts, policy-makers can include special design features which take into consideration the social, economic and political construct of the nation – features which are not typical of and may not be attainable in the traditional judicial institutions.[165]

7.5 Steps to institutionalise compliance and enforcement

This section sets out proposed steps to institutionalise compliance and enforcement. To bring this discussion into context it is imperative to note that the terms *compliance* and *enforcement* as defined and discussed in **Chapter 3**[166] are distinct concepts. However, there is a thin line between compliance and enforcement. While both concepts have their identities, there are many areas where both concepts constantly overlap. This presents a nuanced picture that recognises the significance of environmental regulation with a mixture of both compliance and enforcement.[167] For this reason, the steps for compliance and enforcement reforms in the section will be discussed together.

The power of the Minister for Petroleum Resources to make regulations in the Petroleum Act is an opportunity to take innovative steps to institutionalise compliance and enforcement by

[164] The Brazilian Anti-Bribery (Law No 12,846) of 2013.
[165] Pring and Pring (n 124) 14.
[166] See **section 3.2 (i)** and **(ii)** of **Chapter 3** of this thesis.
[167] Hawkins (n 3) 39.

creating and upgrading the regulatory architecture to incorporate some of the compliance mechanisms.[168] It is argued that with such wide and discretionary powers, innovative compliance mechanisms can be introduced, and enforcement tools upgraded to strengthen the existing weak provisions in the legislation.

It has been established that the decision of the type of regulatory strategy or plan of action to adopt, depends on the justification for such regulatory intervention.[169] This research found that petroleum sector legislation was mostly created in response to environmental incidents or disasters and not in anticipation of such environmental incidents or disasters.[170] It is argued that with the recorded quantity of the reservoir of oil and gas in Nigeria,[171] and the high dependence of the Nigerian economy on the petroleum sector, it was inevitable that the sector would change through *evolution, accident* and *design*.[172] The following section discusses some of the steps that can be adopted to promote the institutionalisation process.

7.5.1 Facilitate the adoption of compliance strategies

From the wordings of the penalty provisions of some of the Nigerian petroleum sector regulation, it can be understood that the intention of the legislature in crafting the penalty

[168] Some of these regulations include the Mineral Oils (Safety) Regulations (L.N. 45 of 1963) as amended, Petroleum (Drilling and Production) Regulations (L.N. 69 of 1969 as amended in 1988, 2001, 2006 and 2019, Petroleum Refining Regulations of 1974 and Crude Oil (Transportation and Shipment) Regulations 1984 etc these regulations are made pursuant to the Petroleum Act of Nigeria.

[169] A Ogus, 'Regulatory Institutions and Structures' 73(4) Annals of Public and Cooperative Economics 627, 629.

[170] For example, the dumping of toxic wastes at Koko in 1988.

[171] Proven crude oil reserves 36,972 million barrels and proven natural gas reserves 5,675 billion cubic meters. OPEC, 'Nigeria Facts and Figures' (2018) <https://www.opec.org/opec_web/en/about_us/167.htm> accessed 1 April 2020.

[172] Waterhout (n 95) 18-20. This was mentioned in **Chapter 4**. *Evolution* can occur when compliance and enforcement mechanisms and tools are reviewed and modified within the legal and institutional framework for environmental regulation. For example, the Introduction of the Nigerian National Policy on the Environment in 1989 which has been revised twice in 1999172 and later in 2016. The modification and reviews of these structures are usually due to *accidents* and other harmful incidents arising out of and in the course of the operations of the petroleum sector such as oil spills, oil equipment failure and gas flaring. These bring about the changes in the *design* of legal instruments or regulatory institutions especially in response to international and regional arrangements and commitments. AE Ite and others, 'Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria's Niger Delta' (2013) 1(4) American Journal of Environmental Protection 78, 81.

provisions was to punish when such provisions are contravened.[173] This is seen in the many provisions for fines captured in these laws. However, there were no provisions to encourage compliance with the offences provisions. Therefore, it is not difficult to infer that the petroleum sector laws in Nigeria adopt the rules and deterrence strategy in regulating the petroleum sector.[174] This stipulation cannot be unconnected with the assumption that organisations will not comply with the law unless there are specified consequences for non-compliance believing that it is economically irrational to be non-compliant.[175] This assumption has proved to be faulty in the context of the petroleum sector in Nigeria because there have been recorded instances of non-compliance despite the stipulated consequences for non-compliance within the law.[176] This has been attributed to the fact that the penalties may not be punitive enough to deter offenders like multinational corporations and sometimes it may prove to be cheaper to violate the law than to comply as is the case with gas flaring.[177] It has been noted that the objective of the rules and deterrence strategy is to control behaviour with prohibitive rules and laws to elicit deterrence from regulated firms as a primary mode of influencing behaviour.[178] This has however not been effective in the petroleum sector in Nigeria as not very much can be said to have changed in the behaviour of the petroleum sector operators from the inception of the petroleum sector operations to date.[179]

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[173] See NESREA Act ss 20 (3) and (4), 21 (3), 22 (3) and (4), 23 (3) and (4), 24 (4) and (5), 26 (3) and (4), 27 (3) and 31; NOSDRA (Amendment) Act s 6 (2) and (3), 26 (3) and (4), 28 (1), 31 (2) (b).

[174] See **section 4.4.2** of **Chapter 4** of this thesis.

[175] J Jackson and others, 'Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions' (2012) 52 (6) British Journal of Criminology 1051.

[176] For instance, the continuous flaring of associated gas in defiance of the prohibitions in the law.

[177] s 3 (1) of the Associated Gas Reinjection Act prohibits flaring of associated gas subject to the approval of the Minister of petroleum resources. S 3 (2) provides for the Minister to grant permission to flare gas where reinjection of the associated gas is not appropriate or feasible subject to the payment of some fees. See U, Udok and EB Akpan, 'Gas Flaring in Nigeria: Problems and Prospects' (2017) 5(1) Global Journal of Politics and Law Research 16, 28.

[178] DJ Fiorino, 'Rethinking Environmental Regulation: Perspectives on Law and Governance ' (1999) 23(2) Harvard Environmental Law Review 441, 459.

[179] F Haines, *Corporate Regulation: Beyond "Punish or Persuade"* (Clarendon Press 1997) 269.

From the foregoing, the rules and deterrence approach which underscores a coercive and adversarial style of enforcement, has not been as effective as was envisaged when the law was crafted. To effectively combat this shortcoming, the regulator needs to adopt other more cooperative regulatory strategies such as the advice and persuasion strategy that will improve the compliance level of the regulated entities.[180] In adopting these compliance strategies, however, consideration must be had to the compliance motivation of such entities,[181] capacity to comply or not comply, the decision to comply or not comply and how the regulated entities perceive the regulation.[182] These considerations are not exhaustive and are dependent on the socio-economic and political construct of Nigeria.[183] Some of these regulatory styles have been tried and tested in other jurisdictions like Australia[184] where the use of communication and education activities have been applied to promote self-regulation, encourage compliance and raise awareness of the benefits of compliance.[185] Australia further created a compliance strategy spanning 2018 – 2022 to monitor compliance in its maritime sector. The vision of this compliance strategy is to focus on promoting voluntary regulatory compliance in protecting the marine environment.[186] To achieve this, the regulatory compliance strategy runs on six elements. These elements are as follows: simplify and explain the law, educate the regulated community and assist it to comply with the law, monitor compliance, reward voluntary

[180] See **section 3.4** of **Chapter 3** of this thesis.
[181] K Peterson and A Diss-Torrance, 'Motivation for compliance with environmental regulations related to forest health' (2012) 112 Journal of Environmental Management 104, 106; SC Winter and PJ May, 'Motivation for Compliance with Environmental Regulations' (2001) 20(4) Journal of Policy Analysis and Management 675, 676.
[182] SA Shapiro and RS Rabinowitz, 'Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA' (1997) 49(4) Administrative Law Review 713, 729.
[183] J Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 (3) University of British Columbia law Review 475, 476.
[184] Department of the Environment, Water, Heritage and the Arts, 'Compliance and Enforcement Policy' (December 2009) 5.
[185] Australian Government, 'AMSA Compliance and Enforcement Policy 2018' (2018) <https://www.amsa.gov.au/about/corporate-publications/compliance-and-enforcement-policy-2018> accessed 10 April 2020, 18, 8; Gunningham (n 86) 176.
[186] ibid 10.

compliance, deter non-compliance and build compliance skills and capacity in the workforce.[187] It is important to note that this is in no way an indication that the rules and deterrence strategy is completely useless. The point here is to promote a more cooperative regulatory strategy and de-emphasising an adversarial strategy and resorting to it only when all else fails. The danger in introducing such cooperative regulatory strategies lies in the fact that because they are new, the tendency is high for the regulator to be distracted from the usefulness of the rules and deterrence approach that may still be ideal for some situations.[188]

7.5.2 Improve access to information

The petroleum sector in Nigeria is the main source of foreign exchange earnings and the economic balance of Nigeria rests squarely on the proceeds of the petroleum sector. For this reason, the federal government's focus on the sector has been to sustain the continuous production of the natural resources from the sector above other concerns. The operations of the petroleum sector in Nigeria are mainly carried out in rural areas in the Niger Delta area of southern Nigeria where crude oil is found.[189] The indigenes in these localities are usually poor, uneducated and uninformed about the operations surrounding exploitation and exploration and transportation of petroleum substances.[190] As a result of this, the indigenes of such rural areas are generally unaware of the benefits and dangers of the operations around their communities. In some cases, this ignorance breeds the feeling of anger and abandonment leading to tampering with oil installations in such location and damage to the facilities and occasioning oil spills, vandalism, kidnapping and general host community altercations and armed conflicts.[191]

[187] ibid 6.
[188] Mushal (n 87) 210.
[189] J Effiong, 'Oil and Gas Industry in Nigeria: The Paradox of the Black Gold' (2010) 18 Research in Social Problems and Public Policy 323, 327.
[190] ibid 328.
[191] C Nwapi, 'A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria' (2010) 54(2) Journal of African Law 184, 208.

It has been reported that violent conflicts have been fuelled by natural resource exploitation and other related environmental issues.[192] This is because there is a lack of adequate information about what oil facilities are or how dangerous they can be. Access to information allows for an atmosphere of full disclosure enabling all concerned parties to understand their rights and responsibilities regarding petroleum sector operations.

The Environmental Impact Assessment (EIA) Act of Nigeria[193] requires that the environmental impact of activities that are likely to affect the areas of operation be determined and made public with allowance for objections if any before the project commences.[194] This can only be achieved where the immediate and remote stakeholders are given unlimited access to the information about the proposed activities. Often, these environmental impact assessments are purportedly done and published but it is hardly ascertained whether the illiterate villager who lives in the area of operation understands or is made aware of the immediate and remote impacts of the operations because the operations are often commenced without due consideration of the indigenes of such rural areas.[195] For example, it was argued that the oil and gas exploration activities in Ogoniland in Nigeria cannot be said to have commenced under a proper environmental impact assessment considering the details uncovered in the UNEP report on Ogoniland in 2011.[196]

The sociological institutionalism theory can be applied in this instance to create awareness in the host communities.[197] This theory stipulates that organisational practices have to be

[192] O Das, *Environmental Protection, Security and Armed Conflict: A Sustainable Development Perspective* (Edward Elgar Publishing 2013) 270, 1.
[193] Environmental Impact Assessment Act Cap E12 Laws of the Federation of Nigeria 2010.
[194] S 1 (a) EIA Act.
[195] OA Ogunba, 'EIA systems in Nigeria: Evolution, Current Practice and Shortcomings' (2004) 24 Environmental Impact Assessment Review 643, 652.
[196] United Nations Environment Programme. 'Environmental Assessment of Ogoniland' (2011) <https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf> accessed 6 July 2019.
[197] See **section 2.2.5** of **Chapter 2** of this thesis.

explained or related in cultural terms.[198] It is argued that when petroleum sector operatives take the time to explain their intentions to the community where operations are done, the opinion and concerns of the community are taken into consideration and the community members feel respected and understand their stake in the operations. This will encourage the participation of the public who is likely to be affected by the operations in the locality.[199]

It can prove difficult to secure access to information held by petroleum sector operators or where it is provided, the information may be inadequate. In this situation, the Freedom of Information Act provides the legal right to apply for such information either directly[200] or through the court.[201]

7.5.3 Promote public participation in environmental decision-making

Public participation is a process that involves any individual, group of individuals, organisations or political entity with interest in the outcome of a decision, in problem-solving or decision-making and utilises the input of such persons to make decisions.[202] Public participation in environmental decision-making is recognised along with the right to access information and access to administrative and judicial proceedings, which have been deemed fundamental elements for good environmental governance.[203] It is argued that the promotion of public participation in environmental decision-making, can strengthen compliance and enforcement. This is because the stakeholders will have knowledge of the extent and impact of

[198] Hall and Taylor (n 85) 946,
[199] U Etemire and NU Sobere, 'Improving Public Compliance with Modern Environmental Laws in Nigeria: Looking to Traditional African Norms and Practices' (2020) 38(3) Journal of Energy & Natural Resources Law 305, 313.
[200] S 1 and 2 Freedom of Information Act Laws of the Federation of Nigeria 2011.
[201] S 20 and 23 Freedom of Information Act Laws of the Federation of Nigeria 2011.
[202] AI Badiora, AI Bako and DO Olaleye, 'Evaluating Public Participation in a Project Review: A Nigerian Case Study' (2020) 16(36) Journal of Multidisciplinary Evaluation 1, 3.
[203] D Banisar and others, 'Moving from Principles to Rights: Rio 2012 and Access to Information, Public Participation, and Justice' (2011) 12(3) Sustainable Development Law & Policy 8, 8. These access rights are discussed independently.

the operations and be in a position to offer their input, monitor the activities of the sector operators and know when non-compliance is occurring and take steps to make such operators compliant or activate the other environmental participatory rights available in the event of non-compliance.

The concept of public participation in environmental decision-making draws its legitimacy from national, international and regional instruments. Paragraph 23 of the United Nations World Charter for Nature adopted by the United Nations General Assembly in 1982, provides for the opportunity for all persons under national legislation, to participate individually, or with others in the formulation of decisions of direct concern to their environment, including access to a means of redress when their environment suffers damage or degradation.[204] Principle 10 of the Rio Declaration on Environment and Development advocates that environmental issues are best handled with the participation of all concerned citizens at the relevant level by participation in decision-making processes.[205] Under the Rio declaration, public participation is advocated along with access to information concerning the environment and access to judicial and administrative proceedings including redress and remedy.[206] Principle 11 of the Rio declaration further requires states to enact effective environmental legislation that will reflect the environmental and developmental context of each state.

Another instrument that backs the concept of public participation is the Aarhus Convention.[207] Although this is a regional instrument sponsored by the United Nations Economic Commission for Europe (UNECE), it is open to adoption to countries that are not UNECE members. This

[204] HW Wood, 'The United Nations World Charter for Nature: The Developing Nations' Initiative to Establish Protections for the Environment' (1985) 12(4) Ecology Law Quarterly 977, 996.
[205] Principle 10 of the United Nations Conference on Environment and Development. 'Rio Declaration' (United Nations, Rio de Janeiro 14 June1992).
[206] ibid.
[207] United Nations Economic Commission for Europe, 'Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (Aarhus, Denmark 25 June1998)

convention essentially draws inspiration from the Rio declaration and addresses the issues of public participation in decision-making, access to information and access to justice in environmental matters.[208] These principles in the Rio Declaration were later developed and adopted by UNEP under the guidelines for the development of national legislation on information, public participation and access to justice in environmental matters (the Bali Guidelines).[209] It has been noted that the Bali guidelines hold huge significance and potentials in furthering the entrenchment of environmental participatory rights at all levels especially as it supports principle 10 of the Rio declaration.[210]

In Africa, the right to participate in environmental decision making was subsumed under the interpretation of the right to a satisfactory environment set out in Article 24 of the African Charter on Human and Peoples' Rights in the case of *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria*.[211]

In defining the obligations that emanate from the right to a satisfactory environment, the African Commission held that a state is required to among others, carry out scientific monitoring of threatened environments, require and publish environmental and social impact studies, provide information to the affected communities and grant those affected the opportunity to participate in the process.[212] Public participation in environmental decision-making is important because, among other reasons, it facilitates deliberations between

[208] Principle 10 of the Rio Declaration 1992.
[209] Adopted by the Governing Council of UNEP, UNEP/GCSS.XI/11, Decision SS.XI/5, pt. A, 26 February 2010. Other International instruments embodying the concept of public participation include the ILO Convention 169, the 1991 Convention on Environmental Impact Assessment in a Transboundary Context and the 1992 Convention on Biological Diversity. See ET Bristol-Alagbariya, 'The Concept, Principle, Law and Developmental Practice of Environmental Democracy towards Sustainable Development in Resources-Rich Communities of Developing Countries: Focus on Nigeria's Oil Producing Delta Region' (2020) 94 Journal of Law Policy & Globalization 53, 57; C Nwapi (n 191) 192.
[210] U Etemire (n 199) 412.
[211] *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria* (2001) AHRLR 51 (ACHPR 2001).
[212] ibid Paragraphs 53-55

operators, stakeholders and the public, it is fundamental to democratic processes, provides the opportunity for accountability to the public, allows for the inclusion of lay knowledge in decision making and improves public support for project decisions.[213]

It has been noted that public participation is often reactive and usually occurs after the project decision is made. This is because the process of public participation involves little actual public involvement and is characterised by insufficient deliberation by a small number of participants.[214] In Nigeria, the dissatisfaction with the way petroleum sector operations are carried on is usually expressed in conflicts resulting in militancy, altercation, accidents and sabotage of oil facilities and operation by third parties.[215] For instance, Ogunba noted the shortcomings of the EIA processes and the techniques used by multinational corporations to prevent public participation in Nigeria.[216] These techniques include quasi-participation, hired project supporters, inaccessibility of the EIA report to the public, insufficient notice for public response to the EIA report.[217] It is contended that if more public participation is encouraged, most of the issues resulting from such areas of operation will be overcome because public participation in environmental decision-making gives place to transparency, efficient management of the operations, universal design and equality.[218]

From the foregoing, public participation remains an important component of environmental decision-making. However, it is vital to pursue improvements to the way public participation is construed and practised as they appear to have fallen short of achieving the aim of actual

[213] D Banisar and others (n 203) 8; L Laurian, 'Public Participation in Environmental Decision Making: Findings from Communities Facing Toxic Waste Cleanup,' (2004) 70(1) Journal of the American Planning Association 53, 53.
[214] DM Konisky and TC Beierle, 'Innovations in Public Participation and Environmental Decision Making: Examples from the Great Lakes Region' (2001) 14(9) Society and Natural Resources 815, 815.
[215] Effiong (n 189) 329.
[216] Ogunba (n 195) 654.
[217] AM Lawal, S Bouzarovski and J Clark, 'Public Participation in EIA: The Case of West African Gas Pipeline and Tank Farm Projects in Nigeria' (2013) 31(3) Impact Assessment and Project Appraisal 226, 230.
[218] Badiora, Bako and Olaleye (n 202) 7.

public participation especially in the case of the petroleum sector in Nigeria.[219] Therefore, this thesis suggests the following reforms. *First*, an improved public participatory model should aim to achieve a balance of the goals of the operator, regulator and the public.[220] *Second*, the regulatory agencies such as NESREA, NOSDRA and DPR should make an early and concerted effort to inform and get the public to participate in environmental decision-making. *Third*, the regulatory agencies must emphasise the right of the public to participate in environmental decision-making and ensure that there is a reasonable time frame to participate. *Fourth*, the regulatory agencies must act as a liaison between the government, the petroleum sector operators and the public and make it a duty to facilitate a seamless feedback mechanism between the parties. A communication line should be maintained while the project subsists for continuous interaction as the situation may change in the course of the project e.g. oil spills, or equipment failure.

In the United Kingdom and the United States of America, numerous environmental groups and think-tanks such as Greenpeace and World Resource Institute have continued to advocate for more public participation in environmental decision-making and this has yielded many positive results[221] as this trend is gradually being practised around the globe and there are more calls for more public participation in environmental decision-making.[222] In Nigeria, the EIA Act[223] and the Freedom of Information Act[224] both provide legal support for the concept of public

[219] ibid 22.
[220] Konisky and Beierle (n 214) 824.
[221] J Rai and S Soni, 'Approaches to Environmental Decision Making through Human-environment Relationship Perspectives' (2018) 18(4) Journal of Geography, Environment and Earth Science International 1, 10.
[222] ET Bristol-Alagbariya, 'The Concept, Principle, Law and Developmental Practice of Environmental Democracy towards Sustainable Development in Resources-Rich Communities of Developing Countries: Focus on Nigeria's Oil Producing Delta Region' (2020) 94 Journal of Law Policy & Globalization 53, 54.
[223] Environmental Impact Assessment Act Cap E12 Laws of the Federation of Nigeria 2010.
[224] Freedom of Information Act, Laws of the Federation of Nigeria 2011.

participation and access to information. However, these rights are not expressly provided for under the Fundamental Rights Chapter of the Nigerian Constitution.[225]

7.5.4 Strengthen access to remedies

In the business of the petroleum sector in any jurisdiction, accidents or conflicts can occur occasioning injury or damage. The position attained by the petroleum sector due to the need to exercise sovereignty over natural resources and the continuous push for economic development in Nigeria is testament to the fact that the petroleum business is not ending anytime soon, and neither are the incidents resulting in accidents and conflicts that cause damage and injury. The environmental right to access to administrative and judicial remedies to assuage this damage balances out the situation. Access to remedies is largely achievable through the courts, therefore, access to courts is a prerequisite to the realisation of access to remedies. As discussed in **Chapters 5** and **6** of this thesis, access to courts in Nigeria have been hampered by legal factors affecting compliance and enforcement and the challenges of the judiciary in the institutionalisation of compliance and enforcement.[226] The third pillar of access rights guarantees that there shall be effective access to judicial and administrative proceeding including redress and remedy.[227]

Some of the common remedies in environmental cases include order of injunction, declaratory judgements, damages, compensation etc. For any remedy to have real value, it must be available, effective and sufficient to satisfy the injured party.[228] However, litigants have continued to suffer even after achieving these orders due to the various impediments to the

[225] **Chapter IV** of the Constitution of Nigeria 1999 as amended.
[226] Please see **section 5.2.1** of **Chapter 5** of this thesis and **section 6.2.2** of **Chapter 6** of this thesis, respectively.
[227] Principle 10 of the United Nations Conference on Environment and Development. 'Rio Declaration' (United Nations, Rio de Janeiro 14 June1992).
[228] JA Dada, 'Judicial Remedies for Human Rights Violations in Nigeria: A Critical Appraisal' (2013) 10 Journal of Law Policy & Globalization 1, 16.

actualisation of ordered judicial remedies. Some of the impediments include litigation cost, legal aid, grievance procedure of companies, disobedience to court orders, the problem of *locus standi* etc.[229]

Access to remedies can be strengthened by improving access to courts on the one hand and addressing the various impediments that create barriers to the actualisation of court-ordered remedies on the other hand. For instance, creating and designating environmental courts and decentralising them especially for environmental-related cases.[230] Removing the *locus standi* barrier and granting standing to stakeholders provides a wide array of representation especially for illiterate and indigent victims of environmental harm. This was the position of the Supreme Court of Nigeria in the case of Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation (NNPC)[231] where the court overturned the judgement of the Court of Appeal that an NGO had no *locus standi* to sue the NNPC for failure to clean up an impacted site. While this decision is laudable,[232] steps need to be taken to regularise the inconsistency in the 1999 Constitution[233] to bring it in line with the current reality. In India, the Supreme court in defining sufficient interest liberally, initiated Public Interest Litigation, a method to address public grievances and a solution to the problem of access to justice, where the legislature and

[229] ibid 11-12.

[230] There is a growing number of environmental cases before various national, regional and international courts and tribunals, competing for attention alongside cases of other subject matters. R Holifield, *The Routledge Handbook of Environmental Justice* (Routledge International Handbooks 2017) 653, 486. See also **section 7.4.2** of this chapter.

[231] *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation (NNPC)* (2019) 5 NWLR (Pt.1666) 518.

[232] That other interest groups and stakeholders can institute legal action in environmental violation cases. MC Anozie and EO Wingate, 'NGO Standing in Petroleum Pollution Litigation in Nigeria—*Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation* (2020) Journal of World Energy Law and Business, 2020 1, 8.

[233] S 6 (6) (c) limits the judicial power of entertaining any issue or question of whether the provisions of Chapter 2 of the Constitution has been violated or not complied with. S 46 (1) also limits standing to any person who alleges contravention of his fundamental human right to his person thereby narrowing the class of persons who can bring an action for human rights violation.

executive fail to do their job.[234] Public interest litigation operates as a window to those who are unable to directly access remedies or court thereby solving the problem of *locus standi*.[235]

The United Nations Sustainable Development Goals (SDG) reiterates the importance of access to remedies in Goal 16 which promotes peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.[236] Within the Goal 16 targets, *peace* has been broadly understood as freedom from violence at the hands of state and private actors including activities that promote violence. *Justice* relates to the rule of law, non-discrimination and remedies; and *strong institutions* involve lack of corruption, transparency, legal recognition and public participation.[237]

It is contended that while access to remedies through the courts have continued to receive support outside the shores of Nigeria, not much has improved in Nigeria in that regard. In the recent United Kingdom Supreme Court decision in the case of *Okpabi and Ors v Royal Dutch Shell Plc and Anor,*[238] the UK Supreme Court held that the polluted *Ogale* and *Bille* communities can sue Royal Dutch Shell as a parent company to SPDC because it owes the communities a common law duty of care since it exercised significant control over material aspects of the operations of its subsidiary SPDC in the communities. This decision is an indication that the UK Courts will readily give audience to host communities in Nigeria who have hitherto not found this access before Nigerian courts. This points to the fact that where

234 MG Faure and AV Raja, 'Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables' (2010) 21(2) Fordham Environmental Law Review 239, 248, 93.
235 A Kumar and D Sunayana, 'Public Interest Litigation: A Window for Justice' (2021) 7(7) European Journal of Molecular & Clinical Medicine 5922, 5922.
236 J Blaustein and others, 'The Nexus Between Crime, Justice and Sustainable Development' in J Blaustein and others (ed), *The Emerald Handbook of Crime, Justice and Sustainable Development* (Emerald Publishing Limited 2021) 4, 6.
237 A Ivanovic, H Cooper and AM Nguyen, 'Institutionalisation of SDG 16: More a Trickle than a Cascade?' (2018) 37(1) Social Alternatives 49, 49.
238 *Okpabi and Ors v Royal Dutch Shell Plc and Anor* [2021] UKSC 31. On appeal from [2018] EWCA Civ 191.

access to court and judicial and administrative remedies is improved, it will send a clear message to petroleum sector operatives that they can no longer rely on the barriers hindering access to courts to continue operating with impunity as justice, redress and remedy will be swift.

While it is conceded that the public participation, access to information and access to administrative and judicial proceedings processes in Nigeria are fraught with irregularities and challenges such as community fragmentation and socio-economic priorities etc. these irregularities and challenges are not insurmountable as they can be managed with clear and flexible legal guidelines implemented in good faith.[239] It has been noted that the weak environmental procedural mechanism of access rights is the major cause of non-compliance and consequent environmental degradation.[240] It is contended that the improvement to both public participation in environmental decision-making and access to information can easily be achieved if the Nigerian government leverages on already established international and regional instruments in existence to strengthen its legal framework for these access rights.

7.5.5 Promote Alternative Dispute Resolution (ADR) measures

The courts can encourage alternative pathways to achieve remedies to reduce the time spent in litigation including appeals. In most cases, remedies are assumed to only be accessible through the courts, but it has been opined that informal and extra-judicial mechanisms can also be designed to redress injury and damage due to environmental interactions.[241] These mechanisms can be in the form of Alternative Dispute Resolution (ADR) and other non-judicial approaches

[239] A Ingelson and C Nwapi, 'Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis' (2014) 10 (1) Law, Environment and Development Journal 37, 56; C Nwapi, 'A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria' (2010) 54(2) Journal of African Law 184, 205.
[240] Etemire and Sobere (n 199) 327.
[241] Dada (n 228) 3.

to violations like those promoted by traditional African dispute settlement.[242] In this system, importance is placed on improving the relationship between parties based on equity, good conscience and fair play as opposed to legal friction and technicality thereby promoting amicable dispute settlement over the adversarial judicial procedure.[243] This holds some benefits for the litigants as it has the potential among others, to discourage further congestion of the courts where not only environmental and petroleum sector-related cases are heard but the litigants are saved the legal costs of prosecution.[244]

Petroleum operations generally are a risk-prone business especially because of their highly technical nature, the requirement of heavy equipment and the complexity of the process of extracting, processing and transporting the resource. For these reasons, it is almost impossible not to occasion some accident or environmental harm in the process. In ADR, various options abound to cater to the complexities of the kind of conflicts from petroleum sector operations e.g., Arbitration, mediation, conciliation, International Commercial Arbitration, Construction Expert Determination etc. This is not strange in petroleum sector arrangements as in most Joint Venture arrangements, provision for ADR is made. Therefore, this can be extended to other arrangements between the sector operator and other stakeholders.

Further to the suggestion to traditional African dispute settlement, it has been opined that a lot can be learnt from the hitherto effective traditional African norms and practices to improve compliance with environmental regulations in Nigeria.[245] This is because traditional African environmental norms and practices have been known to attract better public compliance in traditional settings as exemplified in the precolonial era environmental protection methods.[246]

[242] Etemire and Sobere (n 199) 306.
[243] NJ Udombana, 'An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication' (2002) 28 Brooklyn Journal of International Law 811, 818.
[244] Dada (n 228) 5.
[245] Etemire and Sobere (n 199) 327.
[246] See **section 3.4.2** of **Chapter 3** of this thesis.

Such public compliance for traditional practices has been successfully recorded in Tanzania,[247] Zimbabwe[248] and Nigeria.[249] Indigenous norms, practices and knowledge can provide the basis for grassroots decision-making as it holds much value for a participatory approach in decision-making for sustainable development.[250]

7.5.6 Apply cleaner business and production practices.

Innovation now plays a major role in almost every industry where production occurs. Businesses have increasingly adopted technological means to carry on their trade for various reasons. Some of the reasons include mitigating risk and loss, especially where the industry is prone to human errors and natural disasters which can lead to pollution of the environment. Innovative sustainable practices can reduce the impact on the local environment, cultural resources, and disruptions to residents. It can also reduce leakage from oil and gas infrastructure, reduce physical contact in terms of transportation of petroleum products.[251] As part of the steps to institutionalise compliance and enforcement, which can help to reduce environmental pollution from accidents, petroleum can be more efficiently explored and

[247] In Tanzania, the pastoralists apply the strategy of mobile grazing to afford their livestock the opportunity to utilise a variety of vegetation at different places, this gives the unused areas to regenerate while a particular is being utilised. See J Msuya, 'Challenges and Opportunities in the Protection and Preservation of Indigenous Knowledge in Africa' (2007) 7 International Review of Information Ethics 1, 3.

[248] In Zimbabwe, it is a taboo in some communities to kill young animals, pregnant female animals or premature edible insects or to exploit some natural resources before certain periods of the year. See T Chigonda, 'More than Just Story Telling: A Review of Biodiversity Conservation and Utilisation from Precolonial to Postcolonial Zimbabwe' (2018) Scientifica 1, 3.

[249] In Nigeria, the *Oban* Hill communities in Cross River State has several sacred forests called *Mgbe* forests that are protected by traditional norms and taboos which prohibit human activities in the forests. See Etemire and Sobere (n 207) 308; SO Jimoh and others, 'The Role of Traditional Laws and Taboos in Wildlife Conservation in the Oban Hill Sector of Cross River National Park (CRNP), Nigeria' (2012) 39(3) Journal of Human Ecology 209, 212.

[250] SGJN Senanayake, 'Indigenous Knowledge as a Key to Sustainable Development' (2006) 2(1) The Journal of Agricultural Sciences 87, 90.

[251] J Engel-Cox and others, 'Innovations in Upstream Oil and Gas Operations in Close Proximity to Communities ' (National Renewable Energy Lab. (NREL), Golden, CO (United States) 2019) 1 <https://www.nrel.gov/docs/fy19osti/72151.pdf> accessed 14 April 2020.

exploited with better technology and application of cleaner business and production practices.[252]

The United Nations under its Sustainable Development Goal 12, advocates for worldwide sustainable consumption and production patterns. This goal considers sustainability mainly through the lens of production efficiency regarding the use of natural resources, management of chemical wastes, food production and supply related wastes, sustainable corporate practices and reporting and sustainable public procurement.[253] While the SDGs are voluntary, it is a very good template to draw inspiration from because its application has the potential of contributing positively towards the conservation of not only the petroleum sector but also biodiversity, forests and forest-dependent livelihoods.[254]

Technological advancements have been made in various countries in the bid to explore and exploit their natural resources more efficiently. For example, in the United States of America, technological advancements have been made in the oil and gas industry from exploration to field maintenance and safe decommissioning of wells, technologies to increase reservoir recovery factors and oil spill prevention for onshore and offshore exploration.[255] Oil and gas firms are digitally transforming their operations by forming partnerships with oilfield service providers and Big Tech firms. This relationship has been exhibited by the Chevron, Schlumberger and Microsoft partnership in their bid to accelerate the creation of innovative

[252] Elum, Mopipi and Henri-Ukoha (n 90) 12887.
[253] D Gasper, A Shah and S Tankha, 'The Framing of Sustainable Consumption and Production in SDG 12' (2019) 10(1) Global Policy 83, 85.
[254] P Schröder and others, 'SDG 12: Responsible Consumption and Production–Potential Benefits and Impacts on Forests and Livelihoods' in P. Katila (ed), *Sustainable Development Goals: Their Impacts on Forests and People* (Cambridge University Press. 2019) 386, 386.
[255] 'Advancing Systems and Technologies to Produce Cleaner Fuels' (2015) <https://www.energy.gov/sites/prod/files/2016/05/f32/Ch.7-SI-Oil-and-Gas-Technologies.pdf> accessed 4 February 2020.

Petro technical and digital technologies.[256] It has been predicted that the future of the oil and gas industry is 'smart drilling' and "requires a combination of technology and rationale that reimagines how firms manage and execute a more harmonised approach to early well life."[257] In a 2019 study in the United States of America, it was revealed that upstream oil and gas companies are increasingly employing innovative sustainable practices to reduce costs, minimise community impacts and secure their social license to operate in urban and suburban areas.[258] Some of these innovative sustainable practices include capping of older, legacy wells as a condition for new development, equipment upgrades, tankless on-site water/product management, electric-powered equipment, community air quality monitoring and better water usage and treatment.[259]

Nigeria as a host country and the petroleum sector operators both have significant roles to play in actualising the reform suggestion discussed in this section. *First*, it is argued that Nigeria can learn from this move and insist on smart business models regarding new exploration and exploitation activities while gradually reviewing the existing ones in the petroleum sector to make them technologically compliant with modern practices. Some of the steps that can be taken can be in form of the development of an accurate database of active and inactive oil wells both onshore and offshore.[260] Establishment of robust legal support for proper site

[256] T Paraskova, 'How New Technology is Revolutionizing Oil & Gas' (2019) <https://oilprice.com/Energy/Energy-General/How-New-Technology-Is-Revolutionizing-Oil-Gas.html> accessed 4 February 2020.

[257] T Husseini, 'The Future of Oil and Gas: Eight Bold Industry Predictions' (2018) <https://www.offshore-technology.com/features/the-future-of-oil-and-gas-predictions/> accessed 4 February 2020. Other predictions include Incorporating Blockchain Technology, Blurring the lines between fossil and renewable fuels, 'smart oilfield' technology and digital transformation offshore.

[258] J Engel-Cox and others (n 251).

[259] J Engel-Cox and others (n 251) 2 – 7.

[260] It has been shown in recent literature that the information on this record is only an estimation. See KI Ojukwu, 'Managing Abandonment Issues in Nigerian Oil & Gas Industry' (2020) <https://www.ogel.org/journal-advance-publication-article.asp?key=655#citation> accessed 3 January 2020, 6, 8.

decommissioning and clean up as a condition for the issue of fresh petroleum sector licences.[261] Further, a clause for the routine maintenance and replacement of vital and sensitive oil production equipment and facilities regardless of whether a fault is recorded or not, can feature in every new petroleum operations arrangement.

Second, the sector operators can also apply global best practices in their operations in Nigeria, exhibit good fate in ensuring proper participation of all stakeholders in the environmental decision-making process and take all necessary steps to alleviate the social and environmental effect of the operations in the host communities. It has been noted that a key component of sustainable development and by implication, compliance and enforcement is collaborative-environmental governance or collaborative-environmental management.[262] This is a collaborative approach to environmental management in a general and inclusive sense involving the government, the operators and the host communities. All parties can share knowledge and concerns about the given project to better integrate important insights from diverse points of view and diffuse knowledge and best practices within themselves.[263] At the time of this research, no example of this collaboration was found in Nigeria.

In Australia, this approach was applied in the area of Natural Resources Management (NRM) to solve the resulting environmental degradation from rising water tables, increasing salinity, water scarcity and pollution, biodiversity etc. the collaboration was between the Australian government and 56 regional NRM bodies. The government provided fronds for these regional

[261] The relevant legal instruments that broached the issue of decommissioning or abandonment of crude oil facilities are vague and superficial. See 36 (1) (2) and 46 (3) of the Petroleum (Drilling and Production) Regulations made pursuant to the Petroleum Act Cap P10 Laws of the Federation of Nigeria 2004. See also KG Kingston and Z Adangor, 'The Vacuum in Nigeria's Crude Oil Laws: An Inquiry into the Decommissioning of Onshore and Offshore Facilities' (2018) 8(1) Cranbrook Law Review 1, 6.

[262] TM Koontz, 'Collaboration for Sustainability? A Framework for Analyzing Government Impacts in Collaborative-environmental Management' (2006) 2(1) Sustainability: Science, Practice and Policy 15, 22.

[263] Ö Bodin, 'Collaborative Environmental Governance: Achieving Collective Action in Social-ecological Systems' (2017) 357(6352) Science 1,1.

bodies to develop a regional plan and regional investment strategy and implement the same under a collaborative partnership-based decision-making process to solve the ensuing environmental degradation.[264]

A comprehensive audit of existing petroleum installations was undertaken to assess the health and lifespan of all installations in Algeria to solve the problem of industrial accidents due to ageing oil and gas installations. Two executive decrees were implemented. *First*, Executive Decree No. 14-349 (December 23rd, 2014) to establish the conditions of installations and equipment compliance associated with hydrocarbon activities and Executive Decree No. 15 – 09 (January 29th, 2015) to establish the terms and conditions of approved specific hazards studies of hydrocarbon.[265]

This audit system can be useful because a majority of the petroleum installations in Nigeria, have not been reviewed or replaced since the initial installation resulting in equipment failures such as oil and gas pipelines explosions.[266] This will serve to reduce any accidents from equipment failure because this audit will reveal whether the causes of equipment failure has set in already or is likely to happen. Some of the causes of oil equipment failure include corrosion, excavation damage, natural force damage, material/weld failure, equipment failure and incorrect equipment operation.[267] Another advantage of this is that it will help in keeping track of decommissioned installations and installations that are due but not yet decommissioned since Nigeria lacks a comprehensive legal framework for oil and gas installation

[264] N Gunningham, 'The New Collaborative Environmental Governance: The Localization of Regulation' (2009) 36(1) Journal of Law and Society 145, 155.
[265] B Yacine, D Mébarek and H Hefaidh, 'Contribution to the Ageing Control of Onshore Oil and Gas Fields' (2020) 6(3) Petroleum 311, 312.
[266] MV Biezma and others, 'Most Fatal Oil & Gas Pipeline Accidents Through History: A Lessons Learned Approach' (2020) 110 Engineering Failure Analysis 104446, 104452; L Zardasti and others, 'Review on the Identification of Reputation Loss Indicators in an Onshore Pipeline Explosion Event' (2017) 48 Journal of Loss Prevention in the Process Industries 71, 80. This is also evident in the recent increase in equipment failure resulting in pipelines explosions in Nigeria.
[267] Biezma and others (n 266)104449.

decommissioning. The data generated from the audit of existing petroleum installations can be applied to forecast decommissioning activities in onshore and offshore oil and gas operation in Nigeria as is the case in Mexico.[268]

Intelligent crude oil anti-theft system based on the Internet of Things (IoT) can be adopted by the relevant petroleum sector operator and regulator to monitor and detect leakages in the pipelines and other oil installations.[269] While Achilike has noted that this technology is already in place in Nigeria,[270] it is argued that based on the prevalence of pipeline vandalism and oil theft in Nigeria, it is either the current system is faulty or the technology was not deployed extensively to cover the vast network of pipelines across Nigeria and needs to be urgently upgraded. This system can be used to analyse the behaviour of oil and gas at the different stages of production to develop a stable theft detection system by installing Radio Frequency Identification (RFID), remotely controlled cameras, temperature sensors, pressure sensor, flow sensors, GPS etc.[271]

7.5.7. Adopt new technology in the exploration and exploitation process to avoid adverse environmental impact

Petroleum has undoubtedly opened up opportunities for countries and economies across the globe. However, more attention is now focused on the impact of activities through which these opportunities are harnessed.[272] It is important to invest more in research and development to discover easier, safer, cheaper and cleaner alternatives to exploration and production. It has

[268] MJ Kaiser, 'Decommissioning Forecast in the Deepwater Gulfof Mexico, 2013 - 2033' (2015) 41 Marine Structures 96, 125.
[269] J Suna, Z Zhangam and X Suna, 'The Intelligent Crude Oil Anti-Theft System Based on IoT Under Different Scenarios' (2016) 96 Procedia Computer Science 1581, 1584.
[270] CMN Achilike, 'Securing Nigeria's Crude Oil and Gas Pipelines – Change in Current Approach and Focus on the Future' (2017) 5(1) Scientific Research Journal (SCIRJ) 1, 2.
[271] TP Ayeni and BA Ayogu, 'Intelligent Pipeline Monitoring System Based on Internet of Things' (2020) 8(8) Scientific Research Journal 44, 46.
[272] This has been expressed in various international efforts such as the Sustainable Development Goals.

been noted that while fossil fuel is advantageous from the perspective of the global economy, politics and security, it is increasingly harmful to the environment.[273] In the last two decades, there have been technological advancements in various areas of natural resources development. These advancements have been in the areas of onshore and offshore exploration and production focusing on sophisticated data acquisition, processing and visualisation, technologies to increase reservoir recovery factors, oil spill prevention technology, enhanced oil recovery etc.[274]

Exploration and exploitation activities in the petroleum sector in Nigeria are carried out through multinational companies that have proven records in petroleum operations. However, this ought not to preclude the Nigerian government from insisting on international standards and best practices when entering into petroleum arrangements with such companies as the ones set out in the previous section. It is contended that one of the many reasons for weak compliance and enforcement in the petroleum sector in Nigeria is that the operators of the sector have consistently ignored the significance of the practice of standards and values claimed by the petroleum sector operatives.[275] This explains the reason for the failure of institutionalisation of compliance and enforcement by regulated entities as they behave in ways that would normally be prohibited in their country of origin because, in the case of Nigeria, corruption rules practice, and these poor standards become cemented with time.[276]

Applying the normative institutionalism theory, Nigeria can insist on best practices and highest standards at the point of new business relationships, especially in the petroleum sector. The

[273] U S Department of Energy, 'Chapter 7: Advancing Systems and Technologies to Produce Cleaner Fuels Supplemental Information' (2015) <https://www.energy.gov/sites/prod/files/2016/05/f32/Ch.7-SI-Oil-and-Gas-Technologies.pdf> accessed 14 April 2020, 22.
[274] ibid 238.
[275] See JG March and JP Olsen, 'The Logic of Appropriateness' in RE Goodin (ed), *Oxford Handbook of Political Science* (Oxford University Press 2011) 1; Peters (n 90)12.
[276] Enyoghasim and others (n 72) 370.

normative institutionalism theory[277] emphasises the values and standards of an organisation based on the logic of appropriateness where action is seen as driven by rules of appropriate or exemplary behaviour and where rules are followed because they are natural, rightful, expected and legitimate.[278] It offers a framework for the analysis of organisational institutionalisation because it emphasises the relevance of norms and perceives organisations as tools that form the basic framework for individual actions in a social process.[279]

In the course of this thesis, compliance and enforcement have been conceptualised from the organisational and regulatory points of view. It is contended that compliance and enforcement cannot happen abruptly but has to be progressively integrated through a gradual process that will bring incremental changes in the petroleum sector and structural changes in regulation and institutions.[280] It is therefore imperative to reinforce these provisions by making them more prominent and tackling the challenges impeding the effective implementation of such provisions through institutionalisation. To achieve compliance, the laws should be made easier to comply with than it is to violate them. Some compliance mechanisms that have been identified and can be adopted include generating rules or laws with compliance built in, advanced pollution monitoring, electronic monitoring, increased transparency and innovative enforcement strategies.[281]

While compliance can be easily seen as acting according to a command or rule, regarding a business, it is characterised by the actions and attitudes of corporate bodies in line with ethical,

[277] See **section 2.2.4** of **Chapter 2** of this thesis.
[278] JW Goodell, 'Comparing Normative Institutionalism with Intended Rationality in Cultural-Finance Research' (2019) 62 International Review of Financial Analysis 124, 125.
[279] E Bolfíková, D Hrehová and J Frenová, 'Normative Institutionalism, Institutional Basis of Organising' (2012) 50 (1) Sociologija i Prostor/Sociology & Space 89, 90.
[280] *Institutionalising the Environmental Planning and Management (EPM) Process* Vol 5 (Sustainable Cities Programme (SCP) Source Book Series UN-HABITAT 1999) 11, 14 and Peters (n 90) 1.
[281] ibid 23.

legal and procedural rules that regulate their business activities.[282] For this to be sustainable, it has to ride on a compliance programme supported by tools that will establish a set of institutional, management, control and regulatory acts that promote transparency and reduces the risk level of behaviours that violate the principles of integrity.[283] It is argued that in determining whether compliance and enforcement are attainable or not, the development of the petroleum sector in Nigeria mirrors the existence or otherwise of the relevant institutional theories discussed in **Chapter 2** of this thesis.[284]

7.5.8 Support funding sources and ensure funding to promote compliance and enforcement

Funding is vital as compliance and enforcement implementation does not come cheap.[285] Poor funding poses a great challenge to regulators because it impedes the ability of the regulatory agencies to effectively achieve their statutory functions and update enforcement apparatus.[286] It stands to reason that allocating more funds to the environmental and petroleum sector could solve this problem.[287] However, while government appropriation towards environmental and petroleum sector regulation is important, it is not enough to simply appropriate more funds without ensuring that the funds are properly applied to improve the different aspects of the compliance and enforcement process. One of the important areas to channel funding to is research and development of compliance and enforcement.[288] This helps the regulators stay

[282] ALM de Rosso, and others, (n 74) 501.
[283] MCP Ribeiro and PDF Diniz, 'Compliance and Anti-Corruption Law in Companies' (2015) 52(205) Legislative Information Review 87.
[284] See **section 2.2.1** of **Chapter 2** of this thesis on Institutional theories.
[285] K Hawkins, 'Enforcing Regulation: Robert Kagan's Contribution - And Some Questions' (2013) 38(4) Law & Social Inquiry 950, 954.
[286] Ijaiya and Joseph (n 59) 315.
[287] ED Oruonye and YM Ahmed, 'The Role of Enforcement in Environmental Protection in Nigeria' (2020) 7(1) World Journal of Advanced Research and Reviews 48, 55.
[288] See s 5 (h) of the NOSDRA Act (as amended). The act provides for research and development but in the area of local development of methods, materials and equipment for oil spill detection and response as one of the objectives of the NOSDRA Act.

abreast of the evolving challenges of compliance and enforcement and have a response for when the need arises for it.

Improved funding can be applied to personnel training in the regulatory agencies (executive), the legislature and the judiciary. The advantages include *first*, bringing officers of regulatory agencies at par with national, regional and international best practices and technological advancement regarding compliance and enforcement processes.[289] *Second*, it removes the need for physical compliance and enforcement implementation systems and replace them with technologically advanced models. *Third*, upgrade of compliance and enforcement equipment in regulatory agencies which will require constant training to operate.[290] *Fourth*, improve and strengthen the regulatory agencies because accountability and integrity of regulatory officers will improve.[291] *Fifth*, improve drafting skills of legislative officers to draft better environmental and petroleum sector laws, consolidate multiple laws, integrate compliance and enforcement measures into the law and ways to achieve it[292] and improve the service delivery of the Judicial officers offering both judicial and administrative services in the environmental courts when they are created.[293]

The environmental and petroleum sector regulators in Nigeria need to adopt a funding policy that is guided by principles[294] that provide coherence, consistency and transparency in the application of funding. For instance, following the polluter pays principle, the regulatory agencies can introduce fees or taxes payable on potentially hazardous installations and reroute

[289] VE Agbazue, EK Anih and BU Ngang, 'The Role of NESREA Act 2007 in Ensuring Environmental Awareness and Compliance in Nigeria' (2017) 10(9) IOSR Journal of Applied Chemistry 32, 35.
[290] OJ Olujobi and T Olusola-Olujobi, 'Comparative Appraisals of Legal and Institutional Framework Governing Gas Flaring in Nigeria's Upstream Petroleum Sector: How Satisfactory?' (2020) Environmental Quality Management 1, 3.
[291] Ijaiya and Joseph (n 59) 318.
[292] See **section 7.4.2** of this Chapter.
[293] See **sections 6.5** and **6.5.1** of **Chapter 6** of this thesis.
[294] Some of these principles include the Polluter Pays Principle, the User or Beneficiary Pays Principle, Full cost recovery and the Integrity (prevention of conflict of interest) Principle.

these fees and taxes towards compliance and enforcement plans and preparedness.[295] This has been applied in countries like Australia, Ireland and the United Kingdom. However, it is contended that the choice, interpretation and extent of application of the funding principle depends on the political, social and economic construct of Nigeria to respond appropriately to the regulatory demands of the environmental and petroleum sector.

7.5.9 Encourage public awareness and education programmes

Public awareness and education are provided in some of the petroleum sector-related and environmental laws of Nigeria making it the duty of government by law.[296] However, it appears that very little is done to educate the general public about the operations of the petroleum sector. It is contended that this may be connected with the fact that public awareness and education ought not to be the responsibility of government alone. It is trite that no one organisation can claim to possess all the knowledge regarding the environment and petroleum sector in Nigeria, therefore, public awareness and education ought to be the responsibility of all environmental and petroleum sector stakeholders to the extent of the knowledge that each possesses. This is closely linked to the environmental right to access of information. It is contended that an improvement in public awareness and education demystifies the concept of the petroleum sector operations. It creates awareness of the obligation, responsibilities and rights of all stakeholders and further improves the knowledge and understanding of the environment and put stakeholders in a position to better comply with environmental regulations.[297] It creates trust regarding the motives of the operators and can protect the oil facilities as stakeholders will

[295] A Bularga and K Michalak, *Funding Environmental Compliance Assurance* (OECD Publishing. Paris, France 2005) 101, 25.
[296] See ss 7 (l) and 8 (p) of the NESREA Act.
[297] Etemire and Sobere (n 199) 313; Ogunba (n 195) 654.

see the benefits of the operations and discourage sabotage of equipment and facilities of the operators.

7.6 Conclusion

It is established that compliance mechanisms and enforcement tools exist in the regulatory framework of the petroleum sector legislations in existence in Nigeria and is achievable. However, it is conceded that they are not fully integrated into the regulatory practices and implementation efforts of the federal government.[298] This chapter has set out the actions and steps to be taken to institutionalise and strengthen compliance and enforcement. Policy-makers need to implement the law systematically and fairly, and regulated entities have to be given access to administrative review to cater to issues that may arise regarding the requisite regulation as well as timely decisions on appeals where necessary.[299] Where there is effective implementation, compliance and enforcement can become synonymous with correct posture in the conduct of business.[300]

For implementation to work, new laws and policies where necessary, need to be progressively infused into the petroleum sector regulatory framework. Countries around the world are developing environmental governance systems based on the core precepts of effective laws, disclosure, public participation, accountability, authority, dispute resolution and public integrity301 because the success of environmental regulation depends on effective monitoring and enforcement.[302] However, it is conceded that compliance levels can vary from case to case

[298] E Graham and JS Ovadia, 'Oil Exploration and Production in Sub-Saharan Africa, 1990-present: Trends and Developments' (2019) 6(2) The Extractive Industries and Society 593, 606.
[299] OECD, 'Compliance, Enforcement, Appeals.', *Better Regulation in Europe, Netherlands 2010* (OECD 2010) 107. 1. However, the administrative review is one that is carried out by the enforcement agency, an independent body and judicial review by the courts and an ombudsman.
[300] de Rosso and others (n 74) 501.
[301] S Fulton and AH Benjamin, 'Foundations of Sustainability' (2011) 28(6) Environmental Forum 32, 34.
[302] 'Indian Oil and Gas Industry Report August 2019' (2019) <https://www.ibef.org/industry/oil-gas-india.aspx> accessed 2 October 2019.

because compliance depends mostly on the government's willingness to enforce a particular law as enforcement agencies are not independent enough and lack the ability and capacity to perform their functions effectively especially in developing countries.[303] In resolving the dilemma as to what the role of compliance and enforcement should ultimately be, it lies between whether it should be in an advisory role in support of a regulatory entity's regulatory obligation or whether it should be in an adversarial role in monitoring a regulatory entity's business activities. It is suggested that future regulatory developments would likely require a combination of the two.[304]

[303] E Ostrovskaya and J Leentvaar, 'Enhancing Compliance with Environmental Laws in Developing Countries: Can Better Enforcement Strategies Help?' (9th INECE International Network for Environmental Compliance and Enforcement Conference British Columbia, Canada 20 June2011) 1, 7.

[304] KPMG, 'The Future of Compliance: Compliance Functions as Strategic Partners in the New Regulatory World' (2012) <https://www.int-comp.org/media/1048/kpmg-future-of-compliance_web_acc4.pdf> accessed 10 April 2020 28, 12.

Chapter 8

Conclusion

Introduction

At first glance, it appears that environmental regulations of the petroleum sector in Nigeria is guaranteed because of the volume of legal instruments and regulatory agencies in existence. Following the rising spate of environmental degradation resulting from the activities of the petroleum sector, this research took deeper scrutiny of the existing regulatory instruments and regulatory agencies in Nigeria. It was found that the existing legal and institutional framework for the environmental regulation of the petroleum sector in Nigeria is largely inadequate in its current form to effectively regulate the sector. This thesis applied a socio-legal methodology in resolving the research questions and adopted a doctrinal approach in analysing data gathered throughout this research. After an in-depth analysis of the legal instruments and scholarly literature on the subject, it became clear that the components of Nigerian environmental regulations which are compliance and enforcement had major flaws that made it practically impossible to sustain the environmental integrity and sustainability of the petroleum sector in Nigeria. Hence the search for a more reliable method of institutionalising compliance and enforcement of environmental regulation of the petroleum sector.

The choice of the petroleum sector in Nigeria as the case study upon which this research was based is hinged on the significance of the sector as the highest foreign exchange earner for the country upon which the economic sustenance of Nigeria rests today and the extent of environmental harm attributed to the activities of the petroleum sector and its allied businesses.

While the idea of the petroleum sector of Nigeria has continued to grow because of the potentials it holds and the relevance it commands on the international level as one of the highest producers of oil in Africa and the large natural gas deposits it still holds in its reserves, it is

naturally expected that petroleum sector business should be maintained based on an effectively regulated sector. Unfortunately, the problem of increasing environmental degradation and ineffective regulation has continued to push national efforts towards better regulatory reforms. For example, the legal framework supporting petroleum sector operations boasts of laws that were enacted over two decades ago with specific attention to how the crude oil produced from the sector is sold and what the fiscal structure should be like with the ultimate aim of profiting from the sector. It is argued that not much thought was put into harnessing the proceeds of the sector to also plan for the impact of the operations on the human and natural environment and consequently, the sustainability of the health of the environment from where the resource is being extracted.

The reality of the folly of this decision hit hard when the news broke of the dumping of toxic wastes in the small village of Koko in the former western Nigeria state of Bendel (now Delta State).[1] That act resulted in the extensive poisoning of the environment, death of the owner of the land on which the toxic wastes were kept and exposed the acute unpreparedness of the legal and institutional framework of the petroleum sector for such foreseeable dangers of inadequate environmental protection plan.[2] This signalled a new direction in the attempt of the Nigerian government to reconsider its focus in the decision to venture into the oil business. The period was characterised by the involvement of Nigeria in international and regional meetings and agreements for the protection of the environment. The rolling out of multiple laws and regulatory agencies towards environmental protection only left the Nigerian government trying to play catch up in the effort to achieve effective environmental regulation of the petroleum sector.

[1] IA Aigbe and EO Enakireru, 'Enforcement of Environmental Laws in Nigeria' (2020) 1(1) International Journal of Comparative Law and Legal Philosophy 44, 51.
[2] JO Ihonvbere, 'The State and Environmental Degradation in Nigeria: A Study of the 1988 Toxic Waste Dump in Koko' (1994) 23(3) Journal of Environmental Systems 207, 219.

This research proceeded to query how effective compliance and enforcement of environmental regulation of the petroleum sector can be institutionalised to cater to the nagging problem of environmental degradation resulting from the continuous exploitation and exploration of the petroleum sector in Nigeria.

8.1 Key arguments of this research

While the regulatory architecture in Nigeria favours a command and control system of environmental regulation, it has proved to be ineffective since regulated entities now prefer to deliberately violate the law and pay the stipulated fines. It is argued that even the punitive measure of fines does not provide any deterrent as the fines are quite low and prove easy for the violators to pay.[3] It is imperative to note here that the essence of this research is to improve compliance and only resort to enforcement when all else fails. The rationale behind this stand is that in most instances, the damages done to the human and natural environment by the activities in the petroleum sector are irreversible. Therefore, while the harmful act may be remediated, it could never revert the damaged area or lost lives to *status quo ante*. This research favours a pre-emptive regulatory style that promotes compliance and prevents environmental harm from happening *ab initio*.[4]

This research argued that the existence of laws and regulatory agencies alone is not enough to ensure the proper environmental regulation of the petroleum sector in Nigeria[5] because the existing regulatory structure suffered from many deficiencies. For instance, basic compliance

[3] See **section 3.4.3** of **Chapter 3** of this thesis.
[4] CT Brown, 'Will Remediation Ever Be Enough? The Environmental Pollution Tragedy' (2019) 5(2) International Journal of Law 28, 30.
[5] ZO Edo, 'The Challenges of Effective Environmental Enforcement and Compliance in The Niger Delta Region of Nigeria' (2012) 14(6) Journal of Sustainable Development in Africa 261, 265. See also **section 2.5** of **Chapter 2** of this thesis.

provisions were missing and where compliance provisions existed, they were barely noticeable and key strategies and processes to encourage compliance, were missing.

This research finds that the concept of institutionalisation serves to align the constituent parts (individual and collective interests) of an organisation towards achieving a collective purpose in this case, compliance and enforcement.[6] This is achieved by implementing and internalising new practices or infusing value into the organisation to create a better organisation. The relevant institutional theories help to explain the relationship between an organisation and its behaviour towards the law because behaviour is a function of the rules and incentives by which an organisation operates[7] and an organisation is usually made of smaller units or individuals that make it function.

This research finds that alternative compliance strategies exist that can serve to encourage an organisation to comply with regulation such as advice and persuasion, responsive regulation, smart regulation, criteria-based regulation, risk-based regulation, meta-regulation and self-regulation and next-generation compliance.[8] The convenience of this is that these compliance strategies can be applied alone or as a hybrid depending on the regulatory needs of the sector to achieve the desired regulatory results. It is contended that when these alternative compliance strategies are applied, there are compliance management options to measure the effectiveness of these compliance strategies. The advantage is that where a compliance strategy no longer serves the regulatory needs of the sector, the compliance management system detects it through its monitoring and assessment mechanism and alternative compliance strategies can be activated.

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[6] P Holm, 'The Dynamics of Institutionalization: Transformation Processes in Norwegian Fisheries' (1995) 40(3) Administrative Science Quarterly 398, 399. See also **section 2.5** of **Chapter 2** of this thesis.
[7] PA Hall and RC Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44 Political Studies 936, 950.
[8] N Gunningham, 'Environmental Law, Regulation and Governance: Shifting Architectures' (2009) 21 (2) Journal of Environmental Law 179, 182. See **section 3.4** of **Chapter 3** of this thesis.

Regardless of the existence of more suitable compliance options, motivations exist that drive compliance in an organisation.[9] Some of these include calculated motivation, normative motivation, social motivation, reason driven motivation, citizens-oriented motivation. Likewise, factors exist as well that inhibit compliance and prevent the regulator from effectively initiating enforcement actions even when the organisation intends to comply. These include the legal, non-legal and institutional factors. The decision to comply or not to comply with environmental regulations ultimately depends on the organisation's ability and willingness to comply.[10]

As the arm of government that interprets the law and adjudicates on disputes, this research finds that compliance and enforcement have still not found their place in the judiciary.[11] The judiciary needs to step up and act its part in institutionalising compliance and enforcement by promoting environmental rule of law and making realistic and achievable pronouncements that will promote the cause. This can be easily realised when the challenges of the judiciary concerning implementing environmental regulations are addressed. A vital step in this direction is the creation of specialised courts and establishing specialisation through continuous training in the adjudication of environmental law related matters.

This research is relevant considering that in the last fifty years that Nigeria has engaged in active petroleum production, the human and natural environment has progressively suffered. In the course of establishing laws and regulatory agencies, much thought was not put into how the laws would work and the short- and long-term interventions that would be needed if the regulatory model failed as it has proved to have failed. An example of this situation is the

[9] See **section 5.1.1** of **Chapter 5** of this thesis.
[10] M Cherbonneau and BA Jacobs, 'Imminent Capture and Noncompliance: Probing Deterrence in Extreme Environments' (2019) 36(6) Justice Quarterly 1122, 1123; AC Salihu and others, 'Analysis of the Factors Affecting Facilities Compliance to Environmental Regulations in Minna–Niger State, Nigeria' (2016) 45(2) World Scientific News 174, 180; A Nollkaemper, 'Legal Implications of the Obligation to Apply the Best Available Technology' (1993) 26 (5) Marine Pollution Bulletin 236, 238.
[11] See **section 6.3.2** of **Chapter 6** of this thesis.

struggle to review the fifty-one-year-old Petroleum Act[12] that still stands as good law as at the time of this research. The journey to review the law has lasted for over ten years because the legislative arm of government has not been able to agree on the review of relevant provisions of the new Bill.[13] It is argued that the same fate likely awaits any other legislation relating to the environment and petroleum sector that could require a review.

8.2 Institutionalised compliance and enforcement and Sustainable Development

Institutionalising compliance and enforcement in environmental and petroleum sector regulation promotes respect for nature as this is one of the core values of the United Nations Sustainable Development Goals.[14] Where there is effective compliance and enforcement, prudence will be shown in the management of the natural resources and there will be sustainable development. It is argued that Nigeria, through an effectively regulated environment and petroleum sector can move a lot faster towards achieving the SDGs and making a huge contribution to the global movement for a healthy environment. In a recent study, it was argued that environmental destruction cannot be avoided even with sustainable development.[15] The reason for this stand according to the study is that there is a failure to integrate environmental priorities into the development plans of developing countries because of lack of technical capacity, difficulty in coordinating across administrative silos in addition to the challenges discussed in **Chapter 4** which hinder effective compliance and enforcement

[12] The Petroleum Act of 1969 now Petroleum Act Cap P10 Laws of the Federation of Nigeria 2004.
[13] A Nwozor and others, 'Reform in a Limbo: The Politics and Politicization of Reforms in Nigeria's Petroleum Sector' (2020) 10(4) International Journal of Energy Economics and Policy 184, 185; AH Amadi, VD Ola and JO Ayoola, 'Review of Nigeria's Petroleum Industry Bill (PIB)' (2020) 5(9) European Journal of Engineering Research and Science 1081, 1082.
[14] An explicit statement of the supporting values of the United Nations Sustainable Development Goals can be found in the Millennium Declaration. These set of values underlying the 60 specific goals of the Millennium Development Goals, are seen as essential to international relations, freedom, equality, solidarity tolerance, respect for nature and shared responsibility. See KW Robert, TM Parris and AA Leiserowitz, 'What is Sustainable Development? Goals, Indicators, Values, and Practice' (2005) 47(3) Environment: Science and Policy for Sustainable Development 8, 16.
[15] Y Zeng and others, 'Environmental Destruction Not Avoided with the Sustainable Development Goals' (2020) 3(10) Nature Sustainability 795, 796.

processes.[16] The study however agrees that addressing these challenges can deal with the findings of the study.[17]

The above assertion essentially aligns with the general and sector-specific reform suggestions in **Chapter 6** of this thesis. Furthermore, addressing these challenges can further the course of the United Nations Sustainable Development Goals (SDGs) because the SDGs contain significant, broad and ambitious environmental content.[18] Improving access to information and promoting public participation in environmental decision making facilitates access to inclusive and equitable quality education at all levels and promote lifelong learning as expressed by Goal 4 of the SDGs.[19] Application of cleaner business and production practices through advanced technology promotes Goal 9 of the SDGs which is centred on three main pillars: industry, infrastructure and innovation. It acknowledges that industrialisation must be inclusive, environmentally sound and sustainable, that infrastructure must be resilient, and that technology must play a central role in achieving these aims through resource and energy efficiency and access to digital technologies.[20] One of the reform proposals in this thesis is the consolidation of regulatory legal instruments and agencies and the creation of Environmental Courts and Tribunals to facilitate compliance and enforcement and access to court in pursuit of environmental justice.[21] This aligns with the Peace, Justice and inclusive institutions thrust of goal 16 of the SDGs. It has been noted that development is linked to peace, and insecurity and

[16] ibid 796.
[17] ibid 798.
[18] M Elder and SH Olsen, 'The Design of Environmental Priorities in the SDGs' (2019) 10(1) Global Policy 70, 80.
[19] E Unterhalter, 'The Many Meanings of Quality Education: Politics of Targets and Indicators in SDG 4' (2019) 10(1) Global Policy 39, 39. This is a shift from the narrow focus on universal primary education in the Millennium Development Goals framework goal 2. See also **section 7.5.2** of **Chapter 7** of this thesis.
[20] MF Tomaselli and others, 'SDG 9: Industry, Innovation and Infrastructure–Anticipating the Potential Impacts on Forests and Forest-Based Livelihoods' in P Katila and others (ed), *Sustainable Development Goals: The Impacts on Forests and People* (Cambridge University Press 2019) 279, 279, 280. See **sections 7.5.6** and **7.5.7** of **Chapter 7** of this thesis.
[21] See **sections 7.4.1** and **7.4.2** of **Chapter 7** of this thesis.

conflicts are major development challenges that can set back development gains and negatively affect foreign direct investment.[22]

8.3 Institutionalised Compliance and enforcement and transformative change towards good institutional governance

Gass defined transformation as an approach and a methodology for individual, organisational and societal change that creates breakthroughs in the way people think, feel and behave while simultaneously working to shift the structural conditions in which they operate.[23] It is a societal change in terms of technological, economic and social structures and includes both personal and social transformations,[24] shifts in values and beliefs and patterns of social behaviour.[25] It has been noted that achieving key societal goals associated with sustainability of the environment requires transformative change. Transformative change involves changes in social structures and relations, norms and institutions, both formal and informal, that shape the behaviour of people and organizations in the social, economic, environmental and political spheres.[26]

To realise this transformative change, Chan *et al* identified eight leverage points and five levers that can be applied across the eight leverage points to facilitate this change.[27] Leverage points are places within a complex system such as a corporation or an economy where a small shift in

[22] RH Kempe, 'Peace, Justice and Inclusive Institutions: Overcoming Challenges to the Implementation of Sustainable Development Goal 16' (2020) 32(1) Global Change, Peace & Security 57, 58; G Kpae, 'Impact of Oil Exploration on the Niger Delta: The Drivers and Dynamics of Conflict over Environmental Degradation' (2021) 7(1) Journal of Advances in Social Science and Humanities 1382, 1389.
[23] R Gass, *What is Transformation: And How Does it Advance Social Change?* (Social Transformation Project 2012) 52, 21.
[24] Kei Otsuki, *Transformative Sustainable Development Participation, Reflection and Change* (1st edn, Routledge 2014) 152.
[25] BC Chaffin and others, 'Biological Invasions, Ecological Resilience and Adaptive Governance' (2016) 183 Journal of Environmental Management 399.
[26] United Nations Research Institute for Social Development, 'Understanding Transformation for Sustainable Development' (2018) <https://www.unrisd.org/flagship2016-chapter1> accessed 6 February 2021.
[27] KM Chan and others, 'Levers and Leverage Points for Pathways to Sustainability' (2020) 2(3) People and Nature 693, 699.

one element can produce big changes in everything.[28] The eight leverage points are Visions of a good life, Total consumption and waste, Latent values of responsibility, Inequalities, Justice and inclusion in conservation, Externalities from trade and other telecouplings, Responsible technology, innovation and investment, and Education and knowledge generation and sharing.[29] The five levers are Incentives and capacity building, Coordination across sectors and jurisdictions, Pre-emptive action, Adaptive decision-making and Environmental law and implementation.[30] It was noted that applying the approach of leverage points and levers can facilitate a paradigm shift and societal transformation when the desire for change coincides with the practical means to achieving the desired change.[31] The various reforms to institutionalise compliance and enforcement discussed earlier can ride on the outlined leverage points and levers.[32]

As noted earlier, institutionalisation is a gradual process that brings incremental changes in an organisation and structural changes in regulation and institutions.[33] In the context of this research, institutionalisation translates to housing compliance and enforcement mechanisms in environmental and petroleum sector regulations to make the option of compliance a more viable and attractive option to petroleum sector operators thereby progressively introducing fundamental changes. It is argued that institutionalisation of compliance and enforcement can promote transformation in the way sector operators and other stakeholders respond to environmental and petroleum sector regulation. Regulators across the world have increasingly

[28] DH Meadows, 'Places to Intervene in a System' (1997) <https://www.bfi.org/sites/default/files/attachments/pages/PlacesInterveneSystem-Meadows.pdf> accessed 6 February 2021.
[29] Chan and others (n 27) 699 – 702.
[30] ibid 699 – 702.
[31] J Fischer and M Riechers, 'A Leverage Points Perspective on Sustainability' (2019) 1(1) People and Nature 115, 119.
[32] See **sections 7.4** and **7.5** of **Chapter 7** this thesis.
[33] See **section 2.3** of **Chapter 2** of this thesis. *Institutionalising the Environmental Planning and Management (EPM) Process* Vol 5 (Sustainable Cities Programme (SCP) Source Book Series UN-HABITAT 1999) 11, 14 and BG Peters, *Institutional Theory: Problems and Prospects* (Reihe Politikwissenschaft (Vienna, Austria) No 69 (Institut für Höhere Studien (IHS) 2000) 1.

moved away from the command and control strategy of environmental protection towards a more participatory and more cooperative strategy of environmental regulation.[34] Institutionalisation of compliance and enforcement can improve environmental and petroleum sector regulation through incremental change, reform and transformation that can effectively meet the real challenges therein.

8.4 Conclusion

It has been noted that in all areas of law, there are gaps between the "law on the books" and the "law in action" and this is very much evident in environmental law. As Farber succinctly puts it, "There is many a slip 'twix the cup and the lip" but environmental law scholarship has focused on standard-setting "cup" rather than the non-compliance "slip."[35] According to Farber, environmental law scholarship has focused more on standards governing pollution, hazardous waste, and preservation of wilderness and wildlife.[36]

This has been the case in environmental regulation of the petroleum sector in Nigeria. Therefore, this research emphasises that it is time to concentrate on "the slip" and not "the cup" because therein lies the silver bullet to resolve regulatory failure in the Nigerian petroleum sector. One of the ways to institutionalise compliance and enforcement among many others is to develop instruments that house compliance strategies to strengthen the capacity of regulated entities to comply.[37] Well-designed and enforced regulations are attractive to regulated entities to adhere to.[38] Institutionalisation of compliance and enforcement mechanisms will solve the problem of the failure of compliance and enforcement of environmental regulation because it

[34] PC Yeager, 'The Elusive Deterrence of Corporate Crime' (2016) 15 (2) Criminology & Public Policy 439.
[35] DA Farber, 'Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law' (1999) 23(2) Harvard Environmental Law review 297, 297.
[36] ibid 297.
[37] TA Börzela and A Buzogány, 'Compliance with EU Environmental Law: The Iceberg is Melting' (2019) 28(2) Environmental Politics 315, 331.
[38] P Kellett, 'Securing High Levels of Business Compliance with Environmental Laws: What Works and What to Avoid' (2020) 32(2) Journal of Environmental Law 179, 193.

will house the relevant compliance and enforcement mechanisms suitable to the Nigerian context, in the body of the regulations. Therefore, institutionalisation helps to align individual interests thereby creating a solution to a collective problem.[39] Furthermore, the repeated practice of these strategies in environmental regulation will produce habituated actions that will form an effectively regulated environment and petroleum sector.[40] The flexibility to adopt alternative compliance and enforcement strategies allows the regulators to monitor, assess and measure the continued relevance of a chosen set of strategies and to adopt new strategies as the regulatory demands change.

The essence of this research is to avoid the occurrence of any severe form of environmental damage by ensuring that petroleum operations are carried on with the full compliance of petroleum sector operatives rather than just seek solutions to environmental problems that could have been avoided if there was compliance in the first instance.

[39] Holm (n 6) 399.
[40] T Lawrence, R Suddaby and B Leca, 'Institutional Work: Refocusing Institutional Studies of Organization' (2011) 20(1) Journal of Management Inquiry 52, 54.

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List of Abbreviations and Acronyms

ACHPR - African Charter on Human and Peoples' Rights

ACHPR - African Commission on Human and Peoples' Rights

CEDAW - Convention for the Elimination of All Forms of Discrimination Against Women

CFRN - Constitution of the Federal Republic of Nigeria

CNA - Clean Nigeria Associates

COA - Court of appeal

CSR Corporate Social Responsibility

DPR - Department of Petroleum Resources

ECN - Energy Commission of Nigeria

ECOWAS - Economic Community of West African States

EGASPIN - Environmental Guidelines and Standards for the Petroleum Industry in Nigeria

EIA - Environmental Impact Assessment

EU – European Union

EWCA

EWCA – England and Wales Court of Appeal

FAQ – Frequently Asked Questions

FEPA - Federal Environmental Protection Agency

FHC - Federal High Court

FME - Federal Ministry of Environment

FMWR - Federal Ministry of Water Resources

FODP - Fundamental Objectives of Directive Principles

FRN - Federal Republic of Nigeria

FRSC - Federal Road Safety Commission

ICA - International Compliance Association

INECE - International Network for Environmental Compliance and Enforcement

LNG – Liquefied Natural Gas

LPELR-CA - Law Pavilion Electronic Law Report- Court of Appeal

MDG - Millennium Development Goals

MHWUN - Medical and Health Workers' Union of Nigeria

MoPNG - Ministry of Petroleum and Natural Gas

NBMA - National Bio-Safety Management Agency

NCLR – Nigeria Constitutional Law Report

NESREA - National Environmental Standards Regulations Enforcement Agency

NGO – Non-Governmental Agency

NIPOST – Nigeria Postal Agency

NNPC - Nigeria National Petroleum Company

NNRA - Nigerian Nuclear Regulatory Authority

NOA - National Orientation Agency

NOSCP - National Oil Spill Contingency Plan

NOSDRA - National Oil Spill Detection Response Agency

NPA - Nigeria Ports Authority

NSCDC - Nigeria Security and Civil Defence Corp

NWLR - Nigeria Weekly Law Report

NWLR – Nigeria Weekly Law Report

RoN – Rights of Nature

SC - Supreme Court

SCNJ – Supreme Court of Nigeria Judgement

SDG - Nations Sustainable Development Goals

SERAP - Socio-economic Rights and Accountability Project

SHC - State High Court

SPDC – Shell Petroleum Development Company

UKSC – United Kingdom Supreme Court

UNEP - United Nations Environment Programme

US EPA - United States Environmental Protection Agency

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