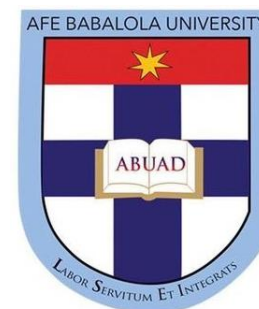




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## MAINSTREAMING DISTRIBUTIVE JUSTICE INTO RESOURCES MANAGEMENT IN NIGERIA: THE EXTENT OF THE PETROLEUM INDUSTRY ACT 2021

Uche Val Obi, SAN, FCArb\*

### ABSTRACT

The distribution of petroleum resources has always been an issue of serious controversy in the Nigerian state under the previous petroleum regime. Thus, this paper examined the extent to which the newly enacted Petroleum Industry Act (PIA) 2021 has engrained distributive justice with respect to petroleum resources management. It concludes that the PIA has made giant strides towards this end, in view of the creation of the Host Communities Development Trust Fund, Frontier Basin Exploration Fund and improved environment protection measures. However, this study identified certain factors which will limit the full realisation of the distributive justice intendment of the Act. It is, therefore, submitted that until these issues are addressed, distributive justice would continue to remain elusive for petroleum resources management.

**Keywords:** Distributive Justice; Energy Justice; Petroleum Resource Management; Host Communities Right; Frontier Exploration Fund.

## 1. INTRODUCTION

The petroleum industry in Nigeria has continued to remain the main stay of Nigeria's economy since the country's attainment of independence.<sup>1</sup> This is due to the country's high endowment in petroleum and natural gas. The way the petroleum industry has been operated over the years has given various stakeholders serious cause for concern. Most of the vexed issues that have given rise to agitations include but are not limited to issues such as: resource control over natural resources, environmental degradation, controversies regarding the distribution of oil revenue. Most Nigerians, particularly of the oil producing states, have decried the inequitable distribution of petroleum revenue by the Nigerian state. The pre-existing legal regime did not create a framework for fair distribution of petroleum resources amongst stakeholders, thereby giving rise to resource conflict which lasted for many years.<sup>2</sup> Indeed, this and many more reasons called for the overhaul of the pre-existing petroleum industry regime.

The Petroleum Industry Act (PIA) was enacted in 2021. The Act is a radical piece of legislation which effectively repealed over 15 pre-existing oil sector laws,<sup>3</sup> although some of the pre-existing laws are retained or saved. Following the reviews which have

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<sup>1</sup> Eti B Herbert, 'Legal Mechanism for Blowing the Whistle against Incidence of Tax Haven in Nigeria', (2019) 12 (4) OIDA International Journal of Sustainable Development 33, 33.

<sup>2</sup> Johnson Osagie and Others, 'Conflicts in the Niger Delta Region of Nigeria as Expressed by the Youth in Delta State', (2010) 5 *Procedia Social and Behavioural Sciences* 82, 89.

<sup>3</sup> PIA 2021, ss 310 and 311 (9).

heralded the emergence of the Act, it has become pertinent to examine whether the Act has successfully engendered distributive justice into the management of petroleum resources in Nigeria. Relying on the theoretical framework of energy justice, narrowed down to distributive justice perspective, which is a derivative of natural law jurisprudence, this study shall assess the extent to which the PIA has entrenched distributive justice into petroleum resource management in Nigeria.

Energy justice is a concept which projects that cost/benefit consideration in the utilisation for energy resources, in a manner that would incorporate the interest of various stakeholders. The infusion of justice as a prism for measuring energy law, has subjected energy law to the tag of either 'just' or 'unjust', in line with the persuasion of natural law jurist.<sup>4</sup> With reference to distributive justice, can the PIA 2021 be rightly described as a just energy law? This paper seeks to address these challenges.

The need for the entrenchment of distributive justice in the energy sector cannot be overemphasised, considering that petroleum resources is the commonwealth of the Nigerian people. As such, there is a need to ensure that the interest of various stakeholders in the sector is put into perspective in the management and distribution of the resources accruing from the sector. While it is agreed that one of the objectives of enacting PIA 2021 is to attain this objective, the extent to which the Act has or is likely to attain this objective is what this paper seeks to

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<sup>4</sup> Munoz M Cabre and J Vega-Araujo, 'Considerations for a Just and Equitable Energy Transition', (Stockholm Environment Institute, 2022) <[https://www.sei.org/wp-content/uploads/2022/05/energy-transitions-stockholm50background\\_paper.pdf](https://www.sei.org/wp-content/uploads/2022/05/energy-transitions-stockholm50background_paper.pdf)> accessed 10 September, 2023; Dante Dalabajan and Others, 'Towards a Just Energy Transition: Implication for Communities in Lower- and middle- Income Countries', (Oxford Research Report, 2022) <<https://oxfamilibrary.openrepository.com/bitstream/10546/621455/1/rr-just-energy-transition-071222-en.pdf>> accessed 10 September, 2023.

scrutinise. This paper shall add its voice to the energy justice discuss from a practice perspective, hence its specific focus on the PIA 2021.

This article is divided into five parts. Part one is the introduction, which sets out the agenda for the study. Part two identifies the theoretical and conceptual framework of the study. Specifically, this section discusses the concept of energy justice; while part three focuses on the distributive justice element of energy justice. Part four traces the various imprint and reflection of distributive justice in the PIA 2021. The various aspects of distributive (energy) justice identified in the PIA shall be critically examined in the subsections under part four. Part five is the concluding section. It discusses the summary of research findings and makes final submissions accordingly.

## 2. THEORETICAL UNDERPINNINGS OF DISTRIBUTIVE JUSTICE

The concept of justice is a derivative of natural law jurisprudence. The word ‘justice’ derives its etymological root from the Latin expression, ‘justitia’.<sup>5</sup> While the term suffers from lack of scientific precision in its definition, it connotes equality, equity, fairness, uprightness or receiving what is due to one.<sup>6</sup> It has also been defined as the “the fair and proper administration of laws”.<sup>7</sup> To the natural law jurist, justice is a yardstick for

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<sup>5</sup> Nicolae V Dura, “Jus” (Law) and “Justitia” (Justice) in Roman Solicitors’ Perception and Definition. Reflection and Evaluation’, (2019) 7 (2) Logos Univ ersality Mentality Education Novelty: Law 45, 45.

<sup>6</sup> Ademola O Ojekunle, ‘Meaning of Law, its Function and Relationship with Some Related Concepts’, in Adewale Taiwo and Ifeolu J Koni, ed. Jurisprudence and Legal Theory in Nigeria (Princeton, 2019) 37.

<sup>7</sup> Brian A Garner, Black’s Law Dictionary (7<sup>th</sup> ed. West Group, 1999) 867. The court, in *Etim v. AG Akwa Ibom & Ors.* (2016) LPELR-40129(CA) adopted this definition.

measuring the validity or otherwise of law. In other words, the end of law should be justice; hence, any law which does not promote justice is not to be regarded as law properly so called.<sup>8</sup> Socrates, Plato, Aristotle and other ancient Greek natural law philosophers had expounded on various theories of justice, which have been further categorised into: universal justice, social justice, political justice, distributive justice, retributive justice, restorative justice, corrective justice, substantive justice, procedural justice, etc.<sup>9</sup>

John Rawls, which represents a contemporary proponent of natural law philosophy, expounded justice from the perspective of fairness. The Supreme Court of Nigeria appears to have aligned with the contemporary perspective of natural law when it held that, justice is the application of fair treatment in the course of making its decision on contending rights between parties.<sup>10</sup> In so doing, the court has to ensure the definite and apparent display of fairness from the viewpoint of officious bystanders.<sup>11</sup> Rawls contends that, imbued in every human is an inviolable right resting on the fundamental principles of justice, which cannot be overridden by collective rights.<sup>12</sup> Typical of most naturalist theorists, Rawls measured the validity of every societal laws and institutions from the prism of justice. Rawls also perceives justice as a distributor of social primary goods.<sup>13</sup> Distributive justice has been described as the most fundamental aspect of justice considering its significance to the dissemination

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<sup>8</sup> Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 2009) 70.

<sup>9</sup> Juan M Elegido, *Jurisprudence* (1st edn. Spectrum Books, 1994) 363-365.

<sup>10</sup> *Obajinmi v. Adedeji* (2008) 3 NWLR (Pt. 1073) 19-20.

<sup>11</sup> *ibid.*

<sup>12</sup> John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 3.

<sup>13</sup> *ibid.* 6.

of economic resources.<sup>14</sup> It has also been contended that the tangible currency of distributive justice is quality of life and equal opportunity for all to access quality life.<sup>15</sup> This would entail striking a balance between the contending claims of parties regarding the material goods available for distribution.<sup>16</sup>

### 3. INTERPLAY OF DISTRIBUTIVE JUSTICE IN ENERGY JUSTICE POSTULATION

The concept of justice is a universal standard that has been applied to various phenomena or industries. The energy sector is not left out, hence the birthing of the concept of energy justice. The energy justice movement started to gain prominence in 2013, when energy law scholars began to advocate for the application of principles of justice in the operations of the energy sector. Energy justice has been defined as an energy system which contemplates fair dissemination of “both the benefits and costs of energy services”, while incorporating “representative and impartial decision making” process.<sup>17</sup> It seeks to determine the complex equity questions of who is entitled to what and the standard procedures for reaching such distribution formulae.<sup>18</sup> While energy justice implicates infusing human rights elements in the energy life-cycle, it does not speak of justice in the abstract sense, but also targeted towards the attainment of ‘just’ societal

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<sup>14</sup> Raphael J Heffron, Darren McCauley and Gerardo Z de Rubens, ‘Balancing the Energy Trilemma through the Energy Justice Metric’, (2018) 229 *Applied Energy* 1191, 1193.

<sup>15</sup> Peter Vallentyne, *Distributive Justice* <<https://core.ac.uk/download/pdf/62769502.pdf>> accessed 25 April 2023.

<sup>16</sup> Yahaya Abubakar and Musa P Onuche, ‘Distributive Justice and the Niger Delta Question in Historical Perspective’, (2022) 8 (1) *Journal of Humanities and Social Policy* 42, 44.

<sup>17</sup> Benjamin K Sovacool and Michael H Dworkin, ‘Energy Justice: Conceptual Insights and Practical Applications’, (2015) 142 *Applied Energy* 435, 436.

<sup>18</sup> *ibid.* 437.

goal.<sup>19</sup> Expounding further, energy justice theorists developed eight core standards of measure, including: energy availability, energy affordability, compliance with due process, transparency and accountability, energy sustainability, inter-generational equity and responsibility.<sup>20</sup>

Energy justice is delineated into the tripod tenets of recognitive, procedural and distributive justice.<sup>21</sup> The recognition justice criteria advocate for a recognition, incorporation, and participation of energy communities as key stakeholders in the decision-making processes. This offers individual members of energy communities the platform to attain their potential as positive contributors to community development.<sup>22</sup> Other ideals, such as: community benefits and consumer protection are also within the contemplation of this variant of energy justice.<sup>23</sup> It does not just stop with identifying the parts of society undergoing distributive justice deficiency, it also caters for the interest of groups suffering from marginalisation, representation or misrepresentation.<sup>24</sup> Energy justice also play out on the energy transition discuss. With respect to energy transition,

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<sup>19</sup> Ademola O Jegede, 'Should They 'Just' Leave? Global Energy Transition, Climate Change and the Protection of Workers' Rights in South Africa' (2021) 19 (1) *Oil, Gas & Energy Law Intelligence* 1, 4.

<sup>20</sup> Benjamin K Sovacool and Others, 'Energy Decisions Reframed as Justice and Ethical Concerns', (2016) 24 *Nature Energy* <<https://doi.org/10.1038/nenergy.2016.24>> accessed 25 June, 2023.

<sup>21</sup> Darren McCauley and Others, 'Advancing Energy Justice: The Triumvirate of Tenets', (2013) 32 (3) *International Energy Law Review* 107, 107.

<sup>22</sup> Thoko Kaime and Godswill Agbaitoro, 'An Energy Justice Approach to Resolving the Conflict between the Development of Energy Access Projects and Human Rights Risks and Violations in Africa: Can a Balance be Struck?' (2022) 3 (1) *Global Energy Law and Sustainability* 39, 62.

<sup>23</sup> Lea Diestelmeier, 'Citizen Energy Communities as a Vehicle for a Just Energy Transition in the EU - Challenges for the Transposition', (2021) 19 (1) *Oil, Gas & Energy Law Intelligence* 1, 11.

<sup>24</sup> Kirsten Jenkins and Others, 'Energy Justice: A Conceptual Review', (2016) 11 *Energy Research & Social Science* 174–177.



Olawuyi pointed out the need to incorporate the interest of underprivileged workers and vulnerable groups in the aftermath of energy transition the protection of the in the energy sector.<sup>25</sup> This also accords with the tenet of recognition justice in the energy sector, as it acknowledges the interest of a group as beneficiaries of the energy sector.

The procedural justice dimension of the energy justice is concerned about the process in the administration and operation of the energy sector. Best practices require that the energy sector decision-making process should be guided by ideals such as: compliance with due process, wide consultation of stakeholders, transparency, and accountability. Again, for consultation to be adjudged effective, it must entail a two-way traffic communication between operators and stakeholders, in alignment with the structural compartment of the community.<sup>26</sup> By complying with the procedural justice tenets, operators obtain social licence to operate, which confers legitimacy, credibility and trust on their going extractive concerns.<sup>27</sup>

In applying distributive justice in the context of the energy sector, it has been described as a ‘socio-spatial concept directing attention to patterns in the location and dissemination of energy

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<sup>25</sup> Damilola S Olawuyi, ‘The Role of Natural Gas in a Just and Equitable Energy Transition’, in Damilola S Olawuyi and Eduardo G Pereira, eds. *The Palgrave Handbook of Natural Gas and Global Energy Transitions* (Palgrave Macmillan, 2022) 73, 77.

<sup>26</sup> Madeline Taylor and Susanne Taylor, ‘Applying Energy Justice Principles: A Case Study of Solar Energy in Vanuatu’, (2022) 15 *Journal of World Energy Law and Business* 193, 209.

<sup>27</sup> Gokce Mete, Marina Yamamoto and Gulzhan Kozhabayeva, ‘Tracing Social Licence to Operate in the Mining Sector of Mongolia, Kazakhstan and Uzbekistan’, (2020) 18 (1) *Oil, Gas & Energy Law Intelligence* 1, 2.

goods and ills.<sup>28</sup> Put differently, are the benefits and burden accruing from the energy sector borne equitably by the various stakeholders?<sup>29</sup> Benefits and burden would necessarily go side by side. Distributive energy justice also accords with the environmental justice movement which partly advocates for equal distribution of environmental risks, with environmental laws preferring cautionary measures over curative measures to environmental protection.<sup>30</sup> Thus, the recent judicial liberalisation of individual rights to maintain action against adverse environmental implications of exploration activities of multinational companies<sup>31</sup> has been described as a positive for distributive justice in the Nigerian energy sector.<sup>32</sup> Aspects of energy justice also feature in energy transition, as it implicates shifting of costs and benefits.<sup>33</sup>

From the above, it could be seen that the distribution of the benefits accruing to the state from the exploration of petroleum resources does not necessarily mean energy resources have to be distributed in equal measure between respective stakeholders. Indeed, to do so would amount to injustice, as the equities are never equal in practical terms. It is important to factor the distribution of burden into energy justice, considering the

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<sup>28</sup> Paul Munro, Greg van der Horst & Stephen Healy, 'Energy Justice for all? Rethinking Sustainable Development Goal 7 through Struggles over Traditional Energy Practices in Sierra Leone' (2017) 105 Energy Policy 35-41.

<sup>29</sup> Raphael J Heffron and Darren McCauley, 'The Concept of Energy Justice Across the Disciplines', (2017) 105 Energy Policy 658, 658.

<sup>30</sup> *ibid.* 663.

<sup>31</sup> Generally, see *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation* (2019) 5 NWLR 518.

<sup>32</sup> Eghosa Ekhator and Edward Okumagba, 'Climate Change, Multinationals and Human Rights in Nigeria: A Case for Climate Justice' in Kim Bouwer and Others (eds) *In Pursuit of Climate Justice in Africa* (Bristol University Press, 2024) <[https://ssrn.com/sol3/papers.cfm?abstract\\_id=4320843](https://ssrn.com/sol3/papers.cfm?abstract_id=4320843)> accessed 11 September 2023.

<sup>33</sup> Lea Diestelmeier, *supra* (n. 23) 9.

pollution potential of most energy sources and the regulatory weakness of Nigeria to stem out or at least minimise environmental pollution from petroleum exploration and production activities. As a curative mechanism, restorative justice comes in handy to remediate instances of breakdown or gap in distributive justice during energy sector operations.<sup>34</sup>

#### 4. REFLECTION OF DISTRIBUTIVE JUSTICE IN THE PETROLEUM INDUSTRY ACT 2021

As noted above, the PIA 2021 has revolutionised the legal and regulatory landscape of petroleum industry in Nigeria. It repealed several pre-existing legislations in the sector. The Act also largely consolidates the petroleum law framework scattered around various statutes, into a one-stop shop statute for the sector. The exception is those statutes expressly saved by the Act, such as some provisions of the Petroleum Act of 1969. Again, it must be ensured that there are no conflicts or inconsistency with the provisions of the PIA, which shall be overriding.<sup>35</sup>

Apart from its objective of streamlining the sector regulatory regime, the Act principally seek to address the shortcomings and challenges in the petroleum industry regime.<sup>36</sup> This paper shall examine the various innovative provisions pertaining to petroleum resources management, to measure its adherence to the distributive (energy) justice imperatives as canvassed by energy justice proponents. The various aspects under which this

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<sup>34</sup> Maryam Hazrati and Raphael J Heffron, 'Conceptualising Restorative Justice in the Energy Transition: Changing the Perspectives of Fossil Fuels', (2021) 78 Energy Research & Social Science 1, 4.

<sup>35</sup> The Petroleum Industry Act 2021, s. 310, 311, 317 (1) and (2).

<sup>36</sup> Ngozi C Ole and Eti B Herbert, 'The Nigerian Offshore Oil Risk Governance Regime: Does the Petroleum Industry Act 2021 Address the Existing Gaps?', (2022) 31 (3) Studia Iuridica Lublinensia 143, 146.

will be considered are host communities right; frontier basins exploration; environmental protection and appointment of board members of the Host Community Development Trusts (HCDT).

#### **4.1 Host Communities Right**

Prior to the enactment of the PIA, the existing legal framework in the petroleum sector did not recognise host communities' entitlement to proceed of petroleum exploration in their communities.<sup>37</sup> In Nigeria, the federal government has the absolute ownership rights to petroleum and other mineral resources embedded within the Nigerian territory.<sup>38</sup> This effectively confers on the federal government the entitlement to the proceeds of petroleum resource exploration in Nigeria. The only known related right arising is that which is accruable to states within whose territory the petroleum resources were produced. This is the basis for the application of derivation principle, which entitles such states to be allocated 13% of revenue converted from such petroleum resources.<sup>39</sup>

In view of the foregoing, host communities were constantly at the mercy of the federal and state governments, and multinational and local producing companies operating within their communities since they are concessionaires and licensees of the federal government and not the aboriginal landowners. The result of this situation was an impoverished host community which lacked basic social amenities, labouring with huge infrastructural decay, environmental degradation, and poor standard of living, despite the abundant mineral resources

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<sup>37</sup> Macaulay JD Akpan, 'Petroleum Industry Act in Nigeria: An Analysis of the Impact of the Novel Host Communities Development Trusts Provision', (2021) 9 (7) *Global Journal of Politics and Law Research* 30, 31.

<sup>38</sup> Constitution of the Federal Republic of Nigeria (CFRN) 1999, s. 44 (3); PIA 2021, s. 1.

<sup>39</sup> CFRN, s. 162 (2).

extracted from their lands. Although most multinational corporations commissioned developmental projects in their host communities as part of their corporate social responsibilities, they were not legally bound to do so.<sup>40</sup> Hence, they could decide to do otherwise. These were the major causes of the agitation for resource control and resource conflict, synonymous with that regime, all in a bid to address the distributive injustice.<sup>41</sup> The creation of the HCDTF in the PIA 2021 simply standardised and input obligatory legal order to the pre-existing corporate social responsibility initiatives of operators within the petroleum industry. This has effectively given a legal impetus towards the realisation of distributive justice in the sector.

One of the major constraints that stalled the enactment of the PIA for over 20 years was the competing claims over the equitable distribution of resources generated from petroleum resources. The requisite majority votes and support could hardly be attained, due to division amongst lawmakers along the north/south divide.<sup>42</sup> For instance, serious controversy trailed the insertion of the Frontier Basin Development Fund, which is perceived to favour the interest of the northern part of Nigeria.<sup>43</sup> The sector operators also expressed reservations regarding the

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<sup>40</sup> Frederick Ahen and Joseph Amankwah-Amoah, 'Institutional Voids and the Philanthropization of CSR Practices: Insights from Developing Economies' (2018) 10 Sustainability 1, 1.

<sup>41</sup> Donatus U Nwachukwu, 'Distributive Justice and its Realization in Nigeria: Philosophy and Education as a Roadmap to Change for a Multi-Cultural Society' (PhD Dissertation, Rostock University 2021) 118.

<sup>42</sup> 'PIA: A Revolutionary Law and its Many Controversies', Thisday 22 February 2021 <<https://www.thisdaylive.com/index.php/2021/08/22/pia-a-revolutionary-law-and-its-many-controversies>> accessed 10 September 2023.

<sup>43</sup> Kasirim Nwuke, 'Nigeria's Petroleum Industry Act; Addressing Old Problems, Creating New Ones', (Brookings Institute, 2021) <<https://www.brookings.edu/articles-petroleum-industry-act-addressing-old-problems-creating-new-ones/>> accessed 10 Sep- tember 2023.

new fiscal regime.<sup>44</sup> The delay in the enactment of the Act was a combined consequence of these factors.

The eventual enactment of the PIA in 2021 seems to have changed some of these narratives,<sup>45</sup> as it has now given recognition and create some rights accruable to host communities in the petroleum upstream, midstream and downstream operations in Nigeria.<sup>46</sup> A core objective of the Act is to guarantee sustainable prosperity deliverables to host communities.<sup>47</sup> These are typically realised through delivery of socio-economic projects towards community development as explicated in Section 239 of the Act. The implication of qualifying prosperity with the sustainability requirement is that the law intends to uplift host communities away from the poverty line and position them on a higher standard of living. This accord with measure social, economic, environmental, and intergenerational dimensions of sustainable development goals.

Towards this end, the Act created a Host Community Development Trusts (HCDDT) for the benefit of host communities. The HCDDT is fashioned in the likeness of the trust arrangement practiced under English law; with the operators of the various joint ventures in the petroleum industry acting as the settlor, while the host communities are the beneficiaries.<sup>48</sup> The settlor has the obligation to incorporate the HCDDT and appoint board of trustees for the purpose of managing the fund on behalf

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<sup>44</sup> Babajide Komolafe, 'PIB: Minister, Operators Disagree on Fiscal Regime', Vanguard, 5 December 2012 <<https://www.vanguardngr.com/2012/12/pib-minister-operators-disagree-on-fiscal-regime/>> accessed 10 September 2023.

<sup>45</sup> Chapter 3 of the PIA 2021 is dedicated to addressing host communities' concerns.

<sup>46</sup> Resolution Law, 'Nigeria: Overview of the New Petroleum Industry Act 2021' (Mondaq, 2021) <<https://www.mondaq.com/nigeria/oil-gas-electricity/1113104/overview-of-the-new-petroleum-industry-act-2021>> accessed 17 April 2022.

<sup>47</sup> PIA 2021, s. 234 (1) (a).

<sup>48</sup> *ibid.* s. 235 (2) and (3).

of the host communities.<sup>49</sup> This will effectively clothe the body with the requisite legal personality to act as trustee. The settlor also has obligation to carry out needs assessment detailing the economic, social, and environmental consideration,<sup>50</sup> which will eventually culminate into community development plan to be implemented by the HCDF.<sup>51</sup>

The financing for undertaking the various developmental strides for the host communities is to be achieved through the HCDF. The major funding source of the HCDF is the 3% operating expenses incurred in upstream petroleum operations in each preceding financial year, which each settlor is obligated to contribute to the fund annually.<sup>52</sup> Other sources of the fund include: donations, gifts, grants, profits, and interest ensuing from the HCDF reserve funds<sup>53</sup> and investments.<sup>54</sup> The HCDF is not subject to any form of taxation.<sup>55</sup>

The creation of the HCDF is a clear reflection of the distributive justice principle. This is because the HCDF has now considered the interest of the host communities, which were previously schemed out of the huge benefits accruing from the petroleum resources explored within their communities.<sup>56</sup> This is notwithstanding the environmental degradation which host communities suffered because of petroleum exploration and production activities in their communities.

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<sup>49</sup> Ibid. ss. 235 (1) (4) and 243.

<sup>50</sup> *ibid.* s. 251 (2).

<sup>51</sup> *ibid.* s. 235 (7).

<sup>52</sup> *ibid.* s. 240 (2).

<sup>53</sup> *ibid.* s. 240 (3) and (4).

<sup>54</sup> *ibid.* s. 244 (b).

<sup>55</sup> *ibid.* s. 256.

<sup>56</sup> Olutumbi A Babayomi, 'A Review of the Key Provisions of the Petroleum Industry Bill and the Implications on Deregulation' (2014) 3 (1) Afe Babalola University: Journal of Sustainable Development Law and Policy 189, 199.

The pertinent question now is what qualifies a community to be ascribed with the status of a host community that would entitle it to a share of the distribution scheme of the HCDTF. According to the PIA 2021, host communities means “communities situated in or appurtenant to the area of operation of a settlor, and any other community, as a settlor may determine”.<sup>57</sup> Section 235 (3) PIA 2021 further provides that, in the case of operators undertaking petroleum operations in shallow water or deep offshore, the communities by the shoreline and other communities determined by the settlor will be conferred with the status of host communities.

Although the forgoing provisions explicitly set out criteria to determine host communities, they allow for some vagueness, ambiguity, arbitrariness, and unquestionable discretion to be used to determine some qualifiers by the licensee (settlor). This is oblivious of the transparency requirement which is the foremost energy justice principle. Also, the wide discretion to be exercised by the settlor gives room for unfair exclusion of communities who may be ordinarily entitled to a measure of petroleum resources or the inclusion of communities who ought not be part of the scheme. In such an instance, the essence of distributive justice, which the Act seeks to achieve, would have been compromised or defeated.

The PIA 2021 reflected instances of distribution of burden or responsibilities to host communities. According to Section 257 (2) PIA 2021, in any financial year where there are incidences of vandalism, disturbance or civil unrest in the host communities which leads to the destruction of the facilities of petroleum operators, thereby leading to disruption of petroleum operations, the host communities are liable to forfeit their

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<sup>57</sup> PIA 2021, s. 328.



entitlement for that year in the equivalent of the amount required to repair the damaged facilities. This provision of the Act applies the principle of no-fault liability. In other words, it is not really concerned about the cause of the civil unrest leading to the damage. It is immaterial whether the unrest was perpetrated by the community members or outsiders. The Act placed strict and express liability on the host communities. This provision has the capacity to create unjust outcome in the instance where the host community is made to bear liability for sabotage not perpetrated by the community. It, therefore, means that the burden may not be distributed evenly in accordance with the distributive justice principle. However, going by past experiences which suggest that some of such damage or disruptions of infrastructure or operations are either caused by elements within the communities, their collaborators, or otherwise would not occur if the communities are vigilant and taking ownership of such facilities one can easily understand the rationale for the strict liability provision in practical terms and exigencies.

Most of the resource-based conflicts in the Niger-Delta region under the previous legal regime has been associated with acts of sabotage by host communities.<sup>58</sup> It has been argued that the act of aggression by the host communities towards multi-national oil companies are not unconnected with the fact that host communities feel shortchanged from benefitting from the natural resource wealth deposit in their land and the environmental degradation arising from petroleum exploration activities which had deprived them of their livelihood.<sup>59</sup> That is not to say that

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<sup>58</sup> Gabriel Eweje, 'Multinational Oil Companies CSR Initiatives in Nigeria: The Skepticism of Stakeholders in Host Communities' (2007) 49 *Managerial Law* 218, 220.

<sup>59</sup> Victor Ojajorotu and Ufo Okeke-Uzodike, 'Oil, Arms Proliferation and Conflict in the Niger Delta of Nigeria', (2007) 6 *African Journal on Conflict Resolution* 85, 87.

there were no incidences of destruction of petroleum exploration facilities by natural occurrence or acts of sabotage by persons from outside the host community. If it is correct that the host communities were largely responsible for acts of vandalism, they will be compelled to stop it. They would have no justification or incentive to continue in such act, since a measure of petroleum resource wealth is now being distributed to them under the PIA regime. The merit in this provision is that it subtly imposes a duty on the community to protect the energy infrastructure from damage or disruption caused by persons within and outside the community.

## **4.2 Frontier Basins Exploration**

Another measure of distribution of petroleum resources under the PIA 2021 is in the aspect of the frontier basins exploration. This is another novel creation under the Act. The “Frontier Basin” are basins wherein petroleum exploration has not previously been undertaken or previously discovered in commercial quantity.<sup>60</sup> They are mostly high-risk and undeveloped sedimentary basins without sufficient data.<sup>61</sup> Studies over the years have shown that these frontier basins comprise of enormous unproven reserves of petroleum and natural gas.<sup>62</sup>

The Frontier Exploration Fund Administration Regulation, which was established pursuant to Section 9 of the PIA 2021, has specifically designated Anambra State, Dahomey, Bida, Sokoto, Chad and Benue as frontier basins. The Nigerian Upstream Petroleum Regulatory Commission (NUPRC) also has power to create regulation declaring any part of the country as a frontier

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<sup>60</sup> Frontier Exploration Fund Administration Regulations, s. 7.

<sup>61</sup> Nuhu G Obaje and Others, ‘The Nigerian Petroleum Industry Act, Frontier Basins Exploration and the Global Energy Transition’, (2022) 5 (1) Energy and Earth Science 1, 3.

<sup>62</sup> *ibid.* 4.

basin. Section 9 (4) PIA 2021 mandates the Nigerian National Petroleum Company Limited (NNPC Ltd) to set out 30% of profit accruing from the various forms of its petroleum contractual undertaking, towards contribution into the Frontier Exploration Fund (FEF). The FEF is established for the purpose of prospecting and exploring new frontiers for petroleum exploration in Nigeria.

The FEF is another initiative that accords with the distributive justice objectives. It can be seen in the light of the benefit and the burden which it portends for the country, states, and communities where the frontier basin is designated and discovered. The petroleum resources explored from frontier basins will widen the revenue net of the Nigerian state. It also means that funds will be available for the federal government to carry out developmental projects for the benefit of its citizens. With respect to the state, successful frontier exploration will entitle such states to the 13% derivation accruable to oil producing states in accordance with the constitution. With respect to the designated community where the frontier basin results in commercial oil yield, such community automatically gets conferred with the status of host community and assessable to the distributions under the PIA.

On the flip side, the discovery of frontier basins is not without its corresponding burden. For one, the challenges which host communities undergo will only be expanded to more communities and localities. The environmental consequences of petroleum pollution exploration will only extend to communities which were hitherto not faced with such environmental challenges.

Moreover, the constitutionality of the frontier exploration deductions from the profit of NNPC Ltd has been put to

question. Section 64 (c) PIA 2021 mandates NNPC Ltd to deduct the 30% FEF from its profit before remitting its profit to the federation account. It is doubtful whether this statutory directive is not an affront to Section 162 (1) of the Constitution, which requires all revenue collected by the federal government to be channelled to the federation account.<sup>63</sup> There is a distributive justice undertone of this constitutional provision, in the sense that, funds in the federation account are distributed among the three tiers of government. The Supreme Court stamped its judicial seal to this constitutional provision in the case of Attorney General Federation v. Attorney General Abia State and Ors. No. 2,<sup>64</sup> when it held that, it is unconstitutional to deduct NNPC cash call obligations as first line charge. If this judicial precedent is anything to go by, it is arguable that Section 64 (c) PIA 2021 may be declared unconstitutional and invalid if such matter is litigated upon. It is, therefore, submitted that the application of the FEF, as captured in the PIA and FEF Administration Regulations, qualifies as both an enabler and albatross to distributive justice of petroleum resource management.

### **4.3 Environmental Protection**

The PIA 2021 seeks means for better protection of the environment. This suggests why it contains several environmental protection driven sections. The major innovation which the Act captures in this regard is the Environmental Remediation Fund.<sup>65</sup> Petroleum industry operators are required to submit their Environmental Management Plan as a condition

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<sup>63</sup> Olusina Sipasi, Joshua Idoko & Tejumade Adetona, 'Funds Created Under the PIA (Part 1)' (Aelix, 2021) 2. <<https://www.aelix.com/wp-content/uploads/2021/09/AELEX-PETROLEUM-INDUSTRY-ACT-ARTICLES-SERIES-FUNDS-CRETE-UNDER-THE-PIA-Part-1.pdf>>accessed 16 June 2023.

<sup>64</sup> (2002) 6 NWLR (Pt. 764) 542.

<sup>65</sup> PIA 2021, s. 103 (1).

precedent to obtaining licence or lease to carry out petroleum operations. The exploration and production companies are expected to make financial contribution, known as the environmental remediation fund, towards remediating environmental harm and other negative environmental impacts arising from petroleum explorations.<sup>66</sup> Granted that oil spill is a necessary evil that is associated with petroleum exploration, it is, therefore, the responsibility of the operators to timeously clean up the spill within their operation sites or caused by their operations.<sup>67</sup> Fines and penalties levied against licensee and leases for flaring gas also forms part of the Environmental Remediation Fund.<sup>68</sup>

With respect to environmental protection, the amount set for environmental remediation diminishes its very essence in the circumstance where there are provisions of the Act that seem to expressly encourage environmental degrading activities. For instance, the PIA still adopted the approach under the repealed Associated Gas Re-Injection Act, wherein gas flaring was permissible upon payment of nominal fees, instead of an outright ban or phase out, as has been widely canvassed.<sup>69</sup> According to Section 107 of the Act, licensees can obtain permit from the Commission to flare gas for facility startup and strategic operational reasons. This depicts weak political will of the Nigerian government in energy justice delivery.<sup>70</sup> Apart from being a harbinger of distributive injustice, gas flaring policy

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<sup>66</sup> *ibid.*

<sup>67</sup> Oil Producers Trade Section, 'OPTS Memorandum on the Petroleum Industry Bill (SB.510 & HB.1061)', (Lagos Chamber of Commerce and Industry, 2021) <[https://www.opts-ng.com/wp-content/uploads/2021/02/20210120-PIB-Memorandum\\_vFINAL.pdf](https://www.opts-ng.com/wp-content/uploads/2021/02/20210120-PIB-Memorandum_vFINAL.pdf)> Accessed 26 June 2023.

<sup>68</sup> PIA 2021, s. 104 (4).

<sup>69</sup> PIA 2021, s. 105 (1).

<sup>70</sup> Ayodele Morocco-Clarke, 'In the Midst of So Much Injustice, Can There be a Seat for Energy Justice at the Nigerian Table?' (2023) 16 (1) *Journal of World Energy Law and Business* 251, 266.

failures also portends adverse implications on sustainable development.<sup>71</sup>

Alternatively, it has been suggested that the penalty for gas flaring should be made severe to act as a deterrent. Indeed, a version of the Petroleum Industry Bill had earlier proposed that the penalty imposed on gas flaring should be in like sum as the monetary worth of gas flared.<sup>72</sup> However, this provision did not survive the legislative pruning that midwived the PIA. Section 104(1)(c) PIA simply confers the discretion on the Commission to decide on appropriate fine to impose on violators. This provision is, therefore, subject to manipulation, arbitrariness, and political influence. Considering the severe implication of gas flaring on human health and the environment,<sup>73</sup> the PIA is unable to deliver distributive justice in this regard. This is because it is residents of communities that are meant to bear the health and environmental burden of gas flaring within their communities.

Additionally, it is observed that there has been a poor environmental practice in Nigeria where operators abandon facilities used for petroleum exploration when such exploration acreage is no longer of commercial interest or after the expiration

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<sup>71</sup> Aare A Babalola and Damilola S Olawuyi, 'Overcoming Regulatory Failure in the Design and Implementation of Gas Flaring Policies: The Potential and Promise of an Energy Justice Approach' (2022) 14 (11), 6800 Sustainability 1, 3. <<https://doi.org/10.3390/su14116800>> accessed 10 September 2023.

<sup>72</sup> Petroleum Industry Bill (PIB) Newsletter Series: New Dawn or False Hope? (Templars Newsletter, 2012) <<https://www.templars-law.com/app/uploads/2015/05/PIB-Newsletter-Series-No.1-Tax-Fiscal-Highlights-.pdf>> accessed 28 June 2023.

<sup>73</sup> Simon Amaduobogha, and Others, 'The Petroleum Industry Bill 2020: Examining Provisions for the Environment, Host Communities and Accountability', (Social Action Briefing 19, 2021) <<https://saction.org/the-petroleum-industry-bill-2020-examining-provisions-for-the-environment-host-communities-and-accountability/>> accessed 16 June, 2023.

of operators' license.<sup>74</sup> Apart from having an abandonment plan, the Act also mandates licensees and lessees to set up decommissioning and abandonment fund which is to be used for the sole purpose of defraying the cost of decommissioning of abandoned petroleum exploration facilities.<sup>75</sup> In the undesirable event that a licensee fails to perform its decommission obligations, the Commission is empowered to access such fund to enable decommissioning of the site.<sup>76</sup> Thus, unlike previous instances where the host communities were meant to suffer the environmental hazards of such act, in this instance, the burden and responsibility of addressing the issues are distributed across board which appears fair.

#### **4.4 Appointment of Board Members**

The president is legally conferred with the powers to appoint persons to constitute the Governing Board of the Nigerian Upstream Petroleum Regulatory Commission (NUPRC or the Commission).<sup>77</sup> The Commission is the body conferred with the power to exercise regulatory functions under the Act.<sup>78</sup> There are appointments which the president is statutorily empowered to make into the boards of other institutions established in the Act. Considering the heterogeneous nature of Nigeria, constituting boards, particularly in the oil and gas sector, attracts keen interest from the several sections of the country, which will jostle to be represented.

Generally, appointments of such nature have political dimensions, which the appointing authority must take

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<sup>74</sup> Brian FI Anyatang and Bassey E Kooffreh, 'Abandonment/Decommissioning under Nigerian Legal Regimes: A Comparative Analysis', (2021) 23 (2) Environmental Law Review <<https://doi.org/10.1177/14614529211006074>> accessed 28 June, 2023.

<sup>75</sup> PIA 2021, s. 233 (1).

<sup>76</sup> *ibid.* s. 232 (3).

<sup>77</sup> *ibid.* s. 11 (3).

<sup>78</sup> *ibid.* s. 6-10.

cognisance, in order not to spark up claims of marginalisation and create discontent amongst competing interest groups. Most federal government appointments are usually given geographical spread to reflect the principles of distributive federalism.<sup>79</sup> This is also a way of ensuring that various interest groups are represented and given the opportunity to partake in the share of the national resources, often described in Nigeria as the “national cake”. This is also done in the spirit of distributive justice.

In the light of the foregoing, it has become a norm and convention for the membership of such critical national interest boards, companies, and parastatals to be constituted in such a way as to reflect the six geopolitical zones of the country. However, the PIA did not take cognisance of this critical politically expedient practice which has helped preserved the federal character of the Nigerian state. Apart from not containing an explicit provision to that effect, the membership of some of the boards under the Act is not large enough to accommodate the appointment of natives of the six geopolitical zones of the federation often politically considered in making national political appointments. This situation does not support a fair and equal distribution of positions across the various interest groups.

Another instance that does not depict a fair positional distributive justice is with respect to constituting the HCDF Board of Trustees. Section 242 PIA confers enormous powers on the settlor to select members of the board; determine the financial and administrative procedures of the board; etc. The implication of this provision is that the settlor will have

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<sup>79</sup> Zacchaeus Adangor, ‘The Principle of Derivation and the Search for Distributive Justice in the Niger Delta Region of Nigeria: The Journey so Far’, (2015) 41 *Journal of Law, Policy and Globalization* 115, 115.



overbearing influence on the activities of the board and management of the fund. Positional distributive injustice is further perpetrated in view of the powers of the settlor to appoint members of the HCDF board, “who may not necessarily come from any of the host communities”.<sup>80</sup> This is against the spirit of inclusivity which distributive justice seeks to protect. Instead, the Act should have specifically provided that the host community should be given a slot to nominate a member of the host community as their representative on the board. Such a representative would ensure that the interest of the host community is well protected in the management of the fund. Also, since the community is in the best position to identify their developmental challenges, the presence of a member of the community in the board would enable the board to make a proper need assessment of the community and ensure its implementation thereof.

## 5. RESEARCH DESIGN

According to Dias, the search for justice has been challenging and elusive like the search for the holygrail.<sup>81</sup> This view appears to mirror the situation of the oil and gas sector in Nigeria, where the search for distributive justice has even attained aggressive disposition over the years. Notwithstanding this challenge, the need to incorporate distributive justice into the Nigerian energy sector cannot be overemphasised. This is underscored by the fact that energy injustice is the harbinger of vices such as: energy poverty, social exclusion, human rights violations, environmental degradation, etc.<sup>82</sup>

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<sup>80</sup> PIA 2021, s. 242 (2).

<sup>81</sup> Reginald WM Dias, *Jurisprudence* (5<sup>th</sup> edn. Butterworth, 1985) 65.

<sup>82</sup> Damilola S. Olawuyi, *supra* (n 25) 90.

The eventual enactment of the PIA in 2021 was partly poised towards addressing distributive injustice in petroleum resource management. This necessitated the creation of the HCDTF, frontier basin exploration fund and improved environmental protection measures. While these are commendable steps towards the realisation of distributive justice in the petroleum resource management, this paper has identified certain provisions in the PIA 2021 which inhibits the full actualisation of distributive justice in the sector. It is therefore submitted that, except these shortcomings are addressed, the realisation of distributive justice in petroleum resource management in Nigeria will remain elusive.

This paper has contributed its intellectual bit to the energy justice discuss. Advancing beyond the theoretical postulations, the adoption of case study approach, with specific focus on the PIA 2021, gave practicality to the energy justice concept. It is anticipated that this study will continue to inspire policy makers to infuse distributive justice considerations in energy policy making.