

# CHAPTER 7

## DEMOCRATISING THE GOVERNANCE OF ENERGY IN NIGERIA – FLAWED OR PRAGMATIC?

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### 1 Introduction

Energy (crude oil, natural gas, renewables and electricity) is crucial to human development and is increasingly central to global and national politics.<sup>1</sup> Economic growth, progress, poverty eradication and national security are laudable objectives intertwined with the energy sector.<sup>2</sup> Available uninterrupted supply of energy that is accessible, affordable and environmentally friendly is not merely desirable but essential to nation states.<sup>3</sup> Energy consumption, of course, corresponds to living standards and fuels productive activities.<sup>4</sup>

In recent times energy governance has become a critical issue for policy makers at the international and national level. Yet it would seem that energy sometimes is poorly governed as overly-centralised institutions and actors prevent access to modern energy services.<sup>5</sup> The amount of control exerted by government over the energy sector is crucial, as a well-designed and structured governance regime will ensure that stakeholders other than government have a say in governance.<sup>6</sup> One might argue that

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1 Proceedings of the Annual Meeting of American Society of International Law 'The architecture of international energy governance' (2012) 106 *Confronting Complexity* 389-390.

2 E Eleri 'Nigeria: Energy for sustainable development' (1993) 19 *Journal of Energy and Development* 97; O Aigboroand & E Ogboka 'Electric Power Sector Reform Act 2005 and the development of renewable energy in Nigeria' (2016) 7 *Renewable Energy Law and Policy Review* 20.

3 P Ramchandra & D Boucar *Green energy and technology* (2011); Proceedings of the Annual Meeting of American Society of International Law (n 1) 391.

4 SO Oyedepo 'Energy and sustainable development in Nigeria: The way forward' (2012) 2 *Energy Sustainability and Society* 1.

5 A Florini 'We need new energy governance' *The Guardian* 12 January 2010, <https://www.theguardian.com/commentisfree/cif-green/2010/jan/12/energy-governance-climate> (accessed 2 August 2018).

6 See E Adhekpukoli 'The democratisation of electricity in Nigeria' (2018) 31 *The Electricity Journal* 5.

energy choices are so important that there is a need for it to be rooted in democratic norms.

A democratic energy governance regime may be regarded as problematic as the concepts of democracy and governance perhaps are nebulous due to tensions generated by ideological and philosophical approaches to the concepts.<sup>7</sup> That said, democracy essentially is rule by the people, and governance is the rules of good government that enable the resolution of conflict between actors.

This chapter argues for the need to adopt a democratised energy governance approach that would assist in resolving key energy problems caused by decades of military rule off and on since independence in 1960. It is posited that a democratic energy governance regime is based on three tenets: a decentralised structure; energy transition from fossils to renewable energy; and public participation and accountability. This is rather different from the existing snapshot of Nigeria's energy sector.

Nigeria is Africa's energy giant with a rich energy mix. The nation has estimated crude oil reserves of 36,7 billion barrels.<sup>8</sup> It is also a major gas arena with reserves in the range of 198 738 TCF.<sup>9</sup> Coal and lignite reserves are projected to be 2,7 billion tons, with tar sand reserves of 31 billion barrels oil equivalent. Identified hydroelectricity sites have an estimated 14 250 MW capacity.<sup>10</sup>

As of 2015, the installed and available capacity in Nigerian generating stations shows that despite a total grid capacity of 5924,7 MW, only 4586 MW is available, meaning that 22% of the installed capacity was unavailable.<sup>11</sup> The Council for Renewable Energy of Nigeria estimate per cents loss occasioned by power outages at 126 billion naira (US\$ 984,38 million) annually.<sup>12</sup>

Furthermore, Nigeria has significant biomass resources to meet its power generation needs. Notwithstanding these natural energy assets, the energy sector is arguably in a state of disarray as the upstream oil production arena concerning search for crude oil and gas, the downstream industry involving refineries and product distribution, midstream processing and transport of oil and natural gas, and electricity sector are clouded by uncertainty, energy shortages and inefficient resource

7 ST Akindele et al 'Democracy, governance, legislative challenges and impediments in Nigeria 1999-2011' (2012) 5 *Journal of Politics and Law* 177.

8 Department of Petroleum Resources '2016 Oil and gas annual report' 29, <https://dpr.gov.ng/wp-content/uploads/2018/04/2016-Oil-Gas-Industry-Annual-Report.pdf> (accessed 28 July 2018).

9 As above.

10 OS Adeoye & AA Adeloye 'Electrical energy access: A viable alternative for the alleviation of the Nigerian economy' (2018) 5 *Research in Medical and Engineering Sciences* 479.

11 Ajumogobia and Okeke Law Firm 'Nigeria energy sector review: Legal and regulatory overview' (2015) 6 <http://www.ajumogobiaokeke.com/wp-content/uploads/2018/01/2b13946e4257859eb7988150d1c620a2.pdf> (accessed 15 July 2018).

12 Council for Renewable Energy, Nigeria (CREN) *Nigeria electricity crunch* (2009).

management.<sup>13</sup> Since the restoration of democratic government in 1999, the federal government has made significant efforts to reform the oil and gas, and electricity sectors.

The chapter adopts a desktop research-based methodology to evaluate the pragmatism of democratising governance of energy in Nigeria. It focuses on major laws, policies and institutions and is structured as follows: Part 2 considers the evolution of energy sector governance. Part 3 assesses democratic governance of energy architecture, while part 4 examines prospects for democratising energy reforms. The author argues that the dysfunctional energy sector is largely due to overwhelming centralisation of energy governance powers in the federal government. One would further posit that a pragmatic and effective governance regime requires that the federal government accommodate key stakeholders such as state and local governments, host communities and civil society as partners in the reform process.

## 2 Evolution of energy sector governance

Energy is an important subject revolving around the extraction of resources, its utilisation, as well as power generation and distribution within the dynamics of relevant markets.<sup>14</sup> Governance means the act or state of controlling and governing.<sup>15</sup> Broadly, the term refers to all the ways in which groups of people collectively make choices and/or to any of the numerous processes for setting and enforcing rules in order to achieve desired outcomes.<sup>16</sup> Governance also deals with the functional needs in any social system, such as the need to cope with outward challenges, prevent internal conflicts, procure resources and ensure the well-being and preservation of the system.<sup>17</sup> Although the framing of goals and policies is the job of the government, an effective governance regime exceeds the involvement of government alone, though control and governance is essential to order and stability in any system.<sup>18</sup>

Energy governance, as a term, consists of powers and mechanisms to control and govern the stability and sustainability of energy systems.<sup>19</sup> It allows the interaction of actors, institutions and processes that shape how decisions are made in relation to energy services.<sup>20</sup> Actors or stakeholders include government (federal, state and local) non-governmental

13 Eleri (n 2) 97-100.

14 ED Brown et al *Governance, decentralisation and energy: A critical review of the key issues* (2015) 7-8.

15 K Koyama 'An analysis on global energy governance' *A Japanese Perspective on the International Energy Landscape* (Institute of Electrical Engineers of Japan 18 August 2017) 1.

16 A Florini and BK Sovacool 'Who energy governs? The challenges facing global energy governance' (2009) *37 Energy Policy* 5240.

17 JN Rosenau 'Governance in the twenty-first century' (1995) 1 *Global Governance* 13.

18 As above.

19 Koyama (n 15) 1.

20 A Florini & BK Sovacool 'Bridging the gaps in global energy governance' (2011) 17 *Global Governance* 57-74.

organisations (NGOs), civil society groups, corporations and citizens. Underpinning this are the institutions or rules according to which decisions are made and entire process of agenda setting, negotiation, implementation, monitoring and enforcement of rules related to energy.<sup>21</sup> Simply stated, state and non-state actors can collaborate to achieve desired goals on the basis of the available mechanisms and rules.

Furthermore, energy governance encompasses instruments that ensure energy security, protect energy market order, addresses climate change and other energy-related environmental problems such as gas flaring.<sup>22</sup> Poor institutional and regulatory frameworks are critical bottlenecks to the delivery of modern and affordable energy services. Energy governance thus seeks to utilise laws, policies and regulatory frameworks in order to promote investments in for instance, renewable energy, energy efficiency and access to modern energy. As a matter of necessity, national governments play an important role in energy governance due to its complexity and the need for technical expertise found in state institutions in charge of planning, energy development, public enterprises, and so forth.

## 2.1 Oil and gas

Historically, oil and gas governance in Nigeria dates back to the pre-colonial era.<sup>23</sup> Mineral oil (petroleum) legislation made its mark with the Petroleum Ordinance of 1889, followed by the Mineral Regulation (Oil) Ordinance of 1907 and Order 19 of 1909 of Southern Nigeria. These basic framework legislations on the development of petroleum and other minerals in Nigeria were strengthened by the Mineral Oil Ordinance 1914, which was enacted to regulate the 'right to search for, win and work mineral oils' in Nigeria. Until this landmark law, only British subjects and companies were eligible for an oil exploration licence or lease. This meant a discriminatory, non-competitive exclusion of other nationals as well as citizens of Nigeria.<sup>24</sup> By 1938 the colonial government had granted the state backed Shell D'Arcy Company monopoly over the exploration of all minerals and petroleum throughout the entire colony. The monopoly was only broken in 1959 when oil exploration rights were granted to US, Italian and French companies such as Mobil, Gulf (now Chevron), Amoseas (Texaco/Chevron) Agip and Safrap (Elf).

To extend the territorial ambit of petroleum law, a new section 10

21 BK Sovacool & A Florini 'Examining the complications of global energy governance' (2012) 30 *Journal of Energy and Natural Resources Law* 235.

22 Koyama (n 15) 1.

23 For a history of Nigeria's oil, see MM Olisa *Nigerian petroleum law and practice* (1987) 2-3; MM Gidado *Petroleum development contracts with multinational oil firms: The Nigerian experience* (1999) 53-55.

24 Sec 6(1) of the Mineral Oil Ordinance; see also J Yalaju 'The Nigerian oil industry: Historical and legal perspectives' (2006) 2 *Environmental and Planning Review* 3.

was added to the 1914 Ordinance by the Mineral Oils (Amendment) Act 1950 whereby the submarine areas of Nigeria's territorial waters were brought under the realm of the 1914 Ordinance.<sup>25</sup> Further reform on the eve of independence in 1959 through the Mineral Oils Act, ensured the competence of Nigeria's federal legislature over the submarine areas of territorial waters and enactment of the Petroleum Profits Tax Ordinance 1959.<sup>26</sup>

Upon national independence in 1960, important petroleum laws were brought into play within the first decade of independence. The Petroleum Act, promulgated as Decree 51 of 1969, was the most significant of these laws.<sup>27</sup> It repealed the existing statutes on petroleum and with its accompanying Petroleum (Drilling and Production Regulations), laid the foundation for the legal regulation of Nigeria's oil industry. More specifically, the Petroleum Act vests ownership and regulation in the FG,<sup>28</sup> starting the dominance of federal authority in the energy sector. Other laws governing the governance of the oil and gas sector include the Petroleum Equalisation Fund (Management Board etc),<sup>29</sup> the Petroleum Production and Distribution (Anti-Sabotage) Act;<sup>30</sup> the Petroleum (Special) Trust Fund Act;<sup>31</sup> the Petroleum Technology Development Fund Act;<sup>32</sup> the Petroleum Training Institute Act;<sup>33</sup> the Oil Pipelines Act 1956; the Associated Gas Reinjection Act;<sup>34</sup> the Oil Terminal Dues Act;<sup>35</sup> the NNPC Act; the Oil in Navigable Waters Act;<sup>36</sup> and the Nigerian Liquefied Natural Gas Act.<sup>37</sup>

After the resumption of democratic rule in 1999 the federal government gradually added new laws to an already complex legal regime. Some of the key legislation has been absolutely essential as they represent a specific response to some of the problems plaguing the oil and gas industry. Take, for instance, host community militancy involving the destruction of oil infrastructure and kidnapping occasioned by governmental neglect and oil pollution damage to essentially farming and fishing communities. This led to the interventionist agency created by the Niger-Delta Development Commission (Establishment etc) Act 2000. Also important is the Allocation of Revenue (Abolition of Dichotomy in the Application of Derivation) Act 2004 which provided relief to oil-producing states from a judgment of the Supreme Court affirming the absolute ownership of

25 See also G Etikerentse *Nigerian petroleum law* (1985) 1-2.

26 Petroleum Profits Tax Act Cap P13 LFN 2004.

27 Now Cap P10 LFN 2004.

28 See sec I(1) of the Petroleum Act.

29 Cap P11 LFN 2004.

30 Cap P12 LFN 2004.

31 Cap P14 LFN 2004.

32 Cap P15 LFN 2004.

33 Cap P16 LFN 2004.

34 Cap A25 LFN 2004.

35 Cap O8 LFN 2004.

36 Cap O6 LFN 2004.

37 Cap N87 LFN 2004.

the FG over offshore oil and gas resources.<sup>38</sup> Meanwhile, the National Oil Spill Detection and Response Agency (Establishment) Act 2006 sought to actually address the scourge of oil pollution. Transparency considerations and disquiet over lack of indigenous involvement in the industry resulted in the Nigeria Extractive Industries Transparency Initiative Act 2007 and the National Oil and Gas Industry Content Act 2010.

## 2.2 Electricity sector

Turning to the electricity sector, the first power-generating equipment was installed in Marina, Lagos in 1898. The amalgamation of Northern and Southern Protectorates to form Nigeria in 1914 meant that individual towns in the country started to develop local electric power systems.<sup>39</sup> Interestingly, the governance model was decentralised as Government and the Native Authorities owned separate operational entities until 1949 when the Nigerian Government Electricity Undertaking (NGEU) as part of the Public Works Department took over the assets and liabilities of electricity supply in Lagos. The colonial government in 1950 established the Electricity Corporation of Nigeria (ECN) under Ordinance 15 to take over the entire electricity system. Centralisation under the ECN in April 1951 allowed for an improved integrated electric power regime through generation, transmission and distribution of electricity.<sup>40</sup> By the 1960s the nation had established the Niger Dams Authority (NDA) leading to the construction of Kainji Dam in 1968.

Central control of the electricity sector was reinforced in 1972 with the merger of ECN and NDA by military decree, National Electric Power Authority (NEPA) Decree 4 1972. The electricity network sharply developed under NEPA control in the 1970s and 1980s. However, the 1990s saw a critical underinvestment in the power sector as there was no significant state funding between 1989 and 1999. Crucially no new power generation plant was constructed and the last transmission line installed was in 1987. Similarly, no major investment was available for the distribution network.

The incoming democratic government in 1999 was faced with an urgent crisis in the electricity sector and did not have the financial capital to fill the resource gap. Other problems included frequent power outages, institutionalised corruption, poor management and bureaucracy, inadequate tariffs, as well as high technical and non-technical losses (estimated at 45-50 per cent). Driven by World Bank experts and the need for private sector investment, a new approach to electricity governance saw amendments to the Electricity and NEPA Acts that abolished the

38 E Egede 'Who owns the Nigerian offshore seabed: Federal or states? An examination of the *Attorney General of the Federation v Attorney General of Abia State and 35 Ors case*' (2005) 49 *Journal of African Law* 205.

39 CA Awosope *Nigeria electricity industry: Issues, challenges and solutions* (2014) 5.

40 Awosope (n 39) 6.

statutory monopoly status of NEPA.

In 2000 the National Council on Privatisation (NCP) inaugurated the Electric Power Implementation Committee (EPIC), drafted the National Electric Power Policy (NEPP) 2001 and the Bureau of Public Enterprises (BPE) delivered Electric Power Sector Reform Act (EPSRA) 2005. NEPA was transmitted into the Power Holding Company of Nigeria (PHCN) and unbundled into 18 companies comprising one transmission company, six generating companies and 11 distribution companies.

Only the transmission company is a hundred per cent owned by the federal government, and in an effort at efficiency, management was initially transferred to the Canadian, Manitoba Hydro Company. The Transmission Company of Nigeria is now managed by an appointee of the African Development Bank due to loans taken from the development agency. Generation and distribution assets are run by the private sector which has significant shares from federal government divestment. Certificates of ownership to prospective owners were handed over on 30 September 2013.

### **3 Democratising governance of energy architecture**

The centralisation of political power and governance was a fundamental aspect of military governments in Nigeria with significant repercussions for the energy sector. The traditional arguments for centralisation of energy governance included energy security, national planning, avoidance of regional or local rivalry, and so forth. This meant in practice that although Nigeria is a federation, effectively it was run as a unitary state.

The authoritarian assumption that the federal government should shoulder many of the responsibilities and duties associated with energy governance was increasingly called into question from 1999 onwards. Democratisation of energy indicates that democratic tenets be infused into energy governance. One might define such an approach as a socio-economic and political concept that combines (a) decentralised governance regime; (b) energy transition from fossil fuels to renewable driven by international climate change obligations; and (c) public participation and accountability to drive affordable energy and democratic energy ownership.

There is no doubt that democratisation of energy governance or even energy democracy will mean different things to different people. The application of democratic norms to energy planning, policy and regulations will always be fraught with difficulty but it arguably allows for a decentralisation of energy regimes focused on affordable energy as well as community participation and engagement. Ultimately, this allows for democratic legitimacy and societal acceptance of energy laws

and regulations.<sup>41</sup> This is particularly important in light of the potential obstacles to achieving democratic governance, for example the need to trade off fossil fuel national security for more sustainable renewable energy.<sup>42</sup>

### 3.1 Oil and gas regime

A starting point to the national oil and gas governance can be perceived in the 1999 Constitution. According to this document, absolute ownership and control over the oil and gas sector is vested in the FG. Section 44(3) explicitly provides:

Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner by the National Assembly.

This absolute ownership approach is an attribute of military rule as the 1999 Constitution was drafted under the supervision of an unelected military dictatorship. The consequence is that Nigeria is a federation that focuses on the federal government to the exclusion of other tiers of government (state and local) as well as petroleum host communities. This governance approach has also been replicated in section 1(1) of the Petroleum Act as well as section 2(1) of the Exclusive Economic Zone Act, seemingly for the avoidance of doubt.

As noted above, the Supreme Court in *Attorney-General of the Federation v Attorney-General Abia State and 35 Others* (2002)<sup>43</sup> was of the view that the eight littoral states did not own oil and gas resources located in the territorial waters, continental shelf or exclusive economic zone as absolute ownership vested in the FG. This meant that the littoral states were not entitled to offshore derivation and benefit from section 62(2) 1999 Constitution 'provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen percent of the revenue accruing to the Federation Account directly from any natural resources'.

The severe fiscal repercussions of the judgment on oil producing states and the political fallout resulted in a rare 'reversal' of federal dominance through legislation. The Allocation of Revenue (Abolition of Dichotomy

41 K van de Biezenbos 'Negotiating energy democracy' (2018) 33 *Journal of Land Use and Environmental Law* 333; see also M Pečarić 'A heterarchic model of good governance: A unifying hub for adaptability, differences, similarities, democracy and accountability' (2015) 15 *Croatian and Comparative Public Administration* 909; JO Allen 'Decentralised electricity and its implications for the governance of UK energy security' PhD thesis, University of Exeter, 2014 158-162.

42 N Gunningham 'Confronting the challenge of energy governance' (2012) 1 *Transnational Environmental Law* 125.

43 (2001) 11 NWLR 689.



in the Application of the Principle of Derivation) Act 2004 is an example of the democratising of energy governance as it provides that for the purposes of revenue sharing to states, it shall be immaterial whether such resources are located onshore or offshore. Note that ownership remains centralised in the FG but the statute allows states to enjoy limited financial benefits from their status as oil-producing littoral states.

Centralised governance is reflected in the laws governing the oil and gas sector. The most important is the Petroleum Act which vests resource ownership in the Nigerian state. It also grants the Minister of Petroleum Resources (MPR) significant oversight and discretionary powers over all aspects of the upstream, downstream and midstream sector. The MPR grants an oil exploration licence, oil-prospecting licence and oil-mining lease as a matter of discretion. Similarly, no refinery can be constructed or operated without a licence granted by the Minister. Of note also is that no person can import, store, sell or distribute petroleum products without a ministerial licence. The MPR has the authority to make regulations for the sector.<sup>44</sup>

The MPR chairs the powerful state-owned Nigerian National Petroleum Corporation (NNPC) which, among other things, manages the joint venture businesses between the FG and IOCs like Royal Dutch Shell, ExxonMobil, Chevron and Agip. To improve accountability and good governance, NNPC has undertaken periodic reforms in the 1970s, 1988 (commercialised into 12 strategic business units) and, most recently in 2016, when NNPC was restructured into seven units. These reforms targeted at making NNPC an efficient oil and gas player, instead of a rent collector, do not seem to work as the Corporation is continually dogged by corruption allegations, including failure to remit funds into the federation account.

Nigeria's downstream sector also demonstrates deep-rooted problems that have challenged democratic policy makers and government. Starting out in decentralised fashion, it has consolidated into a monopolistic behemoth. Prior to 1966, IOCs like Shell, Total and BP, imported petroleum products into Nigeria, until the nation built its first refinery in Port Harcourt in 1966. At the moment, four refineries in Port Harcourt (old and new), Warri and Kaduna with a nameplate capacity of 445 000 barrels per day have been barely functional since 1999, despite expensive turn around maintenance (TAM) regimes. State dominance of the oil product supply chain through the NNPC (Pipelines and Product Marketing Company), Department of Petroleum Resources (DPR) (regulator) and the Petroleum Products Pricing Regulatory Agency has ensured that the nation subsidises oil product imports with hundreds of billions of naira annually. Ironically, this has not prevented occasional product shortages and overnight queues at filling stations.

44 See secs 8 and 9 of the Petroleum Act.

In relation to the natural gas sector, the arena has traditionally been ignored by policy makers until recently. Gas depends on fixed transport routes and expensive infrastructure that do not generate immediate returns as in the case of crude oil. That said, the export of liquefied natural gas and the urgent need for electric power have turned government attention to natural gas monetisation instead of wasteful gas flaring. The Nigerian Gas Master Plan (NGMP) approved on 13th February 2008 by the FG aims to ensure that the natural gas sector serves national development and allows Nigeria to export to international gas markets. Few legal instruments exist on natural gas, for instance, the Associated Gas ReInjection Act 1979, Nigeria LNG (Fiscal Incentives etc.) Act 1990, National Domestic Gas Supply and Pricing Policy 2008, and the more recent National Gas Policy 2018 and Flare Gas (Prevention of Waste and Pollution) Regulations 2018. Federal dominance is obvious as the key players are the Ministry of Petroleum Resources, DPR and IOCs.

### **3.2 Electricity regime**

Electricity governance, by contrast, seemingly showcases a decentralised approach. Part II of the 2nd Schedule to the 1999 Constitution places the sector on the concurrent legislative list that provides the extent of federal and state legislative powers. The National Assembly is allowed to make laws to govern electricity, the generation and transmission of electricity from one state to another, dams and cross-border electricity. A State House of Assembly, on the other hand, can make laws on electricity and power stations in the state, and generation, transmission and distribution of power in areas not covered by the national grid. It is open to debate how decentralised electricity governance can be achieved, when one considers the role and importance of relevant federal government institutions and agencies.

Not surprisingly, the legal framework on electricity governance is extensive but perhaps unduly complicated. The principal legislative regime stretches from the 1999 Constitution, Public Enterprises (Privatisation and Commercialisation) Act, ESPRA 2005, National Domestic Gas Supply and Pricing Regulations, National Domestic Gas Supply and Pricing Policy, Renewable Electricity Policy Guidelines 2006, and the Roadmap for Power Sector Reform. Note that the Roadmap is not a policy document per se but constitutes strategies to be adopted to achieve the National Electric Power Policy.

Key institutions to achieve government objectives include the Federal Ministry of Power (FMP) and the Energy Commission of Nigeria which was established by Act 62, as amended by Act 32 of 1988 and Act 19 of 1989. The Commission is in charge of the energy sector planning, policy implementation, and promoting renewable and alternative energy in the country's energy mix. It is responsible for developing the National Energy

Policy, National Policy on Integrated Rural Development, the Millennium Development Goals (MDGs), Renewable Energy Master Plan (REMP) and so forth.

The FMP is responsible for ensuring that Nigeria gets a robust electricity sector that can ensure national development. Its main responsibility is to initiate, formulate, coordinate and implement state policy on power generation, transmission, distribution and supply. Working closely with the Presidential Task Force on Power (PTFP), the latter was established in June 2010 to drive power sector reforms by cutting through bureaucratic bottlenecks by bringing together all government agencies and remove obstacles to private investment. As a result, the PTFP monitors projects and coordinates with government agencies involved in power sector reform. Despite the commendable rationale for the PTFP it represents yet another bureaucratic layer in the electricity industry.

The National Electricity Regulatory Commission is another key institution in electricity governance. It is the sector regulator that ensures orderly development of a competitive market; promote private sector participation; boost investor confidence while protecting consumers; licence and regulate generation, transmission, distribution and electricity trading; and manage price regulation through the Multi-Year Tariff Order (MYTO).

It is instructive that 24 institutions are responsible for various aspects of the power sector. Ranging from NERC, Nigeria Atomic Energy Commission, Nigeria Hydrological Services Agency, Standard Organisation of Nigeria, Nigeria Electricity Management Authority etc. Also notable is the fact that these bodies are all part of the federal government. By this, federal domination is assured, despite the fact that the 1999 Constitution provides for federal and state participation. Arguably, the reality of centralisation trumps the constitutional cooperative approach to energy governance.

## **4 Prospects for democratising energy reforms**

### **4.1 Oil and gas regime**

The resumption of democratic rule in 1999 saw renewed FG attention on the cash cow of the national economy. Driven by the parlous state of upstream oil and gas production due to oil militancy in the Niger Delta caused by a desire for local control of resources and modification of the absolute ownership stance of the Nigerian state. In 2000 then President Olusegun Obasanjo inaugurated the Oil and Gas Implementation Committee (OGIC) under Dr Rilwanu Lukman culminating in a draft

National Oil and Gas Policy and Petroleum Industry Bill (PIB)<sup>45</sup> It is unfortunate that no attempt was made to infuse democratic norms such as decentralised public participation, energy transition and public participation and accountability from the outset.

The thrust of the National Oil and Gas Policy was to ‘to maximise the net economic benefit to the nation from oil and gas resources and to enhance the social and economic development of the people while meeting the nation’s needs for fuels at a competitive cost, accomplishing all in an environmentally acceptable manner’.<sup>46</sup> Moreover, the PIB sought to enhance exploration and exploitation of petroleum resources; create a peaceful business environment; create a commercially viable national oil company; deregulate downstream petroleum business; create efficient regulatory entities; engender transparency and accountability, among others.<sup>47</sup>

This omnibus and perhaps revolutionary Bill running into over 200 pages sought to provide holistic reform of the oil and gas sector, whilst repealing the outdated aspects of the legal framework, some of which date to the 1960s and 1970s. Two PIB versions delivered to the National Assembly in 2008 and 2012 failed to pass due to the strong objections of important stakeholders. The most contentious parts of the PIB relates to a new fiscal regime firmly opposed by the IOCs, and the Host Communities Fund opposed by some legislators as unduly generous to states located in the Niger Delta. Failure to pass the PIB has caused significant damage to the Nigerian oil and gas sector. This includes a decline in oil and gas production and reserves; a reduction in government earnings; the deferment of investments; sabotage; oil theft, and so forth.

As far back as 2013, Shell Petroleum Development Company (SPDC) put on hold investment decisions on two key offshore oil and gas projects that would have cost about \$30 billion in investment until the new petroleum law (PIB) was approved.<sup>48</sup> Reports in 2015 suggest that the country lost \$10 billion (N1,7 trillion) in fresh investments due to the non-passage of the PIB.<sup>49</sup> The Nigeria Extractive Industries Transparency Initiative (NEITI) in a policy brief in the same year estimated annual losses due to stalled reforms (the non-passage of the PIB) at \$200 billion while asserting that another \$15 billion is lost yearly in fresh investments to regulatory uncertainty.<sup>50</sup> This last figure corresponds to estimates from

45 F Okoromadu ‘PIGB and transformation of Nigeria’s oil, gas sector’ *Leadership* 11 May 2018, <https://leadership.ng/2018/05/11/pigb-and-transformation-of-nigerias-oil-gas-sector/> (accessed 29 July 2018).

46 ‘Petroleum Industry Governance Bill 2017 (as passed by the Senate)’ *Thisday Live*, <https://www.thisdaylive.com/index.php/2017/05/28/final-copy-of-petroleum-industry-governance-bill-2017/amp/> (accessed 23 June 2018).

47 As above.

48 D Adugbo ‘PIGB: How Buhari’s assent can save over \$15bn oil sector losses’ *Daily Trust* 15 May 2018, <https://www.dailytrust.com.ng/pigb-how-buhari-s-assent-can-save-over-15bn-oil-sector-losses-250575.html> (accessed 12 June 2018).

49 As above.

50 As above.

the influential and highly respected Energy Information Administration of the United States Energy Department.<sup>51</sup>

To break the legislative reform impasse, the PIB was reviewed and broken up into four components consisting of the Petroleum Industry Governance bill (PIGB), Petroleum Host and Impacted Community bill (PHICB), Petroleum Industry Administration bill (PIAB) and Petroleum Industry Fiscal Bill (PIFB). Legislative priority was accorded the PIGB due to its reform of oil and natural gas governance. Key features include the establishment of an independent regulatory commission (the Nigerian Petroleum Regulatory Commission which combines the present-day Department of Petroleum Resources (DPR)) and the Petroleum Product Pricing Regulatory Agency (PPPRA); the unbundling of the NNPC into two limited liability companies, with one holding joint venture assets in the upstream sector (Nigeria Petroleum Company) and the other holding the production sharing contract assets (Nigerian Petroleum Assets Management Company); and governance and accountability arrangements with respect to the new institutions created.<sup>52</sup> The PIGB has already been passed by the National Assembly, and is awaiting presidential assent.<sup>53</sup>

Downstream governance on petroleum products also presents a complex challenge to the Nigerian government. For decades, the FG has vacillated between state control, privatisation and deregulation. The downstream sector is a notorious political hot potato, and even military governments prior to 1999 tread carefully on the issue of product pricing, as its immediate impact on the poor and workers has resulted in general strikes and political instability. Meanwhile official FG policy is to ensure supply of products at a reasonable price, regulate price controls, reduce government subsidies, boost investment and encourage competition.

These sets of conflicting objectives encapsulate the downstream imbroglio and the inability of the federal government to resolve its manifest problems. Existing laws on the downstream such as the Petroleum Act, Oil Pipelines Act, NNPC Act as well as key stakeholders like the DPR and Petroleum Products Pricing Regulatory Agency are set for repeal under the PIGB. Nevertheless, the proposed law replicates current state dominance and repeats errors like the Petroleum Equalisation Fund which subsidises equal petroleum pricing across the country. This is contrary to FG policy to deregulate product pricing to reduce corruption and abuse.<sup>54</sup> A great example of the deregulation policy of the FG was effected in January 2012 with a withdrawal of a large percentage of the petroleum

51 As above.

52 KC Ene 'The fall and rise of the Nigerian Petroleum Industry Governance Bill' Oxford Policy Management February 2018, <https://www.opml.co.uk/blog/nigerian-petroleum-industry-governance-bill> (accessed 22 July 2018).

53 Fears have been expressed in some quarters about whether the President will give his assent to the Bill since it appears to whittle down the President's power over the oil sector. See Adugbo (n 48).

54 MM Mojeed 'Monumental oil subsidy fraud and corruption at the NNPC: The damning KPMG Report' *Sahara Reporters* 9 December 2011.

subsidy. This followed the deregulation of diesel prices in 2009 in order to boost revenue for national infrastructure investments. At the moment, subsidies continue to subsist and the pragmatism of such action has not been addressed due to the absence of a democratised energy regime. This means that there is no satisfactory conclusion to almost two decades of upstream and downstream oil and gas reforms.

## 4.2 Electricity regime

Although electricity reforms are in part inspired by external institutions such as the World Bank, the philosophical basis of reform has followed the traditional military pattern of federal dominance. Much worse is that climate change obligations from energy transition have not been installed at the heart of electricity policy, hence an emphasis on gas fuelled power. Also, the role to be played by the general public, civil society, and so forth has not been clearly spelt out in the reform process. This democratic deficit is evident in the governance regime.

The centralised under carriage to electricity governance is most obvious in ESPRA 2005 which opened up the sector to private sector participation. Generally, the aims and objectives of reform include improved performance and operations through private sector expertise; meeting current and future electricity demands; private sector-led investments; independent regulator (Nigerian Electricity Regulatory Commission); establishing new market structures and trading; and promoting competition and transparency.

The EPSR Act also warranted the establishment of the Rural Electrification Agency (REA).<sup>55</sup> The REA promotes and coordinates rural electrification projects, implements and manages the Rural Electrification Fund, and regulates rural electrification. Moreover, it administers the Rural Electrification Fund (REF), a designated fund to promote, support and provide rural electrification programmes through public and private sector involvement in order to achieve more equitable regional access to electricity; maximise the economic, social and environmental benefits of rural electrification subsidies; promote expansion of the grid and development of off-grid electrification; and stimulate innovative approaches to rural electrification.

However, no part of the Rural Electrification Fund can be used to subsidise electricity consumption.<sup>56</sup> The REA projects assist grid expansion to rural areas, including the deployment of off-grid and mini-grid renewable energy generating systems.<sup>57</sup> On the face of it, REA activities are parallel to and subsume the responsibility of state governments to provide off-grid infrastructure. It is conceded that not all state governments have the

55 Sec 88(1) EPSR Act.

56 Sec 88(13) EPSR Act.

57 Sec 88(9) EPSR Act.

political will or resources to participate in the electricity sector.

The underdeveloped nature of electricity sector reform in Nigeria perhaps is understandable. The failure to involve state and local governments in a bottom-up approach against the extant top-down centralised narrative means that there is room for improvement. At present, the Lagos State Electric Power Sector Reform Law 2018 is a very rare example of a state law on electricity. The law provides legal backing to the Lagos Embedded Power Scheme 2017 to generate up to 3 000 MW off grid power from the private sector within six years. It also aims to improve electricity supply and distribution, as well as consumer rights.

Also problematic is the failure to take account of the need for public participation and accountability. Similarly, no genuine consideration is made of the important energy transition from fossils to a more sustainable low carbon future. The huge gap between electricity demand and supply means that government policies and strategies have not been fully responsive to climate change and mitigation demands. Consequently, the federal government has failed to set up an energy architecture that can deliver renewable energy and energy security. This *lacuna* is problematic and inconsistent with a democratised energy governance regime. In view of the billions of dollars spent, and current electricity blackouts, there is no satisfactory end to almost 20 years of reform.

## 5 Conclusion

There is little doubt that the incoming democratic government in 1999 inherited an energy sector with substantial problems. Post-1999, important laws, policies and regulations such as the Niger-Delta Development Commission (Establishment) Act 2000, Extractive Industries Transparency Initiative Act 2007, National Oil and Gas Industry Content Act 2010, EPSRA 2005, Renewable Electricity Policy Guidelines 2006, National Petroleum Policy 2018, National Gas Policy 2018 and Flare Gas (Prevention of Waste and Pollution) Regulations 2018 have been put in place despite admitted problems in the energy sector. This chapter argues that a democratised energy regime will be less centralised and more responsive to democratic norms

As earlier discussed, the energy sector largely is in the hands of the FG and state governments to a large extent are on the sidelines. More particularly, civil society, host communities, and local government are not active participants in the determination of laws and policies. Thus, oil and gas and electricity matters are treated as a predominantly national matter within the exclusive purview of the FG, National Assembly and a multitude of federal institutions and agencies. Despite constitutional provision for state government engagement in the electricity sector. Sadly, undue federal dominance has severe implications for effective governance, and the chapter argues that a democratised energy governance based on the tripod of decentralised structure, energy transition approach and

public participation and accountability would have avoided the stalled reform process.

At the moment there seemingly is little immediate prospect for a more democratised approach to energy governance. To the author, democratic legitimacy will ensure a more robust energy governance regime that allows all the key stakeholders led by the FG to take the difficult decisions confronting the oil and gas and electricity sectors. To achieve this, there is a need for constitutional reform, as well as institutional and cultural changes. Such radical change requires substantial political will on the part of the government. Indeed, a democratised energy governance process will be pragmatic and ensure the delivery of an efficient energy sector that can achieve much needed socioeconomic development in Nigeria.