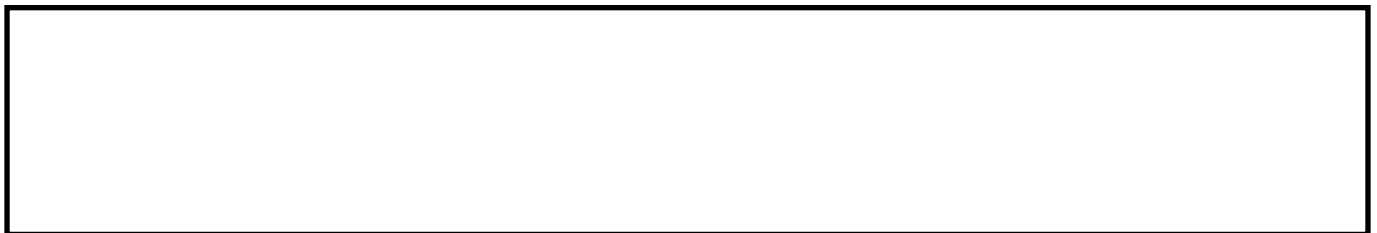


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# Deficient legislation sanctioning oil spill in Nigeria: a need for a review of the regulatory component of petroleum laws in Nigeria and the Petroleum Industries Bill

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## Deficient Legislation Sanctioning Oil Spill in Nigeria: A Need for a Review of the Regulatory Component of Petroleum Laws in Nigeria and the Petroleum Industries Bill

Chukwuemeka Chuks-Ezike\*

The Law School, Robert Gordon University, UK

**Abstract.** The grave challenges of oil pollution have been over stated in several environmental journals. Similarly, there have been several discourses on the prevailing nature of Nigerian oil spill pollution. Alarming, the spills seem to have persisted, despite existing legislations sanctioning them, making it seem as if there was no legislation sanctioning such pollution activities *ab-initio*. Scholars state that the environmental pollution and degradation that has emanated from oil spill in Nigeria has led to the destruction of landscape, loss of arable farm-lands, aesthetic environment, fishing operations, revenue, and sometime lives. This article shall therefore review the current legislation to identify their deficiencies, as well as the perceived inability of the Petroleum Industries Bill (PIB) to effectively enforce against deliberate pollution.

**Keywords.** *pollution, policy, legislation, constitution, environment*

\*Correspondence:  
c.chuks-ezike@rgu.ac.uk

### Introduction

The ideal of environmental protection forms a core basis for the discussions in this article. To proceed, we would posit, to wit, that whether in Nigeria or elsewhere, the discussions on sanctioning as a principle of environmental law hinges on a justification as to why there should be sanctions in the first instance. Thus, it is trite to inquire if and why there is even a need to protect the environment.

A consensual protection of the ecosystem has been viewed as the only solution to the global environmental challenges (Oks, 2015). Hence, not only are all of earth's resources finite, they are also important for continued functionality of planet earth, and are interconnected with each other. The above position tallies with the view of some other environmental schools, to wit, that the need for environmental protection stems from the critical issues of maintaining good human health (Chartered Institute of Environmental Health, 2017), eliminating or at least curbing the notorious global warming and climate change challenge, reducing the depletion of earth's finite resources (Mensah and Castro,

2014), and the fact that matters of environmental concern are integral to other aspects of life and societal construction (such as policy and political concepts) (Scotford, 2017).

It is therefore deducible from the foregoing that while environmental protection is the basis for environmental law, it also maintains necessary harmony with the other subjects of life that might be affected by environmental issues. In addition, the formulation of effective legislation remains a key challenge for many governments.

For this article, "effectiveness" as adopted from the English Oxford online dictionaries (2017) means "the degree to which something is successful in producing a desired result; success." It therefore implies that a legislation can only be deemed effective when it has succeeded in the purpose for its enactment. Similarly, "sanctioning" as adopted from the Merriam-Webster online dictionary (2017) means "a mechanism of social control for enforcing a society's standards." Relating these concepts to Nigeria, it would therefore be expected that legislation set out to sanction

pollution in Nigeria's oil sector would have failed to be effective, if despite the presence of such seeming legislation, oil pollution continues undeterred.

### **Pollution in Nigeria's Oil Sector**

Pollution sources in Nigeria include industrial plants of manufacturing organizations, domestic household wastes and other decomposing waste, solid mineral mining activities, as well as petroleum mining activity (Kesiena and Didigwu, 2012). Even more, a discharge of industrial and individual household (untreated) wastes, and soil erosions, as sources of this, form pollution. Relative to the above discourse, flooding has been identified as another major source of environmental pollution in Nigeria (Kesiena and Didigwu, 2012). The United Nations Development Programme (UNDP) announced that the Lagos flooding arose from rivers and streams overflowing their banks (Kesiena and Didigwu, 2012).

Furthermore, activities such as bush burning that results in deforestation has been highlighted as a source of soil pollution (Ityavyar and Thomas, 2012). A notable scholar has posited that when ground is broken for farming or commercial purposes, vegetation is removed exposing the soil layer to unnecessary contractions from construction equipment (Peters, 2015). Runoff and storm flow increase, while land erosion is enhanced thus increasing sedimentary loads down the alley (Peters, 2015). This effect obstructs smooth flow, thus increasing flooding and shift in configuration of the channel bottom (Peters, 2015). It equally alters species of fish due to the changes produced in the flora and fauna upon which the fishes depend (Peters, 2015).

However, none of these pollution sources seem to have equaled the extent of environmental damage that has been caused by Nigeria's oil and gas sector (Orubu et al., 2004). Indeed, scholars of environmental law trace a bane of Nigeria's oil pollution to the 1956 discovery of oil in Oloibiri, Bayelsa state (Mmadu, 2013). They assert that the environmental pollution and degradation that has emanated from oil spill in Nigeria has led

to the destruction of landscape, loss of arable farmlands, aesthetic environment, fishing operations, revenue, and sometime lives (Kadafa, 2012). Instances of death resulting from oil pollution in Nigeria's Niger Delta include the reported death of over 100 persons in the Jesse inferno, as well as the numerous deaths from the Idaho crude oil platform spill which tragically affected five communities (Peters, 2015).

A reason for the huge effects the oil and gas industry has had on the Nigerian environment and public health, as against other common sources of pollution identified above, might not be unconnected to the fact that the oil and gas sector is a sizable portion of the Nigerian economy (Akinlo, 2012; Uwakonye et al., 2006). Scholars believe crude oil production has become more relevant in contemporary times as there is yet no cheaper alternative to it as a form of energy (Oyende, 2012). Indeed, over 80% of Nigeria's revenue comes from sale of oil produced from the Niger Delta region, which is home to Nigeria's oil production (Ite et al., 2013; Oduyemi and Oguntseitan, 1985; Takon, 2014). Therefore, it seems to be a necessary evil that the Nigerian country cannot escape from. It is, therefore, trite to assume that while there seems to be a perceived usefulness of oil and gas in the Nigerian society, the volatility of the industry necessitates some regulation that would check the extent of degradation caused on the environment by it.

To address environmental issues in their oil sector, various other jurisdictions such as the United States Federal jurisdiction, Norway, or even Alberta of Canada have enacted legislation regulating their oil sector, while setting up enforcement institutions to implement provisions of the appropriate legislation. (Hayman and Brack, 2002). Nigeria has been no exception to this. Prior to June 1988, Nigeria's response to environment matters seemed to be on an ad hoc basis (Ikhariale, 1989). Environmental legislations at the time seemed to rather be in response to selective challenges oil discovery and industrialization brought as they came individually, rather than a holistic approach at examining these environmental misconduct as collective crimes (Ola, 1984).

Although the Criminal Code provided some light sanctions against minor environmental infringements (Criminal Code Act, 2004), the statute failed to make any strong preventive sanctions against the spate of increasing major criminal pollution (such as that caused by harmful waste discharge). This deficiency became evident from the Koko incident (Liu, 1992; Ogbodo, 2009). This incident in 1988 was as a result of some ship loads of toxic nuclear waste materials (which were allegedly imported from Italy by a contractor) dumped on a farm in Koko town near the Sapele River in the former Bendel State of Nigeria, now Delta State

In reaction to the shock of the incident, the Nigerian government organized an international workshop on the environment (Aina and Adedipe, 1991); a conference that resulted in the formulation of a National Policy on Environment (NPE) in 1991 (and later revised in 1999). This policy framework became a formula for enacting environmental laws in Nigeria, especially for environmental regulation within the oil and gas sector (Oyende, 2012).

Paragraph 8 of the 1991 NPE states thus (Federal Environmental Protection Agency, 1999):

*The legal framework as a component of the national environmental policy should be designed as an instrument that recognises the need to achieve a balance between environment, development and socio-economic considerations.*

Hence, it recognizes the principle of sustainable development as a principle that must guide the formation of Nigeria's environmental laws, toward achieving environmental protection. To ensure this, it provides that action shall be taken to:

- a. *periodically evaluate current legislation with a view to updating existing provisions;*
- b. *streamline all legislation and regulations relating to the environment with a view to re-organising them into a holistic and integrated compact that recognises the cross-sectoral linkages of the environment;*
- c. *prescribe jurisdictional boundaries for law making on the environment as well as provide clear responsibilities to promote coordination and*

*eliminate overlapping of functions among the various tiers of government; provide for the development of appropriate law for environmental emergencies.*

The provisions of the NPE apparently seeks to provide a strong regulatory framework for the Nigerian environment. To wit, several environmental laws have been enacted to ensure a protection of the environment under the theme of achieving sustainable development. (Oyende, 2012). The World Commission on Environment and Development (1987) has defined sustainable development to mean a "development meets the needs of the present without compromising the ability of future generations to meet their own needs."

According to Principle 4 of the Rio Declaration, "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." (U.N Convention on the Rio Declaration of Environment and Development, 1992). Similarly, Article 11 of the Treaty of the Functioning of the European Union (2012) provides that "Environmental protection requirements must be integrated into the definition and implementation of (all areas of policy) in particular with a view to promoting sustainable development."

Even more, Paragraph 5 of the "Political Declaration" at the Johannesburg Summit on Sustainable Development enforced "economic development, social development and environmental protection" as the "interdependent and mutually reinforcing pillars of sustainable development." (Conference Report on World Summit on Sustainable Development, 2002). Environmental protection is, therefore, arguably a core component of the sustainable development principle.

An important issue for this article is therefore not whether environmental laws regulating the oil production exist in Nigeria, but rather how effective such laws have been in achieving the desired sustainable development. Indeed, to appreciate the aptness of these legislative enactments in the oil and gas sector, one must first understand the circumstantial incidents that have happened since the years of Nigeria's foray into oil and gas exploration and production.

## **Extensive Oil Spill Pollution (and its Effects) as it is in Nigeria**

The United Nations Development Programme (UNDP) estimates that between 1976 and 2001 alone, there were an approximate of 6,800 spills totaling 3 million barrels of oil (United Nations Development Programme, 2006). Similarly, reports showed that there were 253 oil spills in 2006, 588 oil spills in 2007, and 419 oil spills in the first 6 months of 2008 (Yakubu, 2008). Cumulatively, an estimated 9 to 13 million barrels (1.5 million tons) of oil has spilled into the Niger Delta over the past 53 years (Imoobe and Tanshi, 2009).

Marine waters in Nigeria and their basins include all navigable rivers such as the rivers Niger and Benue, the rivers Sokoto, Ogun, Hadejia, Kaduna, Gongola, Katsina- Ala, and Cross River, etc., and their tributaries (National Inland Waterways Authority Act, 2004). There are also smaller bodies of water enclosed by the lagoons, such as the Lagos Lagoon, the creeks, etc., which are also regarded as internal waters under the Act. Record has it that most parts of these rivers have been polluted by oil wastes, thus destroying aquatic life and presence in their respective forms (Oyende, 2012).

An Amnesty International Report has observed that the repeated oil wastes that has caused damage to the water system of the Niger Delta (the rivers, streams, ponds), is majorly constituted of oil spills and waste discharges from oil companies (Amnesty International, 2009). This report becomes interesting as several Niger Delta indigenes rely on fishing for their sustenance and survival (Amnesty International, 2009). The damage effect has not been limited to aquatic life but has also affected even the natural survival of man. A recent study of the United Nations Environmental Programme (2011) found that drinking water in Ogoniland (a native name for the Niger Delta), contained a known carcinogen at levels 900 times above World Health Organization (WHO) guidelines (United Nations Environmental Programme, 2011).

It is also a known fact that the people of the Niger Delta region rely mostly on agriculture for food and their livelihood (Oyende, 2012). Interestingly, it has been reported that oil pipelines run

across farmlands and other oil infrastructure, such as well heads and flow stations, which are often close to agricultural land (Amnesty International, 2009). It is therefore easy for a spill to destroy viable crops of Niger Delta farmers. A study found that oil spills in the Niger Delta region reduces the ascorbic content of vegetables by an estimate of 36% and the crude protein content of cassava by an estimate of 40%, thus resulting in a 24% increase in the prevalence of childhood malnutrition in the region (Ordinoha and Brisibe, 2013). Another has posited that emissions from the combustion of associated gas contains toxins such as benzene, nitrogen oxides, dioxin, etc., which increase air prone disease risk, insecurity of food, and damage to the weather (Edafienene, 2012).

It is further asserted that oil spills on land also cause the ground to become toxic and this constitutes a danger to plants and animals who feed on these materials (Oyende, 2012). Several of these spills have been linked to the exploration activities of oil multinationals in the Niger Delta region such as the Shell Petroleum Development Company (SPDC) and others (Amnesty International, 2011). However, reports have shown that despite a relinquishment of some assets formerly belonging to some oil multinationals operating in Nigeria (such as the Shell subsidiary-SPDC), to the Nigeria Petroleum Development Company (NPDC), oil pipeline spills in areas such as the Itsekiri and Ilaje coastal communities have yet continued (Amaize, 2017).

A sustained pollution in Nigeria's oil production sector, as discussed above, makes one wonder whether there are existing legislations in Nigeria sanctioning oil spill. The article shall therefore explore to what extent the existing legal framework on oil production in Nigeria has effectively sanctioned oil spill.

## **The Nigerian Constitution**

Firstly, the Nigerian constitution (1999) is the *grundnorm* of all laws in Nigeria. Section 20 of the Nigerian constitution provides that: "the State shall protect and improve the environment and safeguard the water, air and land, forest and

wild life of Nigeria.” Hence the Nigerian constitution creates an obligation on the Nigerian government and its enforcement organs to ensure environmental protection while guaranteeing public safety. This provision in other words, creates some form of liability for the Nigerian government (albeit, in circumstances where they fail to comply with the obligation). Interestingly, it includes some form of criminal liability to any Nigerian government that fails (or/and has failed) to regulate the environmental crime in Nigeria.

Forthwith, other environmental laws regulating the oil sector has been enacted. It is interesting that despite the apparent disregard to the Nigerian environment, the environmental law regime in Nigeria is replete with legislations of this nature (Ijaiya and Joseph, 2014). Amongst such laws are the Petroleum Act, the Oil Pipelines Act, the Petroleum Production and Distribution Anti Sabotage Act, and the Petroleum Industries Bill. In this regard, these legislations will be scrutinized in order to determine their overall effectiveness in sanctioning oil spill in Nigeria.

### **Petroleum Act**

The Petroleum Act (1990) was enacted to regulate all petroleum activities in Nigeria (Orji, 2012). Section 2(3) of the Petroleum Act mandates a lessee or licensee to pay “fair and adequate compensation for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased land.” Indeed, the obligation created by the Act on a potential lessee or licensee to pay some form of compensation for surface disturbance is laudable. However, the Act fails to define or interpret exactly what it deems to be “fair and adequate.” The vagueness caused by the failure of the Act to precisely define what it deems as “fair and adequate” leaves the determination to the court, which can be belittled by a good lawyer on legal technicalities.

One must adequately examine what truly constitutes “disturbance to surface.” Surface disturbance as it relates to the environment has been defined as “...exposure, covering or erosion of the surface of land in any manner, or the degradation or deterioration in any manner of the

physical surface of land” (Government of Alberta, 2017). It seems, therefore, that the Petroleum Act merely provided some form of financial liability for petroleum pollution of the Nigerian lands, thus neglecting petroleum pollution on the Nigerian waters and severe air pollution (of gas flaring), which constitutes a severity of the Nigerian pollution likewise.

Furthermore, there seems to be a vagueness as to whether a scope of pollution covered by this provision covers just the soil, or just the plants and structures on the soil, or both the soil and the plants and structures on it. This uncertainty was highlighted in *Shell Petroleum Development Company of Nigeria Ltd. v. Councillor F. B. Farah* (1995). In this case, an oil well blow-out polluted about 60,700 hectares of land. The top soil was heavily contaminated but SPDC abandoned the rehabilitation of the land and offered only N44,000.00 (~\$125) as compensation. The respondents who had 13,245 hectares of the affected land were paid only N2000 (~\$5.50) for their crops and economic trees but no compensation was paid for the contaminated soil. Although the Act eventually awarded damages of N4,621,307.00 (~\$12,800) the court had to rely on common law principles of assessment of damages for tort as the Petroleum Act provided no guidance for the court to rely on.

Interestingly, the succeeding regulation borne out of its inadequacy has made no practical improvements to its deficiencies. Phrases such as “practicable precaution,” “up-to-date equipment,” “prompt step,” “good oil field practices,” and “good refining practices” run through the Petroleum (Drilling and Production) Regulation (2004) with no particular clarification as to what they actually entail within the Regulation. Hence the Regulation provides no practical interpretation of these phrases (that constitute the core subjects of its enactment).

### **Oil Pipelines Act**

The Oil Pipelines Act (1956) was enacted to regulate the granting of licenses for the establishment and maintenance of oil pipelines (this is provided for in the Preamble to the Act). This Act gives the holder of an oil pipeline license, right to

enter upon, take possession of or use a strip of land specified in the license and construct, maintain, and operate an oil pipeline and ancillary installation (Section 11[1] of Act). However, the Act also requires such holder to prevent potential pollution arising from such spill through its provision for compensation under section 11(5) of the Act. Section 11(5) of the Act provides thus:

*The holder of a licence shall pay compensation –*

- a. to any person whose land or interest in land (whether or not it is land respect of which the licence has been granted) is injuriously affected by the exercise of the rights conferred by the licence, for any such injurious affection not otherwise made good; and*
- b. to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work structure or thing executed under the licence, for any such damage not otherwise made good; and*
- c. to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.*

By this provision, a license holder under this Act, is obligated to pay compensation to a person whose land or interest has been affected by the exercise of the right under the license. A careful examination of section 11(5)(c) shows some form of defense to the license holder in the sense that such license holder could easily allege a damage of the oil pipeline that had caused a spill was due to the acts of a third party. Hence, a mere allusion as to the cause of an oil spill to be the willful sabotage of oil pipelines by local indigenes of the Niger Delta could absolve oil operators of the liability of compensating victims of the Niger Delta oil spills. The Act could, therefore, encourage an arbitrary abuse of the strict liability rule by corporate oil polluters seeking to evade the sanction imposed by the provisions of the Act. The Act could, therefore, defeat the very purpose for its enactment.

## **Petroleum Production and Distribution Anti Sabotage Act**

It is on record that several oil companies in Nigeria have alleged several pollutions from their facilities to pipeline sabotage and vandalism (Frynas, 2002). Whilst this article has tried to allude to a use of sabotage by local indigenes as a defense to oil spill liability on the part of such operators, the article yet agrees with the opinion of other scholars that there might be events of sabotage of oil pipelines by local indigenes in the Niger Delta (Augustine, 2005; British Broadcasting Corporation, 2010; Hinshaw and Kent, 2016).

As had been asserted by a scholar that, “Crude oil is tapped from pipelines and terminals of the oil producing companies with advanced technological equipment in the waterways, creeks, swamps and high seas. Plastic pipes are fixed to manifold points and intersection of several pipelines and crude oil is then pumped into barges. In some cases, ships are hooked to hoses that siphon crude from MNC facilities that may be several hundred meters away” (Ikelegbe, 2005). Shell Producing Development Company (SPDC) of Nigeria have repeatedly alleged illegal refining and third-party interference as a main source of pollution in the Niger Delta (Shell Nigeria, 2017).

The Petroleum Production and Distribution Anti Sabotage Act (1975) defines sabotage as a person who:

- a. wilfully does anything with intent to obstruct or prevent the production or distribution of petroleum products in any part of Nigeria; or*
- b. wilfully does anything with intent to obstruct or prevent the procurement of petroleum products for distribution in any part of Nigeria; or*
- c. wilfully does anything in respect of any vehicle or any public highway with intent to obstruct or prevent the use of that vehicle or that public highway for the distribution of petroleum product.*

The Act stipulates the death penalty or an imprisonment term of 21 years as punishment for an offender under the Act. This punishment seems more than sufficient to sanction an environmental crime of its sort. However, there is yet any known official case against oil sabotage in

the country. This makes it seem as if the Act is a toothless dog with no real sense of enforcement.

### Petroleum Industries Bill

The Petroleum Industry Bill (2012) seeks to “provide for the establishment of a legal, fiscal and regulatory framework for the Petroleum Industry in Nigeria and for other related matters” (Preamble to the Bill). This implies that the Bill covers all matters relative to oil and gas in Nigeria including environmental matters that relate to both spheres. Subject to Section 6(1), “The Federal Government shall, to the extent practicable, honor international environmental obligations and shall promote energy efficiency, the provision of reliable energy, and a taxation policy that encourages fuel efficiency by producers and consumers.”

The clause “...to the extent practicable,” Section 6(1) above, of the Bill, reiterates the position of the NESREA Act as it regards international environmental treaties and obligations on oil and gas matters, only shifting from the position of empowerment of NESREA on such international obligations to a mandate of the federal government. However, by employing the caveat “...to the extent practicable” the provision suddenly reduces the certainty on the extent to which the federal government can honor such international treaties. This is because such caveat creates some form of escape to the federal government from committing to the international environmental obligations.

Section 283 of the Bill, provides that:

*Every licensee or lessee engaged in petroleum operations shall, within three months of the commencement of this Act, submit an environmental programme or an environmental quality management plan...which shall:*

- a. Contain the licensee's written;*
- b. Commitment to comply with relevant laws, regulations, guidelines and standards;*
- c. Investigate, assess and evaluate the impact of the licensee or lessee's proposed exploration and production activities on-*
  - (i) the environment; and*

*(ii) the socio-economic conditions of any person who might be directly affected by the petroleum operations;*

- d. develop an environmental awareness plan describing the manner in which the applicant intends to inform his or her employees of any environmental risks which may result from their work and the manner in which the risks must be dealt with in order to avoid pollution or the degradation of the environment; proposed exploration and production activities on...the environment;*
- e. Describe the way he or she intends to-*
  - (i) modify, remedy, control or stop any action, activity or process which causes pollution or environmental degradation;*
  - (ii) contain or remedy the cause of pollution or degradation and migration of pollutants; and*
  - (iii) comply with any prescribed waste standard or management standards or practices;*

Similarly, 285(1) of the Bill provides thus:

*Prior to the approval of the environmental management plan or environmental management programme by the Minister, every licensee or lessee shall pay the prescribed financial provision to the Inspectorate in accordance with guidelines as may be issued by the Inspectorate from time to time, for the rehabilitation or management of negative environmental impacts, as a condition for the grant of the said licence or lease.*

Indeed, the provisions of Section 283 of the Bill cover a tender of EIA in the form of quality management plans. However, this Bill fails to provide any penalty whatsoever against a potential offender who fails to tender this plan. This implies that if in essence, the Bill is passed into law, there would be no real criminal penalty sanctioning environmental matters in the oil and gas sector in Nigeria.

Similarly, in providing that the licensee shall make some payments from the onset toward the remediation or management of environmental damage, Section 285 (1) of the Bill seems to anticipate environmental harm even before the actual commission which (considering the fact that the Bill makes no actual provision for the particular amount that shall be set aside for this purpose but leaves it to the inspectorate, nor does



the bill provide any form of penalty for a criminal breach of the licensee to tender an environmental quality management plan [EQMP]), might naturally make a licensee chose to pay the prescribed financial provision set aside, refuse to tender any form of EQMP, and yet commit pollution crimes.

Furthermore, Section 293(1) of the bill provides that:

*any person engaged in activities requiring a licence, lease or permit in the upstream and downstream sectors of the petroleum industry shall manage all environmental impacts in accordance with the licensee or lessee's approved environmental management plan or programme. It shall be the responsibility of every licensee or lessee as far as reasonably practicable to rehabilitate the environment affected by exploration and production activities whenever environmental impacts occur as a result of the licensee or lessee's operations.*

However, Section 293(2) of the Bill, exempts the licensee or lessee from liabilities for the rehabilitation of the environment where the act adversely affecting the environment has occurred because of sabotage of petroleum facilities which includes tampering with the integrity of any petroleum pipeline and storage systems. It went further to provide that any dispute as to the cause of an act that has adversely affected the environment shall be referred to the Downstream Regulatory Agency (which it refers to as the Agency) by the licensee, lessee, or any affected person for determination, and that such determination by the Agency shall be final. Even more, Section 293(4) of the Bill expressly provides that:

*Where the determination is that the act adversely affecting the environment has occurred as a result of sabotage, the costs of restoration and remediation shall be borne by the local government council and the state governments within which the act of sabotage occurred.*

An attribution of vicarious liability to states and local government councils within which any act of sabotage adversely affecting the environment has occurred is grossly unjustifiable. Firstly, this is because a determination by the Agency of any such dispute under Section 293(2) of the Bill

seems to be a derogation of an exercise of powers that should be clearly judicial in nature. It is, therefore, doubtful whether the Agency (which is not a court or tribunal established by law and vested with judicial power) is competent to make such determination in any dispute arising between a licensee/lessee on the one hand and a local government council or state on the other.

It is an undisputable principle of constitutional law that such judicial powers of adjudication can only be exercised by competent judicial courts or tribunals established under law with legal powers and capacity to adjudicate rather than an Agency as the PIB Bill proposes. This point has been well-enunciated by Nwabueze who defined the concept of independence of the judiciary as implying (Nwabueze, 1992):

*First, that the powers exercised by the courts in the adjudication of disputes is independent of legislative and executive powers, so as to make it usurpation to attempt to exercise it either directly by legislation, as by a Bill of Attainder, or by vesting any part of it in a body which is not a court; secondly, that the personnel of the court are independent of the legislature and the executive as regards their appointment, removal and other conditions of service.*

Similarly, in *Kayili v. Yilbuk* (2015), the Supreme Court held that:

*Section 3(2) of the Chiefs (Appointment and Deposition) Law of Northern Nigeria 1963 which provided that in the case of any dispute, the Governor, after due inquiry and consultation with the persons concerned in the selection, shall be the sole judge as to whether any appointment of a Chief has been made in accordance with native law and custom was null and void because the provision purported to oust the unlimited jurisdiction of the State High Court and conferred same on the Governor.*

Secondly, relying on the ruling on the SPDC/Bodo case (The Tides Newspaper, 2014), it can be presumed that the licensee or lessee has a general shielding and caring obligation toward the host community to protect it against avoidable harm arising from its operations. An established common law rule is that:

*The one who carries out hazardous activity on land is responsible for failing to anticipate and minimise the damaging effect of all trespassers, even those who are ill-intentioned. If a facility is not adequately secured against such trespassers, then the owner or operator of that facility can, be at least partly responsible for the damage done to third parties by, for example, thieves or others who have malicious intent (Leader et al., 2014).*

Interestingly, the provisions of Section 293(4) of the Bill do not only seem to go against this case law, but also seems to contradict the provisions under Section 4.1 of the extant Environmental Guidelines and Standards for the Petroleum Industry in Nigeria which states that "an operator shall be responsible for the containment and recovery of any spill discovered within its operational area, whether or not its source is known. The operator shall take prompt and adequate steps to contain, remove and dispose of the spill" (Department of Petroleum Resources, 1992).

It is notable that even in tort, "the party that has the greatest control over the risks, and can reduce them most effectively should be assigned liability" (Tuytel and Dyke, 2011). This is because, "imposing liability on parties who are in the best position to mitigate risks provides incentives to do so" (Tuytel and Dyke, 2011). Hence, considering the fact that one of such prominent operators in Nigeria, such as Shell who ranks top ten on the Fortune 500 (Fortune, 2017), it is only a reasonable expectation that in a case of satisfaction of liability between them and the host community, the former would rather be in the best position to mitigate the risks of sabotage. Thus, a defense of sabotage does not provide an automatic shield to them as the operator or owner of the facility unless it is established that all reasonable diligence has been exercised to secure and supervise the facility against interference by third parties.

Interestingly, relying on the rationale for a vicarious liability relationship to exist being that there has to be a special relationship between the parties, there seems to be no grounds set out under the Bill on identifying the special relationship between any oil-producing host state/ local government council and the perceived third-party saboteurs within the boundaries of the

said states and local government councils. Hence, there seems to be no justifiable grounds to impose a vicarious liability on the third party.

Indeed, until identified that any such relationship exists between oil-producing host states/ local government councils and vandals of petroleum facilities and installations, and a clear ground of such identification is shown, it would rather be unjustifiable to place any liability on oil-producing host states/local government councils. Thus, in *Gilbert Okoroma & Ors v. Nigerian Agip Oil Co., Ltd.* (1976), Manuel, J., dismissing the defense of sabotage raised by the defendant, held that "the act of a third party is a good defence . . . but evidence must be led either to identify such third party or show circumstances to lead to an irresistible conclusion of the act of third party whose act was neither unforeseeable nor controllable by the defendant."

Even more, Section 116 of the Bill proposes the establishment of the Petroleum Host Communities Fund (PHC Fund) toward developing the economic and social infrastructure of the communities within the petroleum producing area in accordance with Section 117 thereof. To give effect to Section 117, Section 118(1) of the Bill provides that upstream petroleum producing company shall remit on a monthly basis ten per cent of its net profit into the PHC Fund. Section 118(1) (a) and (b) of the Bill provides the beneficiaries of the PHC Fund to be the host communities within the petroleum producing areas and the petroleum producing littoral states.

Curiously, Section 118 (5) of the Bill creates a loophole which can be exploited as a dangerous escape which can result to a depletion of the Fund to the detriment of host communities; by providing that in the event of vandalism, sabotage, or other civil unrest occurs that causes damage to any petroleum facilities within a host community, the cost of repair of such facilities shall be paid from the Fund unless it is established that no member of the community was responsible for the damage. The danger then becomes thus: giving the persistent allegations of vandalism and sabotage of petroleum facilities by oil companies against host communities and the very fact that this has been found to be mere

allegation to escape liability, it might be unsurprising that virtually any damage to petroleum facilities within host communities could be attributed to the host communities with the result that cost of repairs of damaged petroleum facilities would simply become a drain on the Fund.

By stating; "...the cost of repair of such facility shall be paid from the PHC Fund entitlement unless it is established that no member of the community is responsible" Section 118(5) of the bill seems to place the burden of proving that no member of the host community was involved or responsible for the act of vandalism or sabotage that caused damage to petroleum facilities within the host community, on the host community. It, therefore, might not be so wrong to presume the placement of the burden of proof of innocence on the host community might defeat the purpose of the PHC Fund, as failure by the host community to discharge the burden of proof in any given case implies that the PHC Fund that has accrued in favor of the host community will be applied to off-set the cost of repairs to the damaged facilities and installations. In this way, the Petroleum Host Communities' Fund could be drained for purposes other than that for which it is primarily proposed.

It is notable that besides the fact that this bill provides no seeming strict criminal penalty sanctioning oil pollution, and provides no certainty as to the legal obligation imposed on the Federal government to abide by international treaties for the protection of the environment, it also seems to be in favor of oil operators as it provides clear escape route from some liabilities that might have deterred the extent of criminal pollution they cause in the Niger Delta. It is, therefore, almost clear that although the oil and gas sector presents the worst spate of criminal pollution in the country, the PIB, which ordinarily should have become a standard of environmental protection and punishment of criminal pollution within the country, provides no real solution in the sense.

It is provided under the Preamble of Bill that it seeks to address environmental concern in the petroleum, and possibly, gas sector (Zacchaeus, 2016). Upon passage, the bill shall repeal all existing legislation governing oil and gas in Nigeria

(Section 354 of Bill). Interestingly, scholars have pointed out that the Bill does little or nothing in depleting the actual structure and content of the existing environmental laws in the oil and gas sector but rather offer mere repetitions of the existing respective legislations it was made to repeal (Musa and Bappah, 2014). These scholars have even asserted that the Bill rather seems to offer less solutions in terms of securing environmental protection than the respective legislations its parts have been made to repeal.

An example where the bill has merely reflected the structure of an existing environmental Act without necessarily making any addition (being the very essence for its drafting) is that the Bill (in line with the Petroleum Act 1969) stipulates under Section 198(2) that "a licensee or lessee who causes damage or injury to a tree or object of commercial value or which is the object of veneration shall pay fair and adequate compensation to the persons or communities directly affected by the damage or injury." This provision is laudable in the sense that it guarantees some form of compensation from the offender who disturbs the surface. However, just like its predecessor, the Bill fails to explicitly define or interpret what it deems to be "fair and adequate." Furthermore, it fails to explicitly interpret what should be deemed as "any other right."

Indeed, a comparison of the above provision of Section 198(2) of the Bill and Section 2(3) of the Petroleum Act shows a clear repetition of structure and intent, together with the apparent limitations reflective in both cases. This makes one wonder if the Bill has really made any clear addition to what already exists or merely repeated what is already existing (and obsolete).

Similarly, Section 200 of the Bill provides that "every licensee or lessee engaged in upstream petroleum operations shall within one year of the commencement of this Act, or within 3 months after having been granted the license or lease, submit an environmental management plan to the inspectorate for approval." While this provision is laudable, the Bill provides no mechanism of inspecting the said plan that has been submitted to ensure that it is accurate nor does the Bill provide any mechanism for affected com-

munities to request an inspection of sites or areas they deem to be polluted or at risk from pollution. Thus, the Bill fails to encourage public participation in this regard.

On May 25, 2017, the Nigerian Senate passed the first tranche of the Petroleum Industry Bill (PIB), titled the Petroleum Industry Governance Bill (2016) at the Senate House, although this is yet to be passed at the House of Representative (the Nigerian National legislative arm is made up of the Senate and the House of Representatives and Bills must go through both Houses to effectively become an Act; Vanguard, 2017). This Bill is only a part of the PIB and contains just very few parts of the PIB. Interestingly, the PIGB does not make any additions to the PIB but rather only repeals or retains some of its sections. Virtually every section of the PIB that relates to environmental issues have been retained. This is except for the provision of PHCF that was reflected in the PIB and was repealed in the PIGB. It is therefore not surprising that the PIGB has provided no extra details to environmental matters besides what existed in the mother document (PIB).

## Conclusion

A cursory look through the discussions above, shows an ineffectiveness of environmental regu-

lations in extant petroleum laws in Nigeria. Indeed, the current structure of the PIB and its componential parts still fail to provide any necessary solution to either of these weaknesses. It is the view of this article that extant petroleum laws in Nigerian laws has failed to reflect current pollution incidents in Nigeria's petroleum sector. This is either because the provisions of laws have become outdated and not measurable to the pervasive nature of recent oil pollutions in Nigeria, or the wordings of the provisions are too vague to convey an adequate interpretation of the purpose of the statutes. Interestingly, the PIB which should be a respite to the ailing petroleum sector, and which under normal circumstances, should create a more effective regulatory capacity for environmental protection in Nigeria's oil sector seems unable to do so.

It is, therefore, a position of this article that most petroleum laws in Nigeria be revised to amend the regulatory component of such laws, especially with regards to the environment. Furthermore, a revision of such laws becomes apt to bring the sanctioning under the laws at par with the current spate of pollution activities in Nigeria's oil sector. Above all, the PIB should be amended before its final passage as law, as its current state reflects no real improvement to the laws it had been made to repeal.

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