

The petroleum industries bill; a deficient policy for environmental management in Nigeria's oil and gas sector.

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Abstract

The process for passage of the Petroleum Industries Bill (PIB) of Nigeria, instituted in 2008 was done with the purpose of regulating Nigeria's oil and gas sector. This Bill is therefore, upon passage, expected to repeal all extant statutes regulating the oil and gas sector. Indeed, environmental management seems to be an important subject in most of Nigeria's oil and gas legislations. It is however, notable that the theoretical importance given to this piece of legislation might not exactly translate to its practical effects on the environment.

The factors of time, and the significant increase in oil and gas pollution (both in the upstream, midstream and downstream sectors) over the years seem to make extant laws (which the PIB seeks to repeal) ineffective. It is therefore trite that one of the reasons for initiating the PIB is to proffer solutions to the seeming ineffectiveness of current legislative provisions on environmental management and sanctioning in the oil and gas sector. This article therefore, within the context of this objective, shall examine the PIB to determine whether legislative provisions under the Bill provides any real solution to environmental challenges in Nigeria's oil and gas sector.

Keywords: Pollution, petroleum, legislation, environment, oil and gas, policy.

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Introduction

The Oil and Gas industry is regarded to be laden with environmental risks [1]. Similarly, the Nigerian oil and gas sector has been adduced to have brought about several challenges to the Nigerian environment and the public health of its inhabitants [2]. These challenges include, water pollution from oil wastes which negatively impacts the hygienic capacity of such waters to man, as well as the natural habitat it serves to aquatic life, [3] and land pollution from oil wastes which affect the agricultural function ability of such lands [4]. It is the view of certain scholars that these spills have either been a result of the negligence of oil operators in the Niger Delta region, [5] or a consequence of the act of oil sabotage by oil vandalisers [6].

It also includes gas flaring as a form of air pollution [7]. Gas flaring has been defined as the burning of natural gas, which could have otherwise, been refined into usable products [8]. This pollution source has been asserted to cause health risk such as asthma, bronchitis, skin problems, breathing problems [9]. Wisner and Cannon posited that the process of flaring creates a physical raging fire at gas flaring sites, with thick smokes billowing into the atmosphere and falling back as acid rain, thus polluting the rivers and creeks within the region [10]. This position was supported by Uyigwe and Agho [11], who posited that the concentration of acid rain seems higher in the Niger Delta than surrounding regions. Scholars have further maintained that the heat from the gas flaring in the region has killed several of the regions vegetation, destroyed the mangrove swamps and salt marshes, and inhibited growth of plants [12].

Indeed, this paper does not seek to discuss the challenges of oil and gas pollution in Nigeria, nor does it seek to discuss the attendant

effects of the pollution. This is based on the premise that there has been several discourse on this subject. The paper does not also seek to discuss the position of extant Nigerian laws on oil and gas pollution. This is based on the premise that the PIB (in its current form), under Section 354 provides itself to, upon passage, repeal all existing laws relating to oil and gas in Nigeria [13].

Hence, this paper posits that in replacing extant legislations on oil and gas regulation, there is some measure of expectation as to the ability of the PIB to resolve the inherent oil and gas pollution as that is also part of the regulatory measures implored in these legislations. The paper shall illustrate some inherent deficiencies within the Bill (as it currently is) by discussing a few of its provisions that seems to make it unable to solve the oil and gas pollution debacle in Nigeria.

Deficiencies of the Petroleum Industries Bill

Some of the existing legislations regulating Nigeria's oil and gas sector include: the Oil Pipelines Act [14], the Petroleum Act [15], the Associated Gas Reinjection Act [16], the Harmful Waste (Special Criminal Provisions, Etc.) Act [17], the National Oil Spill Detection and Response Agency Act [18], the Oil in Navigable Waters Act [19], the Environmental Impact Assessment Act-EIA Act [20], the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act-NESREA [21], and the Petroleum Production and Distribution Anti Sabotage Act [22].

In line with the provision of the PIB to repeal all extant laws regarding oil and gas in Nigeria, it is expected that the former should seek to further environmental management in the oil and gas sector. This it can do by providing solutions to the current

environmental challenges associated with Nigeria's oil and gas industry that existing legislations might have been unable to remedy. Scholars have pointed out some deficiencies that might have inhibited the ability of these legislations to effectively solve the environmental menace of Nigeria's oil and gas sector as including: lack of clarity on core terms within the Acts to convey the message of the Act, very weak sanctions that are not commensurate with the extent of pollution they have been provided against, inability of the Acts to sanction a failure of the agencies they create (as laws) to perform the very purpose for which their individual Acts has created them; hence an inability of the Acts to provide true enforcement of their purpose, etc. [23]. It therefore means the PIB under normal circumstances ought to address these inadequacies in its structure towards solving Nigeria's oil and gas pollution. The paper shall therefore examine how it has fared in this regard.

The PIB seeks to "provide for the establishment of a legal, fiscal and regulatory framework for the Petroleum Industry in Nigeria and for other related matters." 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, honour 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," as in Section 6(1) of the Bill, above, restates the provisions in the NESREA Act as pertain to international environmental treaties and obligations on oil and gas matters, only shifting responsibility on such international obligations from NESREA to the federal government. However, by employing the caveat "...to the extent practicable" the provision suddenly reduces the certainty and introduces some elasticity with regard to the extent to which the federal government can honour such international treaties. This is because such caveat creates some form of escape to the federal government from actually committing to the international environmental obligations not only merely in form, but in substance.

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..."

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 outset towards the remediation or management of environmental damage, Section 285 (1) of the Bill seems to anticipate environmental harm even before the actual occurrence (Considering the fact that the Bill makes no actual provision for the particular amount that shall be so 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)), this gaping huge loophole 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. At any rate, should the licensee pay this anticipatory environmental remediation fee now, even before commencement of operations, if and when environmental issues such as oil spill occur in the future, who would be responsible for clean-up and environmental restoration? Meanwhile, who benefits from the money being paid now, the government and/or its agents, the regulatory authorities, or the future, as-yet-unknown victim(s)?

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 as a result 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."

This study is of the position that the 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 the law with legal powers and capacity to adjudicate rather than an Agency as the PIB proposes. This point has been well enunciated by Nwabueze who defined the concept of independence of the judiciary as implying [24]:

“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* [25], 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 [26], it can be presumed that the licensee or lessee has a general shielding and caring obligation towards 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” [27].

Interestingly, the provisions of Section 293(4) of the Bill does 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 thus:

“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.”

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” [28]. This is because, “imposing liability on parties who are in the best position to mitigate risks provides incentives to do so.” Hence, considering the fact that one of such prominent operators in Nigeria, such as Shell ranks top ten on the Fortune 500 [29], 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 defence 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 parties saboteurs within the boundaries of the said states and local government councils. Hence, there seems to actually be no justifiable grounds to impose a vicarious liability on the faceless 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 grounds of such identification is shown, it is the submission of this study that it is unjustifiable to place any liability on oil-producing host states/ local government councils. Thus, in *Gilbert Okoroma & Ors v Nigerian Agip Oil Co., Ltd.* [30], Manuel J, dismissing the defence 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) towards developing the economic and social infrastructure of the communities within the petroleum producing area in accordance with Section 117 thereof. In order 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 nominates 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 ostensibly legitimate ground for a depletion of the Fund to the detriment of host communities; by providing that in the event of that 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. It therefore, might not be so wrong to surmise that 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 their favour 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.

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 surmise that 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 their favour 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 provided in the Preamble to the Bill, which it seeks to address environmental concern in the petroleum, and possibly, gas sector [31]. Upon passage, the bill shall repeal all existing legislation governing oil and gas in Nigeria. Beyond repealing existing or previous legislations, such Bill, expectedly, should address most of the perceived structural, political, and administrative weaknesses that had bedevilled its predecessors. Interestingly however, two scholars have contributively 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 offers mere copious repetitions of the existing respective legislations it was made to repeal [32]. These scholars have even asserted that the Bill rather than address those concerns, seems to offer fewer solutions in terms of securing the desired environmental protection than the respective legislations it is being made to repeal.

An example where the Bill has merely reflected the structure of an existing environmental Act without necessarily making any addition is reflected in 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 including uprooting economic trees and moving communal groves and shrines.

However, its provision seems almost same as Section 2(3) of the Petroleum Act which provide for the 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.” In any case, the Bill, just like the Petroleum Act fails to explicitly define or interpret what it deems to be ‘fair and adequate’ nor does it explicitly explain who determines what actually is fair and adequate compensation in this regards. Indeed a comparison of the above provision of Section 198(2) of the Bill with Section 2(3) of the Petroleum Act shows a clear repetition of structure and intent, together with the apparent limitations contained in both.

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 for actually inspecting the said plan that has been submitted to ensure that it is accurate nor does it provide any pathway for affected communities to make input and voice their concerns, especially where they happen to be aggrieved.

It has been noted above that the Bill fails to provide any specific penal sanction against environmental offences in Nigeria. It has also been discussed that instead of making any real addition to existing environmental laws, the Bill rather seems to have repeated what has already been provided or even weaken the core element in what is available in the existing laws.

An example where the Bill has rather reduced what is available in existing legislation is its proposed alteration to the extant legislation on gas flaring. Indeed extant gas flaring legislation names a price to flaring (albeit insufficient) with a view to eventually ending gas flaring. However Section 201 of the current Bill merely lamely provides that “the lessee shall pay such gas flaring penalties as the minister may determine from time to time.” Similarly, Section 277 of the Bill confers rights on the minister to permit flaring in circumstances whereby he feels utilisation is not feasible.

A combination of the provisions of Sections 201 and 277 of the Bill indicates that the Bill not only fails to explicitly mention any known penalty to sanction gas flaring rather than a discretionary choice of the minister to stipulate payments from ‘time to time’, but also hands over the power to make such a colossal decision to a minister (a politician). This sweeping authority to one person who is not a judicial officer is dangerous for obvious reasons.

This further implies that the Bill only reflects the same position of the Associated Gas Injection Act without making any real improvements. It even worsens the current legislative provisions on flaring as instead of providing any tangible penalty against flaring, it provides a vague sanctioning reliant on the discretion of the petrol minister. Furthermore, unlike the previous gas flaring Acts that specifically set deadlines (that might not have been met) to gas flaring, Section 275 of the PIB sets no deadline but also confers a decision on the end date for flaring on the petrol minister.

Even more, the Bill fails to make any direct reference to the menace of oil sabotage that has been adduced to be a huge cause of Nigeria’s oil pipeline spill; nor does it provide any sanction against the crime.

On 25TH May, 2017, the Nigerian Senate passed the first tranche of the Petroleum Industry Bill (PIB), titled the Petroleum Industry Governance Bill-PIGB [33] at a Senate plenary session although this is yet to be concurred to by the House of Representative- the 2nd (and lower) Chamber of the Nigerian legislature [34]. What was passed so far is only a portion of the original Bill and indeed contains just a very few parts of it. 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 was retained. This is except for the provision of Petroleum

Host Communities Fund that was reflected in the PIB and was repealed in the PIGB. It is therefore clear that the PIGB has provided no extra details as to environmental matters besides what existed in the mother document (PIB).

Conclusion

It is the position of this study, that besides the fact that this bill provides no seeming strict criminal penalty sanctioning oil pollution, nor does it provide any sanctioning against gas flaring besides a reference on 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 favour 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 though 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 to this challenge.

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