POLLUTER PAYS PRINCIPLE UNDER THE NIGERIAN OIL AND GAS INDUSTRY: LEGAL AND INSTITUTIONAL CHALLENGES

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ABSTRACT

An important liability imposed on the operator in the oil and gas industry is the polluter pays principle, (PPP). This liability is to the extent that the operator is liable to pay the victim of any damage caused to his person or property and possibly remedy the environment in the form of clean-up. This is because the operator in the oil and gas industry causes series of havoc on the people, their property and the general environment either intentionally or negligently and either directly or indirectly through oil spillage, gas flaring and even effluent discharge. The law has imposed certain liabilities on the perpetrator of pollution through certain legal instruments such as the Environmental Guidelines and Standards for the petroleum industry in Nigeria, National Oil Spill Detection and Response Agency Act etc., and institutional framework such as the Department of Petroleum Resources, National oil Spill Detection and Response Agency (NOSDRA) just to mention a few. At the end, it is discovered that the legislations and the institutions have not done much in holding the polluter liable to pay. This is because either the laws are vague, ineffective or inadequate or the institutions are not strong enough in enforcing the laws. This has become a very big challenge which allows or create avenue for the perpetrator of pollution to go unpunished in most cases. This research therefore, recommends a very strong enforcement agency or agencies that will be able to tackle this problem(s) and also a very effective legislation in Nigeria.

Keywords: Liability; Oil; Pollution; Pays; Principle; Petroleum; Gas; Environmental law.

INTRODUCTION

The Polluter Pays Principle which is one of the principles in environmental law basically implies that, everyone should be responsible for 'cleaning-up his mess'. In other words, the principle holds that the polluter who creates an environmental harm is liable to pay the cost to remedy the harm and compensate the victims of the harm.

This principle has been adopted by many countries all over the world to hold the responsible party (RP) liable for any damage caused in the course of any activity and most especially, the oil gas activity. In Nigeria, for instance, there is no exception as the principle is applied or used in the oil and gas industry to hold the responsible part liable. In order to do so, by holding the polluter pay for the damage caused, mechanisms are put in place among which are certain environmental laws and also oil and gas laws. Also in place are institutions. Among these legal mechanisms are the following legislations: Oil Pipelines Act, National Oil Spills Detection and Response Agency Act and Environmental Guidelines and Standards for the Petroleum Industries in Nigeria etc. Also the institutions are the Department of Petroleum Resources (DPR), the National Oil Spill Detection and Response Agency (NOSDRA), etc.

This work seeks to examine these legal and institutional frameworks enacted and established to hold the polluter liable for the damage caused. Furthermore, to interrogate the

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efficacy or otherwise of these legal and institutional framework and come out with recommendation for an efficacious 'polluter pays principle' in Nigeria. This will be achieved against the backdrop of making a comparative analysis with other jurisdictions, where the best practices rule applies.

Legal Framework for Polluter Pays Principle in Nigeria

Harmful wastes (Special Criminal Provisions) Act – Section 12(i) of the Act provides that: "*Where any damage has been caused by any harmful waste which has been deposited or dumped on any land or territorial waters or contiguous zone or Exclusive Economic Zone of Nigeria or its inland waterways, any person who deposited, dumped or imported the harmful wastes or caused the harmful waste to be deposited, dumped or imported shall be liable for the damage.*" (Crimes in respect of harmful wastes, 2010).

According to Oraegbunam et al. (2019), the above provision is a civil liability which invariably means that where or if a victim suffers injury by reason of the adverse environmental effects of the activities of the polluter, he may be awarded damages for the loss or damage to his property.

Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)

Paragraph 8.1 of the Guidelines provides for polluter pays principle and provides: "*a spiller shall be liable for the damage from the spill for which he is responsible*". The implication of the above is that the spiller which is the polluter is liable to pay for the damage caused to the victims which he is liable (Olawuyi & Tubodenyefa, 2018).

National oil spill detection and response (Establishment) agency Act

This legislation also applies polluter pays principle. This is provided for in Section 6 (2) & (3) of the Act which states: '*The spiller's failure to clean-up the impacted site to all practical extent including remediation shall attract a fine of a million naira'*. The element of polluter pays principle in this legislation is that it makes the polluter responsible for cleaning up of the impacted site and not necessarily the fine (Alexander, 2006).

Oil pipelines Act

For the purpose of polluter pays principle, section 11(5) of the Act vests civil liability on any person who owns or is in charge of any pipelines. Thus, he would be liable to pay compensation to anyone who suffers physical or economic injury as a result of a break or leak in the pipeline.

Minerals and mining Act

The Mineral and Mining Act is also another legislation which provides for the polluter pays principle in Nigeria. This is done basically through three channels: The first is by the polluter paying for the administrative cost for controlling and preventing environmental pollution (Ezeanokwasa, 2018). The second is by the polluter paying for the specified pollution control and prevention measures to be complied with by the polluter, and third, by the polluter paying for the general pollution control and prevention obligation of polluters.

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The Administrative costs are costs incurred by the agencies created specifically by the Act for this purpose. These agencies are; the Mineral Resources and Environmental Management Committee (MREMC) and the Mines Environment Compliance Department (MECD). The payment is made through the fees paid by polluters for the administration of the Act, and for rehabilitation and reclamation of impacted areas. The second channel for the polluters to pay for their pollution is through bearing the costs of complying with measures set up by public administration for pollution control and prevention (Ezeanokwasa, 2018). Such measures include the: Environmental Impact Assessment Standards, Environmental Protection and Rehabilitation programme, Environmental Protection and Rehabilitation Fund (EPRF), and Community Development Agreement, which refers to the obligation of involving the community, hosting mining activities to be involved in the control and prevention of pollution in their area. The third channel is through bearing the costs for the general obligations for pollution control and prevention, which polluters bear in their respective stages in the mineral exploitation process (Ezeanokwasa, 2018). A breach of any of these obligations gives rise to the polluter paying compensation to the victim.

A holder of an exploration license bears the obligation to conduct exploration activities in an environmentally responsible manner. He is to maintain and restore the land that is the subject matter of the license to a safe state from any disturbance resulting from exploration activities including but not limited to filling up any shafts, well, holes or trenches made by the title holder. He is to compensate users or occupiers or land for any damage to land and property resulting from activities in the exploration area.

Legal, Institutional and Other Challenges

Enabling statutory instruments not regularly updated: Public administration does its job in seeing that polluters pay for pollution caused by them in accordance with the provisions of the enabling statutory instrument (Ezeanokwasa, 2018). These instruments usually recommend environmental protection technologies to be adopted by potential polluters and fines to be imposed when environmental control provisions are flaunted. One obvious fact about technologies is that they change from time to time with better one being produced. In the same way, fines lose deterrence value overtime due to inflation particularly in unstable economies which Nigeria is one of. Therefore one of the challenges in the regulatory framework for polluter pays principle is lack of updated statutory instruments in Nigeria.

Undue delay in court processes: It is usual for legal instruments for environmental protection to provide for judicial actions against a polluter, who, without legitimate justification fails to comply with a measure for actualizing the ppp. The action can be civil or criminal as the case may be. In either of the processes, the frustration encountered by the inordinate long period of time that judicial processes take in Nigeria is an obstacle to the actualization of the ppp.

In criminal proceedings for instance, the agencies saddled with the duty of enforcing the principle would be frustrated and disillusioned. The long judicial process is capable of being exploited by an unscrupulous enforcement agent who can resort to settlement with offenders by which they collect money from them and release them. In civil proceedings on the other hand the cases might last for so long that the victims of environmental pollution might not be alive to reap the harvest of the damages due to them. A few examples where there were undue delays are: In the case of John Ebiogbe v NNPC, it took 15 years to finish one case. Damage from oil activities was caused in 1979, writ of summons was filed in 1984

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and the case was first heard in 1987. It was appealed in 1989 and Supreme Court heard it in 1994. Again, in *Shell Petroleum Dev. Co. Nig. Ltd. v. George Uzoaru & 3 Ors* the cause of action arose in 1972 and the case was first heard in the High Court in 1985 and the court of Appeal in 1994. Yet in another case of *Elf Nig. Ltd. v Opere Silo & Anor,* the damage was suffered in 1967, the case came to High court in 1987 and at the Court of Appeal in 1990 and finally at the Supreme Court in 1994.

Undue attachment to technicalities by courts: Nigerian courts unduly attach their decisions based on technicality especially in ppp cases of negligence and other common law principle cases. Reliance on technicalities leads to injustice especially on the victims of oil pollution. Base on this claims litigants have been thrown out of courts on mere technicalities. The technicalities are either locus standi or expert opinion. On Locus standi for instance, it means the capacity of a person to institute legal proceedings in a court or other competent tribunal. It therefore, follows that such a person must have an interest which is sufficiently affected the action (Ezike, 2010). The issues of locus standi does not depend on the success or merits of the case, but on whether the plaintiff has sufficient interest or legal right in the subject matter of the case (Thomas v Olufosoye, 1986). Court uses the above technicality to knockout cases of the victims of oil pollution in Nigeria.

Another technicality is that of expert opinion. Environmental pollution though can be seen clearly with the naked eyes still; often time's courts require scientific proof. For a victim of environmental pollution to succeed, he must procure the services of experts to analyze the incident in proper scientific terms. In most cases these experts charge high fees which are beyond the reach of these victims, and as such lead to inability to prove their cases and therefore fail to obtain justice. In Seiesmograph Services Ltd. v. Benedict Onokpasa, the respondent/plaintiff brought an action for damages to his building allegedly caused by the negligent act of the appellant/defendant. To succeed in this case the plaintiff has to prove that the defendant's negligent act caused the damage. This he was unable to do to the satisfaction of the court. The appellant called three experts who testified to the effect that there was no link between the shooting operations of the company and the damage to the plaintiff's building. The witness called by the plaintiff were not match to the three called by the defendant, the matter was thrown out. Because of the inability of the plaintiff to prove his case scientifically, he lost the case and the award of damages.

Institutional Challenges

Under-funding of enforcement agencies: Part of the mechanisms for implementing the ppp is by a polluter defraying the public administration cost for measures implemented towards pollution control and prevention (Ezeanokwasa, 2018). These costs are defrayed through the payment of administrative fee charged. This presupposes that the government funds the enforcement agencies adequately for their jobs prior to the actual or potential polluter paying fees for the services rendered by public officers. But the experience is that oftentimes, these agencies are not adequately funded for their functions.

Inefficient enforcement of laws by the agencies: It is noted that NOSDRA and the DPR that should see that the oil spillers pay for the spillage such as cleaning up the impacted areas, do not have the necessary tools and technical expertise for their work. They rely on oil companies who are the spillers themselves. Another unfortunate situation is that, oil spill investigations are organized by oil company personnel. NOSDRA does not initiate oil spill investigations, it rather depends on the company to take both its staff and the oil company to

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spill sites and supply technical data about the spills. In this situation standard must be compromised.

Overlaps of legal position and mandates: There are overlaps of policy and mandates among the agencies. An example is the NOSDRA and DPR which seems to have conflicting issues as to who is responsible for monitoring, responding, mediating and detecting oil spill incidences (Albert et al., 2018). DPR and NOSDRA appear to claim this same role in some circumstances leading to contradictions in policy enforcement in some important ways. Also, the NOSDRA and NEMA whose mandates are in providing policies for the environment and environmental disaster management, coordination for effective response to any disaster, still have related mandate with NOSDRA in some cases.

Other Challenges

Transparency and lack of proper compensation structures: There are significant shortages of compensation structures in the oil spill areas. There is no uniform structure for oil spill damages as different people, states and even communities tend to be compensated differently at the whims and caprices of the oil companies. The oil companies sometimes pay compensations after decades of impacts, protests, long delay and several litigations and sometimes compensation is never paid (Albert et al., 2018). Again the compensation strategy applied in relation to environmental damage from oil operation is observed to be inadequate, given that it is much reliance on the polluter's interest rather than that of the victims. Above all compensation structures in Nigeria oil and gas industry lacks transparency due to the fact that there is not Act that comprises all damages due to the polluters. This makes the victims even powerless and worse off.

Difficulties in identifying the polluter: The polluter pays only if he can be laid hands on. Where he cannot be identified, then there is no how he can pay for the pollution caused by him. This situation often arises in oil spill cases resulting from vandalization of oil pipelines, sabotage of oil installations and illegal bunkering. In this situation, it is difficult to identify the polluter in such activities because they are carried out clandestinely (Ezeanokwasa, 2018).

CONCLUSION

Polluter pays principle as entrenched in our laws and its practice by our courts should be enforced strictly and rigidly. If this is the case, and the above recommendations are adhered to by our courts and all other individuals, industry corporate bodies; it will bring a healthy environment as well as victims being redressed for the wrong done to them by the polluter.

RECOMMENDATIONS FOR REFORM

Amendment of all environmental laws – It is suggested that all environmental laws in Nigeria be amended. The amendment should incorporate strict environmental damage and absolute liability. This will suggest that a polluter must necessarily pay for his activity that damaged the environment strictly.

The agencies should be well funded to carry out their duties, effectively and efficiently. A situation where an agency has to rely on the polluter to provide logistics as well as funds for the inspection of the impacted site or even rely on the investigations provided by the polluter is not healthy, therefore must be discouraged.

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Apart from holding the polluter strictly liable, he should be made to pay heavy cost. Courts should make the polluters pay heavily. This might deter their further act of polluting the environment recklessly.

There should be adequate compensation for the victims of pollution by the polluters. This is because environmental damage are far reaching and devastating therefore large sum of money is needed for the victim to regain his stand to his former position.

Polluter must be made to rehabilitate the polluted environment. Apart from the direct victims of the pollution, every other person is affected indirectly, therefore, there is a need that the polluter is made to rehabilitate the environment and make it habitable for all.

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