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Petroleum industry bill 2012 and the principle of vicarious liability of oil producing states and local government councils for sabotage of petroleum facilities: Resurrecting an old colonial policy in the Niger Delta region of Nigeria

Z. Adangor
Review

Petroleum industry bill 2012 and the principle of vicarious liability of oil producing states and local government councils for sabotage of petroleum facilities: Resurrecting an old colonial policy in the Niger Delta region of Nigeria

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The Petroleum Industry Bill, (PIB) 2012 is designed to provide a comprehensive legal framework for the operation of the oil and gas industry in Nigeria. In providing a framework for dealing with the environmental impacts of petroleum exploration and production, s.118 (5) of the PIB 2012 provides that where any act of vandalism, sabotage or other civil unrest occurs which causes damage to any petroleum facilities within a host community, the cost of repair of such facilities shall be paid from the Petroleum Host Community Fund established under section 116 of the Bill for the development of the economic and social infrastructure of the communities within the petroleum producing area unless it is established that no member of the community was responsible for the damage. Similarly, under section 293 of the bill, where the Downstream Regulatory Agency determines that a particular harm to the environment has been caused by sabotage of petroleum facilities within any of the oil producing states or local government, the cost of restoration and remediation shall be borne by the state governments and local governments within which the act occurred and the licensee or lessee shall be discharged of any liability in respect thereof. This study argues that the oil producing states and local government councils should not be held vicariously liable for acts of sabotage of petroleum facilities committed by unidentifiable third parties who obviously did not act as their agents. It is also argued that the principle of vicarious liability under the Bill smacks of an old colonial policy adopted by British Consuls in the Niger Delta of holding coastal communities liable for criminal acts committed by unidentifiable third parties against British interests.

Key words: Petroleum Industry Bill 2012, Niger Delta principle of vicarious liability.

INTRODUCTION

The principal legislation governing the Nigerian petroleum industry is the Petroleum Act 1969 which was promulgated by the defunct Federal Military Government as the Petroleum Decree 1969.¹ It was enacted as part of the federal military government’s strategy not only to weaken the separatist campaign launched by the Igbo
which culminated in the Nigeria-Biafra Civil War of 1967 to 1970, but also to forestall any such campaign in future. The Petroleum Act (hereinafter referred to simply as the ‘Act’) as amended by the Petroleum (Amendment) Act 1996 and the Petroleum (Amendment) Act 1998 has alongside about sixty-seven other principal legislation and about thirty subsidiary legislation governed the nation’s petroleum industry for over four decades. Arguably, Nigeria’s oil and gas industry has experienced several challenges over the period including those dictated by global practices in the oil and gas industry which underscore the need for urgent legislative reform. What with the persistent calls for the deregulation of the downstream sector of the industry and the unbundling of the State National Oil Corporation, Nigerian National Petroleum Corporation.

Whether the agitations in the Niger Delta region of the federation of Nigeria for resource control also provided additional impetus for the current review of the Petroleum Act, 1969 remains highly contentious. However, the opposition of the oil-producing ethnic minorities of the Niger Delta to the current regime of centralized state ownership of petroleum resources in Nigeria has remained unwavering. To be sure, the position of the oil producing ethnic minorities of the Niger Delta region is that the current regime of exclusive federal ownership of petroleum resources is a negation of the underlying principles of Nigerian federalism and a violation of their right to self-determination within a federal Nigeria. For instance, the Ijaws — the dominant ethnic nationality in the Niger delta region — contend that “the confiscation of the peoples’ land and mineral resources through obnoxious and undemocratic laws thereby denying them their legitimate and inalienable rights is not only the greatest aberration of federalism but an invitation to anarchy.” They demand a restructuring of the Nigerian federation to enhance “a truly federal system where component federating units own and control their resources and pay appropriate taxes to the centre.”

The Ijaw position on resource ownership was reinforced by the Kaima Declaration adopted by Ijaw Youths on December 11, 1998. The Ogonis, a major oil-producing minority group and host to the bulk of Shell’s operations in Nigeria, have also taken a similar position on resource control. In 1990, the Ogonis under the aegis of the Movement for the Survival of Ogoni People (MOSOP) presented the Ogoni Bill of Rights to the Government and People of Nigeria. The Bill recounted the complete degradation of the Ogoni environment from decades of oil exploration, the neglect of the Ogonis by successive federal administrations and their political marginalization in the federation. Consequently, the Ogonis demanded for political autonomy to participate in the affairs of Nigeria as a distinct and separate unit including the right to control their political affairs, the right to control and use a fair proportion of Ogoni economic resources for Ogoni development and the right to protect the Ogoni environment from further degradation. The Ogoni Bill of Rights therefore sets a non-violent tone for the engagement of the ethnic minorities of the Niger delta with the Nigerian State over the contentious issue of restructuring the federation to give individual ethnic communities and/or the federating units a stake in the powers of the central government over natural resources.

It was against the foregoing background that on 7th September, 2007 the federal government —the sovereign owner of the entire petroleum resources in Nigeria — inaugurated the Oil and Gas Reform Committee which was charged with the responsibility of formulating a blue print for the reform and restructuring of the petroleum industry. The work of the Reform Committee culminated in the introduction of the Petroleum Industry Bill (PIB) 2012 in the National Assembly.

Although the Bill was first introduced in the National Assembly as an executive bill in 2008, it is yet to be passed into law by the National Assembly almost eight years after its introduction. Unarguably, the inexplicable delay in its passage has not gone without disapproval by stakeholders in the nation’s key economic sectors. The delay in the passage of the bill may be attributed to ethnic politics and intrigues by different stakeholders in the nation’s oil and gas industry.

The purpose of this article is to examine critically the relevant provisions of the Petroleum Industry Bill 2012 which seek to hold oil-producing states and local government councils in the Niger Delta region of Nigeria vicariously liable for sabotage of petroleum facilities and installations by unidentifiable third parties within their geographic boundaries. It is argued that these provisions are not only punitive but also appear to be designed to further impoverish the already impoverished and hopeless ethnic minorities of the region. Arguably, the provisions of the Bill on vicarious liability bear visible scares of an old colonial policy adopted by British Consuls of holding coastal communities of the Niger Delta vicariously liable for criminal acts committed by unidentifiable third parties within the communities against British economic interests.

The study is divided into four sections. The introductory section provides the background to the study. Section two of the paper discusses the general principles of the
Bill while the third section critiques the provisions in the bill dealing with vicarious liability of oil-producing States and local government councils for acts of sabotage of petroleum facilities and installations committed by unidentified third parties within their geographic boundaries. The concluding remarks are captured in the fourth section.

**GENERAL PRINCIPLES OF THE PIB 2012**

According to its long title, the Petroleum Industry Bill 2012 is a bill to “provide for the establishment of a legal, fiscal and regulatory framework for the Petroleum Industry in Nigeria and for other related matters.” The bill seeks to harmonize and replace all extant legislation governing oil and gas in Nigeria. Accordingly, from the effective date of its passage into law, all extant petroleum and gas legislation will stand repealed.xviii

The fundamental objectives of the bill as set out in section 1 includes enhancing exploration and exploitation of petroleum resources in Nigeria for the “benefit of Nigerian people” and protecting health, safety and the environment in the course of petroleum operations. Other fundamental objectives of the bill include the vesting of the property and sovereign ownership of petroleum within Nigeria in the sovereign State of Nigeria and the right of the federal government to participate in the venture to which any licence or lease granted under the provisions of the bill relates on terms and conditions to be negotiated between the Minister in charge of petroleum resources and the applicant for the licence or lease including the exploitation of any natural gas discovered.xix

Thus, the federal government cannot unilaterally acquire participating interest in any venture to which any licence or lease granted under the bill relates without prior negotiation with the applicant for the licence or lease.xx

The right of participation by the federal government in the exploitation and production of petroleum covered by any licence or lease granted by the Minister is consistent with the Resolution adopted by The Organization of the Petroleum Exporting Countries (OPEC) in 1968 which enjoins Member-States to assume control and assert sovereignty over petroleum resources within their jurisdictions by acquiring reasonable participating interest in the operations of the International Oil Companies on “the ground of changing circumstances.xxii

However, it would appear that the participation of the federal government in the exploitation and production of petroleum per se cannot guarantee the needed control over petroleum resources envisaged by the bill. The participation of the Federal government in the oil and gas industry over the past three decades has not diminished the near-monopolistic influence being exerted by The International Oil Companies (IOC’s) on the industry. The reason for this sad development is not farfetched:

The country has not developed the capacity to manage its petroleum resources by itself: all crude oil is still produced by foreign operators. Even though some Nigerians who work in the industry occupy important management positions, the key management roles are performed largely by foreigners.xxiii

Although the situation may have changed slightly from what it was when the above grim observation was made, the irrepressible fact is that Nigeria is yet to possess the indigenous technological capability to prospect for, explore, exploit and produce petroleum. Nigerian petroleum industry is driven by foreign technology which underscores the indispensability of the IOCs in the industry. The effect of this, notes a learned writer, is that “The state is essentially a passive tax collector, turning over the risk of oil exploitation and control of such exploitation to private foreign companies, in exchange for a share of profits from the sale of the oil.”xxiv

In terms of resource ownership, the PIB 2012 unequivocally maintains the status quo by retaining exclusive ownership of petroleum and natural gas in the Federal government of Nigeria.xxvi It also purports to expand the ambit of section 44(3) of the Constitution of the Federal Republic of Nigeria (1999) (as amended) by extending federal government’s sovereign ownership of petroleum resources to those in “the extended continental shelf.”xxvi

In furtherance of the nation’s drive towards good governance and accountability, s. 3 of the bill provides that the management and allocation of petroleum resources and their derivatives in Nigeria shall be conducted strictly in accordance with the principles of good governance, transparency and sustainable development of Nigeria and that the overriding consideration in the management of petroleum resources shall be the maximization of benefits to the Nigerian state. Therefore, the bill seeks to provide:

(i) An orderly, fair and competitive system;
(ii) Clear and effective legal and institutional frameworks for organizing petroleum operations; and
(iii) A fiscal regime that offers fair returns on investment while optimizing benefits to the Nigerian people.xxvi

These are no doubt lofty ideals but their realization may remain a tall order having regard to institutionalized corruption that is ravaging the country, particularly the oil and gas sector.xxviii Human Rights Watch reports that “the country’s tremendous oil wealth which could have been used to improve the lives of ordinary Nigerians, continues to be squandered and siphoned off by the governing elite, leaving poverty, malnutrition and mortality rates among the worst in the world.xxvi

The major thrust of the PIB 2012 is the liberalization of the petroleum industry through the unbundling of the National Oil Company, Nigerian National Petroleum
Corporation (NNPC). Several new agencies are proposed for establishment in place of the NNPC. These agencies include Petroleum Technical Bureau; xxix Upstream Petroleum Inspectorate; xxx Downstream Petroleum Regulatory Agency; xxx and National Petroleum Assets Management Corporation which shall be a holding company operating fully on commercial principles. xxii Two new Companies are to be incorporated by the Minister for Petroleum Resources not later than three months of the effective date of the bill. These are the Nigerian Petroleum Assets Management Company (or to be called by such other name as shall be available) xxxiii and a new National Oil Company. xxxiv

Sadly, there is nothing in the PIB 2012 that demonstrates any significant shift in the legislative policy of the federal government towards the Niger delta in terms of a sustainable development agenda. The perennial failure of the federal government to develop the oil-rich Niger delta region is very well known. The issue here, is that although the entire petroleum resources - Nigeria’s main source of revenue - are derived exclusively from the Niger delta, the oil producing communities in the region belong to the ranks of the most backward, underdeveloped, neglected and politically marginalized groups in the federation.

The underdevelopment and criminal neglect of the region are attributable to the emergence of a highly centralized federal system dominated by the three majority ethnic groups of Hausa/Fulani, Yoruba and Igbo which denies the oil-producing states the legal rights to control and manage the abundant petroleum resources for the development of the region. The oil wealth generated in the Niger delta is simply siphoned out of the region by a powerful federal government to develop other parts of the federation while the region is left to grapple with perennial lack of basic social amenities and infrastructure which are taken for granted in other regions of the federation. xxxvThe mind boggling contrast between the huge oil wealth generated from the region and the striking poverty of its peoples was captured by Amnesty International:

Oil has generated an estimated $600 billion since the 1960s. Despite this, the majority of the Niger delta’s population lives in poverty. The United Nations Development Programme (UNDP) describes the region as suffering from “administrative neglect, crumbling social infrastructure and services, high unemployment, social deprivation and abject poverty, filth and squalor and endemic conflict”. The majority of the people of the Niger delta do not have adequate access to clean water or health care. The poverty and its contrast with the wealth generated by oil, has become one of the world’s starkest and most disturbing examples of the “resource curse”. xxxviii

In 1998, a Lagos-based reputable Magazine at the end of a research on the crisis in the Niger Delta, reported that: Poverty and unemployment . . . are responsible for the rage and violence against companies and government. For example, in over 12 riverine communities visited in Delta State, there was deep-seated lamentation by the people over their neglect. The Ijaw, for example, live in pitiable tents, making do with brackish and saline water. There are hardly traces of development in social amenities. xxxvii

Although there is a tendency to blame the infrastructural poverty of the region on its peculiar deltaic terrain — vast swampy wetland consisting of dense mangrove forest, fresh water swamp, coastal ridges, forest and fertile dry land — the truth of the matter is that the Niger delta is the victim of ingrained ethnic politics. xxxviii This explains why successive federal administrations have ignored the pungent observations made by the Minorities’ Commission (Willink’s Commission) that the ‘needs of those who lived in the creeks and swamps of the Niger delta’ are ‘very different from those of the interior’ and that the Niger delta is ‘poor, backward and neglected.’ xxxix More than fifty years after the above observations were made by the Willink’s Commission; the Niger Delta still remains “poor, backward and neglected.”

The introduction of the principle of vicarious liability under the pib 2012

Given that decades of oil and gas exploration and exploitation in the Niger Delta have generated horrendous adverse ecological and environmental impacts in the region, the PIB 2012 seeks to introduce the polluter-pays-principle whereby the polluter may be held accountable for the cost of remediation of any act of environmental degradation. This principle requires the polluter to bear the cost or expense of preventing, controlling and cleaning up pollution. Its main goals are thus, cost allocation and cost internalization. xiv However, in introducing the polluter-pays principle, the PIB 2012 also introduces the principle of vicarious criminal liability whereby oil-producing states, oil-producing local government councils and oil-producing communities may be held to bear the cost of environmental remediation where the pollution in question is found to have been caused by sabotage of petroleum facilities and installations by unidentifiable third parties within their geographic boundaries.

It is now intended to examine some provisions of the PIB 2012 that incorporate the principle of vicarious criminal liability ostensibly as a way of combating the menace of environmental degradation in the Niger Delta. This section seeks to question the justification or rationale for holding oil-producing states, local government councils and communities vicariously liable for the criminal acts of sabotage perpetrated by unidentifiable third parties merely because such acts occur within the geographic boundaries of the oil-
producing states, local government councils and communities.

**The establishment of the petroleum host communities’ fund (“The PHC Fund”)**

Section 116 of the Bill proposes the establishment of the Petroleum Host Communities Fund (‘the PHC Fund’) which shall be utilized for the development of the economic and social infrastructure of the communities within the petroleum producing area in accordance with s.117 thereof. In order to give effect to s. 117, s. 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.”

Sub-paragraphs (a) and (b) of s. 118(1) of the Bill provide for two categories of beneficiaries of the “PHC Fund” – the host communities within the petroleum producing areas and the petroleum producing littoral states. Whereas under s. 118(1) (a) profit derived from upstream petroleum operations in onshore areas and in the offshore and shallow water areas shall be remitted into the PHC Fund for the benefit of host communities, sub-paragraph (b) on the other hand, provides that profit derived from upstream petroleum operations in deep water areas shall be remitted into the Fund for the benefit of the petroleum producing littoral States.

Curiously, however, s.118 (5) of the PIB 2012 provides a loophole which can be exploited to deplete the Fund to the detriment of host communities. Under the subsection, where any act 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 here is that given the persistent allegations of vandalism and sabotage of petroleum facilities by oil companies against host communities, 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. It is clear from the wording of 118(5) of the bill that the burden of proving that no member of the host community was involved or responsible for the act of vandalism, sabotage or other civil unrest that caused damage to petroleum facilities within the host community, rests on the host community. It is very arguable that the placement of the burden of proof of innocence on the host community in the likely contests between her and the oil companies will completely defeat the purpose of the PHC Fund because failure by the host community to discharge the burden of proof in any given case implies that the PHC Fund that has accrued in 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.

In any event, it is difficult to fathom the juridical basis of the obligation of the host community to secure and safeguard petroleum facilities and installations within its territory. First, the host-community has no equity or participating interest or right in the petroleum operations within its geographic boundaries. It is arguable therefore that in the absence of express contract between the oil company and host community imposing specific obligations on the host-community with respects to the protection of oil facilities and installations, none can be implied. It is further submitted that the existence of a contractual relationship or obligation cannot be implied merely from the presence of an oil company within the host community.

Secondly, the existence of a contractual duty on the part of the host-community to protect petroleum facilities and installations cannot be implied because the host-community is neither the operator nor the party in possession of these potentially dangerous petroleum facilities and installations and thus, owes no duty of care towards the oil company with respect to the said installations.

Thirdly, even where a security contract exists between the Oil company and host community whereby the latter is obligated to secure the former oil facilities and installations, any breach of such contract will raise purely contractual liabilities on the part of the host community which should not be remedied by reference to the Petroleum Host Community Fund. In other words, the fact that a host community breaches its contractual obligations under a security contract with an oil company provides no justification for utilizing the Petroleum Host Community Fund for remediation of the environment. A Fund established by statute for the development of the social infrastructure of the host community cannot be utilized to meet breaches of obligations created by a private contract.

Finally, the activities of oil-companies within the host-community are obviously not intended for the immediate benefit of the host community. This is notwithstanding any corporate social responsibility that the oil company may owe the host-community. Therefore, it will be lame to suggest that any corresponding obligation is imposed on the host-community as a stakeholder in the petroleum operations to protect and secure the petroleum facilities and installations within its boundaries.

**Vicarious liability of local government councils and oil-producing states for criminal acts of third parties**

The dubious application of the principle of vicarious liability is re-enacted in s. 293 of the bill. Under s. 293(1)
of the bill, 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.\textsuperscript{xliv}

However, under sub-section (2) of s. 293 of the Bill, the licensee or lessee shall not be liable for or be placed under an obligation to rehabilitate 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. Any dispute as to the cause of an act that has adversely affected the environment shall be referred to the Downstream Regulatory Agency (hereinafter referred to simply as the “Agency”) by the licensee, lessee or any affected person for determination and the determination of the Agency on the question shall be final.\textsuperscript{xlv} By virtue of s. 293(4) of the Bill, 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.

It is submitted 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 palpably unjustifiable for a number of reasons. First, it is submitted that a determination by the Agency of any dispute as to the cause of an act that has adversely affected the environment which may involve the identity or identities of the person (s) directly responsible for such act is in the nature of the exercise of a judicial power. It is doubtful whether the Agency, not being 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. Clearly, one immutable principle of constitutional law is that the independence of the judicial arm of government implies that judicial power can only be exercised by courts or tribunals established by law and vested with judicial power and that same cannot be shared with or vested in non-judicial bodies such as the Agency proposed to be established under the PIB, 2012. This point has been well made by Nwabueze who defined the concept of independence of the judiciary as implying:

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.\textsuperscript{xlviii}

In Kayili v. Yilbuk,\textsuperscript{xlix} it was held by the Supreme Court 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. Thus, any purported vesting of judicial power in a non-judicial body howsoever designated is null and void.

Secondly, the introduction of the principle of vicarious liability under the bill is highly punitive and exploitative. This punitive legislative policy bears visible imprints of an old colonial policy and practice which the British Consuls and their successors adopted in the Niger Delta. Holding communities vicariously liable for the criminal acts of known or suspected individuals or groups within the communities.\textsuperscript{l} Few examples here will suffice. Following stiff opposition from the potentates and middlemen of the coastal communities of the Niger delta particularly, in Bonny, against the abolition of the transatlantic slave trade which had become the economic mainstay of all coastal principalities by the nineteenth century, direct confrontations ensued between the coastal potentates and the British Squadron,\textsuperscript{lx} This confrontation climaxed in the abduction of British naval officers and palm oil merchants by the regent and chiefs of Bonny. The result of that abduction was the military invasion of Bonny by Her Majesty’s Navy led by the Squadron. As a price for their ‘recalcitrance’ and military defeat, the squadron coerced the regent and chiefs of Bonny to sign the Convention of Amity and Commerce of January 25, 1836 which was reaffirmed by the Convention of Amity and Commerce of April 9, 1937.\textsuperscript{lxi}

These treaties which signalled the beginning of the systematic subjugation and subordination of the coastal kingdoms to Britain provided in part that “no English subject shall from this time be detained on shore or maltreated in any way whatsoever by the king or natives of Bonny under any pretext” and that in the event of any breach of the treaty obligations, the king and natives of Bonny “will bring themselves under the displeasure of the King of England and be declared enemies of Great Britain and that the men of war on any complaint will immediately come up the Bonny to protect the English subjects.”\textsuperscript{lxl}
Similarly, in 1852, the British Consul acting on the instructions of the British government ordered the bombardment of Lagos in 1852; expelled the ‘Slave Trade Chief Kosoko’ and his people from Lagos and reinstalled the exiled ‘friendly’ king Akitoye on the throne under the guise that ‘Lagos was a notorious slave depot’ and that the deposed king Kosoko actively encouraged slave trade.\(^1\)

The effect of such punitive policy, according to Tamuno, then as now is that it “intensified bitterness and hatred of government coercion, oppression, intimidation, injustice and inequities among these communities.”\(^2\) In this light, therefore, the provisions of the PIB 2012 dealing with vicarious liability of the Niger Delta oil-producing states, local government councils and communities seem to enthrone a new phase of internal colonialism in the region.

Thirdly, apart from the fact that exclusive competency over the security agencies is assigned to the federal government under the Constitution of the Federal Republic of Nigeria (1999)\(^3\) (as amended), the PIB 2012 seems to gloss over the fact that it is the primary responsibility of the oil companies to take reasonable steps to secure and safeguard their installations. In a recent ruling delivered by the London Technology and Construction Court involving SPDC and Bodo Community in respect of the 2008/2009 Bodo oil spill, the court observed that while SPDC did not have an obligation to provide policing or military surveillance of its installations, SPDC could be legally liable if it has failed to take other reasonable steps to protect its installations such as the use of appropriate technology (leak detection systems), provision of anti-tamper equipment (which could give prompt and early warning of tampering with pipelines), renewing protective coatings on the pipelines, a system of effective surveillance, and prompt reporting to the Police.\(^4\) The licensee or lessee therefore has a general shielding and caring obligation towards the host community to protect it against avoidable harm arising from its operations. At common law, the rule has been firmly established 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.\(^5\) Thus, the defence of sabotage does not provide an automatic shield to 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.

Furthermore, the provisions of the PIB 2012 relieving the Oil Company of responsibility for the remediation of damage to the environment caused by alleged sabotage are inconsistent with the provisions of the extant Environmental Guidelines and Standards for the Petroleum Industry in Nigeria. Section 4.1 of the said Guidelines provides 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.\(^6\)

Oil Company of responsibility for the remediation of damage to the environment caused by alleged sabotage are inconsistent with the provisions of the extant Environmental Guidelines and Standards for the Petroleum Industry in Nigeria. Section 4.1 of the said Guidelines provides 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.\(^7\)

Unarguably, the Guidelines recognise that the responsibility of the owner or operator of the facility to provide remediation to the environment damaged by oil spill is not diminished by sabotage of petroleum facilities by third parties. The principle of the Guidelines is consistent with the goal of tort liability which is that “the party that has the greatest control over the risks, and can reduce them most effectively should be assigned liability.”\(^8\) The rationale is that “imposing liability on parties who are in the best position to mitigate risks provides incentives to do so.”\(^9\) There is no doubt that as between the oil company and the host community, the party in the best position to mitigate the risks of sabotage is the oil company. Imposing liability on the host community rather than the oil company, therefore, defies logic.

Finally, it is submitted that it is unreasonable to place the primary responsibility for securing and safeguarding petroleum installations on the host States and local governments which have no control over the security agencies and hold them responsible for the alleged acts of unidentifiable third parties who are not shown to be acting as their agents. Clearly the principle of vicarious liability which rests on the maxim— *qui facit per alium facit per se* (“He who acts through another is himself responsible”) presupposes the existence of a master-servant relationship.\(^10\) This is clear from the observations of Lord Brougham in *Duncan v. Finlater* that, “By employing him, I set the whole thing in motion, and what he does, being done for my benefit, and under my

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direction, I am responsible for the consequences of doing it.\textsuperscript{lxv}

It cannot be said that third parties who tamper with oil installations belonging to oil companies purport to act as agents of the oil-producing States or host local government councils within which the sabotage occur. If such criminals are not agents of the oil-producing States or host local government councils (and they are certainly not), on what ground can the oil-producing states or local government councils be held vicariously liable to the extent of bearing the cost of the remediation and restoration of the environment that has been adversely affected by the act of sabotage?

It must be noted that vicarious liability is the imposition of liability on one person for the actionable conduct of another based solely on a relationship between the two persons. In other words, it is the indirect legal responsibility of one person for the actionable conduct of another person. For this liability to arise, the existence of a special relationship between the two persons in question must be established as to make it just and rational to come to the conclusion that the actionable conduct in question was carried out by one on behalf of the other.\textsuperscript{lvi} In \textit{NEPA v. Obiese}, the Court of Appeal (per Ba‘aba, J. C. A.,) stated the law thus:

Vicarious liability is the imposition of liability on one person for the actionable conduct of another based solely on a relationship between the two persons. Indirect or imputed legal responsibilities for the acts of another; for example, the liability of an employer for the acts of an employee, or a principal for torts and conduct of an agent.\textsuperscript{lxvi}

It is clear from the judgment of the Supreme Court of Nigeria in \textit{Management Enterprises Ltd. v. Otusanya},\textsuperscript{lxvii} that since the vicarious liability of the employer or principal is merely consequential and dependent upon the liability of the employee or servant, the employer or principal cannot be held vicariously liable until the liability of the employee or servant is established in evidence. Thus, in \textit{Ifeanyi Chukwu (Osundu) Co. Ltd. v. Soleh Boneh (Nig) Ltd.},\textsuperscript{lxxvii} it was held by the Court of Appeal in every case where it is sought to make the master liable for the conduct of his servant the first question is to inquire whether the servant was liable. If the answer is yes, the second question is to ascertain whether the employer should shoulder the servant’s liability.

We have already argued that no employer/employee, master/servant or any other special relationship subsists between any oil-producing state/ local government council and the unidentifiable third parties who are suspected to be responsible for sabotage of petroleum facilities and installations within the boundaries of the said states and local government councils. Therefore, the primary consideration for the application of the principle of vicarious liability does not exist. However, assuming without conceding that such relationship exists at all between oil-producing states/ local government councils and vandals of petroleum facilities and installations, it is submitted that liability will not attach to the oil-producing states/ local government councils until the liability of the unidentifiable third parties is established. Given that the identities of the suspected saboteurs are neither known nor easily ascertainable, it would appear that establishing their liability as the basis of the liability of the oil-producing states and local government councils will be near impossible. Thus, in \textit{Gilbert Okoroma & Ors v. Nigerian Agip Oil Co., Ltd.}, it was held by Manuel, J., dismissing the defence of sabotage raised by the defendant, 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.\textsuperscript{lxv}

Therefore, the proposed application of the principle of vicarious liability under the PIB 2012 which imputes liability to oil-producing states and local government councils without regard to proof of the liability of the suspected saboteurs violates the established principle of law that he who alleges must prove but that he who denies need not disprove. This time-honoured principle is expressed in the Latin maxim; \textit{ei qui affirmat non ei qui negat incumbent probatio} (“the burden of proof lies on him who alleges or affirms a fact, not on him who denies it”).\textsuperscript{lxxx}

Another point to note is that the liability of oil-producing states and local government councils for acts of sabotage committed by unidentifiable third parties is couched in strict terms because the PIB 2012 does not contain any provision under which oil-producing states and local government councils could be relieved of their liability to bear the cost of repairs if it is shown that the damage caused to oil facilities and installations occurred accidentally. This is curious because it is generally accepted that only wilful damage to oil facilities and installations constitute sabotage in the legal sense of the term thus excluding accidental acts.\textsuperscript{lxxxii} A learned author stated the matter well thus:

It is not every destruction of oil installation by third parties that can be described as sabotage. This distinction which has been recognized by experts in the industry lies in the fact that the damage of oil installation by third parties may not be intentional but accidental hence cannot be described as sabotage in the legal sense.\textsuperscript{lxxxiv}

The practical implication, therefore, is that under the PIB 2012, the liability of oil-producing states and local government councils will arise in every case where damage is caused to oil facilities and installations by third parties irrespective of whether the damage was caused
willfully or accidentally. This is not only inequitable but highly exploitative and oppressive of the oil-producing states and local government councils.

Finally, the PIB seems to gloss over the immediate causes of sabotage of petroleum facilities and installations in the oil-producing Niger Delta region of the federation. The PIB 2012 appears to assume that by punishing oil-producing states and local government councils for the criminal activities of unidentified third parties who operate independently of the states and local government councils, sabotage of petroleum facilities and installations can be contained. Nothing can be farther from the truth! Acts of sabotage of petroleum facilities occur independently of the oil-producing states and local government councils and cannot be contained by merely holding them vicariously liable. To be sure, there is unanimity of opinion that the injustice being meted to the ethnic minorities of the oil-producing states of the Niger Delta by the Nigerian State constitutes natural stimulant for the perennial acts of sabotage of petroleum facilities in the Niger Delta. As one perceptive commentator has rightly observed:

When people are denied access to clean water, soil and air to meet their basic human needs, we see the rise of poverty, ill health and a sense of hopelessness. Desperate people can resort to desperate solutions. They may care little about themselves and the people they hurt.\[110\]

Thus, it is very arguable that the sustained injustice being suffered by the ethnic minorities of the Niger Delta since the discovery of oil in the region in 1956 produces not only resentment against the federal government but also accounts for the acts of sabotage of petroleum facilities in the region. Clearly, the provisions of the PIB 2012 dealing with the application of the principle of vicarious liability do not address the root cause of these acts of sabotage of petroleum facilities and are very unlikely to stem them.

This lead the study to the question whether the application of the principle of vicarious liability to alleged acts of sabotage of petroleum facilities and installations can be justified on ground of public policy? To be sure, public policy refers to the ideals prevailing in society for the time being as to the conditions necessary to ensure its welfare.\[110\] According to the learned Authors of Black’s Law Dictionary, the phrase “public policy” refers broadly to the “principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society.”\[110\] More narrowly, write the learned Authors of Black’s Law Dictionary, “public policy” refers to the “the principle that a person should not be allowed to do anything that would tend to injure the public at large.” As a rule that developed largely from the law of contract, public policy has also been defined as “... that policy of the law of not sanctioning an act which is against the public interest in the sense that it is injurious to the public welfare or public good.”\[110\]

It is submitted that it is not in consonance with public policy or public interest to impose financial liability on oil-producing States for acts perpetrated by unidentified third parties merely because such acts occurred within their territorial boundaries. Rather than conduce to public welfare or interest, such punitive legislative policy can undermine public peace, public safety and public order.

Conclusion

Unarguably, decades of petroleum and gas exploration and exploitation in the Niger Delta have produced environmental and ecological challenges in the Niger Delta that require innovative legislative policies. The PIB 2012 incorporates two legislative policies, namely the Polluter-Pays-Principle and the principle of vicarious liability of oil-producing states, oil-local government councils and oil-producing communities for acts of sabotage of petroleum installations and facilities perpetrated by unidentified third parties.

The effect of the application of the principle of vicarious liability to the remediation of the adverse environmental impacts of oil exploration and exploitation is that if the bill is eventually passed into law, the already impoverished, oppressed and marginalized oil-bearing ethnic minorities of the Niger Delta will be further subjected to a new form of internal colonialism. Through the extension of the application of the principle of vicarious liability to environmental remediation and restoration as set out in the Bill, oil-producing communities will be denied the right to have the Petroleum Host Community Fund applied for the development of their social infrastructure. Besides, oil-producing states and local government councils in the Niger Delta region which are grappling with the challenges of infrastructural development of the region in the face of the horrendous adverse environmental and social externalities associated with resource extraction will be made to apply their limited resources to meeting the cost of environmental remediation and restoration.

Thus, upon the most liberal or generous interpretation of the provisions of the Petroleum Industry Bill 2012 in question, the extension of the principle of vicarious liability to the oil-producing states and local government councils with regard to acts of sabotage of petroleum facilities perpetrated by unidentified third parties is oppressive, exploitative and imperialistic. Arguably, such situation will heighten, rather than abate the restiveness in the Niger Delta region. It is the position of this paper therefore that the provisions of the PIB 2012 on vicarious liability as currently couched should be expunged from the Bill as presently constituted.

Conflict of interest

I wish to state that although am from the Niger Delta
Region of the Federation of Nigeria, I have written the article as an academic from an impersonal point of view. My article reflects an objective review of the PIB 2012 devoid of any sectional or regional bias.

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- See the preamble to the Ogoni Bill of Rights.
- Clauses i-vii of the Ogoni Bill of Rights; similar Declarations adopted by other ethnic groups in the region include the Oron Bill of Rights 1999, Warri Accord 1999, Akalaka Declaration 1999, Charter of Ogbia People 1992, See Report of the Technical Committee on the Niger Delta Vol.1 (November, 2008) 41; The governors of the oil producing states of the Niger delta had also advocated for resource control. In the words of James Ibori former Governor of Delta State speaking on behalf of the governors, “... we are not asking for 13 per cent any more, what we are taking now is everything, the 100 percent control.” See This Day (28 July 2000)7.
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xxxi Omorogbe (n21) 273; Omoge (n21) 219.

xxxii See + 44(3) of the 1999 Constitution; s l 1(8)(c) of the Petroleum Act 1969; s 2(1)of the Exclusive Economic Zone Act 1978 (Cap E17 Laws of the Federation of Nigeria 2004); s l l l 1, (3) & (4) of Oil Pipelines Act 1965 (Cap O7 Laws of the Federation of Nigeria 2004); s 18 of the Interpretation Act (Cap 123 Laws of the Federation of Nigeria 2004); s 1(l) of the Land Use Act 1978 (Cap L5 Laws of the Federation of Nigeria 2004); and s l (1) of the Territorial Waters Act 1967 (Cap T5 Laws of the Federation of Nigeria 2004). e

xxxiii See s 1 of the PIB; s 44(3) of the 1999 Constitution vests ‘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’ in the Government of the Federation.

xxxiv PIB, s. 3(a)-(c).

xxxv See John Ameh, “National Assembly ignores Auditor-General’s reports on government corruption” Punch (5 January 2015) < http://www.punchng.com> accessed 5 January 2015. It was reported that audit queries raised since 1999 by the office of the Auditor-General of the Federation recommending penalties for alleged fraudulent practices committed by public officials and properly laid before both chambers of the National Assembly by the respective Public Account Committee have not been considered.


xxxvii PIB, ss. 9 and 10.

xxxviii PIB, ss. 13 and 14.

xxxix PIB, ss. 43-45.

xxxx PIB, s. 120.

xxxxi PIB, s. 123.


xxxxviii According to SPDC, from 2008-2012, sabotage, oil theft and other criminal activities accounted for around 76% of the oil that escaped’ from its facilities while under a quarter of the oil that escaped from its facilities ‘was due to operational causes such as human error or equipment failure’ see SPDC, ‘Oil leaks in Nigeria’ < http://www.shell.com/global/environment-society/society/nigeria/spills.html> accessed 31 July 2015; similarly in 2014, it was reported by SPDC that the crude oil theft, sabotage and illegal refining were the cause of 75% of spill incidents from SPDC joint venture (SPDC JV) pipelines in 2014. See SPDC, “Briefing Notes: Theft, Sabotage and Spills” (2014) < http://www.s07.static-shell.com/content/dam/shell-new/local/country/nga/downloads/pdf/theft/> accessed 20 August, 2015; cf. Clara Nwachukwu, ‘Nigeria’s horrifying oil spill response management’ Sweet Crude (Vol. 02, No. 15, July 2010)1, 4, who attributed the spills to different causes: corrosion of pipelines and tankers (50%); oil production operations (21%); sabotage (28%); and inadequate or non-functional production equipment (1%); a recent press release issued by Amnesty International has challenged the claims of SPDC that sabotage is responsible for most of the spill incidents, see, Amnesty International, ‘Press Release: Nigeria, Oil giant Shell Criticized over Niger Delta pipelines “sabotage” claims’ (London, 19 June 2013)<http://www.amnesty.org/en/for-media/press-releases/nigeria-oil-giant-shell-criticised-over-niger-delta-pipelines-sabotage-claims/> accessed 08 August, 2015.

xxxxix For instance SPDC Joint Venture has entered into Global Memorandum of Understanding (GMOU) with host communities in Ogoniland whereby the Joint Venture provides funding to support unarmed community patrols which report pipeline incursions and suspicious activities directly to the security forces. See SPDC (n40).


xxxxxi [2015] 7 N. W. L. R. (Pt. 1457) 26 @ 56-57, parcas, E.-C, 58, para. C.


xxxxiii For instance, the King of Bonny had declared to Captain Crow in 1807: “We think that this trade must go on. That also is the verdict of our oracle and priests. They say that your country, however great, can never stop a trade ordained by God Himself” See Hugh Crow, The Memoirs of Captain Hugh Crow: The Life and Times of a Slave Trade Captain (Reprint edn Bodleian Library, University of Oxford, Oxford 2007)137.


xxxxv Art. 1 of the Convention of 1837.


xxxxvii Tamuno (n46) 37.

xxxxviii See item nos. 38 and 45, Exclusive Legislative List, Second Schedule to the 1999 Constitution.


xxi Sheldon Leader, David Ong, Tara Van Ho, Anil Vimlan etal, “Corporate Liability in a New Setting: Shell and the Changing Legal Landscape for the


xi Tuytel and Dyke (n 56) 4.

xii N. W. L. R. (Pt. 709) 494 @ 516-7; N. E. P. A. v. Obiese [1999] 10 N. W. L. R. (Pt. 623) 478 @ 490.

xiii NEPA (n 56) 487.


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