WATER POLLUTION IN NIGERIA COASTAL AREAS: CHALLENGES OF PRESENT LEGAL MECHANISM AND RECOMMENDATIONS FOR AMENDMENT

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Abstract

The activities associated with oil exploration in Nigeria have brought about major challenges to her coastal ecosystem. One of the many challenges is oil spillage, characterised by pipeline corrosion, sabotage, inadequate care in loading and offloading oil vessels etc. In a bid to prevent, control and reduce the incidence of oil pollution, different laws have been enacted by the Federal Government and many international conventions have been ratified and domesticated to address this issue. This study looked into two of the existing legal mechanisms aimed at preventing and controlling the menace of oil pollution in Nigeria. It critically appraised the level of enforcement and compliance to these laws. The outcome showed that some shortcomings exist in both the laws and enforcement mechanisms and these became loopholes for operators to perpetrate unsafe practices. Suggestions which could aid legal measures to amend or repeal outdated laws that are not in tandem with present day realities of the environment were then proposed in order to achieve sustainable practices in the oil production.

Key words: Oil spillage, Niger Delta, Laws, Regulation and Control, Nigeria

1.0 Introduction

Nigeria is bordered to the North by the Republic of Niger and Chad, to the West by the Republic of Benin, to the East by the Republic of Cameroon and to the South by the Atlantic Ocean. She has a coastline of approximately 853km facing the Atlantic Ocean. The terrestrial portion of the Atlantic coastline lies about 28,000 km² in area while the surface area of the continental shelf is 46,300km² (Nwilo and Badejo, 2006). The coastal area of Nigeria is low lying with heights of not more than 3.0 m above sea level and is generally covered by fresh water, swamp, lagoon marshes, tidal channels, beach ridges and sand bars. States in the coastline are Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Lagos, Ondo and Rivers States. Within the national coastal areas, a wide range of human activities are carried out, with such activities ranging from industrial, tourism, ports and shipping, agriculture, fishing, communication, boats and ship building to oil and gas exploration amongst others (Dublin-Green et.al., 1999; Nwilo and Badejo 2006).

Section 20 of the 1999 Constitution of the Federal Republic of Nigeria provide for Environmental objective which stipulate “the state shall protect and improve the environment and safeguard the water, air, land and all plants and humans or animals living therein and the inter-relationships which exist among these or any of them”. The environment in this context is the totality of the physical, economic, cultural,
aesthetic and social circumstances which surround and affect the desirability and value of the environment (Ebeku, 1998). Though the constitution provides for the protection of the environment in its totality, some instances arise when the level of interaction between man and the environment are a subject of concern, most especially when consideration is placed on the balance of constituted laws and regulatory authorities to enforce and forestall substandard practices. The desire and spirit of the constitution while addressing the issues of pollution is aimed at providing a basis for decision making when matters relating to water, air and land contamination arise, either deliberately or by negligence. Moreover, Section 38 of the Federal Environmental Protection Act define pollution as man-made or anthropogenic alteration of the chemical, physical or biological quality of the environment to the extent that is detrimental to that environment or beyond acceptable limits. In view of this definition, water pollution can be defined as the contamination of streams, lakes, underground water, bays or oceans by substances harmful to living things. It makes streams, lakes and coastal water unsuitable for any legitimate purpose of drinking, swimming, fishing, etc.

Sources of water pollution have been found to vary from point sources to non-point sources (Pierce et al., 1998). Unlike non-point sources, point sources refer to specific, identifiable localized sources that directly discharge materials into water. This study is used to focus on point sources of pollution which include spillage as a result of oil exploration and also processing and distribution of petroleum products. Water pollution as a result of oil spillage in Nigeria started in 1956 as a result of the discovery of crude oil in the present day Bayelsa state. It has contributed in no small measure to the pollution of coastal waters in and around the Niger Delta area and has spread to other coastal states. Such activities resulting from exploration and processing of crude oil and distribution of finished petroleum products, coupled with improper handling and lack of maintenance of equipment have resulted in grave consequences on the environment. However, pollution emanating from oil production processes is mostly due to accidental discharges or leakages from faulty, rusty or ill maintained equipment. It may also be as a result of oil pipeline vandalism, engineering drills, inability to effectively control oil wells, failure of machines, and inadequate care in loading and offloading of oil vessels (Nwilo and Badejo, 2006).

2.0 Environmental Pollution Regulatory Control
In a bid to prevent, control and reduce the incidence of oil pollution, different laws have therefore been enacted by the Federal Government and many international conventions have been ratified and domesticated to address the issues. Some of the laws relating to the petroleum industry include The Petroleum Act, Cap 10, Laws of the Federation (LFN), 2004, Petroleum (Drilling & Production) Regulations, Oil in Navigable Waters Act Cap 06, LFN 2004, the Oil Pipelines Act Cap 07, LFN 2004, Federal Environmental Protection Agency Act (FEPA) 2004, now National Environmental Standards and Regulations Enforcement Agency Act 2007. Of these, the Oil in Navigable Waters Act (2004) and the Petroleum Act (2004) are the focus of this study.

2.1 Oil in Navigable Waters Act (2004)

The Act was enacted to give effect to the domestication of the International Convention for the prevention of pollution of
the sea 1954. It created several pollution offences in order to reduce the incidence of oil pollution. These offences as provided for by section 3 include, deliberate or negligent discharge of oil into prohibited sea areas and/or Nigerian waters, failure to install oil pollution equipment on ship or keep record of oil matters, failure by harbor authorities to provide oil reception facilities and also report the presence of oil in harbor waters. Section 4 of the Act provide for a number of defenses that can be pleaded. For instance, it is a defense to an offence charged under section 1 of the Act to prove that the discharge of oil was for the purpose of saving life, or to prevent destruction of vessel or cargo. Section 4 (2) (a) further stressed that it is an acceptable defense if a polluter can prove that the pollutant escaped accidentally as a result of damage to his vessel or leakage there from. Also, that all reasonable steps were taken to contain the discharge and reduce its impact on the environment. Moreover, in order to command strict adherence to the act, provision for penalties were enshrined in it. Such penalties include payment of compensations and taking up responsibility for cleanup which could be the cost of removal therefrom. The cost may however include any of such that may be incurred by any government body or agency in the restoration or replacement of natural resources damaged or destroyed as a result of the discharge. It could also include costs to third parties in the form of reparation, restoration, restitution or compensation as may be determined by the Agency from time to time.

2.2 Petroleum Act (2004)

The Petroleum Act is a fundamental legislation in the oil industry. Section 9 (1) (b) provides authority to make regulations on operations for the prevention of air and water pollution. The coastal areas especially the Niger Delta where oil exploration and production activities are carried on are the worst hit by oil industry pollution. Therefore, in consideration of water pollution, the Petroleum (Drilling and Production) Regulations make it mandatory for a licensee or lessee to “adopt all practicable precautions including the provision of up-to-date equipment approved by the Director of Petroleum Resources. To prevent the pollution of inland waters, rivers, water courses, the territorial waters of Nigeria or the high seas by oil, and mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to fresh water or marine life”. Where any such pollution has occurred the licensee or lessee must take immediate steps to control and if possible put an end to the pollution (Paragraph 25).

However, the question as to what “all practicable precautions for the prevention of pollution” remain subjective, because such an ambiguous provision can be interpreted by different operators to suit their own purpose. There should be avoidance of vagueness and ambiguity which makes the provisions of the law subject to diverse interpretations. Specific and measurable yardsticks/guidelines to ascertain if operations are being carried out in accordance to the guidelines should be developed and made public. If “all practicable precautions” is meant to be the provision of up to date equipment, then the question is, are the operators employing up to date equipment in their operations in order to protect the environment? How long does it take them to detect oil leakages and spill from their pipelines, and what modern environmentally friendly equipment do they adopt when cleanup is required?

Paragraph 36 of the Petroleum (Drilling and Production) Regulation provide that, “the licensee or lessee shall maintain all apparatus and appliances, boreholes and wells capable of producing petroleum, in good conditions, and shall carry out all his
operations in a proper and workmanlike manner in accordance with these and other relevant regulations, methods and practices accepted by the Director of Petroleum Resources as good oil field practices.” If the stated concept of good oil field practices are strictly complied with, it will address the issue of oil pollution as envisaged by paragraph 25 of the regulation. No matter how good and well-intended the regulations, the concept of good oil field practices need further definition. Does such term refer to standards acceptable on the international scene, or that peculiar to Nigeria? According to Steiner (2008), Shell Nigeria has continually flouted Nigerian laws and operated below internationally accepted standards as regards oil spill response and control. The study further stressed the lack of transparency as one of the factors that have aided the company in the flagrant violation of applicable laws and regulations. Section 43 (3) Petroleum Refining Regulation under the Petroleum Act requires the manager of a refinery to take measures to prevent and control pollution of the environment.

2.3 The penalty factor

Taking a look at the penalties as judged by today’s reality, suggest a need for a review of the Oil in Navigable Waters Act (2004) as regards pecuniary penalties. This is in a bid to capture fundamental dynamics of present day pollution processes. Further to this, the laws have not been able to capture the numerous other pollution cases that have become the issues of today’s arguments. This therefore also suggests that in order to have a proper compensation provision, the law needs to be extended to other pollution offences of today’s dimensions. Recommendations for compensation in line with the Act may need a review when consideration is given to current market reality. For instance, apart from the defense as to prevent the loss of life, the defense aimed at protecting the vessel as against environmental protection may need a review. The question that should be asked is what the worth of a vessel or cargo is, compared to the immense damage such a discharge can do to the environment, especially the water body and the marine resources? Penalty as low as N2, 000 (U.S$15) is to be paid as fine for discharging oil into Nigerian waters. Such amount as stated for polluting Nigerian waters may be termed ridiculous to environmental sustainability. Little wonder there is no end to polluting activities.

In addition, Section 45 of the Petroleum Refining Regulation (2004) makes any contravention punishable with a fine of N100 (U.S$0.7) or an imprisonment term of six months. This penalty in today’s market value is ridiculously low and it shows a total lack of commitment to environmental safety and security. The less than $1 fine will in no way deter the polluters and may even harden them the more. This goes to the foundation of the legislation as lacking in public input and therefore may require a review. In making environmental laws in developing countries like Nigeria, principles of subsidiarity and public participation should be brought to bear as obtainable in the international environmental law arena. The water, water bodies and coastal areas will continue to be at the receiving end of oil pollution if the penalties chargeable are not reviewed.

3.0 Enforcement Mechanism

To control the incidence of oil pollution, there are regulations empowering appropriate authorities and accredited public officers to adopt any or a combination of different enforcement mechanism. This is in order to ensure strict compliance with the laws and regulations in the petroleum industry. Such enforcement mechanism
include the power of the minister of petroleum resources (Petroleum Act (2004)) to inspect and supervise all operations carried out under licenses and leases granted under S.8 (1) (a). Part of these powers are stipulated in Section 8 (1) d to f. Further to this, the exercise of the Minister’s power of suspension can be employed to stop furtherance of damage to the environment before it goes out of containment. The power of suspension of operation by the minister is not only in relation to contravention, also if there is a likelihood of a contravention of the provision of the Act or regulation it will warrant a temporary suspension of operation (S.8 (1) (g) and (h) of the Petroleum Act (2004))

Furthermore, Section 9 (1) (b) Act empowers the minister to make regulations for the prevention of pollution of water courses by making it mandatory for the licensee or lessee to adopt all practicable precautions including the provision of up to date equipment to prevent the pollution of inland waters, rivers, water courses, and territorial waters of Nigeria. A breach of, or failure to observe any of the terms and conditions of the license or lease or the terms of the provision of the statute under which the licence was granted in the first place may warrant a revocation of the license or lease. Other enforcement mechanisms include payment of penalty in the form of fine, and or term of imprisonment and also the doctrine of vicarious liability (Okorodudu-Fubara 1988). In view of these provisions, how many licences or leases have been revoked in the face of the high level of pollution going on in the Niger Delta area, and how many operators have been jailed or fined with sums corresponding to damages done to the people, communities and the environment? These are shortcomings in the regulations and legislations relating to operations in the oil industry. Corruption and ineptitude may also be part of the challenges facing Nigeria in strictly implementing and enforcing the provisions of these laws.

4.0 Recommendations
From the foregoing, it is evident that the laws and regulations to prevent, reduce and control pollution emanating from operations in the exploration and production of petroleum are not without their shortcomings. The level of compliance to the laws are still very low, because often than not, there are spates of violence in the Niger Delta area which is the centre of activities of oil production in Nigeria. The acts of violence are majorly fallouts of unsustainable practices in the industry which gives rise to incessant oil spills and pollution of the waters. This consequently endangers the lives and business of the people because fishing and farming are the main sources of livelihood of the people in the area. The appointment of the Minister of Petroleum Resources should not just be political but should be a position occupied by an expert, for effective and efficient functioning. Monitoring committees/taskforce should be constituted by professionals in the field, to carry out inspections of facilities and operations since they are technical functions that require technical expertise. Technicalities in interpretation of the laws by the courts, the inability of the lawmakers to constantly review, amend, or repeal out-dated provisions of laws are some of the loopholes capitalized on by operators in the industry. The threat of revocation of license or lease have not been effective in checking the excesses of the oil producing companies because they have observed the lack-lustre manner with which the government conduct their affairs. The ‘man-know-man’ syndrome
Another factor that makes enforcement of the laws unattainable.

Considering the magnitude of damage that oil spills can cause to the coastal lines and the totality of the environment, the reporting lines should be well defined. Also, there should be the development of rapid response strategies for containment of oil spills. Environmental tribunals should be constituted that will adjudicate on matters relating to the environment. The court should have experts that are conversant with present trends that can advise the court on technical matters and keep abreast of developments. In matters of pollution involving corporate bodies, the alter ego of the companies should be individually and collectively responsible for polluting the environment. Pollution of the waters in the coastal areas should be viewed as crime against humanity, therefore a violation of human rights. This is because people living in the coastal areas depend on the waters for drinking, bathing, and fishing which is their major source of livelihood. Therefore companies and individuals should be held civilly and criminally liable.

Pecuniary penalties imposed by the laws are grossly inadequate to serve as deterrent to the companies operating in the petroleum industry considering the huge profits being grossed in yearly. These laws and other moribund laws create a leeway for the operators in the industry to flout the laws with impunity. How then will they take all precautions necessary and adopt good oil field practices or update their equipment since fines imposed on flouting the laws are inconsequential. It is recommended that pecuniary penalties be made more stringent and should be deterrent indeed. A leaf should be borrowed from the United State of America on pecuniary penalties, compensation and clean up considering the British Petroleum oil spill to the Gulf of Mexico.

An active oil industry bill is required to serve to protect and improve the coastal waters of Nigeria and the totality of the environment as stipulated under Section 20 of the Constitution of the Federal Republic of Nigeria 1999. This section states that “the state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.” This provision should be made justiciable.

Prosecution of offenders under the Oil in Navigable Waters Act has to be initiated with the approval of the Attorney General of the Federation, while offences created by it are subject to concurrent jurisdiction of magistrate and high courts (Section 56(4)). Section 12 of the Act makes it mandatory that the consent of the Attorney General of the Federation be obtained before an action is commenced in a matter of oil spillage. This in effect means that, where spillage occurs in a remote village, the local government will first be notified, and it will in turn inform the Attorney General (Atsegbu et al., 2004). Unless the Attorney General of the Federation gives his approval, which could subject to his will, the matter cannot be instituted. This process is cumbersome and leads to waste of time, energy and resources. Also, it could be subject of manipulation in the situation where the Attorney General has vested interested in the polluter. It is suggested that this provision be reviewed to enable the Attorney General of the state where the spill occur to commence an action in a case of this nature (Salu, 1999). Better still, the individuals, community or local government directly affected by the pollution should be given the powers to initiate after a letter of information of the polluting act has been sent to the Attorney General of the Federation.

The legislature, judiciary and the different agencies saddled with the responsibilities of safeguarding the environment must be
5.0 Conclusion
The challenges of oil pollution in the Nigeria coastal areas dates back to the 1950s and the effects of these oil spillage and leakages are now coming to the fore. It behooves the Federal and State Governments, agencies and operators in the petroleum industry to collectively fight the menace of oil pollution in the coastal areas. Failure to arrest the situation will only bring more economic, political and social tensions in the polity. The spillage of oil and its attendant effects portend grave damage to the ecosystem of the area which cumulatively affects the quality of life of the people living in the area. Moreover the Niger Delta remains a very delicate and extremely important ecosystem in the West Africa region (Steiner 2008). It has also been posited to be one of the ten most important wetlands and marine ecosystems in the world with vast mangroves.

Various regulations and legislations have been enacted and some international conventions ratified in a bid to prevent, control and reduce the incidence of oil pollution in Nigeria. Two of these laws and regulations were examined in accordance with present day situations in this study and some shortcomings were observed. More so, the enforcement mechanisms that have been put in place have not been very effective in checking and enforcing good practices that goes with recognizable international standards. The penalties for flouting the laws have also not been adequate at compelling operators to adhere strictly to best practices. It was therefore proposed among other suggestions that stiffer penalties should be meted on polluters of the environment. It suggested that a general review of the laws and regulations guiding the operations of the oil industry would be extremely important to meet present day realities.

References
Constitution of the Federal Republic of Nigeria, 1999

National Environmental Standards Enforcement Agency Act 2004
Nwilo, P.C., and Badejo, O.T. Impacts and Management of Oil Spill Pollution along the Nigerian Coastal Areas in: Sutherland, M and Sue, N. Administering Marine Spaces, Publication of International Federation of Surveyors, Denmark, 2006
Petroleum Act 2004 Petroleum (Drilling and Production) Regulation Petroleum Refining Regulation

