

AN APPRAISAL OF THE LEGAL DISPENSATION FOR OIL SPILL COMPENSATION IN NIGERIA*

Abstract

Oil spillage is an inevitable consequence of oil production when viewed from the background of possible risks such as accidents or negligence. When the spills occur, harm is occasioned upon the environment and the livelihood of the people living in impacted communities. There are statutory provisions that enable the assessment and payment of compensation for oil spills. However, the legal framework for the assessment and payment of compensations for oil spills in Nigeria is not clear and are not found in one enactment. Although oil spill attracts compensation, the Courts have found it difficult to develop a consistent and acceptable scheme towards compensation for oil spillage victims. There are fragmented extant laws that provide for such compensations. This paper examines the extant legal framework for compensation for oil spills. The paper found that the legal framework for compensation for oil spills is still at its embryonic stage in the country. The paper also found that the bill that presents credible provisions for compensations of oil spills have been approved by both chambers of the National Assembly but has equally been denied presidential assent. The paper further found that the conferment of powers on the Minister for Petroleum Resources under the Petroleum Act for making regulations for the effective implementation of the Act has been misconstrued to mean the exclusion of the legislature from making laws for the regulations of pollution arising from the oil and gas sector.

Keywords: Oil Spill, Compensation, Damages, Amendment Bill.

1. Introduction

Oil exploration and production in Nigeria date back to 1956 when oil was discovered in commercial quantities in Oloibiri, a sleepy town in present day Bayelsa State of Nigeria¹. The construction of oil wells for the extraction of oil from the depths of the earth crust and the building of oil bearing pipelines criss-crossing land and sea is a feature of oil production. Incidentally, the valve of the oil wells sometimes blow up while the pipelines are sometimes ruptured pumping off several thousands of barrels of oil into the land and sea. Consequently, the land and waters of the oil producing areas are polluted and degraded by this black unctuous substance known as 'crude oil'. Oil spillage is the process of discharging of oil meant for a flow station or other evacuation points through pipelines or tankers, into the surrounding marine and land environments due to either an accident or acts of omission or commission by man.² Oil spillage is therefore the inevitable fallout from oil production activities. The business of extracting crude oil from the deep bowels of the earth and distributing them through pipelines to different evacuation points is a very risky one, though highly technology driven. Oil spills in Nigeria has been categorized into minor, medium, major and disaster spills.³ A minor spill occurs when less than 25 barrels of oil are spilled into inland waters or less than 250 barrels are spilled on land, offshore or coastal waters. Medium spills occur when the oil spill is less than 250 barrels in the inland waters and between 250 to 2500 barrels on land, offshore or other coastal waters. The extreme form of spill is the disaster spill, which refers to any uncontrolled well blow out, pipeline rupture, or storage tank failure that poses an immediate danger to public health and welfare.⁴ Essentially, oil spill is a major cause of environmental degradation as well as environmental conflict in Nigeria.

2. Causes and Consequences of Oil Spills in Nigeria

Oil spills have been attributed to several factors, viz, corrosion of pipelines and tanks and sabotage of oil facilities by resource control agitators and sometimes by common criminals. Corrosion in ageing pipelines is said to account for 50% of oil spills in Nigeria.⁵ The pipelines and infrastructure were built in the 1960's and 1980's according to the then prevailing standards. The standards are different today but the multinational oil

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¹ The discovery of oil in commercial quantity was in Nigeria was in 1956.

² T.C. Eze & G.U. Eze, *The Law for the prevention of Oil and Gas pollution in Nigeria* (Enugu: Ebenezer Productions, 2015) P.24

³ Greenpeace Organization in African Environmental News, available at www.greenpeace.org/africa/en/news/Blog/shellshocked/blog/309541

⁴ *ibid*

⁵ Shell international Petroleum Company *Newsletter*, 'Developments in Nigeria' (London, March, 1995) p.1

companies have failed to update the pipelines, Shell admits that they will not build the pipeline the way they built them in the past today.⁶ The same account attributes 28% of oil spills to sabotage of oil facilities while other causes such as accidents account for about 22% of oil spills. Oil spills have destroyed immense tracks of mangrove forests in Nigeria.⁷ The rain forest area of the Niger Delta is not spared as it is also disappearing fast. Spills have been known to destroy crops and aquaculture occasioning famine and food shortages to agrarian populations around the oil producing areas. The loss of the mangrove forests has led to a decline in the quality of life for plants and animals as well as humans.

3. Brief History of Oil Spill Incidents in Nigeria

Oil spill incidents have occurred at different times in different parts of Niger-Delta of Nigeria. From 1976 to 1998, a total of 5,724 oil spill incidents occurred resulting in the spill of about 2,571,113.90 barrels of oil into the environment.⁸ Some of the major spill incidents recorded include GOCON'S ESCRAVOUS spills in 1978 where about 300,000 barrels of crude oil were discharged into the environment. Another major spill was Shell Petroleum Development Company (SPDC's) forcados terminals tank failure in 1978 which unleashed 500,000 barrels of crude oil into the environment. In 1980, the Texaco Petroleum Company suffered a well blowout, wherein another awesome 400,000 barrels were discharged into the environment. Another pipeline spill out in Abudu, Edo State in 1982 churned out 18,818 barrels of crude oil into the Abudu agrarian environment. There have also been other minor incidents such as the one that led to the Jesse fire incident, which claimed about a thousand lives. The highest spill incident in Nigeria occurred in 1977 while the least number of spills took place in 1984.

4. Interrogating the Law for Oil Spills Compensation in Nigeria

At the occurrence of most spill incidents, damages are occasioned to people living around the spill areas and even beyond as most spills are capable of travelling a good distance. Farmlands are destroyed, fishponds are polluted and even sources of drinking water are contaminated. Compensation for oil spill damage in Nigeria is usually a very thorny issue. This is because there are so many conflicting laws. The conflicts arise from the issue of whether or not damages arising from an oil spill incident should or should not be compensated; who and who ought to be compensated and finally, what amount should be adequate as compensation. Because of the lack of consistency and harmony in statutory provisions, victims of damages arising from oil spills usually recourse to the remedies available under common law⁹. This has left many of them with either no remedies or with pitiable remedies. There is no distinct code that specifies the process and methods that are to be used for assessing compensation. What exist in reality are separate enactments that are not targeted principally at the oil sector and which are also subject to multiple interpretations. This paper will now examine some extant legislation that point to how compensation for oil spill damage is to be assessed.

Land Use Act

The land use act was enacted in 1978 as a post civil war legislation with the aim of democratizing access to land in Nigeria, by vesting the radical title to land in the Governor of every state who is deemed to hold some in trust for every Nigerian.¹⁰ The major thrust of this Act is to provide government with enabling powers for public acquisition of land for development purposes. The Act decrees a compensation rate for compulsory acquisition of land.¹¹ It does not have any provision for compensation for oil spills. It would appear however that the land ownership philosophy of the Nigerian State is that compensation for any damage to land should be based on loss of economic use and nothing more. According to this line of thought, damage for pollution by oil spill should be calculated on the basis of effect on economic trees, crops, etc and nothing more. The need for damages to include the cost of restoring the damaged environment is not reflected in this rationalization. Thus, the legal basis for assessment for compensation of those who suffer from oil spill damage has been the rates provided under the Land Use Act, 1978. This enactment which was introduced 41

⁶ *Ibid*

⁷ P.C Nwilo & T.B Olusegun, 'Impact and Management of Oil spill pollution along the Nigerian Coast' available at <http://www.ng.net/pub/ng/pub/36/chapter 8 pdf> accessed --

⁸ Niger-Delta Environmental Survey (NDES) Environmental and Socioeconomic Characteristics (Port-Harcourt: NDES, 1977). P.36

⁹ T.C Eze, 'Redress for Pollution Damage under Common Law in Nigeria: An Appraisal' in Vol 3, No. 1--no *Journal of Law and Global Policy*, International Institute of Academic Research and Development (IIARD), Pp 1-6

¹⁰ Section 6, Land Use Act, Cap L5, Laws of the Federation of Nigeria, 2004

¹¹ Section 49 *ibid*

years ago is still the key legislation to which most other relevant legislation about oil spill compensation refer. The compensation provisions of the Land Use Act tend to obscure the environmental damages occasioned by oil spillages.

Constitution of the Federal Republic of Nigeria 1999

The Nigerian constitution recognizes the rights of victims of oil spills in laws designed to compensate damage to buildings, economic trees and crops.¹² The language of the constitution is again targeted at compensation for compulsory acquisition of land for public utilities and not when damage is occasioned to private properties by existing 'public utilities'. This provision may only apply in a situation where oil installations are viewed as public utilities. In a strict sense, they are not however public utilities.

Petroleum Act

This Act requires the payment of 'Fair and adequate compensation' for disturbing the surface rights on land notably for the protection of trees which have commercial value¹³. The Act again emphasizes compensation for damages done in the course of developing an onshore oil field and not on damages occasioned by oil spill in the course of the operation of an oil installation. This provision for fair and adequate compensation is found in the Petroleum (Drilling and Production) Regulation, 1969 made pursuant to the petroleum Act by the Minister in the exercise of powers conferred on him under the Act.¹⁴ The regulation did not define what it meant by fair and adequate compensation. The Petroleum Act falls back on the Land Use Act for a determination of what is fair and adequate compensation.

Minerals and Mining Act 2007

This Act provides for compensation when the surface rights of the land are damaged by the process of extraction¹⁵. It does not however have a clause for assessment of compensation for subsequent pollution in the course of mining activities.

Oil Pipeline Act

This oil pipeline Act makes an elaborate provision for compensation for damages done to buildings, economic trees or crops and for disturbance and damage occasioned by a license holder's negligence and for any other loss in value of or interest in land.¹⁶ This provision for compensation is however with respect to the construction of the pipelines. It does not extend to cover damage as a consequence for breakage or leakage from the pipelines. From the foregoing discussion, it is clear that existing legislation for compensation are targeted primarily at the economic value of the damaged land and not on any specific damage done to the environment. Furthermore, the compensation regime is heavily influenced by the assessment for compensation for compulsory acquisition of land under the Land Use Act. The rates under the Land Use Act are designed to compensate for compulsory acquisition of land by the state. Compensation under the Land Use Act is based on an assessment of the value of commercial activities on the land and not the land itself. This is an anachronistic in the sense that the timeless value of land goes beyond the economic purpose for which it is temporarily been used for at any moment in time. Presently, assessment of compensation for oil spill in Nigeria is mostly done on the basis of trade usage or convention. The most common convention in use is the Oil Producers Trade Section (OPTS) Rates of 1997. These rates were established by the oil industry operators but have no legal bucking. Where recourse is to be made to an existing law, it is usually the Land Use Act, which was enacted more than 41 years ago and has not been reviewed to bring the compensation regime in line with present day realities.

National Oil Spill Detection and Response Agency (NOSDRA) Act 2006

This Act was the product of an initiative by the Federal Ministry of Environment. The focus of the Agency by virtue of its enabling Act is the management of the National (Oil Spill Contingency Plan (NOSCP).¹⁷ The Act was enacted in furtherance of Nigeria's obligation under an international convention, to wit, Oil Pollution,

¹²Section 41(1) constitution of the Federal Republic of Nigeria, 1999 (As Amended)

¹³Regulations 21 & 23, Petroleum (Drilling and Production) Regulations, 1969

¹⁴*Ibid*

¹⁵ Minerals and Mining Act, 2007, S.4

¹⁶ Oil Pipelines Act, 1956, Sections 19, 20 & 28

¹⁷Preamble to the NOSDRA) Act, 2006

Preparedness, Response And Co-Operation (OPPRC) This agency in its original conception did not deal with the issue of assessment of compensation. However, there is currently a bill to amend the NOSDRA Act that has made detailed provisions for assessment and payment of compensation. The bill is the ‘National Oil Spill Detection and Response Agency (Amendment) Bill, 2012.’ The bill contains what may be regarded as a comprehensive provision for assessment and payment of compensation for oil spills. This is in addition to stiff penal provisions for being responsible for oil spills or failing to report an oil spill incident.¹⁸ The new section 11(a) in the proposed Amendment Act provides as follows:

- i. (a) A responsible party to a spill shall be liable, in compensation for damages to real or personal property, loss of subsistence, use of natural resources, loss of profits and earning capacity due to injury, destruction of personal property or natural resources, severance and opportunities both private or public in nature, arising as a result of oil spill or unauthorized gas release or removal cost.
- ii. A claim for compensation for damages arising from an unauthorized oil spill or gas leakage, shall in the first instance be made by the claimant to the responsible party who may pay the claimed value or send a formal notice of rejection of claim to the Agency for an independent verification and valuation.
- iii. A claim for compensation must be directly related to an ecological, economic or property damage arising from an oil spill or gas leakage.
- iv. A formal notice of rejection of claim must clearly indicate the value of claim rejected and the value accepted, if any.
- v. Except otherwise provided, where an independent verification and valuation report to a claim for compensation has been made, such claim shall become payable within 30 days of receipt by the responsible party of such evaluation.
- vi. A verification and valuation report must clearly show the spill on which the claim is made, the qualifying particulars of the claimant to the claim, the nature of the damage being assessed, ground on which the report is based, the verification perimeters, assessment of value particulars, rationale for valuation and total valuation.
- vii. Where there is an objection to the verification and valuation report of any claim, the protesting party shall give notice of this objection to the agency.
- viii. Application may be made to a high court judge in chambers to appoint an independent adjuster whose valuation shall be final in determining the applicable value of claim for compensation.
- ix. The claim adjuster may visit the site or request for more information to evaluate the verification and valuation report on a claim for compensation.
- x. A responsible party shall be bound to pay compensation qualifying under this Act within 60 days after the verification and evaluation report or 30 days after the decision of an adjuster.

This bill presents a very credible and objective platform for assessment and payment of compensation for oil spills in Nigeria. It is rather unfortunate that just last month (March, 2019), this wonderful Bill which has been approved by the Senate, was declined assent by the President of the Federal Republic of Nigeria in the exercise of the powers conferred upon him by Section 58(4) of the 1999 Nigerian Constitution. According to him, the Bill if passed into law will undermine the powers of the Minister for Petroleum Resources. He also cited the 0.5% contribution proposed for oil companies in the Bill for a fund to be established for cleaning up oil spills and for making interim compensation payments to victims of oil spills, as part of his reasons for declining assent to the Bill. According to him, the 0.5% contribution will increase the tax burden on the multinational oil companies. He further stated that the technical roles assigned to the Agency under the Bill will lead to a conflict in duty between the Agency and the Federal Ministry of Petroleum. He finally cited sections 3, 6(1a), 7(a) and (b), 8,9,10 and 11 of the amendment Bill as being unacceptable to him. Section 11 of the Bill reproduced above is one of the core reasons why the president declined assent to the Bill. This reaction from the executive does not come as a surprise. There have been insinuations that the Federal Ministry of Petroleum Resources virtually functions as an arm of the Multinational Oil Companies (MOC) rather than being an independent regulator of the petroleum sector. This bondage problem does not arise simply because the government is engaged in Joint Ventures (JV) operations in the sector with MOC's but because the government appears in reality to be a junior partner in the JV arrangements despite its majority shareholding on paper. It will not therefore be strange to assert that the views of the Nigerian executive arm of government on the provisions for compensation in the Amendment Act is actually the views of the multinational oil companies operating in Nigeria's oil and gas sector. We urge the National Assembly to do

¹⁸ New Section 8 in the proposed amended NOSDRA Act

the necessary with respect to this Bill, by vetoing the president's refusal to sign the Bill into law, in order to save the victims of oil spills.¹⁹ Besides, this Bill has captured what could be regarded as International Best Practices with regards to compensation for oil spills. Sections 10 and 11 of the amendment Bill embody the Polluter Pays Principles (PPP) which is an accepted principle for assessing and apportioning damages for pollution under international law. Is the President saying that the National Assembly can no longer legislate on the oil sector because Section 9 of the Petroleum Act has conferred the power to make regulations for the implementation of the Act on the Minister for Petroleum Resources? I do not think so.

It should be noted however that the National Industrial Court rather than the regular High Courts ought to be a better judicial forum for the appointment of a claim adjusters to handle verification and evaluation reports that are not accepted by the parties or any of them. This is in view of the fact that the National Industrial Court has assumed all the powers of regular High Courts consequent upon the Third Alteration Act, 2010 that amended the 1999 Constitution. Despite the increase in judicial jurisdiction, it retains its simplicity of procedure relevant to the needs of rural communities and their dwellers who are mostly affected by oil spills. A further advantage is that all appeals from the Court terminate at the Court of Appeal. This position is justified by the experience of oil pollution cases such as *Joe Anaro V. SPDC*¹⁹ and *Edemkhue V. SPDC*²⁰, each of which took not less than 20 years to be finally determined at the Supreme Court.

5. Global Trends and Perspectives

The most important convention at the global scene that is relevant to the determination of compensation for oil spill in Nigeria is the International Convention on Civil Liability for Oil Pollution Damage, 1992. The convention provides for compensation in the case of victims of oil spill for damage to property, damage to natural resources (which is the cost of remediating or replacing lost or damaged natural resources), damages for loss of subsistence from natural resources and compensation for other pure economic losses. The civil liability compensation scheme also allows for interim payments for losses from a central fund where the responsible party is not in a position to fund the determined compensation. However, applying the totality of the provisions of the Civil Liability Convention compensation scheme to Nigeria is sometimes difficult. This is because the focus of this international convention is on off shore spills whereas in Nigeria, there are many on shore spills affecting large areas of farmlands.

6. Conclusion and Recommendations

The legal dispensation for oil spill compensation in Nigeria is yet at its embryonic stage. This is mainly due to its being anchored on the wrong philosophy, to wit, that compensation for oil spill damage is in the same mould as compensation for compulsory acquisition of land. Little wonder, the rate of compensation applicable under the Land Use Act are applied by the courts when assessing compensation for oil spill damage. Further, the provision under the oil pipeline Act for 'Fair and adequate Compensation' is vague as it does not define what it means by fair and adequate compensation. The NOSDRA Act was established by the NOSDRA designed to deal with the detection and response to oil spill incidents. This includes clean-up operations as well as restoration of the polluted environment. It did not make express provisions for compensations of victims of oil spill. The Bill for an amendment of the NOSDRA Act has made Elaborate and comprehensive provisions for compensations of victims of oil spill. This bill is however yet to be passed into law and has been declined assent by the President primarily on the basis of the allegation that its provisions undermines the powers conferred on the Minister for Petroleum under the Petroleum Act. With all due respect, this position is not correct but points to an invasion of the legislative powers of the National Assembly by the executive arm with regards to the oil and gas sector in Nigeria. The Bill for the amendment of the NOSDRA Act, which contains elaborate provisions for compensation, should be fast tracked. The withholding of assent to the Bill for the amendment of the NOSDRA Act should not deter the National Assembly, as a true representative of the Nigerian people from going ahead to pass the Bill into law by virtue of the powers conferred on it by Section 58(5) of the constitution. The decline of assent by the executive arm is not unconnected with the avowed commitment of the MOC's in Nigeria to their mega profits with little or no regards to the principles of sustainable development and preservation of the Nigerian environment. In view of the speedy nature of trials at the oil National Industrial Court, pollution damage litigations should be included in the expanded jurisdiction of the Court.

¹⁹ Section 58(5), Constitution of the Federal Republic of Nigeria, 1999

¹⁹ (2015) 12 N.W.L.R (Pt. 1472) 122;

²⁰ SC.60/2003