REGULATION OF THE OIL AND GAS INDUSTRY IN NIGERIA, CANADA AND THE UNITED STATES OF AMERICA: A COMPARATIVE ANALYSIS

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Abstract

Despite the relevance and role oil and gas exploration, exploitation and production plays in the economy of Nigeria, the activities involved in the process of exploration and mining of the products has not been sustainably done. This ranges from the attitude of the exploration process to the regulation of the activities to achieve the triangular achievement of the economic development, social development, and environmental protection, this paper observed that Oil exploration and prospecting activities as practiced in Nigeria has caused serious damage to the environment which alters the environment irreversibly and renders the environment unsustainable due to poor regulations of improper exploration, production, transportation and storage activities. This paper therefore examined the Oil and Gas industry in some other jurisdictions like the United States of America and Canada in the context of ownership and possession of oil, gas, land and the regulation and enforcement of statutory provisions, amongst others, to show how the oil and gas sector is being regulated to achieve economic and social development while ensuring environmental protection in their Oil and Gas Industry. The United States of America and Canada were chosen because they have a long history of best practice with regards to oil pollution and gas flaring regulations. Using the doctrinal research methodology, this paper examined various Articles. Books, publication amongst other, and further did a comparative study of some of the Laws regulating the Oil and Gas Industry in the United States of America and Canada, and their means and style of regulation with those operational in Nigeria to show how the Laws and concepts in those jurisdictions have been effectively used in attaining economic development while protecting the environment and achieving real and sustainable development, without compromising the socio-economic advantage of the activities while protecting the environment. The appraisal is therefore aimed at achieving an efficient regulatory regime at preserving the environment and at the same time achieve sustainable development in the oil and gas sector of the economy in Nigeria.

Introduction.

Since the discovery of Oil over six decades ago; and the subsequent recognition of gas, they have been the main stay of the Nigerian socio-economic prowess. However, this premium hydro- carbon and the resultant gas has been both a blessing and a curse to the Nigerian polity. It is a blessing to the extent that it accounts for almost over 90% of government's revenue[1]; and a curse because oil exploration activities has severely polluted the host communities and immediate environs, and relegated the region to a state of ecological

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1 Bryan, K.O.E. 'Environmental Management and Sustainable Development in Nigeria's Niger Delta' (Vol. 5. No. 15)2014, *Journal of Economics and Sustainable Development*, 29 – 30. However, the exact amount varies slightly from year to year, in recent times; disruptions of oil activities have been alleged to have affected production and consequently revenue from oil. In the same vein, the amount accruing from oil exports has significantly reduced owing to huge fall in the price of oil in the international market.

disaster without compensation and any prospect of remediation and development[2]. This practice has resulted in the persistence of environmental pollution in Nigeria without an attendant real strategic development plan and prospect, which has been due to weak regulatory regimes and enforcement mechanisms[3]. There is no doubt that the government has legislated laws neither has there been any regulatory institutions that can compete favorably in terms of best practices globally in environmental protection, and there is no way a country can achieve environmental sustainability, real and sustainable development when the laws and enforcement mechanisms and strategies are weak and channeled more towards revenue generation than development. Hence, to achieve effective regulation of the oil and gas industry; real and sustainable development, regulatory laws and agencies in the oil and gas industry should be tailored in accordance with global best practices, and other recommendations elucidated out in this paper should be implemented with vigorous effect by the stakeholders.

For the purposes of getting government started towards doing the right thing, the point is made here that the Petroleum Industry Act[4] recently passed into law did not take into total consideration the measures which were before now considered as the first legal regime encouraging community participation and environmental protection, which is the easiest way of resolving the age long conflicts in the Niger Delta Area. There is government responsibility, and the responsibility of the community. Government on the one hand, is to make the laws and regulations in the best interest of all stakeholders, and the stakeholders would in turn perform their duties responsibly all in the interest of the larger society, instead of revenue oriented and socioeconomic inclined focus. A law creating good and sustainable benefits for oil producing communities would likely create an atmosphere of peace for the oil companies to operate without any attack on their staff and facilities. Peace is one of the factors which prompts real and sustainable development. Truly, it is peace the Nigerian nation needs.

Also, the urgent need to conduct a thorough clean-up, and remediation of the degraded and polluted Niger Delta area and initiate processes for real and sustainable development cannot be overemphasized. The lands, rivers and atmosphere of the Niger Delta region are excruciatingly polluted and degraded, serious and unprecedented deforestation has also taken its toll. It is high time for government to be both reactive and proactive towards these incidents. This papers recommends that the Ogoni clean-up as a precursor to massive cleaning and remediation of the entire Niger Delta region be concluded.

Ownership

Within the context and scope of this paper and the fact that whatever assumes the flavour of law becomes lacking in a universally accepted definition, the concept of ownership has been given different definitions by different authors. *Austin* conceived ownership as a relation which subsists between a person and a thing which is the object of ownership. He defined ownership as a right indefinite in point of use, unrestricted in point of dispositions and unlimited in point of duration.[5] In the same vein *Holland*, defines ownership as '*a plenary*

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2 Nale, L. 'The Impact of the Oil and Gas Industries on Sustainable Development in Nigeria's Nigeria Delta Region'. (Vol. 4)2014.*African Journal of Sustainable Development*. 22.

3 Okorodudu, F. "*Law of Environmental Protection*". Caltop Publications (Nigeria) Limited. 1998, 162

4 Petroleum Industry Act (PIA) 2021.

5 Nnabue, U. S. F. *op. cit* 98.

control over the object'.[6] The control includes the right to possession, enjoyment and ownership while *Professor Dias* sees it as a socioeconomic concept, and defined ownership as "*the aggregate of certain jural relations involving claims, powers, liberties and immunities concerning the thing owned*"[7]. Their views supports the observations of *Nwabueze*, when he stated that ownership is the most comprehensive and complete relation that can exists in respect of anything. It implies the fullest amplitude of rights of enjoyment, management and disposal of property.[8] Ownership therefore gives one powers, claims and privileges over a thing. This further emphasizes the position of *Professor Adaramola* who in defining ownership as an instrument of social policy stated that,

> "ownership is often used to delineate the ambit of use and governmental control and ordering of the thing owned. While it is used to invest the power with rights and other benefits, it is also employed to encumber him with certain obligations, liabilities and disabilities which mark the limit of his claims and liberties in his multifarious relationship with other individuals and the society as a corporate entity".[9]

Possession

Possession may be defined as the ability to have physical control, to hold and to retain power over a thing. Possession may also be defined as the acquisition of a degree of physical control over a physical thing, such as land or chattel, or the legal right to control intangible property, (such as credit) with the definite intention of ownership.[10] Possession can be actual or constructive and; in certain instances, it is *prima facie* evidence of title of ownership. Possession is in fact what ownership is in right. From the foregoing, it will be therefore be correct to say that the Oil and Gas deposits in the Niger Delta should belong to the Niger Delta people. This is because based on the concept of ownership, they own the land, and are also in possession of the land in which the natural resources are found. This is further buttressed by the concept of the principle of law tagged *Quic quid plantatur solo, solo, Cedit,* that is, he who owns the land; and is in possession, is entitled to what is under the land.

However, by the provisions of *Section 44(3)* the *Constitution*[11] which provides;

> "notwithstanding the foregoing provisions of this section, 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 shall vest in the Government of the Federation ……."

Similarly, *Section 1(1)* of the *Petroleum Act*[12] - provides that the entire ownership and control of all petroleum in, under or upon any land to which this *section* applies shall vest in the State. While *Section 1* of the *Land Use Act* provides –

> "Subject to the provision of this *Act*, all land comprised in the territory of each State in the Federation is hereby vested in the Governor of that State, and such

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6 Brian E. Robinson, Margaret B Holland, Lisa Trves, Does Security Land Tenure save forest? *A New analysis of the relationship between Land Tenure and Tropical deforestation, Global Enviromental Charge*. Vol 129. 2014. 284. <http//sciencedirect.com> accessed on the 7th March, 2021

7 Adaramola, F, *Basic Jurisprudence*, 2nd Edition. Raymond kunz communications. Lagos. 2004. 212

8 Nwabueze, B. O. *Nigerian Land Law*, Enugu, Nwanife, 1972. 9.

9 Adaramola, *Ibid.* @ 213

10 Tay, A. E. S. "*The concept of possession in common law: Foundation for a New Approach*" in <www.austlu.edu.au> visited on 12th October 2020.

11 *Section 44 Constitution of the Federal Republic of Nigeria 1999* (as amended)

12 *Section 1(1) of the Petroleum Act 2004*

> land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with …………"

A combination of these laws vests the ownership of Oil and Gas in Nigeria in the State and the land on the governor of the states[13], to the exclusion the Niger Delta people from participation in the exploitation of oil and gas found in their aboriginal home land, notwithstanding the adverse environmental and socioeconomic impacts of oil explorations and operations on the environment and the people. The oil producing States are only entitled to the derivation funds accrueable from the natural resources within their States.

Both the independent and post independent *Constitutions* vested ownership of oil and gas in the State. Under the *1954 Federal Constitution*, five percent (5%) of the revenue was shared to the regions based on the principle of derivation. Under the *1960 and 1963 Constitutions*, ownership of mines, minerals, oil fields, oil mining, geological surveying and gas were vested in the central Government. However, based on the principle of derivation, allocation of the proceeds from mineral exploitation was paid to the regions from where they were gotten in order to guarantee the economic independence of the region. *Section 140*[14] - provides thus

> "There shall be paid by the Federal Government to the Region, a sum equal to fifty percent (50%) of the proceeds of any royalty received by the Federation in respect of any minerals extracted in that Region and any mining rents derived by the Federal Government from within any Region".

This was the situation until when subsequent military administrators reduced derivation to forty-five (45%) percent in 1970, twenty percent (20%) in 1975, and in 1982 when 1.5% was allocated to the oil producing states. Towards the end of the Babangida administration in 1992, the share of revenue specifically allocated to oil producing States was doubled to 3%. This was an attempt by the Federal Government to address the ecological problem caused by oil exploration in the Niger Delta. The Babangida[15] administration established the *Oil Mineral Producing* and *Development Commission*[16], during the build-up to the return of civilian Government, because of the restiveness in the Niger Delta region; there was apparent concern about the declining security situation in the Region arising from increased agitation from oil producing communities and its consequent threat to the economy. This made the 1995 constitutional conference to recommend that in sharing the revenue, 13% should be set aside as derivation revenue to assist the development of oil producing States to tackle the monumental neglect and degradation of the environment.[17] This 13% derivation principle was enshrined in the 1999 *Constitution*. *Section 162 (2)*[18] - provides that the principle of derivation shall be constantly reflected in any approved formula as being not less than 13% of the revenue accruing to the Federation account directly from any natural resources. By virtue of this provision, the oil producing States are only entitled to 13% derivation of the revenue accruing to the Federal Government from their States.

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13 This is without prejudice to the provisions of section 34(1) and 36(4) of the Land Use Act 1978, and the powers of appropriation as variously submitted by Prof Jadesola Akande, Prof. R. A, Onuoha, Prof I.O, Smith amongst others.

14 *Section 140 of 1960 Constitution of Nigeria*

15 General Ibrahim Badamosi Babangida, the self-styled Millitary President of Nigeria.

16 Also referred to as *OMPADEC.*

17 Sagay, I. Nigeria:" *Federalism, the Constitution and Resource Control*" in <www.wado.org.resource> visited 28th May 2015.

18 *Section 162 (2) Constitution of the Federal Republic of Nigeria 1999* (as amended).

It is also instructive to note that in 2002, in the case of *Attorney General of the Federation v. Attorney General of Abia State and 35 others*[19] – the Federal Government instituted an action against the oil producing States with respect to the offshore/onshore oil dichotomy, following a dispute that arose between the Federal Government on the one hand and the eight *littoral* States of Akwa Ibom, Bayelsa, Cross River, Delta, Ogun, Lagos, Ondo and Rivers States on the other hand, as to the Southern (or seaward) boundary of each of these States. The Federal Government contended that the Southern (or seaward) boundary of each of these States is the low water mark of the land surface of such State and that the natural resources located within the continental shelf of Nigeria are Federal Government contentions. While the States claimed that its territory extended beyond the low water mark onto the territorial water and even onto the continental shelf and the *Exclusive Economic Zone*. They maintained that natural resources derived from both onshore and offshore are derivable from their respective territory and in respect thereof each is entitled to the not less than 13% allocation as provided in the proviso to *subsection* (2) of *Section162* of the *1999Constitution* as amended. The Supreme Court however, held that the revenue derived from offshore drilling should be excluded and should not form part of the calculation of the revenue attributable to the oil producing States based on the derivation principle. This decision by the Supreme Court further fueled the agitations of the people of the oil producing States. The ownership of oil and gas in Nigeria as it is for now, is still vested in the State (Nigeria).

Ownership and Possession of Oil and Gas in the United States of America.

The United States of America is a Federation consisting of 50 States with Washington District of Columbia as its Capital.[20] The United States became a legal entity in 1781 after 13 Non-Federal States adopted a Constitution which is; at best, a loose arrangement. Since then the Country has evolved into a Federation of States, despite having a multiplicity of cultures and laws.[21] The United States is a major oil producing and consuming State, and its laws on oil pollution in a Federal arrangement like Nigeria informed this comparative analysis. Another basis for this analysis is that the United States of America has a written constitution like Nigeria and the operation of its constituent's elements, like the States and the County's/District is Federal in nature and similar to the States and Local Government arrangement in Nigeria.

Nigeria on the other hand consists of 36 States with Abuja as its Federal capital. The Nigeria States did not evolve like that of the United States but is a creation of Parliament backed up by Military Decrees or Edicts during the time of Military rule. Federal laws have binding force throughout the Federation and are therefore binding on the whole Country, while State laws apply only within the State that makes the laws. There are some matters that fall within the exclusive competence of the National Assembly to make laws, while the State Houses of Assembly have concurrent powers to make laws jointly with the National Assembly.[22] The Local Government has residual powers to make laws that are outside the competence of both the Federal and State Houses of Assembly.[23]

The United States; unlike Nigeria, recognizes private ownership of Oil and Gas. This is because of the fact that the United States practices federalism in which States control all

[19] (2002), 6 NWLR, (Pt 764), 581.

[20] K.B. Oyenede, An Appraisal of the Laws Relating to Oil Pollution in the Inland, Territorial and Maritime Waters of Nigeria in <http://www.researchspace.ukzn.ac.za> visited 8th December, 2019.

[21] *Ibid*.

[22] Second Schedule, Part II, *CFRN* 1999, as Amended.

[23] *Section* 4, 5, 6 and 7 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

activities within their competence and control except foreign policies, military and monetary policies.[24] In the United States, mineral, energy and water resources may be privately owned. In many parts of the United States where oil is found, there has been freedom of exploitation. This is so because of the rule that applies in some of the States that the owner of the land in which petroleum is found may lay claim to it to some extent.[25] Ownership of oil and gas is vested in individuals upon whose land the products are discovered. According to *Laitos*,[26] the private property interest is what is owned by the would-be-developer and user of the resources, this means individuals own oil wells. However, where these individuals explore and exploit these deposits, taxes and royalties are paid to the Government of the State where the reservoirs exist, this is quite apposite as in the situation in Nigeria. Individual coastal States have some level of authority on mineral oil that is found in such a State.

The Federal Government does not hold absolute ownership of the oil. Under this arrangement, the Federal Government of the United States of America and the coastal States jointly own and exploit the oil. In the case of *United States v. Louisiana*[27]the plaintiff sought an action for declaration against the States of Louisiana, Texas, Mississippi, Alabama and Florida, seeking a declaration that it was entitled to exclusive possession of, and full dominion and power over the lands, minerals and other natural resources underlying the waters of the Gulf of Mexico more than three geographical miles seaward from the coast of each state, and extending to the edge of the continental shelf. It also asked that the States be restrained from interfering with the rights of the United States in those areas and that they are required to account for all sums of money derived by them there from June 5, 1950. The Supreme Court held that coastal States have joint ownership of oil and gas with the Federal Government ans as such did not grant the request and claim of the Federal Government. Ownership of oil and gas is determined not by the Federal Government of the United States, but by the individual States in which the deposits were found. This is why there are versatile ownership theories of oil and gas in the United States of America.

Qualified Ownership.

In certain jurisdictions, ownership of oil *insitu* is not recognized unless and until the oil has been produced and reduced to actual possession. This is referred to as the 'qualified ownership theory'.[28] Under this theory, the land owner or lessee, whilst not having full proprietary property rights *insitu* to the resources, but does have a recognized right to acquire such absolute title by reducing the hydrocarbons into actual possession. This theory which obtains in States like California and Indiana is also known as the 'Capture Rule'.[29]The rule is founded upon the belief that as migratory properties, ownership of oil and gas can only crystallize; if and only, when oil is captured and brought into actual possession. In the case of *Westmoreland and Cambria Natural Gas Co. v. De Witt,* [30]the landowner; John Brown, executed an oil and gas lease, the lease was eventually assigned to Westmoreland Natural Gas Company which drilled a well and shut it in by closing the valves at the surface and holding the gas in reserve. Brown was unhappy with this development and sought to top lease of the land to a second company. Westmoreland thereafter filed a suit to prevent the

24 *United States v. Louisiana* (1960) USSC 28

25 *Westmoreland and Cambria Natural Gas Company v. De Witt*. 130 pa 235 (1889)

26 Jan G, Laitos, *Laitos Natural Resources Law*: 1st (First) Edition, Thomson West Group, 2002.

27 *Supra.*

28 *United States v Louisiana*, (1965) 380 U. S. 145.

29 Howard, R.W. and Richard, C.M. and Ors. Cases and Materials in the Law of oil and Gas in <http://www.bora.uib.no> visited 11th of April 2019.

30 *Westmoreland* & *Cambria Nat. Gas Co. v De Witt*, 130 (1889) Pa. 235, 18 Atl. 724, 5 L.R.A. 731.

second company from drilling a well. The court, in affirming the existence of a law of capture held that gas; like wild animals, but unlike other minerals,[31] have the tendency and the power of escaping even against the will of the owner, and to continue to be his property only while within the area subject to the land owners' control, but when they migrate to other areas or fall under the control of other persons, that title to the previous owner disappears. Therefore possession of the land does not necessarily involve possession of gas. If someone drilling on his own land reaches the common deposit and obtains through those drilled wells the gas of neighbouring areas, the ownership of that oil and gas passes to whoever produced it. Hardwicke[32] puts it succinctly when he stated that,

> 'The owner of a tract of land acquires title to oil and gas which he produces from wells drilled thereon, though it may be proved that part of such oil migrated from adjoining lands'.

The general rule is that the first person to capture such a resource owns that resource while in his possession. For example, a land owner who extracts or "*captures*" groundwater, oil or gas from a well that straddles several lands acquires absolute ownership of the substance even if it is drained from beneath another person's land. The land owner that captures the substance owes no duty of care to other land owners. The rule of '*capture*' however, has the likelihood of setting two neighbouring land owners against each other. Thus, where a neighbour refuses to grant well right to an oil company, the oil company may seek grant from a neighbouring land owner to enable the company drain the oil and reduce it to possession by drilling. This was the situation in the case of *Frystak v. Cabot Oil and Gas Corporation*[33] where the defendant represented to the plaintiff that if he failed to sign a lease with him, he would negotiate a lease with the plaintiff's neighbour and capture the gas under the plaintiff's land through the rule of capture, leaving the plaintiff without a lease, or gas in his land

Absolute Ownership Theory.

The absolute ownership theory[34] is applicable in States such as Texas, Pennsylvania and Arkansas. Under this theory of ownership, the land owner is regarded as having legal title in severalty to oil and gas beneath his land. He is not a co-owner when the reservoir cuts across lands owned by different persons. The limitation however to the absoluteness is when the owner loses title if the oil migrates to an adjacent land. In *Barnard v. Monongahel Natural Gas Co*[35] the court refused to restrain drilling by an adjacent land owner alleged to be drilling from a reservoir under the plaintiff's land, holding that the plaintiff's remedy was self-help by drilling his own well. These variants of ownership are borne out of the nature and relevance of oil and gas as an important source of energy which moves the economic engine of any nation.

The rule of capture, though qualified by the capture rule; if allowed its full run, will lead to a dangerous preponderance of oil and gas wells as a result of the fact that every land owner and/or oil seeker will drill as many wells as possible. This undesirable state of affairs will have negative effect on the environment, as well as the quantity and quality of captured oil and gas. The rate of dissipation and waste may increase while reserves may dwindle. In a bid to checkmate this state of affairs the *Conservation Act* was passed by the United States government which has been domesticated by individual States. The State of Pennsylvania

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31 Empasis, mine.
32 130 Pa 235 (1889) *Ibid*
33 *Frystak v. Cabot Oil and Gas Corporation* 13 (1935) TEX.L.REV.393.
34 Howard, R.W. and Richard C.M. Volume 81, Issues 1-14 *University* ***of*** *Minnesota 1948*. 143.
35 (1907)216 Pa. SC 362; 65 A. 801.

passed this law which is known as *Pennsylvania Oil and Gas Conservation Law*[36]. This law prohibits the waste of oil and gas which waste includes physical waste as well as drilling more wells than necessary. It authorizes the Department of Environmental Protection to issue spacing orders which determine where wells can be drilled. This means that when multiple land owners own interests in a drilling unit, the landowners will share in the royalties from the oil or gas well in proportion to their ownership of the land contained within, the drilling unit regardless of whose land the well is drilled upon. The law also prohibits over productivity through unitization. Sometimes, several oil wells are owned by different people, each well producing oil and gas from a common reservoir. To minimize the production of the reservoir, the different wells may be operated jointly, as one unit. These and other requirements as provided by the Conservation laws are geared towards achieving orderliness within the oil and gas industry in the United States of America, thus preventing clashes amongst land owners.

Comparative Analysis of the Laws Regulating the Oil and Gas Industry in the United States with the Laws in Nigeria.

In the United States of America, regulation of Oil and Gas drilling and production are largely left to the States, except for Federal offshore waters, where operations are regulated by the *Bureau* of *Ocean Energy Management*. The names and organizational structures of the State agencies overseeing Oil and Gas extraction vary. In *Texas*, Oil and Gas are regulated by the *Texas Railroad Commission*, in *Oklahoma* by the *Oklahoma Corporation Commission*, and in *North Dakota* by the *Industrial Commission*. In *Colorado* and *Wyoming*, the agencies are the *State Oil* and *Gas Conservation Commissions*. Local control of oil and gas operations is contentious. The key legal issue is generally whether, or to what extent, State regulations preempt Local controls. The result varies from one State to other.

States require a drilling permit being sought and issued before the drilling of a well can be commenced. Requirements to receive drilling permits generally include minimum setbacks from lease or unit boundaries, and adequate casing and cementing programs. States generally require permits, or notices of major work done on a Well, and periodic reports of Oil and Gas produced. When a Well reaches the end of economic production, it must be plugged according to the terms of a *plugging permit*[37].

Where the onshore Oil and Gas rights are owned by the Federal Government, as is the case for marsh Land in the *Western United States*, the various permits must also be obtained from the *Bureau* of *Land Management* as well as the State, which may have different requirements than the equivalent State permits. In the *United States of America*, Oil and Gas is regulated by the various Rules and Regulations of each of the 33 *States*; out of the 50 *States*, in which over 860, 000 sites are located. The Regulations are founded in *Statute*, *Common Law*, *Federal* and *Constitutional Law*.

Local Government control over Oil and Gas production is generally not permitted by State Law, except for Local zoning input; that in some States, allows Local Government control over where and when Oil and Gas production activities can take place to prevent and protect residential neighborhoods from noise pollution, industrial traffic, or perceived health related issues and hazards.

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[36] (1977). 58 Pa. SC State 401-419

[37] John S. Lowe, *Oil and Gas Law in a Nutshell* (5th Ed).St. Paul; West Academic Publishing Co. 2009. 27.

The United States recognizes private ownership of oil and gas, while ownership of oil and gas in Nigeria is vested in the State. By virtue of the provisions of Section 44(3) of the Constitution which provides that;

> Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas, in, under, or upon any land in Nigeria or in, or upon the territorial waters and the exclusive economic zone of Nigeria shall vest in the Government of the Federation

Similarly, *Section 1(1)* of the *Petroleum Act* provides that;

> The entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall vest in the State.

Also, *section 1 of the Land Use Act,* vests all Land within a State on the Governor of that State, to hold same in trust for all Nigerians. A community, combined and cumulative reading of these laws automatically vests the ownership of oil and gas found anywhere in Nigeria on the Federal Government and excludes the oil producing Communities from participation in both ownership, and the exploitation of oil found in their land. Consequently, in Nigeria, the right of action in respect of oil and gas resources also lies with the Federal Government[57] while in the United States, the right of action lies with the individual upon whose land there is trespass by another for the purpose of capturing oil and gas, or for the escape of oil and gas. In the case of *Westmoreland and Cambria Natural Gas Co. v. De-Witt*[38]–the Court gave judgment in favour of Westmoreland over ownership rights in respect of oil and gas.

In the United States, the provision on responsible parties makes it clear who is responsible with regards to an oil spill and gas escape. This is contrary to the laws in Nigeria which creates vague notions with regards to the duties of an oil or gas spiller. In Nigeria, the *Petroleum Act and its Regulations* require the holder or lessee of petroleum license to adopt all '*practicable precautions*' for the prevention of pollution of Inland waters, rivers, water-courses and territorial waters of Nigeria.[39] However, the Regulations did not define the meaning of '*practicable precautions*' and therefore confers vague duties on the holder of a petroleum license. The Regulations also adjoin all licensees to provide '*up to date equipment*' approved by the Director of the '*Department of Petroleum Resources*' to use in the process of oil exploration and production.[40] The Regulations do not however provide a clear and concise definition of 'up to date equipment.

The Licensees are also expected to carry out their operations in a '*proper and workman like manner*' in accordance with regulations and practices accepted by the Department of Petroleum Resources as '*good oil field practices*'.[41] The effect of not imposing specific duties on the oil operators is that they cannot be held accountable for failure in carrying out their duties in protecting the environment in the course of oil exploration and protection. The *Petroleum Act* also prescribes various sanctions against persons who violate the provisions of the *Act*. Sanctions include the power of arrest without warrant, exercised by the Minister of Petroleum, over any person suspected of committing an offence.[42] However, the *Petroleum Act* does not state the penalty that may be suffered by or imposed on such an individual or corporate entity.

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38 *Westmoreland and Cambria Natural Gas Co. v. De Witt* 130 pa.235 (1889).

39 *Regulation 25* Petroleum (Drilling and Production) Regulation 1969.

40 *Regulation 37. Ibid.*

41 *Regulation 36 Ibid.*

42 *Section 8 (d) of the Petroleum Act 1969*

Furthermore, there are lots of difficulties encountered by litigants who wish to seek judicial remedies for environmental wrongs in Nigeria. Issues of *locus-standi* which limits access to Courts in Nigeria is evident in a number of cases.[43] However, in *Adediran v. Interland Transport Ltd*[44] the Supreme Court of Nigeria has held that the restriction imposed at Common Law on the right of an action in public nuisance is inconsistent with the provisions of *Section 6(a) (b) of the 1979 constitution* and is as such; to that extent void. It is the position of this paper that the penalties stipulated under the Nigerian Laws are out of tune with modern realities and practices and cannot as such operate as a check or deterrent.

Under the *Oil Pollution Act* of the United States, the provisions of citizen actions, which is a feature of the *Resource Control and Recovery Act;*[45]a feature of the *Pollution Act 1990,* has widened the scope of *locus-standi* to enable private individuals to seek judicial remedies for actual or threatened damage to the environment or their Agencies.[46] It is also instructive for us to point out that the United States makes provisions for the recovery of natural resources damaged by an oil spill. The provisions of the Natural Resources Trust Fund ensures that the funds for ecological damages are recoverable.[47]

Furthermore by providing for the establishment of Trustees for the environment, the two concepts of Ownership and Control are vested in one body which uses the funds for the recovery of damage to the environment. This is another lesson for Nigeria where ownership of natural resources is vested only in the Nigerian State without corresponding control by the Communities who are; more often than not, the victims of oil pollution and environmental degradation perpetrated by the multinational oil companies. Even where the *Petroleum Industries Act* places responsibility on the licensee to rehabilitate the environment adversely affected by exploration and production activities under *Section 293(1),* it however; under *Section 293(2),* of the *Act* exempts the licensee from liability where the act which adversely affects the environment has occurred by sabotage. Nigeria can draw a lot of lessons from the *United States Oil Pollution Act 1990* and other United States Legislations which makes such an act a strict liability action. The Nigerian legislature should take steps to make laws to recover natural resources damaged by oil spills and also take steps to remediate and restore the environment to its original states and makes polluters liable whether or not there is sabotage preceding the pollution or not.

The Courts in the United States also have for long time ago altered their focus from the position of the Common Law. They observed that the Common Law remedies of Negligence and Nuisance are not easily used to obtained redress because of difficulties associated with proof and causation. The Courts therefore relied on the provisions of the United States Laws and Rules governing compensation for victims of oil spills. This was the situation in the case of *Ayelka Pipeline Service Co. v. United States,*[48] where the Plaintiff, a pipeline company sued the Defendant, the United States Government to recover its clean-up costs after oil had leaked through the pipeline laid by the Defendants. The Plaintiffs brought the suit under the provisions of the *Federal Water Pollution Control Act*, since the *Act* allowed reimbursement to the owner of a facility for clean-up cost, if the pollution was caused by a Third-Party without

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[43] *Amos v. Shell BP* (1974)4 ECSLR 486.

[44] *Supra* p.28

[45] Also referred to as, RCPA.

[46] 42 USC s. 6901 Ibid

[47] Emphasis, is that of the writer.

[48] *Ayelka Pipeline Service Co. v. United States* 649 F.2d 831 (G.C1 1981)

any fault on the part of the owner.[49] The Court held that the Trans-Alaska Pipeline Fund would govern since it is a specific Legislation in force. The Court found support for its position by examining the legislative history behind the Trans-Alaska Pipeline Fund and an examination of the *Federal Water Pollution Control Act* itself.

The *Exxon Valdez* case[50] brought to the fore the inadequate compensation for victims of oil pollution of the magnitude of the Exxon Valdez under Statutory provisions and the Common Law.[51] As a result of the inadequacy of damages and because the *Clean Water Act* did not make clear cut provisions for the contribution of responsible parties to clean ups, added to this is the unresolved issue of who bears the cost of removal of the spills and even compensation to Claimants by Parties responsible for spills. The United States Congress in response to the Exxon Valdez passed the *Oil Pollution Act 1990,* which created a comprehensive liability regime. It created strong criminal sanctions and stiff civil penalties for spills, stringent licensing standards, required detailed spill prevention plans, provides for responsible parties in the event of an oil spill and granted greater authority to the Federal Government to control removal efforts.[52]

In another case involving the Amoco Cadiz.[53]The Amoco Cadiz was a state of the art 228, 513 ton Tanker transporting Iranian crude oil from Karg Island, Iran and Ras Tanura, Saudi Arabia to Rotterdam, Amsterdam. On March 16, 1978, the Amoco Cadiz ran aground off the Coast of France, spilling almost 220, 000 tons of oil into the Atlantic Ocean creating an oil stick eighteen miles wide and eighty miles long. Clean-up crews arrived to remove the oil but the response teams were ill-equipped to rehabilitate the damages to the beaches and wildlife. Protocols to the *International Convention on Civil Liability for Oil Pollution Damage Remedies*[54] were available to the parties injured by the Amoco Cadiz spill. Article 1352 of the *French Civil Code* allows victims to choose their remedies. Even though France was a party to the Protocols to the *International Convention on Civil Liability for Oil Pollution DamageRemedies*, the Amoco Cadiz claimants opted to bring suits in a United States Court. The United States Court held that the Amoco parent company was liable for the spill.

The above process is a far cry from the position in Nigeria, where in majority of the oil and gas cases, liability for oil pollution and the remedy provided for victims of oil pollution are laid and based on Common Law remedies of nuisance, trespass and negligence which cannot be pursued ordinarily by individuals who suffered injury. These remedies are however, limited by the various conditions which a Litigant must establish before the remedies can be invoked, and as much makes it unrealistic and uninteresting and practically almost impossible to pursue.

In *Amos v. Shell BP Nigeria Ltd.,*[55] the Plaintiff in his representative capacity made a claim that the Defendant constructed a large earth dam across their creek. It also hampered the movement of canoes and negatively affected the economic, fishing and agricultural activities of the people resident in that area. The trial Judge ruled that the action brought against the

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49 33 USC S.1321 (2) *Ibid.*

50 *Ibid.*

51 Guajardo, J. 'Deep Water Horizon: Rethinking OPA Liability Limitation in the water environmental disaster', (2002), *Houston Law Review*, (Vol.48), 625

52 33 USC s. 2702(a) (2006) *Ibid*. It provides that a responsible party for a vessel or facility for which oil is discharged is liable for removal costs and damages resulting from such discharge.

53 *Ibid.* i*n the case of Amoco Cadiz* 954 F.2d at 131

48 1984 Protocols to the International Convention on Civil Liability for Oil Pollution Damage (CLC)

55 (1974). 4 ECSLR 486.

blocking of the stream was a representative action which could not be maintained because the interest, and losses suffered by the victims were separate in character and not communal. The plaintiffs were therefore denied relief on the ground that their claims and the damages suffered were not similar.

In *Ndule v. Ibezim,*[56] the court also held that where a suit is brought in a representative capacity, there must be authorization. This means that the persons who are to be represented and those representing them should have same interest in the matter. This; according to the decision of the court on the matter, is usually done by way of an application to Court *ex-parte* where the party seeking authorization applies to the Court and exhibits by way of affidavit evidence, documents showing that he has the authority of the co-applicants to sue in a representative capacity, failing which the court cannot entertain the matter, and as such did not uphold the principle of *ubi jus, ubi remedium.*

As earlier depicted in this paper, the Courts in America have progressed from the rules of Common Law to position of statutory provisions and liability without faulty. So that where an oil operator in the course of drilling, prospecting, exploring, storing, or transporting oil in accordance with oil drilling and production Regulations, pollutes the environment thereby causing injury to others, it will not be a defence that the operators adhered to,or complied with every Regulations from which the damage or injury came into existence. In most jurisdictions, liability without fault has been codified. This is consistent with the "Polluter Pays Principle"[57], in *International Law*. The essence of strict liability is that the law holds the polluter liable to redress an injury in the absence of faults. The law dispenses with the burden of proof and other difficult rules inherent under principles flowing from *Common Law*. In the case of *Gulf Oil Corporation v. Alexander,*[58] The defendant deposited a large quantity of salt in its disposal pit. Despite the incontrovertible evidence that the defendant's method of disposal was in accordance with the universal standard used in the oil industry and that the defendant was not intelligent, he was still held liable for the pollution of fresh water under Texas *Legislation*.

In *Fontenot v. Magmolia Petroleum Corporation*[59] Simon, J. holding the Defendant strictly liable for damages caused by its blasting operations to the plaintiff's residence, stated;

> 'we are unwilling to follow any Rule which rejects the doctrine of absolute liability in cases of this nature and prefer to base our holding and doctrine that negligence or fault in these instances is not a requisite to liability irrespective of the fact that the activity resulting in damage are conducted with assumed reasonable care and in accordance with modern and accepted methods'.

In *Harper v. Regency Development Co. Inc,*[60] the Supreme Court of Alabama followed the Strict Liability principle and upheld an action by members of a residential Community seeking compensation for property damage caused by the defendants blasting operations. The Court recognized the harshness of the traditional required negligence standard in proving liability and dismissed the defendant's contention that liability without fault is an unreasonable and unnecessarily restrictive doctrine.

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[56] *Ndule v. Ibezim* (2002)12 M.J.S.C 150

[57] Otherwise referred to as PPP.

[58] *Gulf Oil Corporation v. Alexander* 291 S.W. 2d 792

[59] *Fontenot v. Magmolia Petroleum Corporation* 291 S.W. 2d 790

[60] *Harper v. Regency Development Co Inc* 399 so 2d 248.

Similarly, in *Fletcher v. Tenneco Incorporated,* [76] the Plaintiff, Land Owners claimed compensation for the contamination of their land, chattels and persons by poly-chlorinated biphenyls[61] from the Defendant's natural gas pipeline operations. Judge Wilhout, of the United States District Court in Kentucky, found the Defendant strictly liable for conducting an ultra-hazardous activity; dismissing as meritless, the defendants argument that poly-chlorinated biphenyls are not hazardous, the Court held that in the light of the clear congressional, administrative and judicial recognition of poly-chlorinated biphenyls as substances that are hazardous to human health, the contamination of plaintiffs lands constituted a condition that would substantially annoy or interfere with the use and enjoyment of property by a person of ordinary sensibilities.

The Nigerian Courts however still rely on the Common Law position, and the laws protecting the environment still follow the 'No liability without fault' system. The Nigerian law on harmful waste for instance still follows the fault liability system. For example, *Section 12(1) and (2)* provides that

> 'where any damage has been caused by any harmful waste which has been deposited or dumped on any land or territorial waters or contiguous zone or exclusive economic zone of Nigeria or its inland waterways, any person who deposited, dumped or imported the harmful waste or caused the harmful waste to be so deposited, dumped, or imported shall be liable for the damage except where the damage:
> a. Was due wholly to the fault of the person who suffered it or
> b. Was suffered by a person who voluntarily accepted the risk therefore.[62]

The reliance on *Common Law* by the Nigerian Courts works hardship on victims of oil spillage. The requirements of these *Common Law* remedies are difficult to satisfy. The burden of proof, the need for expert witness and the nature of litigation combined to frustrate litigants from achieving effective remedies. For example, in *Chief Ejewhonu v. Edok-Eter Mandilas*[63] the Defendant was an independent contractor engaged in road construction. In the course of its construction, the defendant caused a road blockage by barring access to the applicant's poultry farm. The Appellant claimed that during the blockage their Layers had died of starvation and other birds had been sold at a loss for being underweight. They also claimed for medical expenses for the birds, extra cost for transportation and general damages. The Court held that the defendants committed public nuisance and the plaintiffs (now appellants) had suffered particular injuries over and above that suffered by the public at large as a result of the respondent's acts. The Court however held that there was not sufficient evidence of the value of the birds before and after the losses sustained by the appellant and held that damages were not thereby proved. The question of assessment of damages ought to have arisen where the Court finds that there is liability for public nuisance. In the Lower Court, the Court made specific findings in liability in public nuisance. The finding was not specifically appealed against by the Appellant. The Respondents contended that the Appellant Court cannot disturb a finding of fact made by the trial Court. The Court of Appeal did not determine the issue but relied on another ground to find liability against the Respondents. The Respondents now appealed to the Supreme Court. Although the Supreme Court found liability for public nuisance, it however found no basis for the award of damages because the actions of blocking the road could not be successfully proved by the plaintiffs to

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61 Also referred to as *PCBs.*
62 *Section* 12 of the *Harmful Waste Act* 1988.
63 *Ejewhonu v. Edok-Eter Mandilas* (1986)17 NDCC (II) 1184.

be the cause of the loss of weight of the birds or even the death of some birds. This ended the Plaintiffs bid to access justice for harm inflicted on them by the Respondents.

In *Atubin and others v. Shell BP Development Company,*[79] the Plaintiffs brought an action in negligence, claiming that the Defendant caused crude oil, gas and chemicals to escape from pipelines under their control, thereby destroying fish lakes and farmlands. They claimed that the escape destroyed their plantations and made the waters unfit for drinking and agricultural purposes. The Court dismissed the action on the ground that the Plaintiffs could not show that the negligence of the Defendant was the proximate cause of the damage.

In *Seismograph Services Limited v. Akpruovo.*[64] the Plaintiff sued for nuisance claiming that the Defendant's seismic operations caused damage to his buildings and household goods. The trial Court awarded damages to the Plaintiff. Upon appeal, the Supreme Court reversed the judgment on the ground that there was conflicting evidence on whether the building was actually damaged. Since damage or inconvenience must be proved in nuisance actions, the Supreme Court reasoned that the trial Judge ought to have visited the *locus in quo*. Having not done so, his judgment was therefore set aside.

In Chinda v. Shell BP Development Company,[65] the Plaintiff sued the Defendant Company for heat, noise and vibration resulting from the negligent management of the flare set used by the defendant in gas flaring. The court held that the Plaintiff could not prove any negligence on the part of the Defendant in the management of the flare and as such did not grant the prayers of the plaintiff.

In *Shell Petroleum Development Company Limited v. Farah and Seven others,*[66] the respondents as plaintiffs, sued in their personal capacity as well as representatives of five other families. They alleged that the appellant company, engaged in oil prospecting, production and exporting operations, had acquired a portion of their land at Boo-Banabo where the Appellant's Bomu oil Well was located. In 1970, there was an oil blow-out from the Well which lasted several weeks. Before it was brought under control, crude oil and other substances deposited in their adjoining land had caused extensive damage to their land. Prior to the spill, the respondents used the land for farming and hunting. The Appellants' company accepted responsibility and paid compensation to the Respondents for the economic trees and crops but paid no compensation for the damage to their land. In addition to the compensation paid, the Appellant took over the affected land of 13.245 hectares in size and undertook to rehabilitate it and hand it back to the Respondent when the rehabilitation was complete. Pursuant thereto, the Appellant company commissioned a team of experts to facilitate the rehabilitation. The Respondents vacated the polluted area and could neither farm, build nor put the land to any use. In 1988, while responding to a letter by Respondent's Solicitor, the Appellants' company claimed that it had rehabilitated the land and handed it back to the Respondents. The Respondents denied this assertion. In support of this denial, they commissioned a team of Scientists from the University of Port Harcourt (Nigeria), who after due investigation produced a report which negative the Appellant's assertion of having rehabilitated the land. Further, the scientists proffered a program of remedial measures. Also, the Respondents retained a firm of Chartered Surveyors and Estate Consultants who in their

64 *Seismograph services Limited v. Akpruovo* (1972) 6 SC 119.
65 *Chinda v. Shell – BP Development Company* 2 RSLP (1974) 3.
66 *Shell Petroleum Development Company Limited v. Farah and Seven Others* (1976)4 SC 85.

report assessed the value of the losses sustained by them. Based on these two reports by the Experts, the Respondents (as Plaintiffs) claimed in the Court of first instance:

i. The sum of N26, 490, 000.00 from the Defendant as compensation for the damage suffered by them as quantified in their valuation report.
ii. An Order of Court compelling the Defendant to rehabilitate the said Land in line with the recommendations as contained in the Scientific Report of the Plaintiff's Experts.
iii. As an alternative to (ii) the payment of Six Million Naira to the Plaintiffs for the rehabilitation program which would comprise:
    a) The acquisition of a sizeable burrow pit nearby to be used as waste pit.
    b) The removal of 4 feet of top soil from affected area and its transport to the burrow pit.
    c) The refilling of the top soil with a mixture of organic manure. Example cow dung, poultry droppings composite materials *etcetera*, and
    d) The cost of hiring labour, dump trucks and pay loaders at the request of the Appellants' company in 1990.

When litigation had commenced, the second Defence Witness, a Professor of Agronomy, reassessed the alleged rehabilitation exercise and submitted a report which was admitted in evidence. The report confirmed that the land had been substantially rehabilitated. After both sides had closed their cases, and having regard to the conflicting reports of the Experts, Counsel to the Respondents moved a motion asking the Court to appoint two Referees to look into the matter. The application, made pursuant to the Rules of Civil Procedure, not being opposed by the Appellant's counsel, was granted. A Panel of two Referees, one each, nominated by the Parties was appointed. Thereafter one of the Referees tendered a report which was admitted in evidence, as well as for the work done. The trial Court found in favour of the Plaintiffs and awarded a total of N4, 621, 307.00 in damages under various heads. The judgment was appealed by the Defendants. Dismissing the appeal the Court of Appeal held *inter alia* that:

i. Paragraph 36, schedule 1 of the *Petroleum Act* subjected the holders of an oil exploration license, oil prospecting license or oil mining lease in addition to any liability for compensation to which it may be subject, to liability to pay fair and adequate compensation for the disturbance of surface or other rights to any person who owns or in lawful occupation of the licensed or leased lands.
ii. Adequate compensation means just value of property taken under power of eminent domain payable in money i.e. the market value of property when taken it may include interest and may include the cost of value of the property ... such only as puts the injured party is as good a condition as he would have been if injury had not been inflicted.
iii. The underlying principles for the award of compensation of damages to a person who suffers damages from the tortious act of another is to restore the person suffering the *damnum* as far as money can do to the position he was before the *damnum*.

This case clearly exposed the inadequacies of Common Law remedies to victims of oil pollution. The requirements of these remedies are difficult to satisfy. The burden of proof, the need for expert witness and the nature of the litigation combine to frustrate achievement of effective remedies. In this case, the spillage occurred in July 1970. The claim was filed in 1989 after the polluter's bid to frustrate the claim, on the pretext of negotiations was discovered by the victims. Judgment was given in 1991 at the Court of first instance. An appeal by the oil company in 1992 lasted for three years. By 1995 when the appeal was

dismissed, most of the affected victims had died. The case took twenty five years to come to this stage. Furthermore, the requirement of expert witnesses is often over-emphasized by the courts.

In *Seismograph Services v. Kwarbe Ogbeni*[67] - the Supreme Court held that evidence of an expert is necessary in Seismic Operations so that damages to property may be connected to such operations. There are very few experts available in Nigeria, and these experts are easily hired by the rich multinationals that have the financial strength to procure their services. In most cases, victim cannot afford the services of expert witnesses because of poverty.[68] This situation is worrisome because the evidence of the expert witness hired by an oil operator (the polluter) goes unchallenged and uncontradicted, therefore compelling the Court to act on such one-sided evidence. In some cases, the victims can only afford the services of people who are not experienced enough to be regarded as experts.

In *Seismograph Services v. Onapasa.*[69]The three Experts called by the victim were discredited as unskilled in the relevant field. One had not done Civil Engineering work since 1929. The other, a research Officer in Civil Engineering had no practical experience in civil engineering or geology and the third, who studied Estate Management without obtaining a degree, had no knowledge of how a house was constructed. The Court accorded little or no weight to their opinions and preferred the evidence of the polluter's three experts who had several years' experience and credibility in relevant fields.

In *Amos v. Shell British Petroleum.*[70] the Court stated that the expert called by the victim may well be one in his particular field of valuation, but he was an unimpressive witness with respect to issues of that particular case. The cumulative effect of these procedural requirements is that the law operates unjustly to the detriment of oil spill victims. The polluters rely on these technicalities to evade liability.

In *Allar Irou v. Shell British Petroleum.*[71] the Plaintiff brought an application for injunction praying the Court to restrain the development company from polluting the Plaintiff's land, fish pond and creek. The Judge refused to grant the injunction sought, on the ground that nothing should be done to disturb the operations of a trade (mineral resources) from which the Country derives its main source of income.

An examination of the cases decided above establish that the Common Law principles as applied in Nigerian Courts are inadequate in dealing with the damaging effects of oil spillage on the environment. The claims under Common Law as discussed above were obtained through many years of protracted expensive litigation. The incidence of litigation is such that no one knows where, how, and when it will end. These uncertainties make it unattractive for the Common Law to effectively address the degradation of the environment arising from oil spillages, as the actions and intention of government as exhibited in the regulatory laws and enforcement of same seem more tilted towards revenue generation that protecting the environment, or the rights of the citizenry. For example, in a case involving Chevron Nigeria

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67 *Seismograph Services v. Kwarbe Ogbeni* (1976)4 SC 85.

68 Akanle, O. 'A Legal Perspective on Water Resources and Environmental Policy in Nigeria, (Vol.12)(1981).15*Nigeria Law Journal*, 72.

69 *Seismograph Services v. Onapasa* (1972)4 SC 123

70 *Amos v. Shell B.P* (1974)4 E.C.S.L.R 486

71 Ayomo, M.A. An Examination of the *Federal Environmental Laws* in Nigeria in <http://www.research.uk> visted 15th July. 2021.

Limited, an oil company, the Delta State Government has asked Chevron Nigeria limited to pay compensation to affected Communities for an oil spill that allegedly devastated fish firms at Ekpan in Uvwie Local Council Area of the State. The State Government's position was articulated by Utuama[72], when he visited some fish farms allegedly damaged by the oil spill. He stated that contrary to the claim by Chevron Nigeria Limited, the spillage was massive. He observed that the Ekpan fish farm, which the State Government owned and had used as a reference point in its human capital development agenda, was being threatened by the oil spillage. Chevron had in the wake of the spill claimed that only eight litres of oil was spilled. But the Deputy Governor lamented that from what he had seen the spillage was a massive one and not just eight litres as claimed by the oil company.[73] The State Government, *a priori* the poor Community would have to go to Court for the Court to award compensation for damages against multinational oil company like Chevron with all the resources at its disposal. The oil companies are also in a position to employ the best Lawyers who are able to use the knowledge of the law and the technicalities of the case to keep the case in Court for several years. The poor community members whose livelihood is being threatened would have to look for money to keep the case going in Court with no certain assurance of success. This is clearly a limitation to their ability to protect the environment and the interests of the citizenry.

Similarly, on the 20th December, 2011, oil spilled from one of the oil fields operated by Shell. The Bonga oil spill was from a production platform operated by Shell which produces around 200, 000 barrels per day, about 10% of Nigeria daily production. The incident occurred when oil was being transferred from one storage platform to another. Satellite images of the spill affected area indicated that it covered about 922 square kilometres. Shell, as in previous incidents, attributed the disaster to vandalism by oil thieves, but the Community disputed this. Shell officials said some oil has been recovered but fishing and farming activities have been grounded. Over the years, cases of oil spillage in the Delta region have not been treated with the urgency they require or demand, as oil Companies; particularly multinationals, continue their activities without much scrutiny by the Regulatory Authorities. This serious environmental damage caused by frequent oil spills and their impact on human and marine lives has made life in the Niger Delta a most harrowing experience that can ever be imagined, but actually happening.

The United States, in order to adequately compensate victims of oil spill established a Trust Fund known as Oil Spill Liability Trust Fund in the Treasury of the United States. The amounts credited to the Trust Fund are from Taxes received in the Treasury as environmental Taxes or petroleum amounts from the Deep-water Port liability Fund, amounts from Offshore Oil Pollution Compensation Fund[89] *etcetera.* This super fund is used for various purposes, such as payment of Governmental response costs for removal of spills, claims for injury, destruction of loss of natural resources resulting from the release of hazardous substances, remediation, repairs, *etcetera.*

This is different from the position in Nigeria, where the limits of liability provided under the Laws protecting the environment in Nigeria in respect of compensation for oil pollution damage and is low compared with what obtains in the United States. There is a need to review the provisions of the *Oil Pipelines Act*, which was enacted over forty years ago and its

[72] The then Deputy Governor of Delta State, Prof Amos Utuama.
[73] Amadi, E. Pollution in the Delta, in Daily Trust Editorial in <http://www.allafrica.com> visited 4th July. 2021

provisions on injuries affection and the quantum of damages payable to victims of oil pollution.

For example: *Section 11(5)* of the *Oil Pipelines Act* provides:

(1) The holder of a License shall pay compensation to any person whose Land or interests in Land (whether or not it is Land in respect of which the license has been granted) is injuriously affected by the exercise of the rights conferred by the License, for any such injurious affection not otherwise made good, and to any person suffering damage by reason of any neglect on the part of the holder or his Agents, Servants or Workmen to protect, maintain or repair any work structure or thing executed under the License, for any such damage not otherwise made good, and to any person suffering damage (other than on account of his own default or on account of malicious act of a third person as a consequence of any breakage of or a leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good. If the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a Court in accordance with *part IV of the Act.*

(2) Under *Part IV* of the *Act,* the power to determine the quantum of compensation for such damage is given to a Magistrate in the first instance.

(3) *Section 20(3) of the Act* provides – In determining the loss in value of the land or interest in Land of a Claimant, the Court shall assess the value of the Land or the interest injuriously affected at the date immediately before the grant of the license and shall assess the residual value of the claimant of the same land or interests consequent upon and at the date of the grant of the license and shall determine the loss suffered by the claimant as the difference between the values so found, if such residual value is a lesser sum.

(4) No compensation shall be paid in respect of unoccupied land as defined in the *Land Use Act*, except to the extent and in the circumstances specified in that *Act*.

(5) In determining compensation in accordance with the provisions of this *Section* the Court shall apply the provisions of the *Land Use Act* so far as they are applicable and not in conflict with anything in this *Act* as if the Land or interests concerned were land or interests acquired by the President for a public purpose.

As can be gleaned from the above provisions, the Court is given wide discretion to determine the quantum of damages to be paid for compensation under the *Act*. The Courts in carrying out this task have resorted to the provisions of the *Act* and the principles of Common Law and equity in determining the *quantum* of damages paid.

In *Shell Petroleum Development Company (Nig.) Ltd v. High Chief Tiebo VII*[74] The Court was faced with the problem of determining the liability of the Defendants for the extensive oil spillages on the Plaintiff's Land. In this case, the Respondents sued the Appellants claiming the sum of N64, 146, 000 as special and general damages for negligence as well as under the Rule of strict liability as expressed in *Ryland v. Fletcher*[75]. The claim was based on the fact that the Appellants being an oil company constructed a network of oil pipelines over their land which it was contended was a non-natural use of the land. There were extensive oil spillages which polluted Plaintiffs/Respondents source of drinking water and killed all the fishes in the swamps and the forty Ponds of the Community. The spillage also paralysed the fishing life and occupation of members of the Community. The Defendant oil company did not deny the

[74] *Ibid*. @ .37.

[75] LR 30 HL. 330.

oil spillage but claimed that the sum of N5, 500 was adequate as compensation to the Respondents. This compensation was calculated based on *Section II* of the *Oil Pipelines Act.* The *Section* provided the basis for calculating damages to be awarded through the costing of palm trees and raffia palms that were polluted by oil. It merely awarded compensation based on the damage resulting from the right of way of the oil pipelines over the land. The trial Court awarded to the Plaintiffs the sum of N5, 000, 000 as damages. The Defendants being dissatisfied appealed to the Court of Appeal. The Court of Appeal dismissed the appeal of the Defendants/Appellants and upheld the judgment of the trial Court which held that the damages suffered by the Plaintiff/Respondents were in the nature of general and special damages which do not only arise from the wrongful act itself, but depend on circumstances peculiar to the infliction of the injury. These damages in the nature of special damages to be recoverable must flow directly and must be reasonably proximate and foreseeable. The amount awarded by the trial Court was upheld.

On the assessment of damages, it was held that whether or not the Plaintiff refers to the particulars of damages as reasonable and adequate compensation or by any other name, they still remained special damages which must be strictly proved. The Court therefore awarded the Plaintiff less than the amount he asked for on the ground that the special damages were not strictly proved. The Court of Appeal also held that the fact that damages are difficult to assess does not dis-entitle a Plaintiff from compensation for loss resulting from a Defendant's breach. Similarly, the fact that the amount of such loss cannot precisely be ascertained does not also deprive a Plaintiff of all remedies. This amount is grossly inadequate as regards compensation to be paid for the crops of the Plaintiffs, the pollution of the sources of their drinking water and the paralysis of their source of livelihood which is fishing.

Ownership and Possession of Oil and Gas in Canada.

Canada, like Nigeria is endowed with substantial oil and natural gas resources. Over the years, Canada has become a leading producer and supplier of oil and natural gas, with Canadians becoming among the most skilled people in the World at extracting, processing and transporting conventional and unconventional hydrocarbons. In Canada, Oil production drives the economy just like in Nigeria. This therefore, formed a basis of the choice of the jurisdiction for this comparative analysis. The vast area of land in Canada has oil produced from several parts. Twelve out of Thirteen Provinces produce oil and Alberta is one of the major provinces that produce oil. Despite the huge oil and gas production in Canada, the Country has the lowest incidents of oil spills. This is due largely to proper planning, use of modern technology in energy production, and effective enforcement of the Laws regulating the Oil and Gas industry.

In Canada, ownership of oil and gas is vested in the individual Federating States.[76] This has led each of the Provinces that makes up the Country to develop its own peculiar exploration plans that are pursued locally and set to drive the collective National economy. Like the United States, Canada provides for both private and State ownership of oil and gas. The Canadian courts have held that the oil and gas lease is a profit '*a pendre*',[77] and therefore grants the holder a right to search for and win the oil and gas'[78] The holder of a profit '*a pendre*' does not own the gas and oil *in situ* as the right is incorporeal in nature. A profit '*a*

[76] Iyalomhe, D.O. Environmental Regulation of Oil and Gas in Canada in <http://www.collectionscanada.gc.ac>

[77] United States 3 *have held* that where a right is given to enter and remove something from another's land, the right is a *profit* a *prendre*

[78] Mailula, D.T. Protection of Petroleum Resources in Africa: *A Comparative Analysis of Oil and Gas Laws in selected African States* in <http://www.thelawreview.co.ak> visited 20th June 2021

pendre' only allows the holder to sever the oil and gas from the land and reduce them to his or her actual[79] possession. This is probably due to the fugacious nature of oil and gas. According to Blake's Lawyers[80] the freehold oil and gas lease in Canada is a qualified interest and not an automatic possessory ownership interest. The person who holds the profit '*a pendre'*, the lease, has the right to recover the oil and gas but this right does not constitute absolute ownership as it is limited by the migratory nature of oil and gas unless reduced to possession. Land that is owned by the Canadian Federal or Provincial Government is deemed Crown Land. The Government generally leases its oil and gas resources to well-resourced and experienced oil companies through a Crown Lease. This lease regulates the relationship between the Government and the Oil Companies. The acquisition and development of Crown Oil and Gas is Governed by Legislation and Regulations of both the Federal and Provincial levels of Government.

Comparative Analysis of the Laws Regulating the Oil and Gas Industry in Canada with the Laws in Nigeria.

Canada; just as the United States of America, recognizes private ownership of oil and gas resources. Individuals in Canada have the right to search for and win oil and gas. This is different from the situation in Nigeria, which vest ownership of oil and gas in the Nigerian State. The combined provisions of *Section 44(3)* of the *Constitution of the Federal Republic of Nigeria 1999* (as amended), *Section 1(1)* of the *Petroleum Act* and *Section* 1 of the *Land Use Act*; as earlier discussed in this publication, vest the ownership of all mineral, oil and gas in, under or upon any land in Nigeria in the Government of the Federation. This therefore excludes the oil producing Communities; not to talk of individual citizens, from participating in the exploration of oil and gas found in their land, or owning same.

In Canada however, the Province of Ontario has enacted an *Environmental Bill of Rights* which provides for the right to a healthy environment.[81] However, the right to a healthy environment which is provided for in *Section 20 of the Constitution*of Nigeria, falls within *Chapter II* of the *Constitution* which has been severally held by the Nigerian Courts to be non-justiciable, Furthermore, the laws in Canada are effective and geared towards achieving sustainable development, while the laws in Nigeria are vague and do not confer specific duties on holders of petroleum license but tilts more towards revenue generation for the government.

The *Petroleum Act* and its *Regulations* confer vague duties on the holder of a petroleum license to adopt all 'practicable precautions' for the prevention of pollution of water courses in Nigeria. However, the *Act* did not define the meaning of 'practicable precautions', the effect of not imposing specific duties on the oil operators is that they cannot be held accountable for failure to protect the environment. Again, the *National Environmental Standards and Regulations Enforcement Agency Act 2007,* prohibits; without lawful authority, the discharge of hazardous substance into the environment.[82] The punishment for this offence is a fine not exceeding N1, 000.000 (One Million Naira) and an imprisonment term of five (5) years. In the case of a company, there is an additional fine of N50, 000 for every day the offence persists.

However, by *section 7(h).* National Environmental Standards and Regulations Enforcement Agency is empowered to enforce through compliance monitoring, the Environmental

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79 Emphasis, mine.

80 *Ibid.*

81 Webb, K. *Taking Matters into their own Hands*, McGill L.J., 1991, 771.

82 *Section 7(h) of the NESREA Act 2007.*

Regulations and Standards on noise, air, land, seas, oceans, and other water bodies than in the oil and gas sector. This *Section* clearly removes the oil and gas sector from the purview of National Environmental Standards and Regulations Enforcement Agency.

Again, *Section 7(g),* mandates National Environmental Standards and Regulations Enforcement Agency to enforce compliance with Regulations on the transportation, exportation, production, distribution, Storage, Sale, Use, Handling and Disposal of hazardous chemicals and waste other than in the oil and gas sector. This is quite unimaginable as it clearly precludes National Environmental Standards and Regulations Enforcement Agency from exercising its enforcement powers in the oil and gas sector. Furthermore, *Section 8(g),* mandates the Agency to conduct investigation of pollution and degradation of natural resources, except investigations on oil spillage.

Taking into account the effect of oil spills on the Nigerian environment, one is therefore at a loss why we should have such provisions in our laws. Clearly, the laws regulating the oil and gas industry in Nigeria are not aimed at ensuring public safety and protecting the environment or punishing defaulters as operational in the two other jurisdictions under comparative review.

In Alberta, the two main Regulatory Agencies; the Alberta Environmental Protection Board, and the Energy Utility Board, has explored various ways to delimit the scope of their operations to avoid conflict of duties. These include:

- Entering memorandum of understanding and
- The establishment of the "One Window" process for the grant of approvals, permits and licenses for oil and gas operations.

Secondly, the Energy Utility Board is given independent and *Quasi*-judicial powers to regulate oil and gas operations. The Energy Utility Board's membership is composed of seasoned professionals and technically qualified Staff who receive salaries commensurate with industry standards and which the regulated industry cannot easily manipulate. These factors in addition to the power to shut down any facilities of a polluting operator help in ensuring immediate compliance by oil operators.

In another realm, the Environmental Impact Assessment Reports are made by proponents of any energy project and the proposed project will be subjected to a Public hearing by the Energy Utility Board to ensure that all concerns and interest are adequately taken care of. Members of the Public who may be directly or adversely affected by a proposed oil and gas project are given the opportunity to express their concerns. A similar approach in Nigeria will help to reduce incidents of hostility, and oil spill by sabotage in Nigeria.

The funding arrangement for the Energy Utility Board includes Government allocations, and proceeds from licenses and other approval fees. The Energy Utility Board does not therefore depend exclusively on the government for funds to execute its programme. A degree of financial independence enhances any regulatory regime. This is different from the position in Nigeria where there is lack of proper enforcement of the laws, due to overlapping and conflict of duties by the Regulatory Agencies. For example, the functions of the Department of Petroleum Resources are similar to that of National Oil Spill Detection and Regulatory Agency. The effect of this is that when there is an oil spill, different agencies of government respond to the emergencies, causing duplication of functions, conflict of roles and general lack of enforcement of laws. It is suggested that Nigeria should adopt the method applied by

the *Energy* Utility Board of the United States of America and the Alberta Environmental Protection and Enhancement of Canada which is, the memorandum of understanding and the establishment of the "One Window" process for the grant of Approvals, Permits and Licenses for oil and gas operations for private operators. The adoption of this approach in Nigeria would prevent the present conflict of duties between the Department of Petroleum Resources and National Oil Spill Detection and Response Agency; and others, in the regulation of the oil and gas industry.

This publication suggests that Nigeria should establish Independent Regulatory Agencies as the Canadian Energy Utility Board. The agencies should be mandated to manage and regulate the exploration and utilization of natural resources in order to control and prevent pollution from oil and gas operations, and other natural resources utilization. The Agencies should be vested with discretionary powers to adjudicate, arbitrate, carry out inquires, monitoring and investigations in the regulation of the Oil and Gas Industry. The Agency should also be empowered to employ its own staff, which should consist of highly trained, experienced and competent professionals in Oil and Gas regulation and environmental protection matters. They should also appoint people of integrity and honour as Board Members. Apart from periodic Government allocations, the Agency should be allowed to generate funds for its purpose through approval and other application impose-able fees, just as the case in Canada and the United States of America.

In the realm of litigation in Canada, the Courts have also moved away from the position of Common Law, and victims of oil pollution are adequately compensated. For the purpose of this publication, we shall examine the position of the law with respect to the compensation of victims of oil spill in Alberta. The Surface Rights Board was established under the *Surface Right Act*, *Section 27* of the *Revised Statutes of Alberta* 1980, the 1980 *Act*, was superseded with the 1985 *Surface Rights Act Section 27.1 Statutes of Alberta* 1985. The Surface Rights Board is given the mandate to determine the amount of compensation payable to private land owners where oil companies are licensed to enter on such private lands and use them for oil and gas wells, pipeline, power transmission lines and similar purposes. The Board consists of members appointed by the Lieutenant Governor in Council.

Section 7[83] empowers the Board to make rules in respect of calling and holding of its meetings.

Section 8[84] provides that the Powers and Duties of the Board include:

(i) The holding of sittings at any place or places in Alberta that it from time to time considers expedient
(ii) The making of Rules of Procedure and Practice governing hearings, inquires and proceedings conducted by it and regulating the places and times of its settings, keeping records of its hearings, inquires and proceedings.

To circumvent extreme legalism and the technicalities of the law, *Section 8(3),* provides that in conducting a hearing or an inquiry, the Board:

(i) Shall proceed with its rules of practice and procedure
(ii) Is not bound by the rules of law concerning evidence
(iii) May enter on and inspect or authorize any person to enter on and inspect any land, building, works or other property.

[83] *Section 7 Surface Right Act 1988.*
[84] *Section 8 Ibid.*

(iv) May adjourn the hearing or inquiry from time to time for any length of time the Board considers advisable
(v) Has the rights, powers and immunities conferred on a Commissioner under the *Public Inquires Act*.

Under *Section23,* the Board is required to schedule a date for a compensation hearing not later than 30 days after granting right of entry to an oil operator.

In determining the amount payable as compensation, the Board is obliged to consider.[85]
(i) The amount the land granted to the oil operator might be expected to realize if sold in the open market by a willing seller to a willing buyer.
(ii) The per acre value on the date the *Right Of Entry* order was made, of the titled unit in which the land granted to operator is located, based on the highest approved use of land,
(iii) The loss of use by the owner or occupant of the area granted to the operator.
(iv) The adverse effect of the area granted to the operator, on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator.
(v) The damage to the land in the area granted to the operator.
(vi) Any other factors that the Board considers proper under the circumstances.

Where an owner or purchaser of land is required to relocate his residence, the Board is mandated, after determining the amount of compensation payable, to also determine the additional amount that; in the opinion of the Board, is necessary to enable the owner or purchaser to relocate his residence to an alternative accommodation that is at least equivalent to his previous accommodation on his land granted to an operator.[86] In making a compensation order, the Board may also determine amount payable by the operator for
(i) damage arising out of the operations of the operator to any land of the Owner or Occupant other than the area granted to the operator, if those operations were incidental to operations of that operator or the area granted to him under the right of entry order
(ii) the loss of or damage to livestock or other personal property of the owner or occupant arising out of the operations of the operator,
(iii) the time spent or expense incurred by the owner or occupant in recovering any of his livestock that have strayed due to an act or emission of the operator.[87]

Section 26 allows a party in a compensation hearing to appeal the Board's compensation order to the Court of Queen's Bench. An appeal operates as a new hearing. The Court has the power and jurisdiction of the Board in determining the amount of compensation payable. Furthermore, the Court may confirm the decision of the Board or direct that the compensation order be varied in accordance with the judgment, by the leave of a Judge of the Court of Appeal, dissatisfied parties shall further appeal to the Alberta Court of Appeal.

In Lamb v. Canadian Reserve Oil and Gas Ltd[88] The Canadian Supreme Court held that the Board's special knowledge and expertise should be accorded considerable weight. It has also been suggested that the Board's policy directions should only be altered by the Courts after

[85] *Section 25 Ibid.*
[86] *Section 25(3) Ibid.*
[87] *Section 26(5) Ibid.*
[88] (1976) 8 N.R. 613 (SCC).

careful considerations on the grounds of misinterpretation of the intent of the Statute or other questions of law or jurisdiction.[89] In the case of *Sawiak v. Paloma Petroleum Ltd,*[90] The Alberta Court of Appeal upheld the approach adopted by the Surface Right Board and held that decisions of the Queen's Bench was erroneous. The Court also held a similar decision in the case of *Transalta Utilities Corp v. Mac Taggar.*[91]

In some jurisdictions in Canada however, victims of oil spill can bring their actions for compensation under their statutory regime, as well as claim additional remedies under Common Law. In the case of *McCannv. Environmental Compensation Corporation,*[92] the Ontario Court of Appeal unanimously held that the Statutory right to claim compensation from the Environmental Compensation Corporation under *Section91*[93] does not restrict a person's right to pursue any of the available Common Law remedies such as Nuisance or Trespass. The *Statutory Right to Compensation* for loss or inquiry suffered because of an environmental spill is an additional remedy provided to spill victims. It is a right which a spill victim has discretion to exercise even if his claim for compensation succeeds under the statute.

The implication of the *McCann* decision is that the *Ontario Environmental Protection Act* provides for a two pronged attack on polluters to ensure that adequate compensation is paid to persons injured by spills. Victims are allowed to proceed to Court for effective and further compensation. One spill incident may lead to a plethora of damages, injury to person, and damage to property or cost for removal of pollutants. A claim made by a victim for damage to his land or property for instance, should not bar a subsequent common law action for personal injury in Court, if the victim elects to exercise that right. In the same vein, a claim filed by a Government Agency against a polluter, for recovery of costs incurred in removing a spill should not bar an action for damages by a victim.

A victim of multiple damages from a spill should have discretion to make a distinct claim under the Oil Pollution Trust Fund. This situation is different from the position in Nigeria, where the Courts rely only on the rules of common law to prove damages especially in claims under nuisance and negligence, which clearly works hardship on victims of oil spillage. As we have earlier shown in this publication, the requirements of these remedies are difficult to satisfy. The burden of proof, the need of expert witness, the nature of litigation combines to frustrate litigants from achieving effective remedies.

Lessons deduced from the United States and Canada.

Nigeria can draw a lot of lessons from the Laws regulating the oil and gas industry in United States of America, and Canada. The provisions of the Laws in United States and Canada make it clear as to who is responsible with regards to an oil spill and gas flare. 'Responsible Parties' are liable to reimburse claimants for clean-up costs and damages arising therefrom. The provisions for the recovery of natural resources damaged by oil spill as practiced in the United States and Canada should be emulated by Nigeria. The Nigerian Legislature should take steps to make Laws to recover natural resources damaged by oils spills. The damage recoverable should include the cost of restoring, remediation, rehabilitation, replacing or

[89] Barton, B. 'Controversy in Surface Right Compensation: Pattern of Dealings, Evidence and Global Awards', (1985) *Alberta Law Review* (Vol.24), 34.

[90] *Sawiak v. Paloma Petroleum Ltd* (2989)101 AR 306, 71 ALR 360 (Alberta CA).

[91] Transalta Utilities Corp v. Mac Taggar (1990)71 A.L.R. 251.

[92] *McCann v. Environmental Compensation Corporation* (1991) C.E.L.R. (N.5)247 at 249.

[93] Of the *EnvironmentalProtectionAct1980.*

acquiring the equivalent of damaged resources. This should also include hunting rights, fishing life, shell life, aquatic life, and farming, amongst others.

Furthermore, the Institutions created to enforce oil and gas laws in the United States and Canada are independent, with guaranteed tenure, and clear areas of authority. These Agencies are well funded and adequately staffed with the requisite technical expertise to effectively enforce the Laws.[94] Thus; these two Countries under analysis, have been observed to evolve operational process and efficient regulatory procedures aimed at reducing the negative impact on health, safety and environmental impacts of oil pollution and gas flaring. For example, the *Rail Road Commission* in Texas ordered oil companies that flared gas in Texas to stop operations. The oil companies challenged the action of the Commission in Court, and the United States Supreme Court affirmed the decision of the Commission that company should stop operations. This helped to reduce gas flaring in Texas. This is a far cry from the situation in Nigeria, where the Regulatory Agencies lack autonomy and independence. For example, the Department of Petroleum Resources, is a Department of the Ministry of Petroleum Resources, and is under the control and directives of the Minister, while the National Environmental Standard Regulations Enforcement Agency is a parastatal under the Federal Ministry of Environment. These Agencies are subject to political control from their respective supervising Ministers.

These Agencies in Nigeria also lack adequate technical manpower and funds to efficiently discharge their statutory duties. The Agencies do not have access to the best available scientific technology to accurately measure, adopt appropriate rules, and enforce oil and gas Regulations. They mostly rely on funds appropriated and remitted to them by their Supervising Ministries. The Members of Staff of the Regulatory Agencies depend on the Government for funds and also depend on the oil companies for vehicles to carry out monitoring and investigation activities. The oil and gas companies fund most of the Agencies activities thereby raising serious conflict of interest issues.

There is also the problem of jurisdictional conflict between the various regulatory Agencies in Nigeria. The functions given to some of these Agencies; by the various *Statutes*, ssometimes overlaps, and thereby creates conflicts in regulating and enforcing oil and gas Regulations and related Laws. This publication; most humbly submits, that Nigeria should therefore draw lessons from Agencies in the United States and Canada (*Energy Utility Board and Alberta Environmental Protection*)[95], and make the Regulatory Agencies in Nigeria, independent, adequately funded, with clearly defined areas of the exercise of authority. By co-opting some of these, our Laws will be more clearly defined, effective and aimed at achieving real and sustainable development according to International Standard in the oil and gas industry in Nigeria.

Finally, the Courts in Nigeria should be bold like the Courts in Canada and the United States, and progress from total and absolute reliance on the position of Common Law to hold erring oil operators whose activities cause harm to human life and the environment liable for their actions. The Courts should be bold enough to order oil companies to stop operations until they remedy the damage to the environment and change their environmental management

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[94] Otiotio, D. Gas Flaring Regulation in the Oil and Gas Industry: A Comparative Analysis of Nigeria and Texas Regulations in <http://www.academia.edu>. visited 25th June 2021.

[95] *Ibid*.

systems. By so doing, Nigeria will definitely tilt towards achieving real and sustainable development in the oil and gas industry.

Nigeria should follow the model adopted by the United States and Canada to amend her laws by imposing specific duties and responsibilities on oil operators. By so doing the oil companies will be held responsible for their activities if not effectively exercised to protect the environment and attain real and sustainable development.

The Courts should also be bold enough to shift from the position of Common Law and find liability without fault against erring companies and individuals like the Courts in the other jurisdictions under analysis. This will also help protect the environment from further degradation and encourage the healing of the already degraded and polluted environment.

Finally, the Regulatory Institutions should be adequately funded with clearly defined and particularly cut duties and obligations to enable proper and effective enforcement of the Laws regulating the oil and gas industry in Nigeria.

Conclusion

A major challenge for the weak regulatory regime in the oil and gas sector is the relationship between the government as both a regulator and player in the oil and gas industry in Nigeria, hence, the conflict of interest has resulted in a lack of the requisite will and desire needed to enforce the regulatory laws and complacent regimes which tend to favour the oil companies. It has been argued that considering the economic interest of the Nigerian State in the oil and gas industry, it will be very unlikely for the federal government to effectively implement or enforce the oil and gas related regulations.

Another teething problem in the oil and gas sector is the placement of ownership and control of oil and gas resources in Nigeria, which has caused deep bitterness, resentment, deprivation and seeming oppression to the minority oil-producing communities. There has been an infinitesimal or no participation of the oil producing minorities in the petroleum industry mainstream, thus, leaving it in the hands of the government and the regulatory regime; not directly impacted or affected by the experience in the peculiar areas where oil and gas are being explored, wherein the oil wealth found in their land is taken without appropriate compensation, the effect is that the Niger Delta environment is left in a state of dejection.

This publication also recommends the need for the application of the Precautionary, Preventive, strict liability and the Polluter Pays Principles in regulating the activities of oil companies in order to assuage the incessant pollution of the environment and bring about real and sustainable development oriented practices, the precautionary and preventive steps are in the general interest and benefit of all. The fact that any occurrence of pollution would also come with payment of substantial compensation and restitution of degraded land space as suggested in the publication can inhibit the excesses of the oil and gas multinationals with attendant benefits to the state, community and individuals; collectively and individually.

It has been observed that; amongst other natural resources which are not adorned with National ownership as with that of oil and gas, oil and gas are the most exploited natural resource in Nigeria. This publication therefore, recommends that the focus of government should be that of ensuring industrial best practices, sustainable development oriented practices, and that, development should be economically and social environmentally oriented, and real in the sense of tangible and visible development. Any conflict in the

development process between; which is not sustainable and bring about real and sustainable development, should be heavily taxed. That is the way to think of real and sustainable development. Concerns for adequate and best accepted industrial practice of international repute and recognition, and adequate and effective corporate social responsibility towards the sustenance and maintenance of real and sustainable development is also suggested for the preservation and protection of the environment.

Inherent lessons deduced from the United States of America and Canada in terms of environmental protection and regulatory laws and institutions are very instructive. The institutions created to enforce oil and gas laws in the United States and Canada are independent and autonomous, with guaranteed tenure, and clear areas of reference and authority. These Agencies are well funded and adequately staffed with the requisite technical and technological expertise to effectively enforce regulatory and related laws. In Nigeria, the regulatory agencies lack autonomy and independence. For example, the Department of Petroleum Resources, is a Department of the Ministry of Petroleum Resources, and is under the control and direction of the Minister, while the National Environmental Standard and Regulations Enforcement Agency is a parastatal under the Federal Ministry of Environment. These Agencies are subject to political control and influence from their respective supervising Ministers. The agencies do not have access to the best available data, scientific technology to accurately measure, adopt appropriate rules, and enforce oil and gas regulations as required of such institutions in other climes under analysis.

There is also the problem of jurisdictional conflict between the various agencies. The functions given to the agencies by the various statutes are overlapping, and therefore create conflicts in regulations and enforcement of oil and gas laws. Nigeria should therefore draw lessons from the agencies in the United States and Canada (*Energy Utility Board and Alberta Environmental Protection*), and make the regulatory agencies in Nigeria independent, adequately funded, with clear scope of authority. By this way our laws will not only be more responsive but also effective and aim at achieving real sustainable development in major strata.

Finally, the courts in Nigeria should adorn and assume the cloak of boldness like the courts in Canada and the United States. The courts should be bold enough to order oil companies to stop operations until they remedy damages done to or likely to be done to the environment and change their environmental management and sustainable development systems. The courts should also be bold enough to deviate from the position of common law and find liability without fault against companies and individuals where such cases and circumstances arise, just like the courts in other jurisdictions under review. This will also help protect the environment from degradation and encourage real and sustainable development potentials.

The Nigerian government has been unable to hold oil and gas exploration and subsidiary companies to account for the pollution they have caused in the course of their exploration activities which have resulted in the glaring absence of peace and development in the region, they have also not been able to make specific and cognitive regulatory provisions veered towards real and sustainable development. Oil companies have been exploiting the weak and vulnerable regulatory system for such a long time now. The findings of this publication may help government in establishing better legal and regulatory enforcement institutions in terms of environmental protection for socioeconomic development that will be real and sustainable. The issues and recommendations highlighted in this paper will assist the government and

regulatory agencies to develop better strategies in preventing and tackling environmental pollution in the Niger Delta and promote real and sustainable development. This study will also help the government in capacity building in terms of funding and training of institutions responsible for detection, prevention and management of oil spills and gas flaring, and regulatory institutions saddled with the attainment of real and sustainable development.

Recommendations.

The following amongst others too numerous to be outlined herein should be given consideration;

The Legislature should amend the laws regulating the Oil and Gas industry in Nigeria, to make them more effective socioeconomically without compromising action in protecting the environment. For example, the *Oil Pipelines Act* should be amended to adequately deal with pollution. *The Oil in Navigable Waters Act* should also be adequately amended to provide for liability for Oil pollution. The penalties provided under these laws are grossly inadequate to deal with the problems of environmental pollution and cannot serve as deterrence to defaulting Oil companies who degrade the environment. Even the *Petroleum Industry Act 2021,* which places responsibility on the licensee to rehabilitate the environment adversely affected by exploration and production activities, exempts the licensee from liability where the act negatively affecting the environment result from sabotage under *Section 293(2),* this provides a leeway. With respect to gas flaring, the *Petroleum Industry Act 2021* did not provide any specific penalty to sanction gas flaring but rather vests power on the minister to make the decision. The National Environmental Standards and Regulations Agency saddled with the responsibility which hitherto was handled by the National Environmental Protection Agency is restricted for issue that relates to the oil and gas. There is therefore need for these provisions to be seriously amended to meet present reality and international standards.

The Nigerian legislature should be bold enough to stop the activities of the Oil companies who pollute the environment. This can be achieved by enacting laws that will make Oil companies whose activities has continuously degraded the environment to either forfeit their license or suspend them from operations until they stop the activities causing the pollution and remedy the damage already caused to the environment.

Nigerian legislators should as a matter of urgency transfer *Section 20 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) to Part IV of the constitution.* This will make environmental right a Fundamental Human Right that would be enforceable in Nigerian courts, which would not be ousted by *Section 6(6) (c) of the Constitution.* In addition, the law makers should make part II of the Constitution justiciable to enable Nigerians pursue their legal rights whenever their socioeconomic rights are infringed upon.[96] Furthermore, *Section 13 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)* mandates all organs of government and all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this chapter of the *Constitution*. The government is therefore under a duty to protect environmental rights.

The legislators should amend all laws dealing with compensation for oil pollution in order to provide appropriate measures for compensation to victims of oil pollution, which will aim at restoring the victims to their normal position before the pollution occurred. For example,

[96] Alisigwe, H. C. 'Towards the Justiciability of Chapter 2 of the 1999 constitution'. (Vol. 3). 2010. *Journal of Constitutional Law and Practice.* 50.

The Oil Pipelines Act needs to be amended to cure this defect. There is also a need to repeal the provision of the *Act* which was amended over forty year ago and, its provisions on injurious effect and the quantum of damages payable to victims of oil pollution have become outdated.

Nigeria should also follow the model of the United States and establish an oil pollution fund.

The legislature should amend the *Petroleum Act and the Land Use Act* to make the communities where oil is found to be vested with the title to the land upon which the oil is found. Any appropriation of the land belonging to the communities will therefore attract due compensation to the communities. In addition to this, the concept of ownership of land should also be coupled with the control of such land. When this is done, the communities will feel a sense of belonging and this will predispose them to cooperate with the oil companies to develop their land.