

The Petroleum Industry Bill 2012 and the Niger Delta Region of Nigeria: Panacea or Placebo?

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Abstract

Nigeria is a major oil and gas producing country. With the current production level of 2.48 million bpd (representing 2.9 % of the world total daily production), Nigeria is the 11th largest world producer of crude oil and Africa's largest. It is estimated that Nigeria had produced 27 billion barrels of crude oil within the past fifty years. What is striking about Nigeria's oil and gas industry is that all of her oil and gas are currently produced from land and swamps in the Niger Delta and from deep-water reserves some 120 kilometres off the coast of Nigeria. Oil was first struck in commercial quantities by Shell B-P at Oloibiri in the Niger Delta in 1956 and Nigeria successfully joined the ranks of oil-producing nations with her first shipment of crude oil in 1958 when the Oloibiri oil field came on stream producing 5,100 bpd. The Nigerian state has earned several trillion dollars from oil and gas from the Niger Delta. However, the Niger Delta region whose oil wealth sustains the whole country remains a portrait of poverty, infrastructural decay, social dislocation, and environmental degradation. The criminal neglect of the Niger Delta by successive federal administrations under a centre-dominated federal system and the abysmal poverty of its peoples have spurred ethnic nationalism and agitations for resource federalism in the region. The Petroleum Industry Bill, 2012 was supposedly introduced in the National Assembly to stimulate the economic, social and infrastructural development of the region and stem the spate of environment degradation arising from oil and gas exploration and exploitation. However, it is argued that the Bill does not address the core of the Niger Delta agitations which is the participation of the oil-producing states in natural resource development and governance. It is also argued that the principle of vicarious criminal liability of oil-producing communities, local government areas and states for acts of sabotage and vandalism of oil facilities by unknown third parties introduced in the bill is not only punitive and neo-imperialistic but also subversive of the intention of the legislature to provide a new legal framework for addressing the developmental and environmental challenges of the Niger delta region. Arguably, therefore, the Petroleum Industry Bill 2012 does not offer any panacea for the Niger Delta crisis.

Keywords: Petroleum Industry Bill (PIB) 2012, Niger Delta Region of Nigeria, oil and gas, vicarious criminal liability of oil-producing communities

1. INTRODUCTION

Nigeria is a major oil and gas producing country. With the current production level of 2.48 million bpd (representing 2.9 % of the world total daily production), Nigeria is the 11th largest world producer of crude oil and Africa's largest.¹ Nigeria's proved oil reserves as at the end of 2013 stood at 37.1 billion barrels representing 2.2% of world's total reserves and the 11th largest in the world (BP, Ibid).² The country's proved natural gas reserves as at the end of 2013 were no less impressive. They stood at 179.4 trillion cubic feet (5.1 trillion cubic metres) representing 2.7% of world's total reserves and the 9th largest in the world.³ This represented an improvement on the estimated reserves for 1991 and 2001 which stood at 3.4 trillion cubic metres and 4.6 trillion cubic metres respectively.⁴

It is estimated that Nigeria had produced 27 billion barrels of crude oil within the past fifty years. According to the Minister of Petroleum Resources, in 'the first 25 years from 1958 to 1983, the country produced over 9 billion barrels of crude oil and condensate while another 18 billion barrels were produced in the following 25 years.'⁵ Given the serious concerns raised by the Centre for the Study of the Economies of Africa (CSEA) over the consistency and quality of reports generated by the NNPC one is inclined to view these figures

¹BP Statistical Review of World Energy (June 2014)<<http://www.bp.com/content/dam/bp/pdf/Energy-economics/Statistical-review-2014/BP-statistical-review-of-world-energy-2014-full-report-pdf/>>accessed 10 July 2014; Nigerian National Petroleum Corporation, '2012 Annual Statistical Bulletin'< <http://www.nnpcgroup.com/Portals/0/Monthly%Performance/2012%ASB%1st%20edition.pdf>> accessed 10 March, 2015.

²BP (n1)6; Nigerian National Petroleum Corporation, 'Oil Production' (September 2013)< <http://www.nnpcgroup.com/NNPCBusiness/UpstreamVentures/OilProduction.aspx>> accessed 10 January, 2015

³ BP (n1) 20; NNPC (n1).

⁴ BP (n1) 20.

⁵ 'Nigeria produced 27 bln oil barrels in 50 years-minister' *Vanguard* (Lagos Wednesday 30 November 2011)<http://www.vanguardngr.com/2011/11/nigeria_produced_27bln_oil_barrels_in_50_years_minister/> accessed 30 November 2014.

as conservative estimates of the total oil production by the country during the period under reference.¹

To be sure, all of Nigeria's oil and gas are currently produced from 'land and swamps in the Niger Delta and from deep-water reserves some 120 kilometres off the coast of Nigeria.'² Oil was first struck in commercial quantities by Shell B-P at Oloibiri in the Niger Delta in 1956.³ Nigeria successfully joined the ranks of oil-producing nations with her first shipment of crude oil in 1958 when the Oloibiri oil field 'came on stream producing 5,100 bpd.'⁴ New discoveries were made by Shell at Afam, Ebubu, Bomo, and other parts of Ogoni land all in the Niger delta thus raising the prospects of an emerging viable oil industry.⁵

It is indisputable that the Nigerian oil industry commands the most visible presence in the Niger delta with about 2,800 producing wells, 130 flow stations/plants, 33 producing companies and 85 operating companies.⁶ The operations of Shell Petroleum Development Company Limited (SPDC) in the region alone are spread over circa 20,000 square kilometres comprising a 'network of more than 6,000 kilometres of flow lines and pipelines, about 60 producing oil fields, approximately 700 producing wells, 46 flow stations, seven gas plants, and two major oil export terminals at Bonny and Forcados.'⁷ The Niger Delta is thus the sole hub of Nigeria's oil and gas industry.

In terms of contribution to Nigeria's economic development, revenues from oil and gas exports have constituted the bedrock of the economy since the 1970s. As a petroleum dependent economy, oil revenue account for the bulk of budgetary revenues.⁸ From a meagre contribution of 18.9 per cent to the national budget in 1970, the relative contribution of the sector soared to 80.7 per cent in 1974 and by 1989 its contribution stood at 82.2 per cent. By 2011 the share of revenue from oil and gas in total government receipts stood at 79.9 per cent which represented a drop from 85.6 per cent recorded in 2004 and 85.8 per cent recorded in 2005 respectively.⁹ A recent report by the Nigeria Extractive Industries Transparency Initiative (NEITI) shows that the total financial flows from the oil and gas industry to the federation account and other federal agencies from 2009-2011 amounted to \$143.5 billion. This is against the audit total of \$148.8 billion which the sector generated from 2006-2008.¹⁰ Oil is the major source of foreign exchange earnings for the country. According to the Central Bank of Nigeria, the sector accounted for 90.6 per cent of the total inflow of foreign exchange in 2008 compared to its performance in 2007 which stood at 82.5 per cent.¹¹

It is very arguable that no region in the federation of Nigeria has contributed more to the growth of the Nigeria's economy than the Niger delta. Paradoxically, there is no correlation between the contribution of the region to the sustenance of the federation and the current state of her infrastructural and economic growth. Part of the reasons for this painful reality is that ownership and governance of the entire oil and gas found in the region vest in the government of the federation of Nigeria pursuant to s. 44(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). This palpable disconnect has continued to generate agitations for reform

¹ CSEA Policy Brief, 'Transparency Deficits in the Disclosure of Oil Sector Information in Nigeria' Vol. 1, Issue 2 (November, 2011)1-2<http://www.cseaafrica.org/index.php?option=com_docman...80> accessed 07 December 2014.

²SPDC, 'Briefing Notes: Shell interests in Nigeria'(April 2013) <http://www.s05.static-shell.com/content/dam/shell-new/local/country/nga/downloads/pdf/2013bnotes/Nigeria_interests.pdf/>accessed 29 July 2014.

³ Martin M. Olisa, *Nigerian Petroleum Law and Practice* (2nd edn Jonia Ventures Limited, Lagos 1997) 2.

⁴ Nigerian National Petroleum Corporation (NNPC), 'History of the Nigerian Petroleum Industry' <<http://www.nnpcgroup.com/NNPCBusiness/BusinessInformation/OilGasinNigeria/IndustryHistory.aspx>> accessed 30 July 2014.

⁵ M. O. Feyide, *Oil in World Politics* (Lagos University Press, Lagos 1987) 18.

⁶ Department of Petroleum Resources, 'Statistics' (September 2013)<<http://www.dprnigeria.org.ng/dpr-operations/upstream-regulation/statistics>> accessed 10 September 2014.

⁷SPDC, 'Briefing Notes: Shell Interests in Nigeria (April 2014)< <http://www.s07static-shell.com/content/dam/shell-new/local/country/nga/downloads/pdf/2014bnotes/shell-interests.pdf>> accessed 11 July 2014; Amnesty International, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta* (June 2009) 11< <http://www.amnesty.org/en/library/asset/. . . /017/. . . /af440172009.pdf>> accessed 23 December 2014; *Report of the Technical Committee on the Niger Delta Volume 1* (November 2008) 6.

⁸ Technical Committee on the Niger Delta (n12) 6.

⁹Central Bank of Nigeria (CBN), *Annual Report and Financial Statement 2005* <<http://www.cenbank.org>> accessed 05 May 2014; International Monetary Fund (IMF), *Guide on Resource Revenue Transparency* (IMF, Washington, D. C. 2007)62<<http://www.imf.org/external/np/pp/2007/eng/051507g.pdf>>accessed 02 November 2014; Central Bank of Nigeria, 'Annual Report 2011' (Abuja, July 2012)<<http://www.cenbank.org/documents/annualreport.asp/>> accessed 29 July 2014; during the first half of 2012, oil revenue constituted 78.1 per cent of the total federal receipts, see Central Bank of Nigeria, 'Economic Report for the first half of 2012' (Abuja, 2012)<<http://www.cenbank.org/out/2012/ccd/2012%20half%20year%20report.pdf/>>accessed 30 July 2014.

¹⁰Nigeria Extractive Industries Transparency Initiative (NEITI), 'Financial Audit: An Independent Report Assessing and Reconciling Financial Flows within Nigeria's Oil and Gas Industry—2009-2011' (Abuja 2013) <http://www.eiti.org/files/NEITI-EITI-Core-Audit-Report-Oil-Gas-2009-2011-310113-New_4.pdf>accessed 30 July 2014.

¹¹ Central Bank of Nigeria (CBN), 'Annual Report and Financial Statement 2008' (Abuja 2009)<<http://www.cenbank.org>>accessed 20 September 2014.

of the current system of centralised state ownership of natural resources in Nigeria besides serving to fuel restiveness in the region.

It was against the foregoing background that the Petroleum Industry Bill (PIB) 2012 was conceived in part, supposedly to redress the fiscal, ecological and environmental injustices being suffered by the peoples of the Niger delta region since the discovery of crude oil in 1956.

The purpose of this article is to examine whether the provisions of the Petroleum Industry Bill (PIB) 2012 address the core of the agitations of the peoples of the Niger delta which is reform of the current regime of centralised state ownership of oil and gas to guarantee them and their respective state governments a stake in resource ownership and governance. It is argued that the PIB is not the panacea that it is widely believed to be and that its provisions have not addressed the core of the Niger delta agitations.

The article is divided into five sections. The introductory section discussed the background to the PIB 2012. Section two examines how the exploration and exploitation of oil have led to the underdevelopment of the region, the degradation of its environment and the poverty of its peoples. The third section explores the core of the agitations of the peoples and governments of the region for decentralised natural resource ownership and governance. The fourth section x-rays the provisions of the PIB 2012 relevant to the Niger Delta region while the concluding remarks are contained in the fifth section.

2. OIL AND THE UNDERDEVELOPMENT OF THE NIGER DELTA REGION

The ethnic groups of the Niger Delta region have had serious grievances against the Nigerian state which are traceable to the discovery and exploitation of hydrocarbons in their territory since 1956. According to Osaghae, foremost amongst these grievances is that 'although the bulk of crude oil, the country's main source of revenue is derived from their lands, they belong to the ranks of the most backward and politically marginalized groups in the country.'¹ The Niger delta ethnic groups traced this horrendous injustice to the fact that they are ethnic minorities in a federation dominated by the Hausa/Fulani, Yoruba and Igbo ethnic groups. The result is that the oil wealth generated from the region is used to develop other regions of the country inhabited by the majority ethnic groups while the Niger delta is left to grapple with the perennial lack of basic infrastructure and amenities which are taken for granted in other parts of the federation.²

Secondly, oil exploration and exploitation spanning over five decades have left in their trail severe environmental degradation, despoliation of the ecosystem and destruction of the peasant economy of the region built on fishing and farming.³

To be sure, these grievances are not misplaced. The Minorities' Commission set up by the erstwhile British colonial government had as far back as 1958 found that the 'needs of those who lived in the creeks and swamps of the Niger delta' were 'very different from those of the interior' and that the Niger delta was 'poor, backward and neglected.'⁴ Although the Commission recommended the creation of a 'special area' in the Niger delta and the establishment of a Federal Board to direct the development of the region into channels which would meet its peculiar problems, the region has remained poor, underdeveloped and neglected to an extent that suggests that the Commission's description of the Niger delta as 'poor, backward and neglected' is as true today as it was in 1958.

While it is generally acknowledged that the Niger delta terrain which causes seasonal flooding of over 80 per cent of the region 'including all of the swamp forest, except the riverbank levees'⁵ poses peculiar environmental problems, it would be naïve to treat the underdevelopment of the region as a natural consequence of its deltaic terrain. The truth of the matter is that the underdevelopment of the region is the result of decades of wilful neglect by a distant central government dominated by the majority ethnic groups. The result is that the region though rich in natural resources is paradoxically one of the poorest regions of the world.

The 2006 Report by the United Nations Development Programme (UNDP) painted a shocking but true picture of the Niger delta as a "region suffering from administrative neglect, crumbling social infrastructure and services, high unemployment, social deprivation, abject poverty, filth and squalor, and endemic conflict."⁶ The

¹ Eghosa E. Osaghae, 'The Ogoni uprising: Oil Politics, Minority Agitation and the future of the Nigerian State' (1995)94 African Affairs 325.

² Michael Watts, 'Resource Curse? Governmentality, oil and power in the Niger Delta, Nigeria' (2004) 9 Geopolitics 50, 51; Ijaw National Congress (INC), *The Ijaws, the Niger Delta and the Nigerian State* (University of Port Harcourt Press, 2006)13.

³ Ijaw National Congress (n18) 18-22; Chris O. Ikporukpo, 'Petroleum, Fiscal Federalism and Environmental Justice in Nigeria' (2004) 8 Space and Polity 321, 325-330.

⁴ Secretary of State for the Colonies, 'Report of the Commission Appointed to Enquire into The Fears of Minorities and the Means of Allaying Them' (Cmnd 505, London 1958) ch. 7, para. 15; ch. 14, 27.

⁵ World Bank, 'Defining an Environmental Development Strategy for the Niger Delta, Vol. 1' (Industry and Energy Operations Division, West Central Africa Department, World Bank, May 25, 1995) 2.

⁶ UNDP, 'Niger Delta Human Development Report' (UNDP, Abuja Nigeria 2006) 9 <<http://hdr.undp.org/en/reports/nationalreports/africa/nigeria/name3368,en.html>> accessed 03 February 2015.

Report chronicled the lack of basic infrastructure and amenities in the region such as electricity, roads, schools, hospitals, potable water, and housing and concluded that although oil wealth enriches Nigeria as a country, 'it has not alleviated the grinding poverty, neglect and deprivation in the region that produces it.'¹

The findings in the UNDP's Report are amply supported by a number of other reports and studies including those commissioned by the federal government.² Attention may be drawn here to just two of such reports. The Report of the Technical Committee on the Niger Delta discussed the infrastructural poverty of the Niger Delta communities and concluded that:

They still lack basic facilities and amenities that are taken for granted in other parts of the country. In particular, the creeks and riverine areas still look worse than the fourth world by whatever development indicators that may be applied.³

The Report by Amnesty International is no less damning in its vivid description of the striking contrast between the enormous resource wealth of the Niger delta and its shocking underdevelopment and neglect:

Oil has generated an estimated \$600 billion since the 1960s. Despite this, the majority of the Niger delta's population lives in poverty. . . . The majority of the people of the Niger delta do not have adequate access to clean water or health care. Their poverty, and its contrast with the wealth generated by oil, has become one of the world's starkest and most disturbing examples of the 'resource curse.'⁴

Similarly, a recent report released by the National Bureau of Statistics confirmed that the Niger delta (south-south geo-political zone) remains one of the poorest geo-political zones in the federation with a poverty rate of 63.8 per cent; and in terms of dollar per day measure of poverty, all the states in the region except Edo are below the national average.⁵ Although the report also showed that poverty is more extreme in the North with North-West and North-East geo-political zones recording poverty rates of 77.7 per cent and 76.3 per cent respectively, the truth of the matter according to the Human Rights Watch is that the divisions 'between the rich and poor are more obvious in the areas where gas flares light up the night sky.'⁶

The region also lags behind on the Human Development Index (HDI) score which represents a composite index measuring average achievement in three basic dimensions of human development —long and healthy life as measured by life expectancy at birth; knowledge as measured by adult literacy rate; and a decent standard of living as measured by Gross Domestic Product per capita.⁷ According to the UNDP the region's HDI's score remains at a low value of 0.564 which puts it far below countries or regions with similar oil and gas resources.⁸

Although Ross has attempted to rationalise the poverty in the oil-rich Niger delta by reference to a cluster of economic and political ailments plaguing resource-rich countries such as retarded economic growth, prevalence of corruption, higher risks of political instability, and widespread poverty,⁹ it is respectfully submitted that the case of the Niger delta is clearly one of ethnic marginalization and domination. If the vast wealth generated from oil in the region could be deployed to develop several multi-billion naira projects in different regions of the country including the new federal capital city of Abuja in spite of the 'resource curse', it seems difficult to justify the backwardness of the region by reference to any theoretical prescription other than the conspiracy of the three majority ethnic groups.

To be sure, apart from infrastructural and human poverty, the region also suffers from severe environmental degradation arising from decades of petroleum exploration and exploitation. There is a widely received view that the process of petroleum exploration and production generally impacts adversely on the

¹ UNDP (n22) 37.

² Some of these Reports include; Report of the Ministerial Fact-Finding Team to Oil Producing Communities in Nigeria (1994); and Report of the Presidential Committee on the Development Options for the Niger Delta (1996).

³ Technical Committee on the Niger Delta (12)50-1.

⁴ Amnesty International, 'Nigeria: Petroleum, Pollution and Poverty in the Niger Delta' (Amnesty International Publications, London 2009) 9<<http://www.amnesty.org/en/library/asset/. . . /017/. . . /afr440172009.pdf/>> accessed 23 December, 2014; Amnesty International, 'Annual Report 2013' (London, 2013) 196<<http://www.amnesty.org/en/annual-report/2013>> accessed 08 August 2014.

⁵ National Bureau of Statistics, 'Nigeria Poverty Profile 2010' (Abuja Nigeria, January 2012)1, 16, 25.

⁶ Human Rights Watch, 'The Price of Oil, Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities' (Human Rights Watch, New York January 1999)8<<http://www.hrw.org/legacy/reports/1999/nigeria/>> accessed 02 February 2015; Human Rights Watch, 'World Report 2013—Nigeria' (New York, 2013) 140, 144<http://www.hrw.org/sites/default/files/wr2013_web.pdf/> accessed 09 August 2014.

⁷ UNDP, 'Human Development Report 1990' (UNDP, New York 1990)1, 11-2 <http://hdr.undp.org/en/media/hdr_1990_en_chap1.pdf> accessed 03 February 2014.

⁸ UNDP (n 29) 2.

⁹ Michael L. Ross, 'Nigeria's Oil Sector and the Poor' (Paper Prepared for the UK Department for International Development "Nigeria: Drivers of Change Programme" (May 23 2003) 1, 3-4< <http://www.polisci.ucla.edu/faculty/ross.>> accessed 03 February 2015.

environment although the degree of environmental impact is ‘determined by operator responsibility, government oversight and conditions in particular ecosystems.’¹ It is common ground that while a number of public agencies are charged with regulating, supervising and monitoring Nigeria’s oil and gas industry and the environment at large, ‘these agencies are, for the most part, ill-equipped, poorly financed, corrupt, and lack requisite regulatory capacity and expertise.’² Apart from the lack of an effective environmental regulatory mechanism, there is also concern over the lack of political will by the central government to enforce extant regulations, particularly when the international oil companies are involved. The result is that the Niger delta has been rendered far more vulnerable to the adverse impacts of petroleum exploration and exploitation.

Not surprisingly therefore, a study carried out by an independent team of experts drawn from Nigeria, the UK and the USA has found that the Niger delta is ‘one of the 5 most severely petroleum damaged ecosystems in the world’ and that the devastation of the region ‘may even be worse than other notoriously impacted regions such as Azerbaijan, Kazakhstan, Siberia, and Ecuador.’³ The Report described the environmental damage to the Niger delta as ‘chronic and cumulative’ and that it has acted ‘synergistically with other sources of environmental stress to result in a severely impaired coastal ecosystem and compromised the livelihoods and health of the region’s impoverished residents.’⁴ The report also found that the environmental devastation of the Niger delta occurs at every stage of the extractive activities, particularly during exploration, production, transportation, and refining.⁵ Dealing specifically with oil spills which form the major source of pollution, the Report concluded that ‘an estimated 9 million -13 million barrels (1.5 million tons) of oil had spilled in the Niger delta ecosystem over the past 50 years representing about 50 times the estimated volume spilled in the Exxon Valdez Oil Spill in Alaska in 1989.’⁶

Granted that there is a dearth of comprehensive data on the cumulative spills recorded each year, available statistics suggest that this conclusion is well founded. One study has shown that a total of 4,835 spills occurred in the region over the period 1976-1996 resulting in a cumulative spill volume of 2,446,322 spills. Of this amount, only about 15.91 per cent was recovered; implying that about 84.09 per cent of the spill was lost to the environment.⁷ The UNDP on its part estimated that a total of 6,817 oil spills occurred in the region between 1976 and 2001 resulting in the loss of approximately 3 million barrels of crude oil more than 70 per cent of which was not recovered. Approximately 6 per cent spilled on land, 25 per cent in swamps and the remaining 69 per cent in offshore environment.⁸ The SPDC reported an average of 221 spills yearly between 1989 and 1994 involving some 7, 350 barrels of crude oil lost to the environment annually. From 2005 to 2009, SPDC recorded an average of 175 spill incidents involving its facilities yearly. A marginal increase in spill incidents involving SPDC facilities was recorded in 2012 with a total of 198 spills. About 32% of the spilled volume from SPDC facilities in 2012 was lost to the environment. In 2014 SPDC recorded 37 operational spills (those caused by corrosion, equipment failure or human error) from SPDC Joint Venture (JV) network compared to 30 in 2013.⁹

Although the Niger delta communities have disagreed with the IOCs over the causes of these spills, their adverse impacts on the residents and the entire ecosystem cannot be disputed.¹⁰ Oil spills on land destroy

¹David Waskow and Carol Welch, ‘The Environmental, Social and Human Rights Impacts of Oil Development’ in Svetlana Tsalik and Anya Schiffrin (eds), *Covering Oil: A Reporter’s Guide to Energy and Development* (Open Society Institute, New York 2005) 101, 104; Christopher O. Orubu et al., ‘The Nigerian Oil Industry: Environmental Diseconomies, Management Strategies and the Need for Community Involvement’ (2004) 16 J. Hum. Ecol.204.

²Evaristus Oshionebo, ‘Transnational Corporations, Civil Society Organisations and Social Accountability in Nigeria’s Oil and Gas Industry’ (2007) 15 Afr. J. Int’l & Comp. L. 107, 108; see also N.E. Ojukwu-Ogba, ‘Tackling Insecurity in Nigeria’s Niger Delta: The Devil’s Alternative’ (2006)4 OGEL 1, 3.

³Federal Ministry of Environment et al, ‘Niger Delta Natural Resource Damage Assessment and Restoration Project, Phase 1 –Scoping Report’ (Abuja, 2006) 3.

⁴Federal Ministry of Environment (n34) 2.

⁵Federal Ministry of Environment (n34) 5.

⁶Federal Ministry of Environment (n34) 1.

⁷Environmental Resources Managers Ltd., ‘Niger Delta Environmental Survey, Final Report Phase 1, Volume 1’ (1997) 1, 249.

⁸UNDP (n 22) 76.

⁹SPDC, ‘Briefing Notes: Environmental Performance—Oil Spills’ (May, 2010)< http://www.static.shell.com/static/nga/downloads/pdfs/briefing_notes/oil_spills.pdf>accessed 25 January 2015; SPDC, ‘Briefing Notes: Environmental Performance—Oil Spills’ (April 2013)<<http://www.s00.static-shell.com/content/dam/shell-new/local/country/nga/downloads/pdf/2013bnotes/environmental-performance.pdf>>accessed 30 July 2014; SPDC, ‘Briefing Notes 2014: Shell in Nigeria, Theft, Sabotage and Spills’ (May, 2014)<<https://s07.static-shell.com/content/dam/shell-new/local/country/nga/downloads/pdf/theft/pdf>> accessed 17 April, 2015.

¹⁰According to SPDC, ‘intentional third party interference with pipelines and other infrastructure was responsible for around 75% of all oil spill incidents and 92% of all oil volume spilled’ from her facilities over the ‘last five years (2009-2013).’ See Shell, Briefing Notes: ‘Shell in Nigeria, Oil theft, Sabotage and Spills’ (n40); a recent press release issued by Amnesty International has challenged the claims of SPDC that sabotage is responsible for most of the spill incidents, see, Amnesty International, ‘Press Release: Nigeria, Oil giant Shell criticised over Niger Delta pipelines “sabotage” claims’ (London, 19

crops and damage the quality and productivity of the soil. A recent study carried out by the United Nations Environment Programme (UNEP) in Ogoni land has found that when oil reaches the root zone, crops and other plants begin to experience stress and can die and the effect can last as long as 40 years despite repeated clean-up attempts.¹ Oil spills in water affect mangrove forests, kill aquatic and marine lives including fauna and flora and contaminate sources of drinking water. The most serious case of groundwater contamination was found in Ogoni land close to a Nigerian National Company Product pipeline where an 8cm layer of refined oil was observed floating on the groundwater which serves the community wells.² Thus, oil pollution is linked to infections such as diarrhoea, dysentery, gastro-enteritis, and whooping cough.³

Oil exploration has also impacted adversely on the traditional peasant economy of the Niger delta. For instance, through the use of explosives, provision of new routes and pits and stream diversion during the process of prospecting for oil, fishing grounds and farm lands are put out of use thus depriving the local population access to such ancestral farmlands and fishing grounds. Furthermore, explosives destroy marine and aquatic lives within the areas of impact. Lastly, gas flaring which still goes on in the Niger delta 'creates a microclimate around that hinders the survival of both plants and animals alike.'⁴ These activities have led to poor fishing and farming yields, dwindling fortune among the local population and a local economy that is completely destroyed. A learned writer has therefore rightly argued that the impact of the oil industry in the Niger delta can best be summed up in 'three D's: deprivation, despoliation and destitution.'⁵

What clearly emerges from the foregoing is that the ethnic minorities of the Niger delta have borne the costs of oil exploration and exploitation in the region disproportionately but have been denied the benefits derived from these activities. Quite expectedly, the common perception amongst the peoples of the region is that 'all the oil wealth has leaked out, leaving people impoverished and neglected.'⁶ Considering the deprivation, despoliation and destitution the exploration and exploitation of oil have occasioned in the Niger delta, it can be argued that oil has been a curse to the peoples of the region rather than a blessing. It is very arguable that the curse of oil in the Niger delta is traceable to the ethnic politics that defines its governance and management by the federal government.

Therefore, applying the 'grievance theory' developed by Collier and Hoeffler⁷ and the 'grievance mechanisms' formulated by Ross,⁸ it can be argued that given the deprivation, despoliation and destitution which exploitation of natural resources has occasioned in the Niger delta, a genuine grievance by the ethnic groups of the Niger delta is to be expected as a natural consequence. The sense of deprivation, marginalization and neglect in the region is accentuated by the general belief that a distant federal government cannot come to terms with the infrastructural backwardness and adverse environmental impacts of resource extraction in the region the same way the state governments would do. These ingrained feelings taken within the context of Nigerian multi-ethnic federation deeply polarized along ethnic majorities/minorities lines have not only provided the germ for organized resistance against federal dominance over natural resources but also set the stage for agitations for resource control by the Niger delta states. It is to the agitation of the Niger delta ethnic minorities that the paper

June 2013)<<http://www.amnesty.org/en/for-media/press-releases/nigeria-oil-giant-shell-criticised-over-niger-delta-pipelines-sabotage-claims/>>accessed 08 August 2014.

¹ UNEP, *Environmental Assessment of Ogoniland* (UNEP, Nairobi 2011)1, 9<<http://www.unep.org/nigeria/>> accessed 01 March 2014.

² UNEP (n 42)10.

³ C. O. Ikporukpo, 'Petroleum exploitation and the socio-economic environment in Nigeria' (1983)21 *International Journal of Environmental Studies*, 193, 198; J. Finine Fekumo, *Oil Pollution and the Problems of Compensation in Nigeria* (F & F Publishers, Port Harcourt 2011) 5.

⁴ Ikporukpo (44)195-6.

⁵ Ibibia Lucky Worika, 'Deprivation, Despoliation and Destitution: Whither Environment and Human Rights in Nigeria's Niger Delta?' (2001-2002) 8 *ILSA J. Int'l & Comp. L.* 1, 5.

⁶ C. P. Wolf, Forward to Augustine A. Ikein et al., (eds), *Oil, democracy and the promise of true federalism in Nigeria* (University Press of America, Maryland 2008) xiv.

⁷ Paul Collier and Anke Hoeffler, 'Greed and Grievance in Civil War' Working Paper CSAE WP/2002-01 (Centre for the Study of African Economies, Oxford March 13, 2002)1; according to Collier and Hoeffler, countries whose wealth is derived largely from the export of primary commodities such as natural resources suffer a high risk of civil wars. They traced the correlation between natural resources and civil violence to either greed on the part of the rebels or grievances such as feelings of ethnic or political marginalization.

⁸ Michael L. Ross, 'How Do Natural Resources Influence Civil War? Evidence from Thirteen Cases' (2004) 58 *International Organization* 35, 37-8, 41; the study carried out by Ross focused on the mechanisms or processes that linked resource wealth to conflict. Ross concluded that natural resource extraction increases the probability of conflict through several processes principal amongst which is the grievance mechanism. This implies that the management of natural resources which are concentrated in a particular region of the country could cause grievances among the local population over inadequate compensation for land acquisition, environmental degradation, inadequate job opportunities and labour migration and these factors have a tendency to spur regional conflict.

now turns.

3. AGITATIONS FOR RESOURCE CONTROL IN THE NIGER DELTA

The first recorded history of resistance by the ethnic minorities of the Niger delta against marginalization by the ethnic majorities in post-independent Nigeria was the 'twelve day revolution' spear headed by Isaac Jasper Adaka Boro, an Ijaw from the Niger delta region, who led members of the Niger Delta Volunteer Force (NDVF) in a failed attempt to secede from Nigeria by declaring an independent 'Delta Peoples Republic' in February 1966.¹ The rebellion was driven by the ethnic minorities' quest for ownership of the hydrocarbons in the region.² Thus, the rebels issued an order nullifying all existing oil contracts and directing oil companies to negotiate directly with them.³

Although the rebellion was crushed by federal troops exactly twelve days after the declaration of the 'Delta Peoples Republic,' it marked the first organized campaign by the ethnic minorities of the Niger delta against their exploitation and neglect by the Nigerian State. It is equally arguable that subsequent resistance movements in the region have drawn considerable inspiration from it.⁴

The 1990's witnessed a new phase of organized mass action by the ethnic minorities of the Niger delta against centralized state ownership of petroleum resources. This new phase was championed by the Ogonis, a major oil-producing minority group and host to the bulk of Shell's operations in Nigeria.⁵ In 1990, the Ogonis under the aegis of the Movement for the Survival of Ogoni People (MOSOP) presented the Ogoni Bill of Rights to the Government and People of Nigeria.⁶ The Bill recounted the complete degradation of the Ogoni environment from decades of oil exploration, the neglect of the Ogonis by successive federal administrations and their political marginalization in the federation.⁷ Consequently, the Ogonis demanded for political autonomy to participate in the affairs of Nigeria as a distinct and separate unit including the right to control their political affairs, the right to control and use a fair proportion of Ogoni economic resources for Ogoni development and the right to protect the Ogoni environment from further degradation.⁸

The Ogoni Bill of Rights therefore sets a non-violent tone for the engagement of the ethnic minorities of the Niger delta with the Nigerian State over the contentious issue of restructuring the federation to give individual ethnic communities and/or the federating units a stake in the powers of the central government over natural resources. Although the presentation of the Ogoni Bill of Rights did not result in any policy shift by the federal government, it succeeded in internationalizing the struggle of the Ogonis thus drawing global attention to the marginalization of the oil-producing minorities of the Niger delta.⁹

The Ijaws, the largest ethnic group in the Niger delta also demanded for resource control. Their position as stated by the Ijaw National Congress (INC) is that the confiscation of their 'land and mineral resources through obnoxious and undemocratic laws . . . is not only the greatest aberration of federalism but an invitation to anarchy.'¹⁰ The Ijaws therefore demanded a restructuring of the federation to establish 'a truly federal system where the component federating units own and control their resources and pay appropriate taxes to the centre.'¹¹ Their position on resource ownership was reinforced by the Kaiama Declaration adopted by Ijaw Youths on December 11, 1998.¹²

By the close of 2014 more than ten Bills of Rights and Declarations had been adopted and presented to the government of Nigeria by the different oil-bearing communities of the Niger delta.¹³ All the Bills and

¹ Tekena N. Tamuno, 'Separatist Agitations in Nigeria since 1914' (1970)8 *Journal of Modern African Studies*, 563, 577.

² Cyril I. Obi, 'Oil Extraction, Dispossession, Resistance, and Conflict in Nigeria's Oil-Rich Niger Delta' (2010)30 *Canadian Journal of Development Studies* 219, 225-6.

³ International Crisis Group, 'The Swamps of Insurgency: Nigeria's Delta Unrest,' *Crisis Group Africa Report No. 115* (Dakar, 3 August 2006)1, 2<<http://www.crisisgroup.org/en/regions/africa/swamps-of-insurgency-nigerias-delta-unrest.aspx>> accessed 15 February 2014.

⁴One of the major militant movements in the delta led by Asari-Dokubo is named after Boro's NDVF.

⁵ International Crisis Group, 'Nigeria: Ogoni Land after Shell,' *Africa Briefing No. 54* (Dakar, 18 September 2008)1,2<<http://www.crisisgroup.org/en/regions/africa/nigeria/B054-nigeria-ogoni-land-after-shell.aspx> >accessed 01 February 2014.

⁶ Ogoni Bill of Rights, Presented October 1990,< http://www.mosop.org/ogoni_bill_of_rights.html/ > accessed 01 February 2012.

⁷ See the preamble to the Ogoni Bill of Rights.

⁸ Clauses i-vii of the Ogoni Bill of Rights.

⁹The Bill was also presented to several international and regional organizations including the UN sub-committee of Human Rights on the Prevention of Discrimination Against and Protection of Minorities and the African Human Rights Commission.

¹⁰ Ijaw National Congress (INC), *The Ijaws, the Niger Delta and the Nigerian State* (University of Port Harcourt Press, 2006) 33; the INC is the apex socio-cultural organization of the Ijaw people.

¹¹ Ijaw National Congress (n59) 43.

¹² Kaiama Declaration 1998<<http://www.unitedijawstates.com/kaiama/html> > accessed 15 December 2014.

¹³The Declarations include; Charter of Demands of Ogbia People 1992, Resolutions of the First Urhobo Economic Summit

Declarations without exception affirmed the right of the peoples of the oil-producing ethnic communities to self-determination, claimed right of ownership over the natural resources within their territories, demanded the repeal of all obnoxious laws vesting exclusive ownership of natural resources in the federal government, and called for immediate remedial action to be taken on the devastated Niger delta environment.

However, a closed examination of these Bills and Declarations reveals that they contained different prescriptions on natural resource ownership. For instance, while the Ogoni Bill of Rights demanded the participation of the Ogonis in resource management probably through their traditional institutions, the Ijaw National Congress' position seems to suggest that rights of ownership and management should devolve on the constituent units (states) of the federation. The INC's position seems to accord with the position taken by the Governors of the South-South oil-producing States in the Niger delta who demanded control of the natural resources in their respective states on the ground that 'resource control will encourage each state of the federation to control its resources and develop them in accordance with its capabilities.'¹ The governors were emphatic in their agitation for '100 per cent control' of all natural resources within their respective states as opposed to merely sharing the proceeds generated from their exploitation under the principle of derivation.²

Taking the INC and South-South Governors' positions as representing the dominant view, it can be stated that the agitations in the Niger delta involved a quest for the devolution of power of ownership and governance of natural resources from the federal government to the oil-producing states. Thus, the core of the agitations is that the oil-producing states should be granted a decisive role in the exploration for, exploitation and disposal of natural resources within their territories subject to payment of appropriate taxes to the federal government. Indeed, Olorogun Gbagi, a former Minister of the Federal Republic of Nigeria had stated the matter well: 'What the south-south wants is for us to control our resources and pay tax to the federal government as it was done in the time of cocoa and groundnut.'³ Clearly, the agitations emphasized devolution of ownership and governance rights over natural resources to the oil-producing states, rather than a guarantee of greater access to federally-collected revenues derived from natural resources.⁴ Thus, resource control is not coterminous with the principle of derivation enshrined in s. 162(2) of the 1999 Constitution.

It is intended to examine in the next section the provisions of the PIB 2012 pertaining to the Niger Delta with a view to demonstrating the extent if any, to which the Bill addresses the core of the Niger Delta agitations. Does the PIB 2012 address the agitation of the oil-producing ethnic minorities for the participation of the oil-producing States in resource governance?

4.1 PRINCIPLES AND MAIN PROVISIONS OF THE PETROLEUM INDUSTRY BILL (PIB) 2012

The Petroleum Industry Bill 2012 is an executive Bill introduced in the National Assembly by the President.⁵ On 7th September 2007, the federal government inaugurated the Oil and Gas Reform Committee which was charged with the responsibility of formulating a blue print for the reform and restructuring of the petroleum industry.⁶ The work of the Reform Committee culminated in the introduction of the Petroleum Industry Bill (PIB) in the National Assembly.

According to its long title, the Petroleum Industry Bill 2012 is a bill to 'provide for the establishment of a legal, fiscal and regulatory framework for the Petroleum Industry in Nigeria and for other related matters.' Besides the ambitious objectives set out in s. 1 which includes enhancing exploration and exploitation of petroleum resources in Nigeria for the 'benefit of Nigerian people' and protecting health, safety and the environment in the course of petroleum operations, the bill seeks to harmonize all extant legislation governing oil and gas in Nigeria. Accordingly, from the effective date of its passage into law, all extant petroleum and gas legislation will stand repealed.⁷

The major thrust of the bill is the liberalization of the petroleum industry through the unbundling of the

1998, Aklaka Declaration 1999, Warri Accord 1999, Ikwerre Rescue Charter 1999, Bill of Rights of Oron People 1999; Demands of the Niger Delta Indigenous Women's Conference 1999; and The Niger Delta Peoples' Compact 2008; available @ <http://www.oloibiri.blogspot.co.uk/2004/10/Ikwerre-rescue-charter.html/> accessed 06 January 2015.

¹ Johnbosco Agbakwuru, 'Insecurity in North not linked to derivation-S-South Govs' *Vanguard* (Lagos 15 March 2012) <<http://www.vanguardngr.com/2012/03/insecurity-in-north-not-linked-to-derivation-s-south-govs/>> accessed 15 March 2015.

² *This Day* (Lagos, 28 July 2000)7.

³ Emma Amaize, 'Derivation Formula: North Fishing for trouble-S-South' *Vanguard* (Lagos 01 March 2012) <<http://www.vanguardngr.com/2012/03/derivation-formula-north-fishing-for-trouble-S-South/>> accessed 01 March 2014.

⁴ Itse Sagay, 'Nigeria: Federalism, the Constitution and Resource control' in Ikein (n47)351, 357.

⁵ The previous version of the bill, i.e., the Petroleum Industry Bill 2008 was thrown out by the Sixth Legislative Assembly (House of Representatives) at the Committee of the Whole House, see John Ameh, 'Northern Reps plan to throw out PIB' *Punch* (Lagos 24 September 2012) <<http://www.punchng.com/northern/reps-plan-to-throw-out-pib/>> accessed 24 September 2014.

⁶ J. Taiwo, "Oil and gas, power reform committees inaugurated" *This Day* (8 September 2007)

⁷ PIB, s.354.

National Oil Company, Nigerian National Petroleum Corporation (NNPC). Several new agencies will be established in place of the NNPC including Petroleum Technical Bureau,¹ Upstream Petroleum Inspectorate,² Downstream Petroleum Regulatory Agency,³ and National Petroleum Assets Management Corporation which shall be a holding company operating fully on commercial principles.⁴ Two new Companies are to be incorporated by the Minister for Petroleum Resources not later than three months of the effective date of the bill. These are the Nigerian Petroleum Assets Management Company (or to be called by such other name as shall be available)⁵ and a new National Oil Company.⁶

Contrary to the widely held views that the PIB 2012 will enable the ethnic minorities of the Niger Delta to ‘exploit the benefits of resources in their domain’⁷ when passed into law, it is intended to demonstrate that the PIB 2012 does not address the core of the Niger delta agitation which is the devolution of ownership and governance of petroleum resources to the federating units. Besides, the bill contains some obnoxious provisions that are inimical to the interest of the oil-producing states.

Understandably, s.2 of the PIB seeks to maintain the *status quo* laid down in s. 44(3) of the 1999 Constitution (as amended) by vesting exclusive ownership of petroleum resources in the federal government. In other words, by virtue of s. 2 of the PIB 2012, the entire property and control of petroleum in, under or upon any lands within Nigeria, its territorial waters or which form part of its continental shelf and exclusive economic zone shall vest in the government of the federation. The power of the federal government to grant petroleum exploration licence, petroleum prospecting licence and petroleum mining lease under s. 172 of the Bill including its right to acquire participating interest in the licences and leases so granted pursuant to s. 192 of the Bill are incidents of its exclusive ownership of petroleum resources throughout Nigeria.⁸

It is submitted that s. 2 of the PIB which derives from s. 44(3) of the 1999 Constitution (as amended) negates the core agitation of the oil-producing ethnic minorities of the Niger Delta for resource federalism through devolution of power of resource governance from the federal government to the federating states. It also runs contrary to the emerging practice in other transitional and multi-ethnic federations like Pakistan, India and Ethiopia which recognises and accommodates regional interests in natural resource ownership and governance.

In Pakistan, following agitations by Khyber-Pakhtunkhwa, Sindh and Balochistan Provinces for decentralization of the State’s power over natural resources, the Constitution (Eighteenth Amendment) Act 2010 was enacted to amend Articles 161 and 172 of the Pakistan Constitution 1973.⁹ While Article 161 of the Constitution (as amended) assigns the net proceeds of the federal duty of excise on natural gas and oil levied at the well-head and collected by the federal government together with the royalty to the province in which the well-head of natural gas or oil is situated, Article 172(3) (as amended) vests mineral oil and natural gas within the province or the territorial waters adjacent thereto jointly and equally in the province and federal government. Thus, the Eighteenth Amendment to the Pakistan Constitution clearly accommodates both national and regional interests in natural resources.

In the case of India, the Constitution creates a dual regime whereby rights of ownership (dominion) and governance or control (imperium) over natural resources are placed under different constitutional jurisdictions. By virtue of Arts.294-295 of the Constitution of India 1949, each State of the federation is vested with the ownership of land and natural resources located within its territory excluding off-shore natural resources which are owned by the central government under Article 297 of the Constitution. Accordingly, ownership of all on-shore petroleum and mineral oil resources vest in the respective States. However, control and development of these resources vest with the central government by virtue of Art.246(1) and item 53 in List 1 of the seventh schedule to the Constitution which confer exclusive competence on parliament with respect to ‘Regulation and development of oilfields and mineral oil resources; petroleum and petroleum products.’ It is thus within the exclusive competence of the central government to enact relevant laws for the regulation and development of oil

¹ PIB, ss. 9 and 10.

² PIB, ss. 13 and 14.

³ PIB, ss. 43-45.

⁴ PIB, s. 120.

⁵ PIB, s. 123.

⁶ PIB, s. 148.

⁷ Christopher Isiguzo, ‘At the Southern Leaders Meet, National Unity is Sacrosanct’ *This Day Live* (6 February 2013) <<http://www.thisdaylive.com/articles/at-southern-leaders-meet-national-unity-is-sacrosanct/138546/>> accessed 12 February 2014.

⁸ *N.N.P.C v Famfa Oil Ltd.* [2012] 17 N.W.L.R (Pt. 1328)148 @ 202, 207; the PIB 2012 when passed into law will be inferior to the 1999 Constitution and thus cannot derogate from the provisions of the constitution.

⁹ Forum of Federations, ‘Provincial Advisory Groups Round Tables on Ownership & Management of Natural Resources-Pakistan’ (July 21-30, 2011) < <http://www.forumfed.org/en/events/event.php?id=737> > accessed 07 September 2014; Katharine Adeney, ‘A Step Towards Inclusive Federalism in Pakistan? The Politics of the 18th Amendment’ (2012) 42 *Publius: The Journal of Federalism* 539, 544.

and mineral resources including those owned exclusively by the States.¹

As an incident of resource ownership, the States are entitled to grant leases and licences for exploration and exploitation of onshore petroleum resources in addition to collecting fees, taxes and royalties but subject to and in accordance with central laws which prescribe the terms and conditions therefore. Under Rule 5(ii) of the Petroleum & Natural Gas Rules 1959, licences and leases can only be granted by the States for the exploration and exploitation of petroleum with the previous approval of the central government. Similarly, s. 6A of the Oilfields (Regulation and Development) Act 1948 gives the central government the power to fix and revise the rates of royalty payable for licences and leases granted by the States. Taxation of mineral rights by the States is also subject to limitations imposed by central legislation. The combined effect of these provisions is to subject the exercise by the States of their proprietary rights in onshore petroleum resources to the regulatory authority of the central government.

A similar legal framework governs India's solid minerals sector. While ownership of major and minor minerals vests in the federating states, their ownership rights are not absolute but subject to laws governing regulation and control of minerals enacted by parliament. Therefore, although it is within the competence of States to permit the exploitation of minerals through grant of leases, licences and other mineral rights including receiving royalty and fees, these rights can only be exercised in accordance with the relevant Act of parliament. Thus under ss. 2 and 41(2) of the Mines and Mineral Development and Regulation Act 2010 the right to fix and revise royalty appertains to the central government.² The only exception is that under s.41(6) of the Act States are competent to enact their own Rules and Regulations including specifying the rate at which royalty shall be payable in respect of 'minor minerals' such as building stones, gravels, ordinary clay, and ordinary sand.

The Indian Supreme Court has given liberal interpretation to the powers of the federating states to raise revenue on minerals through royalty, dead rents, cess, sales tax, and fees. In *State of West Bengal v Kesoram Industries Ltd.* the Supreme Court held that:

So long as a tax or fee on mineral rights is in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the central government, it is not unconstitutional.³

It is very arguable that although India is often referred to as a quasi-federal state with no strong commitment to federalism,⁴ her resource federalism shows a fair balance between an effective centre and empowered states. In other words, the Indian legal framework entrenches a robust form of resource federalism which guarantees the central and state governments shared competences over onshore natural resources.

With respect to Ethiopia, Art.52 (2) (d) of the Constitution of the Federal Democratic Republic of Ethiopia 1994 empowers States to administer land and other natural resources in accordance with federal laws. Article 51(5) of the Constitution vests the federal government with power to enact laws for the utilization and conservation of land and other natural resources. Through this system of shared competences, while States manage natural resources within their boundaries the federal government provides the regulatory framework. This practice is also reflected in the assignment of tax jurisdictions because by Art.98(3) of the Constitution the federal and state governments shall jointly levy and collect taxes on incomes derived from large scale mining and all petroleum and gas operations including royalties on such operations.

Clearly, the trend in these federations is that natural resource ownership and governance are treated as both national and regional concerns, rather than matters within exclusive national competence. The need for shared competences over natural resources between levels of government in a federation is more compelling in an ethnically divided society like Nigeria where the exercise of governmental power is often influenced by ethnic considerations with the result that federal power is usually appropriated for the benefit and advantage of those ethnic groups that dominate the lever of political power.

Arguably, the reality of Nigerian oil politics is that federal government rights of ownership and control over natural resources have become a veritable tool of ethnic and political domination by the majority ethnic groups against oil-producing communities of the Niger delta. Armed with political and economic powers, the bulk of the oil wealth produced from the Niger delta is 'captured by the federal state and distributed to the so-called "ethnic majorities" in the politically dominant northern and western states.'⁵

¹The Petroleum & Natural Gas Rules, 1959 (as amended), rules 6, 11, 13 and 14; The Oilfields (Regulation and Development) Act, No. 53 of 1948 (as amended), s.4; Ligia Noronha and Nidhi Srivastava, 'India' in George Anderson (ed), *Oil and Gas in Federal Systems* (OUP, Ontario 2012) 121, 129-30.

²Ver 31.3.2010; see also Ligia Noronha et al., 'Resource Federalism in India: The Case of Minerals' (2009) 44 *Economic and Political Weekly* 51, 53.

³Appeal No. (Civil) 1532 of 1993.

⁴Amaresh Bagchi, 'Rethinking Federalism: Changing Power Relations Between the Centre and the States' (2003) 33 *Publius: The Journal of Federalism* 21, 22-3.

⁵Michael Watts, 'Crude Politics: Life and Death on the Nigerian Oil Fields' *Niger Delta Economies of Violence Working*

Another evidence of this domination can be seen in the reckless and brazen manner in which several blocks in the Niger Delta including OML 108, OML 110, OML 112 & 117, OML 113, OML 115, OML 215, OPL 246, OPL 233, OPL 245, OPL 276 & 283, OPL 286, OPL 289, OPL 291, and Asuokpu/Amutu Marginal Field were discretionarily allocated to indigenous oil companies owned by the Hausa/Fulani, Yoruba and Igbo.¹ The result as pointed out by the Chairman, Senate Committee on Rules and Business, Senator Ita Enang is that ‘Eighty-three per cent of all present oil blocks are held by northerners.’² Another commentator had stated the matter more graphically thus:

Unknown to many, more than eighty per cent of ownership of the nation’s oil reserves is in the hands of some influential northerners who acquired marginal fields, Oil Mining Licences (OML), and Oil Prospecting Licences (OPL).³

When the eighty-three per cent of the oil blocks held by Northerners is added to the interests held by members of the Yoruba and Igbo ethnic groups in the nation’s oil reserves, it becomes crystal clear that centralized state ownership of natural resources has merely enabled the federal government to serve as a conduit for transferring effective ownership and control of the oil in the Niger delta to the majority ethnic groups while reducing the oil-producing minorities to rank hopeless spectators in the scramble for the acquisition of rights over the hydrocarbons found beneath their land.

It would appear that the need to avoid such oppression by the federal state against distinct ethnic groups within the federation has influenced the development of the modern trend in natural resource ownership and governance that recognises ‘that more than one level of government can have legitimate interest in the management of natural resources and needs to be involved in the exercise of most government powers (even including those long considered solely national).’⁴ The Fiscal Commission appointed by the British colonial government had recommended the adoption of similar policy in Nigeria in the following terms:

Whenever a profit sharing arrangement is negotiated in Nigeria between the Federal Government and an oil company, the Federal Government should consider the desirability of associating other governments within the Federation as parties to it.⁵

Successive federal governments in Nigeria have refused to implement the above recommendation and there is no gainsaying the fact that the PIB 2012 does not contain any provisions that show the willingness of the federal government to involve oil-producing States in the governance of the resources exploited in the Niger delta region.

4.2. ESTABLISHMENT OF PETROLEUM HOST COMMUNITIES’ FUND

Another issue with the PIB 2012 relates to the proposed Petroleum Host Communities’ Fund. Section 116 of the Bill proposes the establishment of the Petroleum Host Communities Fund (‘the PHC Fund’) which shall be utilized for the development of the economic and social infrastructure of the communities within the petroleum producing area in accordance with s.117 thereof. In order to give effect to s. 117, s. 118(1) of the Bill provides that upstream petroleum producing company shall remit on a monthly basis ten per cent of its net profit into the PHC Fund.

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

It is submitted that the proposed PHC Fund exhibits the same flaws that have characterised past federal initiatives in the Niger delta. It is clear from s.118 (6) of the PIB 2012 which gives the Minister of Petroleum the

Paper No. 25 (Institute of International Studies University of California Berkeley USA, 2009)18. <http://oldweb.geog.berkeley.edu/ProjectsResource/ND%20Website/NigerDelta/WP/Watts_25.pdf/>accessed 07 March 2014.

¹Donald Ojogo, ‘How North cornered Nigeria’s oil blocks, North, South-South in battle royale over oil’ *Nigerian Tribune* (Ibadan 09 March 2012)<<http://tribune.com.ng/index.php/-friday-edition-how-north-cornered-nigeria-s-oil-blocks-north-south-south-in-battle-royale-over-oil>>accessed 07 May 2014; Sylvester O. Akhaine, ‘Nigeria: politics and the end of oil’ (2010) 37 *Review of African Political Economy* 89, 90; Oluwole Josiah, ‘Northerners hold 83 per cent of oil blocks-senator’ *Punch* (Nigeria 07 March, 2013) <<http://www.punchng.com/news/northerners-hold-83-per-cent-of-oil-blocks-senator/>> accessed 07 March 2014.

² Cited in Josiah (n83).

³ Ojogo (n83).

⁴ Nicholas Haysom and Sean Kane, ‘Negotiating natural resource for peace: Ownership, control and wealth-sharing’ *Briefing Paper* (Centre for Humanitarian Dialogue, Geneva Switzerland October, 2009) 18.

⁵Secretary of State for the Colonies, ‘Nigeria: Report of the Fiscal Commission’ (Cmd. 481, London 1958) para.109.

power to make regulations on entitlement, governance and management structure with respect to the Fund that the National Assembly intends that the Fund shall be managed by a federal agency subject to the Minister's supervisory control.¹ It seems unlikely that any role will be assigned to the oil-producing states with respect to the fund thus suggesting that the proposal represents another example of a top-down approach in federal interventions in the region. The point bears repeating that any intervention programme managed by the federal government without the participation of the oil-producing states and indeed the host-communities will not achieve positive impact in the region. Such programmes are perceived in the region as unnecessary incursion by a leviathan distant centre into what should ordinarily be the sphere of influence of the oil-producing states.

Furthermore s.118 (5) of the PIB 2012 provides a curious loophole which can be exploited to deplete the Fund to the detriment of host communities. Under the sub-section, where any act of vandalism, sabotage or other civil unrest occurs that causes damage to any petroleum facilities within a host community, the cost of repair of such facilities shall be paid from the Fund unless it is established that no member of the community was responsible for the damage. The danger here is that given the persistent accusation of vandalism and sabotage of petroleum facilities by oil companies against host communities, virtually any damage to petroleum facilities within host communities could be attributed to them with the result that cost of repairs of damaged petroleum facilities would simply become a drain on the Fund. Indeed by seeking to place the burden of proof of 'innocence' on the host communities in the likely contests between them and the oil companies, the Bill seems to have rendered the entire concept of the PHC Fund otiose.

4.3. VICARIOUS CRIMINAL LIABILITY OF OIL-PRODUCING COMMUNITIES, LOCAL GOVERNMENTS AND STATES FOR ACTS OF THIRD PARTIES

This dubious application of the principle of vicarious liability is re-enacted in s. 293 of the Bill. Under s. 293(1), any person engaged in activities requiring a licence, lease or permit in the upstream and downstream sectors of the petroleum industry shall manage all environmental impacts in accordance with the licensee or lessee's approved environmental management plan or programme. It shall be the responsibility of every licensee or lessee as far as reasonably practicable to rehabilitate the environment affected by exploration and production activities whenever environmental impacts occur as a result of the licensee or lessee's operations.²

However, under sub-section (2) of s. 293 of the Bill, the licensee or lessee shall not be liable for, or under an obligation to rehabilitate the environment where the act adversely affecting the environment has occurred as a result of sabotage of petroleum facilities which includes tampering with the integrity of any petroleum pipeline and storage systems. Any dispute as to the cause of an act that has adversely affected the environment shall be referred to the Agency by the licensee, lessee or any affected person for determination and the determination of the Agency on the question shall be final.³ Curiously, under s. 293(4) of the Bill, where the determination is that the act adversely affecting the environment has occurred as a result of sabotage, the costs of restoration and remediation shall be borne by the local government and the state governments within which the act occurred.

It is submitted that the attribution of vicarious liability to States and local governments within which any act of sabotage adversely affecting the environment has occurred is punitive and exploitative. This punitive legislative policy bears visible imprints of an old colonial policy and practice which the British Consuls and their successors adopted in the Niger Delta from the 1890s of holding communities vicariously liable for the criminal acts of known or suspected individuals or groups within the communities.⁴ In this light therefore, the provisions of the PIB 2012 dealing with vicarious liability of the Niger Delta oil-producing communities seem to enthrone a new phase of internal colonialism in the region.

Furthermore, apart from the fact that exclusive competency over the security agencies is assigned to the federal government under the Constitution of the Federal Republic of Nigeria 1999⁵ (as amended), the Bill seems to gloss over the fact that it is the primary responsibility of the oil companies to take reasonable steps to secure and safeguard their installations. In a recent ruling delivered by the London Technology and Construction Court involving SPDC and Bodo Community in respect of the 2008/2009 Bodo oil spill, the court observed that while SPDC did not have an obligation to provide policing or military surveillance of its installations, SPDC could be legally liable if it has failed to take other reasonable steps to protect its installations such as the use of appropriate technology (leak detection systems), provision of anti-tamper equipment (which could give prompt and early warning of tampering with pipelines), renewing protective coatings on the pipelines, a system of

¹ Sections 5 and 6 (1)(b) of the PIB grant the Minister general supervisory functions over the affairs of the petroleum industry including all operations and institutions in the industry.

² S. 293(1)(b).

³ S. 293(3).

⁴ See, Tekena N. Tamuno, *Oil Wars in the Niger Delta 1849-2009* (Stirling-Horden Publishers Limited, Ibadan 2011) 37.

⁵ See item nos. 38 and 45, Exclusive Legislative List, Second Schedule to the 1999 Constitution.

effective surveillance, and prompt reporting to the Police.¹ The licensee or lessee therefore has a general shielding and caring obligation towards the host community to protect it against avoidable harm arising from its operations.

It is submitted that it is unreasonable to place the primary responsibility for securing and safeguarding petroleum installations on the host States and local governments which have no control over the security agencies and hold them responsible for the alleged acts of unidentifiable third parties who are not shown to be acting as their agents. Clearly the principle of vicarious liability which rests on the maxim— *qui facit per alium facit per se* ('He who acts through another is himself responsible') presupposes the existence of a master-servant relationship.² This is clear from the observations of Lord Brougham in *Duncan v Finlater* that, 'By employing him, I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it.'³

It cannot be argued that third parties who tamper with oil installations belonging to oil companies are agents or purport to act as agents of the oil-producing States or host local government councils within which the sabotage occur. If such criminals are not agents of the oil-producing States or host local government councils (and they are certainly not), on what ground can the oil-producing states or local government councils be held liable vicariously to the extent of bearing the cost of the remediation and restoration of the environment that has been adversely affected by the act of sabotage? Can such punitive measure be justified on ground of public policy?⁴ It is submitted that it is not in consonance with public interest to impose financial liability on oil-producing States for acts perpetrated by unidentifiable third parties merely because such acts occurred within their territorial boundaries. Rather than conduce to public welfare, such punitive legislative policy can undermine public peace and safety.

4.4 ESTABLISHMENT OF ENVIRONMENTAL REMEDIATION FUND

Finally, s. 203 of the Bill provides for the establishment of an environmental remediation fund by the Inspectorate. Under s. 203(1) of the Bill, every licensee or lessee shall pay the prescribed financial contribution to the fund for the rehabilitation of or management of negative impacts arising from the operations of the licensee or lessee and the amount of financial contribution payable by each licensee or lessee shall depend on the size of operations in question and the level of environmental risk that may be determined to exist in accordance with sub-section (2) thereof.

Where a determination is made by the Inspectorate that a negative environmental impact requiring remediation has occurred and the licensee or lessee fails to rehabilitate or manage or is unable to undertake such rehabilitation or to manage any negative impacts on the environment, the Inspectorate may, upon written notice to such licensee or lessee, use all or part of the fund to rehabilitate the environment.⁵ It is clear from a literal interpretation of s. 203(3) of the bill, that the application of the fund by the Inspectorate for rehabilitation or remediation of the environment is permissible only when a determination of the occurrence of negative environmental impacts has been made by the Inspectorate and the licensee or lessee responsible for the negative impacts on the environment fails neglects or is unable to undertake the rehabilitation.

It is striking to note that in this critical area of environmental protection against the hazards associated with petroleum exploration and production, the oil-producing states which are directly affected by the adverse impacts on the environment are made mere on-lookers in the purported efforts to address environmental degradation.⁶ The helplessness of the oil-producing states implies that political and other extraneous considerations at the national level of government could stultify the effectiveness of this regulatory mechanism.

Considering the enormous influence wielded by the International Oil Companies (IOCs) and the persistent lack of political will by the federal government to enforce extant environmental regulations against the IOCs, it seems doubtful if the Inspectorate could make the necessary determination that a negative environmental impacts requiring rehabilitation have occurred. Even where the determination is made and the licensee or lessee fails to rehabilitate the environment there is no guarantee that the remediation fund will be applied judiciously to rehabilitate the environment as contemplated under the bill. This is particularly so because

¹ London Court Ruling: Shell, Ogoni Claim Victory, The Tide (Port Harcourt, Monday 23 June, 2014) <<http://www.thetideonline.com/2014/06/23/london-court-shell-ogoni-claim/victory>> accessed 24 June, 2014.

² *Quarman v Burnett* (1840) 6 M & W. 509; *Hutchinson v York, Newcastle Ry Co.* (1850) 5 Ex. 343; *Jarmakani Trans Ltd. v Abeke* [1963] N. S. C. C. 144, 148; *Itabong & ors v. Akonye* [1964] 3 N. S. C. C. 120, 122-3; *Dalton v. Angus* 6 App. Cas. 740, 829.

³ (1839) Cl. & F. 894.

⁴ Public policy refers to the ideals prevailing in society for the time being as to the conditions necessary to ensure its welfare, see *Statoil (Nigeria) Ltd. v Inducon (Nigeria) Ltd.* [2014] 9 N.W.L.R. (Pt. 1411) 43, 90.

⁵ PIB, s. 203(3).

⁶ The only role assigned to states is under s. 202(1) of the bill wherein the Inspectorate is required to consult State Ministries of Environment when considering environmental management plan submitted by licensees and lessees.

the Inspectorate is not answerable to the oil-producing states and oil-producing communities which suffer the adverse environmental impacts.

The point being made here is that the management of the environmental remediation fund and the enforcement of the regulatory mechanism by the Inspectorate without the active participation of the oil-producing states and the actual victims of environmental degradation– the oil-producing communities’ –cannot produce the desired result. Experience has shown that a centrally-driven development option for the Niger delta is not viable. The Minorities Commission (Wilnik Commission) had warned against such approach thus: ‘We agree that it is not easy for a Government or a Legislature operating from far inland to concern itself, or even fully to understand, the problems of a territory where communications are so difficult, building so expensive and education so scanty.’¹ The result, therefore, is that the environmental degradation associated with petroleum exploration and production will continue to remain with us even after the passage of the PIB 2012.

5. CONCLUDING REMARKS

Perhaps, no single Bill introduced in the National Assembly since the return of democratic rule in 1999 has generated more ethnic sentiments and bickering across the federation than the PIB. These sentiments were wholly responsible for the scuttling of the 2008 version of the PIB by the National Assembly. There is indeed no guarantee that the PIB 2012 will be passed by the current National Assembly before its dissolution on 28th May, 2015. This is because members of the National Assembly from Northern Nigeria appear determined to ensure that the Bill is not passed into law before 29th May, 2015.

The stiff opposition to the PIB 2012 stems from the general perception in the non-oil producing states of the federation that the PIB is designed solely to protect the interests of the oil-producing ethnic minorities of the Niger Delta and that its passage into law will deplete the centrally distributable fund in the Federal Account to the detriment of the non-oil producing states. Nothing can be farther from the truth!

This paper has demonstrated that the PIB 2012 does not offer any cause for celebration by the impoverished oil-producing ethnic minorities of the Niger delta. On the contrary, the bill seeks to deplete the fiscal resources of the oil-producing states/local government councils through a dubious application of the principle of vicarious liability in respect of sabotage of petroleum facilities by third parties within their boundaries. The depletion of the resources of the oil-producing states/local government councils through their application to off-set the cost of repairs of damaged petroleum facilities can only weaken the capacities of these governments to provide basic infrastructure and social amenities for the benefit of their people. It is the position of this paper therefore that, rather than empower the oil-producing states the application of the PIB will weaken them through the imposition of punitive fiscal burdens.

It has also been demonstrated that the Petroleum Host Communities’ Fund does not provide any real relief for the Niger Delta because of the loophole provided in s. 118(5) which could be exploited to deplete the fund. It is equally worrisome that in the critical area of environmental protection, the PIB 2012 does not offer any concrete hope to the region.

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¹ Secretary of States for the Colonies (n20) chp. 7, para. 15.

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