

## PETROLEUM HOST COMMUNITIES FUND: SEEN THROUGH THE LENS OF CHARITABLE TRUST

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### **ABSTRACT**

This article undertakes the viability of the Petroleum Host Communities (PHC) Fund in the Petroleum Industrial Bill (PIB) as a novel initiative towards the economic and social development of petroleum producing communities in Nigeria. The Niger Delta region may be considered as the engine room of Nigeria's economy, but they receive little or no share in the revenue accruable from petroleum exploration and production. This article depicts the applicability of the principles of trust, specifically charitable trust in oil and gas law through the innovation of the PHC Fund whereby oil companies are seen as 'settlers', Niger Delta indigenes are the 'beneficiaries' while the government is seen as a 'trustee' utilizing the fund for bringing sustainable development in the region. This article argues that the purpose of the PHC Fund falls within the spirit and intendments of the Statute of Charitable Uses 1601 thus making it charitable in the bid of removing the impoverish state of the Niger Delta region. This article concludes that the PIB which stands as an antidote to issues pervading the Nigerian oil and gas sector must be passed without delay otherwise the novel concept of PHC Fund may not see the light of the day.

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## INTRODUCTION

It is not out of place for one to assert that the law of trust is an offspring of the principles of equity. The unique principles of equity, irrespective of the criticisms levied against it, it has contributed more in achieving positive justice among disputants. Kayode Eso J.S.C puts succinctly that:

*“Surely, equity should not be treated as a tyrannous phenomenon threatening the law. It does not exist in vacuo or supposedly to roam about pouring water on fire of the law. Equity is not a warlord, determined to do battle with the law. It is part of a legal system which has mixed with the law and the mixture is for the purpose of achieving justice.”<sup>1</sup>*

The law of trust as earlier mentioned is a significant product of equity. Trust in ordinary parlance may mean to place something in somebody’s care<sup>2</sup>; confidently allow someone to do something with the belief that such a person will behave responsibly or properly.<sup>3</sup> However under the lexicon of the principles of equity, it is an obligation imposed on a person by another for the benefit of other specified persons. According to Petit:

*“a trust is an equitable obligation, binding a person*

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<sup>1</sup> *Trans Bridge Co. Ltd v Survey International Ltd* (1986) 4 NWLR (pt. 37) 576

<sup>2</sup> Encarta Dictionaries

<sup>3</sup> *Ibid* (n2)

*(who is called a trustee) to deal with property, over which he has control (which is called the trust property) whether for the benefit of persons (who are called the beneficiaries or cestuis que trust) of whom he may himself be one and any of whom may enforce the obligation or for a charitable purpose which may be enforced at the instance of Attorney General, or for some other purpose permitted by law though unenforceable.<sup>4</sup>*

Keeton described trust as:

*“the relationship which arises where a person called the trustee is compelled in equity to hold property, whether real or personal and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed cestui que trust) or for some object permitted by law, in*

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<sup>4</sup> Petit P. (2001) *Equity and the Law of Trust* (9<sup>th</sup> Edition) London: Butterworths Tolley p. 2

*such a way that the real  
benefit of the property  
accrues, not to the trustee but  
to the beneficiaries or other  
objects of the trust<sup>5</sup>.*”

However Roger Leroy Miller and Gaylord A. Gentz<sup>6</sup> saw trust as any arrangement through which property is transferred from one person to a trustee to be administered for the transferor’s or another party’s benefit.

From the above definitions, it is imperative to assert that a trust relationship creates some-sort of a fiduciary relationship among all the parties to the trust. A person known as the ‘*settlor*’ gives his property which may tangible or intangible to another known as the ‘*trustee*’ for the benefit of the settlor or other persons named by the settlor as ‘*beneficiaries*’. Confidence is reposed on the trustee to deal with those properties righteously. In the case of *Maguire v Makaronis*<sup>7</sup> it was held that equity intervenes not so much to recoup a loss suffered by the plaintiff as to hold the fiduciary to and vindicate the high duty owed to the plaintiff. It went further to state that those in a fiduciary position who enter into transactions with those to whom they owe fiduciary duties, labour under a heavy duty to show the righteousness of the transactions. In addition, a trust relationship is imposed when the legal owner of the property has behaved unconscionably in some ways or it will be unconscionable to deny the beneficial rights of another.

This unique creation of equity cuts across various spheres of life without one noticing. Its ingredients can be found in banking, pension schemes, capital market, companies etc. Under banking operations, the owner of an account in a bank is the settlor and beneficiary while the bank

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<sup>5</sup> Keeton G.W. (1968). *Law of Trust*, (9<sup>th</sup> Edition) London: Pitman Publishers, p. 3

<sup>6</sup> Roger, L.M. and Gaylord, A.G. (1996). *Business Law Today*, (4<sup>th</sup> Edition) South-Western, Div Of Thomson Learning, p. 944

<sup>7</sup> *Maguire v Makaronis* (1997) 188 CLR 449 at 465

stands as a trustee keeping the monies or securities of the owner of the account for his benefit. On account of death of the actual owner of the account, the next of kin stands as the beneficiary while the bank retains the position as the trustee. Notably, there exist trust relationships in oil and gas practice especially under charitable trust. This article seeks to analyze how the law of trust interrelates with oil and gas law under the umbrella of charitable trust, in respect of the novel arrangement of the Petroleum Host Communities (PHC) Fund provided for in the Petroleum Industry Bill 2012. The Bill which has being before the National Assembly for over 14 years now has prevented substantial improvement and investment in the oil and gas industry. The Bill has being held to be such that will reform the oil and gas industry not only for incumbent administration but for subsequent administrations to come. An example of such reform is the ***'Petroleum Host Communities Fund'*** created in favour of oil producing states whereby oil companies shall donates certain monies for the improvement of the lives of people in those states. In essence by analogy, a trust is created specifically an express public trust (Charitable Trust), as the oil companies are settlors, the state is the trustee, while the people in the oil producing state are the beneficiaries.

### CHARITABLE TRUST

There is difficulty in giving a comprehensive definition of charitable trust. However the legal and accepted definition was that given by Lord Macnaghten in *Commissioner of Income Tax v. Pemsel*<sup>8</sup> as follows:

*“Charity in its legal sense  
comprises four principal  
divisions: trust for the relief  
of poverty; trusts for the  
advancement of education;  
trusts for the advancement of*

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<sup>8</sup> *Commissioner of Income Tax v. Pemsel* [1891] A.C. 531 at 583

*religion and trust for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed every charity that deserves the name must do either directly or indirectly.”*

Traditionally for a trust to be considered as charitable, its purpose must fall within the spirit and the intendments of the preamble of the *An Acte to Redress the Misemployment of Landes, Goodes and Stockes of Money heretofore Given to Charitable Uses*<sup>9</sup>, commonly (and hereinafter) referred to as the **Statute of Charitable Uses, 1601**<sup>10</sup>. The Preamble listed the following purposes as charitable:

*“The relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars of universities; the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of*

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<sup>9</sup> 43 Elizabeth I, c. 4

<sup>10</sup> This statute is also frequently referred to as the Statute of Elizabeth

*orphans; the relief, stock or maintenance of houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives and the aid or ease of any poor inhabitants concerning payments of fifteens, setting out soldiers and other taxes."*

Notably, there are divergent views as regards the source of the enumerated purposes stated above. The most commonly cited source is William Langland's poem, *The Vision of Pier Plowman* written in 1362.<sup>11</sup> The poem goes thus:

*And therewith repair hospitals  
help sick people  
mend bad roads  
build up bridges that had broken down  
help maidens to marry or to make them nuns  
find food for prisoners and poor people  
put scholars to school or to some other craft  
put religious orders and  
ameliorate rents or taxes.*

Other writers believe that the true sources of the Preamble are to be found amongst the titles and provisions of the public statutes of the Tudors

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<sup>11</sup> Picarda H, Q.C. (1999). *The Law and Practice Relating to Charities*, (3<sup>rd</sup> edition) London: Butterworth, p.9

monarchs.<sup>12</sup> These statutes provide a compelling explanation for the inclusion in the Preamble of several objects that ordinary persons would not otherwise consider being charitable.<sup>13</sup>

Irrespective of whatever source, it is worthy to note that this preamble has been repealed but our courts use the list of charities in the preamble to determine disputes.<sup>14</sup> In addition, whether a trust is charitable or not is one of law to be decided by the court in the light of the circumstances in which the institution or trust came into existence.<sup>15</sup>

The law favours charitable trusts by according them certain privileges, such as an advantageous tax status. Before a court will enforce a charitable trust, it must examine the charity and evaluate its social benefits. The court cannot rely on the view of the settlor, the one who establishes the trust, that the trust is charitable.<sup>16</sup>

It is imperative to assert that the use of charitable trust in Nigeria is rather not frequent. Based on the difference in the social structure of the English and Nigerian societies, charitable trust and trust generally is at a low-pace in Nigeria.

### **PETROLEUM HOST COMMUNITIES FUND UNDER THE PETROLEUM INDUSTRY BILL (PIB)**

The PIB's journey began as far back as the year 2000 with the inauguration of the Oil and Gas Sector Reform Implementation Committee (OGIC) by the Nigerian government to carry out a comprehensive reform

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<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> See *Iyanda & Ors v. Ajike & Ors* (1948) 19 NLR 11;

<sup>15</sup> *Incorporated Council of Law Reporting for England and Wales v A.G.* [1971] 3 All E.R. 1029

<sup>16</sup>What is Charitable Trust. [Online] Available: [www.freedictionary.com](http://www.freedictionary.com) (January 12, 2014)

of the Nigerian oil and gas industry, i.e. to cover the upstream, midstream and downstream sectors of the industry.

Following the prerequisites for a bill to become law, the PIB was first presented to the National Assembly in September 2008. It is disheartening to realize that since 2008 till date the PIB hasn't being passed into law. The 6<sup>th</sup> National Assembly couldn't pass the PIB into law even after concluding the public hearing and after several promises to Nigerians that they will do so.<sup>17</sup>

The much anticipated PIB 2012 was presented by the Executive arm of the Nigerian government to the 7<sup>th</sup> session of the National Assembly on 18<sup>th</sup> July 2012 to enable the commencement of legislative deliberation. There has however being intense debate among various interest groups without any concrete progress.<sup>18</sup> Indeed, there are indications that the delay in the passage of the PIB has resulted in a significant reduction in investments in the industry.

There are too many versions of the PIB in circulation. For instance, there were indications that there exist up to four versions of the PIB and the general public was worried regarding which of the four versions is the correct version.<sup>19</sup> However, this article will focus on the Petroleum Industry Bill 2012<sup>20</sup> comprising three hundred and sixty-three (363) sections together with five schedules.

Section 116 makes provision for the establishment of the Petroleum Host Community Fund, stipulating thus:

*“There is established a fund  
to be known as the Petroleum*

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<sup>17</sup> Comrade Hyginus C. O.: The Petroleum Industry Bill and the Challenges of Transparency in the Oil and Gas Industry [Online] Available: [http://newsdiaryonline.com/chika\\_bill.htm](http://newsdiaryonline.com/chika_bill.htm) (August 19, 2014)

<sup>18</sup> Ibid

<sup>19</sup> Ibid

<sup>20</sup> This is the current version before the National Assembly

*Host Communities Fund (in this Act referred to as 'the PHC Fund')*”.

The basic rationale behind this novel concept is for the development of the economic and social infrastructure of the communities within the petroleum producing area.<sup>21</sup> All upstream petroleum producing companies are required to make monthly payments of 10% of their net profits.<sup>22</sup> While profits derived from upstream petroleum operations in onshore, offshore and shallow water areas are to be remitted directly to the PHC Fund,<sup>23</sup> profits derived from upstream petroleum operations in deepwater areas are to be remitted into the fund for the benefit of the petroleum producing littoral states of Nigeria.<sup>24</sup>

The literal interpretation of the provision above is that, oil companies engaging in the exploration of crude oil shall pay certain monies, which is 10% of their net profits (deduction of gross profit from cost incurred in the exploration of oil) both in onshore, offshore, shallow waters and in deepwater upstream petroleum operations; these monies will be sent to the newly created PHC Fund and applied solely for the benefit of states considered to be oil producing states.

Furthermore, while 10% of net profits contribution to the PHC Fund places additional fiscal obligation on companies in the upstream subsector, such contributions constitutes an immediate credit against a contributing company's total fiscal rent obligations.<sup>25</sup> This brings about some form of advance payment of taxes as contributions to the PHC Fund are eventually deductible for final tax purposes.

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<sup>21</sup> Section 117

<sup>22</sup> Section 118 (1)

<sup>23</sup> Section 118 (1)(a)

<sup>24</sup> Section 118 (1)(b)

<sup>25</sup> Section 118 (4)

Moreover, where an act of pipeline vandalism, sabotage or other civil unrest occurs which causes damage to petroleum facilities within a host community, the cost of repair of such facility shall be paid from PHC Fund entitlement unless it is established that no member of the community is responsible.<sup>26</sup> In essence, it is still these same contributions from the oil companies that will be used to repair pipelines that have been damaged owing to vandalism, sabotage, crude oil theft etc. This is however question-begging on how this provision is reasonable. One may argue that petroleum companies should seek for other funds to repair any damage whatsoever done to their facilities rather than taking out from the PHC Fund. Taking out from the funds in respect of this matters amounts to a misapplication, rather than applying the funds to the development of other key areas within the host community. However, on the flip side, one can also rightly argue that the above provision seeks to abate all oil-related menace. Using the monies from the PHC Fund would make the indigenes of the host communities to help law enforcement agencies arrest criminals in the bid of stopping these appalling activities and preventing the oil companies to use the PHC Fund to repair the damages done to their facilities, hence applying the funds solely for the development of the economic and social infrastructure within the host community concerned.

Irrespective of where the pendulum of the argument tilts, it is worthy to note that most of the facilities of oil companies are outdated and obsolete. The need for constant calibration is imperative. The position would be different if the pipelines and other oil facilities are standardized and up-to-date in terms of technology. Oil thieves would find it difficult to vandalize these pipelines if they aren't sub-standard or obsolete as well as where appropriate security measures are put in place.

It is noteworthy that the Niger Delta region in Nigeria has been regarded as the reservoir of oil and gas exploration and exploitation.

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<sup>26</sup> Section 118 (5)

Discovered over five (5) decades ago, oil became and has remained the backbone of the Nigerian economy. However, irrespective of these abundant resources in that region, the large revenues accrued have barely touched the Niger Delta region. It's quite saddening to discover that the region has been tagged with deprivation, underdevelopment and unemployment, with majority of its people living in acute poverty. The region has been described as suffering from "*administrative neglect, crumbling social infrastructure and services, high unemployment, social deprivation, abject poverty, filth and squalor, and endemic conflict*".<sup>27</sup>

The Petroleum Host Communities Fund is a means of improving the lives of people in the Niger Delta region. This is a novel concept in Nigerian petroleum law as it is essentially targeted at the development of the economic and social infrastructure in petroleum producing communities. An express public trust (charitable trust) is created in favor of the Niger Delta inhabitants in the sense that, some form of statutory trust is created as the oil companies are mandated to make monthly payments of 10% of their net profit. In light of this, the contributions will be used for economic and social development of the region making it to fall within the spirit and intendment of the preamble of the Statute of Uses Act 1601 "*...the relief of aged, impotent and **poor people**<sup>28</sup>...*" In addition, it falls under the four heads of Lord Macnaghten's definition of what is charitable trust "*...trust for the relief of poverty...trust for other purposes beneficial to the community...*"

The inhabitants in the petroleum producing states are unable to maintain a modest standard of living. The general standard of the communities reveals the need of basic human requirements e.g. clean water, education, employment opportunities, good roads, hospitals etc. The PHC Fund is charitable as it will be used to serve as a relief for the

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<sup>27</sup> UNDP Report, 2006. [Online] Available: <http://web.ng.undp.org/reports/nigeriahdr/report.pdf> (July 12, 2014)

<sup>28</sup> Emphasis mine

impoverish state of the Niger Delta region as well for other purposes beneficial to the communities. The oil companies may by analogy be termed settlors, the monthly payments may be termed trust funds, the government will act as trustees and the petroleum producing states shall be the beneficiaries. A charitable purpose of the PHC is one designed to benefit, ameliorate, or uplift mankind in every ramification.

It may not be out of place to assert that contributions to the PHC Fund should not only be made when profits are made. There are certain situations whereby profits won't be made; can it now be said that because profits are not made, there won't be any remittance to the PHC Fund? It can be tentatively recommended that contributions should not be based on the profits made by the oil companies. In so far as exploration and production operations are carried out in communities whereby the inhabitants would be adversely affected, it should be part of the DNA of the oil companies to increase, develop and maintain the standard of living of the host communities.

### **CONCLUSION**

One may reasonably assert that the Petroleum Industrial Bill (PIB) is a new dawn and not a false hope to the Nigerian oil and gas sector. It has come as an antidote to intractable issues surrounding the Nigerian oil and gas sector. The Petroleum Host Communities (PHC) Fund initiative in the PIB which stands as a novel concept will not see the light of the day if the bill is eventually not signed into law. Problems ranging from unemployed youths, environmental degradation, lack of basic amenities etc. stands as the status quo at the Niger Delta region. One of the therapies to this socio-economic imbalance in the Niger Delta region is the PHC Fund. The PHC Fund is aimed for the development of economic and social infrastructure of petroleum host communities thereby acting as a means of improving the lives of people in the Niger Delta region. This curiously brings to mind the unique principles of charitable trust as the PHC Fund is a trust fund aimed

for bringing sustainable development for the public in the Niger Delta region. A charitable trust fund is created in favour of the public living at oil producing communities and it would be unconscionable on the part of the Federal government of Nigeria acting as trustees to misapply those funds for purposes other than purposes beneficial to the public.

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