TOWARDS A PARADIGM SHIFT IN THE OWNERSHIP CONCEPT OF THE PETROLEUM AND NATURAL GAS IN NIGERIA

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2021.

1.0 INTRODUCTION

The concept of private property ownership is fundamental to contemporary democratic society. In general property law, the ownership of property is normally described as a 'bundle of legal and equitable rights'. The bundle includes the owner's right to use and enjoy the property, the right to sell or rent the property to others, and the right to exclude others from using or interfering with the property. In oil and gas law, the proprietary rights over crude oil and natural gas presents diverse legal challenges thus, we must explore the following theories that underpins any possible claims or disputes arising from contentions with regards to crude oil ownership.

The major benefit of vesting these natural resources in the Government is borne out of the desire to foster international business cooperation amongst Countries and Corporate Organizations with the aim of generating revenue for the running of the State.

The situation in Nigeria is no exception as the ownership and control of the natural resources is vested in the Federal Government. In this particular instance, the ownership and control of Petroleum is vested in the Federal Government of Nigeria which then distributes to the component entities that constitute the Federation the revenue generated from the petroleum sector. This system has ensured stable revenue for the sustenance of the country. In the United States of America, the ownership and control of petroleum is vested in both the state and individual. This system allows for joint ownership between the state and individual.

In Nigeria where the ownership and control of the petroleum sector have been vested in the Federal Government, issues relating to transparency, accountability; and environmental degradation due to the exploration and exploitation of petroleum have led to the agitation of communities where this product is discovered for its ownership and control from the Federal Government.

The United Nations General Assembly Resolution 1803 (XVII) of 14th December, 1962 provides that States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the

Charter of the United Nations and the principles contained in the resolution. These principles are set out in eight articles concerning, *inter alia*, the exploration, development and disposition of

natural resources, nationalization and expropriation, foreign investment, the sharing of profits, and other related issues.

Currently, the position of the law in Nigeria[1] and the United Nations General Assembly resolution 1803 (XVII) of 14th December, 1962 tagged "Permanent sovereignty over natural resources" supported the position of vesting the ownership and control of petroleum in the Federal Government of Nigeria

This paper seeks to examine the concept of ownership of petroleum and natural gas in Nigeria and see if there should be a shift in the ownership concept of petroleum and natural gas in Nigeria.

2.0 THEORIES OF OWNERSHIP OF NATURAL RESOURCES

The ownership regime of natural resource can also be ascertained from international conventions and customary international law, common law and national constitutions". This situation has given rise to the emergence of different theories of ownership and control of natural resources.

There are several theoretical concepts of ownership that govern the legal relationship and entitlements over natural resources. But due to the fugacious nature of oil and gas, a neighbor could drill a well on his side of the fence and drain away an owner's oil or gas. How someone could be said to own oil or gas unless he or the state could prevent the owner's loss. Then, as now, it is impossible to trace the oil and gas produced from a well so as to determine where it actually came from in the subsurface with any degree of certainty. This problem was especially acute in the United States because the 14th Amendment in the American Constitution specifically protects private property.[2]

3.0 ABSOLUTE OWNERSHIP THEORY

This theory declares that whoever owns a piece of land owns the natural resources lying underneath it. Absolute ownership has been defined as "the actual right a person has on a property. A property

[1] Section 44 (3) CFRN, Section 1 Land Use Act, Section 1 Petroleum Act

[2] About owning petroleum and natural Gas,available athttp://www.fhoa.ca/about-freehold-mineral-rights/about ownig-petroleum-a-gas-html>accessed on 3rd April 2019.

in actual ownership can be freely transferable and inheritable". Land includes the right to minerals underneath and the airspace over it. The definition of "absolute ownership" can be expressed in the Latin maxim *quic quid plantatur, solo solo cedit* (whatever is affixed to the soil belongs to the soil). This is only a general statement of the law. This is so, because in some jurisdictions like Nigeria, though title to land vests in the Governor of each state, the natural resources which by definition is part of the land does not belong to the state but vests in the federal government. The federal government absolutely owns the minerals.

Another Latin maxim that explains this theory is *cojus est solum, ejus est usque ad coelom ad inferos*, which means "to whomever the soil belongs he owns also the sky and to the depth". Again, this principle is limited to a certain extent as the advent of air and space travels have placed a limitation on the application of this theory. According to Aladeitan, "the implication of the ownership in place theory is that the land owner owned the land and the resources beneath his land absolutely and could confer separate titles to them by reservation, separation, or severance".[3] Nigeria's Petroleum Act codifies this theory by stating that "the entire ownership and control of all petroleum in, under, or upon any lands to which this section applies shall be vested in the state".[4] Therefore, in Nigeria natural resources is absolutely owned by the state. The theory of "ownership-in-place" was first adopted in the U.S. state of Texas in respect of ownership of oil and gas, "that a landowner owns a corporeal possessory interest (similar to a fee simple) in the substances beneath his land, but his ownership is a determinable fee subject to the rule of capture". The theory was given judicial backing in a leading case where the court stated that: Oil and gas in place are minerals and realty subject to ownership, severance, and sale while embedded in the sands and rocks beneath the earth's surface in like manner and to the same extent as is coal or any other solid minerals.[5] One of the leading cases for the ownership in place theory, as it is applied in Texas is *Brown v. Humble Oil & Refining Co*.[6] where the Court stated: Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in

[3] L.Aladeitan `Ownership and control of oil, Gas and mineral resources in Nigeria :between legality and legitimacy(2013) Thurgood marshall law review vol 38,159 at 160.cited by Theodeore Okoknwo "ownership and control of natural resources under the Nigerian constitution 1999,and its implications for environmental law and practice,2017 ILR,vol 6 no1

[4] Section 1,petroleum Act,CAP 10,LFN 2004

[5] Stephen county v mid-kan sas oil and gas co,(1923)113 Tex 160,167,254,S.W290,292

[6] (1935) Tex S.C,83 SW,(2d) 935 at940

connection with the law of capture. *This rule gives the right to produce all of the oil and gas that will flow out of the well of one's land and this is a property right*. And it is limited only by the physical possibility of the adjoining landowner's diminishing the oil and gas under one's land by the exercise of the same right of capture.

4.0 QUALIFIED INTEREST THEORY

This theory states that no one can be claim ownership of crude oil unless he can prove that he captured it. This theory is built upon the rule of capture. The implication of the theory is that a private land owner cannot claim the oil and gas that straddles beneath his land until he drills and extracts the crude oil and gas.

The key points to note on this theory are

a) Where the crude oil has migrated to adjacent land, title of former owner is now gone. However, the crude oil land owner can stop the oil from migrating by preventing the drain or by drilling several wells to store the draining oil.

b) The party who extracts oil and gas from beneath the land acquires absolute ownership of those extracted substances even though they may be drained from beneath the land of another.

c) The owner thereof may acquire the crude oil without being liable to the owner of the adjacent lands.

d) If the oil well is drilled at a slant or horizontally penetrating the property of another, and if the aggrieved party can prove it, the oil or gas produced from the well belongs to the owner of the land under which the well is bottomed.

In Ohio Oil Company v. Indiana USSC[7] the court held that "Although by virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil, until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession."

5.0 NON-QUALIFIED OWNERSHIP THEORY

[7](1900) 44,LED 729 para 24

The non-ownership theory emphasizes that no person owns the crude oil until produced, or captured and controlled. However, the right to produce or extract crude oil is limited to those persons who own or have the rights to drill on the land where the straddle of the crude is embedded. This theory states that petroleum is not capable of being owned since it is fugacious (has capacity to migrate).In essence, since crude oil is in fluid form and can move from one place to another, it cannot be owned in the strict sense of the word. There is not much support for this theory as modern practice show that petroleum though may move from one place to the other is still subject to ownership by the person or authority that captures it at any particular point in time.

In Brown v. Humble Oil & Refining Co.[8] Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and this is a property right. And it is limited only by the physical possibility of the adjoining landowner's diminishing the oil and gas under one's land by the exercise of the same right of capture.

In Rich v. Donaghey[9] the court held that "... no absolute right or title to the oil or gas which might permeate the strata underlying the surface of their land, as in the case of coal or other solid minerals fixed in, and forming part of, the soil itself. In Strother v. Mangham (1915) 138 La. 437the court held "The doctrine that the owner of the land has no proprietary right in the oil and gas beneath the surface until he has reduced it to possession in no manner denies to such owner the exclusive right to the use of the surface for the purposes of such reduction, or for any other purpose not prohibited by law, but, to the contrary, concedes that right, as inherent in the title to the land, and subject only to the control of the state, in the exercise of its police power; and the right may be sold, as may any other right, and may carry with it the right to the oil and gas that may be found and reduced to possession in Borys v. CPR and Imperial Oil Limited J.C.P.C. [1953] 7 W.W.R. (NS) p. 550 -551,the court held "The substances are fugacious and are not stable within the container although they cannot escape from it. If any of the three substances (petroleum, gas or water) is withdrawn from a portion of the property which does not belong to the appellant but lies

[8] (1935) Tex, SC,83,SW,(2D)935
[9] (1918) Okla S.C,3 ALR,352,P 355

within the same container and any oil or gas situated in his property thereby filters from it to the surrounding lands, admittedly he has no remedy. So, also, if any substance is withdrawn from his property, thereby causing any fugacious matter to enter his land, the surrounding owners have no remedy against him. The only safeguard is to be the first to get to work, in which case, those who make the recovery become owners of the material which they withdraw from any well which is situated on their property or from which they have authority to draw."

6.0 THE EMINENT DOMAIN THEORY/OWNERSHIP CONCEPT IN NIGERIA

The theory of eminent domain states that the government or the monarch of a country can compulsorily take private lands for public use with or without compensation. The implication of this theory is that, the government can enact coercive legislation to back its desire to seize any land from private persons for any purpose it may classify as public good. In Nigeria, the examples of coercive statutes that empower the eminent domain are:

1. Section 1 of the Land use Act [10]vest all lands in the governor of each state to be held in trust and administered for use and common benefit of all Nigerians in accordance with the provision of the Act while Section 28(1)[11] states that "it shall be lawful for the Governor to revoke a right of occupancy for overriding public interest."

2. Section 44(3) of the Constitution[12] states".... entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic zone of Nigeria shall rest in the Government of the Federation''.

The consequence of these provisions is that no person may undertake any activity for the exploration or production of oil and gas without a written authorization of the federal government. such authorization would be by the grant of oil prospecting license and or an oil minning lease.[13]

[10] Cap L5,LFN 2004
[11] Ibid
[12] Cap C23 LFN 2004
[13] M.T Ladan,`Overview of energy resources Law in Nigeria'(2010) 4 NJILJ,P 126

3. Section 1 of the Petroleum Act [14] is to the effect that the entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the state. The section applies to all land (including and covered by water) which is:

(a) is in Nigeria or

(b) is under the territorial waters of Nigeria,

(c) forms part of the continental shelf; or

(d) forms part of the Exclusive Economic Zone of Nigeria."

The right to ownership and control of natural resources under the Nigerian law is constitutional. The Constitution of the Federal Republic of Nigeria 1999 (as amended) section 44 (3) and item 39 Schedule II of the Exclusive Legislative List vests the control and management of the natural resources and hydrocarbon operations on the federal government for the common good and benefit of the citizens. *Attorney-General of the Federation v. Attorney General of Abia State & 35 Others (No. 2) (2002) 6 NWLR (Part 764) 542* where the Supreme Court of Nigeria made several judicial pronouncements on the constitutional question of the derivation principle and ownership and control of natural resources in the Nigeria Federation.

Natural resources are raw materials that are extracted from the ground or soil. They are found naturally embedded in the soil and can only be modified by man for his benefit and use. The natural resource includes fossil fuels, coal, oil, natural gas, gold, copper, iron, diamonds and minerals. Aladeitan, has described natural resources as "a gift of nature and an endowment of comfort that makes the existence of mankind complete".Since natural resources can be used to create and increase the wealth of a country, its ownership and control has become a subject of legal, political and socio-cultural controversy, for whoever controls them controls the environment. Thus, it is imperative that the wealth which is created through the ownership of natural resources must be distributed in such a manner that guarantees a reasonable share for the locality from which the natural resources are produced.[15]

[14] Cap p10,LFN 2004
[15] Ibid 2

Ownership and control of Land and Petroleum have been of great controversy in Nigeria. The differing stances between the state and stakeholder communities as to who has a legitimate claim to land and the minerals under it can be quite complicating. Section 44 (3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) states that "Notwithstanding the foregoing provisions of this section, the entire property in and control of all mineral oils and natural gas in under, or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly"

In Nigeria, the ownership and control of natural resources popularly termed "resource control" in terms of crude oil and the natural gas which are produced in the Niger Delta areas of the country has given rise to ethnic agitations and environmental terrorism "due partly to a sharp reaction by the oil producing communities, which suffer grievous hardships resulting from the operations of the laws governing the sector".[16] These natural resources have been described as a curse to the people as the citizens continue to live in abject poverty with little or no development. The oil companies operating in these areas carry out hydrocarbon operations without due regard to the best international practices in the industry, thus, leaving trails of environmental destruction and human neglect. Within the Nigerian polity itself, ownership and control of the natural resources have equally generated crisis in the way and manner the financial proceeds are shared among the federating units of Nigeria in what is popularly known and called Revenue Allocation, which is tied to ownership and control of the natural resources.

The concept of ownership is therefore very material on who controls the natural resources. *Ownership* connotes *dominium that* is "complete power to use, to enjoy, and to dispose of property at will". This means that the legal right to own and control natural resources in Nigeria resides with the federal government which exercises "the maximum degree of formalized control over…" mines and minerals, including oil fields, oil mining, geological surveys, and natural gas and nuclear energy.[17] Thus, ownership of natural resources as embedded in the Nigerian Constitution translates into "State Ownership", with the state granting leases of oil wells or oil fields to private

[16] F.o Ayodele`Appraising the oil and gas laws:A search for enduring legislation for the niger delta'(2001)JSDA 3,1
[17] Items 39 &41 schedule 11,exclusive legislative list, cap c.23 LFN 2004

companies for mining operations. This grant of mining leases to private companies gives them qualified ownership of the natural resources located within the area of the oil mining licenses.

Prof M.A Ajomo argument on the concept of ownership of petroleum and natural gas is as follows:

1. If ownership is vested in the Federal Government it makes room for uniform Promulgation and development in the country.
2. Revenue generated from places where or section where the petroleum and natural gas is found could be used for even development.
3. There is the likelihood of some states or individual becoming rich than the federal government if ownership is vested in an individual or community.
4. Mining and natural gas is under the exclusive legislative list of the government.

According to Ajomo, "no individual, organization, or any constituent State of the federation has ownership rights over mineral oil in situ or its proceeds whether from onshore or offshore mining".[18]

Professor Sagay, is of the opinion that the common law principle of quic quid plantatur solo solo cedit prevail over the concept of ownership, however this doctrine is an exception to the ownership of land in which mineral oil is found as legislative incursion has vested ownership of such lands the federal government.

In Nigeria, the federal government owns and controls the ownership of mineral resources. Laws, such as the Constitution of Nigeria, the Land Use Act and Petroleum Act, amongst others, vest the total ownership and control of mineral resources in the federal government to the detriment of the states, local governments and the local communities wherein the mineral resources are situated. One plausible argument for the federal government's ownership of mineral resources is that the minerals (oil and gas included) in or upon any land in Nigeria "are viewed by the state as public goods and government's intervention in their exploitation becomes simply a case of public use." That is, the mineral resources are managed or held in trust on behalf of the Nigerian people by the federal government for the benefit and development of the country.

[18] [18] See M.A. Ajomo, "*Ownership of Mineral Oils and the Land Use Act"* in A. Aguda, (ed.) Nigeria Current Law Review 330 (Lagos: NIALS, 1982), p332

However, it is the general consensus that ownership of mineral resources by the federal government has been detrimental to the people of the oil producing areas of Nigeria.[19]

Itse Sagay is in support of this view and he states thus: Regarding the danger of private ownership of oil creating enormous wealth for a few people who would then misuse these funds, the question may be asked: Has central ownership and control prevented the emergence of a class of enormously wealthy individuals in Nigeria? Have the proceeds of oil been prudently and patriotically put to use? Regarding the country's extra sales of crude oil during the Gulf War alone, the Okigbo Panel noted that some US$ 12.4 billion is yet to be properly accounted for.[20]

7.0 SHOULD THERE BE A PARADIGM SHIFT IN THE OWNERSHIP CONCEPT OF THE PETROLEUM AND NATURAL GAS IN NIGERIA?

In Nigeria, the ownership of mineral resources is vested in the federal Government,[21] while the land is vested in the state governments.[22]

Section 1 of the Petroleum Act tagged "vesting of petroleum in the state" states that "the entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State" This section applies to all land including land covered by water under the territorial control of the country or which forms part of the continental shelf and that which is within the exclusive Economic Zone of Nigeria. Section 1 of the Land Use Act 1978 equally states that "subject to the provisions of this Act, all Land comprised in the territory of each state of the federation are hereby vested in the governor of the state and such land shall be held in trust and administered for the use and common benefit of all Nigeria in accordance with the provisions of this Act"

Also, Section 44 (3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) states that "Notwithstanding the foregoing provisions of this section, the entire property in and control of all mineral oils and natural gas in under, or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of

[19] E.Egbosa" *Annual Survey of International & Comparative Law", Vol. 21 [2016], Iss. 1, Art. 6*
[20] Itse Sagay, *Ownership and Control of Nigerian Petroleum Resources: A Legal Angle, in* nigerian petroleum business handbook 180 (V.E. Erhonsele ed., Advent Communications Ltd.(1997)cited in *Annual Survey of International & Comparative Law, Vol. 21 [2016], Iss. 1, Art. 6*.
[21] Section 44 (3) 1999 CFRN
[22] Section 1 Land Use Act 1978

the Federation and shall be managed in such manner as may be prescribed by the National Assembly

Land is an indispensable factor of production. It is a basic factor of division of labour. Land is a natural endowment, which is a gift of nature. Every person requires land for his supports, preservation and self-actualization within the general ideals of the society. Two Latin maxims are frequently employed to define "land" quic quid plantatur solo solo cedit, and cuius est solum eius est usque ad colum et ad iferos. The former means that "whatever is attached to the ground becomes part of it", the latter means "he who owns the land owns everything extending to the heavens and to the depth of the earth."

Common law conception of land is that it is made up of the following:

· The surface of the soil or the earth surface

· Everything naturally growing or attached to the surface of the soil

· Everything inside the sub-soil

· The air space above the soil.

· Things artificially attached to the soil.

However, such artificial attachment must be for a permanent purpose. This common law principle has been judicially recognized as an established principle of our law by the Supreme Court. In the landmark cases of *Otogbolu v Okeluwa*[23] , *Francis v Ibitoye*[24] and *Adamu v Ikharo*[25], our courts equally defended this principle.

Under common law, certain exceptions are recognized in relation to this maxim quic quid plantatur solo solo cedit, which include:

a. That a tenant has right to remove at the end of his tenure his trade fixture (e.g. Counter, shelves, batcher), ornamental or domestic fixture[26] (e.g. flower, air conditioner, ceiling fan); and finally agricultural fixtures (e.g. poultry cage/pen, yam barn).

b. In respect to things inside the sub-soil, gold and silver are exclusively rested in the crown as a Royal Prerogative.

[23] (1981) 68 S.C. 99@146
[24] (1936) Is nir p.11
[25] (1988) NWLR pt. 89@ p.471
[26] Section 3 UK Landlord and Tenant Act 1861

Then, on the second maxim "cuius est solum eius est usque ad coelum et ad inferos"[27] there is a presumption that a landowner also owns all mineral on or beneath the surface of that land. This was applied in the celebrated mining case of *Commonwealth v. New South Wales*.[28]

The presumption is subject to the exception of the Royal metals. As early as the sixteenth century, the common law held that all gold and silver, whether situated on public or private land belonged to the Crown.[29]

This common law principle has been adopted in Nigeria as part of received English Law by section 3(3) of Interpretation Act 1945[30]; imports the common law meaning of land into Nigerian jurisprudence. The section defines land as meaning the earth surface and everything attached to the earth or permanently fastened to anything that is attached to the earth and all chattels real (i.e. a legal expression for lease- hold interest). Unfortunately, against the spirit of common law, the section expressly excludes mineral from the definition. It went further to give the ownership of all minerals (petroleum inclusive) to the central government.[31]

8.0 STATE OWNERSHIP OF LAND AND AGITATION FOR RESOURCE CONTROL

The general law governing the title and use of Land in Nigeria today is the Land Use Act 1978. The Act provides:

Subject to the provisions of this Act, all Land comprised in the territory of each state of the federation are hereby vested in the governor of the state and such land shall be held in trust and administered for the use and common benefit of all Nigeria in accordance with the provisions of this Act.[32] By virtue of this provision, the governor of the state, for the benefit of all Nigerians, now holds all land within the territory of each state of the federation in trust. It therefore means that the governor is the trustee of the land of the people who are beneficiaries.

It therefore means that the trustee has the right to manage, control and use the trust property against all persons except the beneficiaries. It equally means that the right of ownership is rested on him, not as owner or but on behalf of the owner.

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[27] Which only explains the former quic quid platantur solo solo cedit
[28] (1923) 33 CLR 1@ 23
[29] Case of Mines (1567) 1 plowd 316, 75 ER 472
[30] Cap. 192, LFN 1990
[31] Minerals Act Cap 226 1990, Petroleum Act 1969 and Section 44 (3) 1999 CFRN
[32] Section 1 Land Use Act 1978

When Section 1 of the Land Use Act is read together with Section 44 (3) of the 1999 Constitution of Nigeria, it will be observed that our law is clear on who owns what. While the Land is vested in the State Governors, the mineral resources are vested in the Federal Government.

It is therefore imperative to notice that this system runs contrary to the principle of quic quid plantatur solo solo cedit on one land and the principle of federalism on the other. Unfortunately, that is the current position of the law in Nigeria.

On the principle of *quic quid plantatur solo solo cedit*, it has been established that this principle means that "who owns the Land, owns everything thereof", therefore, it follows that if the state government is vested with land, it equally should be vested with that beneath the Land. This has led to a disagreement between the federal government and the state government over the control of natural resource in Nigeria that is known as 'resource control.'

Section 162 (2) of the 1999 Constitution granted 13% derivable revenue from minerals to the states from where it is derived. The Constitution is silent as to how the mineral resources are attributed to the state in other words, it does not mention onshore.

Following widespread protests, the Federal Government instituted a case against the 36 states of the Federation asking the Supreme Court to interpret what constituted the seaward boundary of a littoral state in Nigeria.[33] The court gave a ruling that effectively resuscitated the 1971 position.

The offshore Decree No 9 of 1971 abolished the principle of derivation in respect of mineral royalties and mining rents as contained in the 1963 constitution to the effect that the continental shelf shall be deemed to be part of a region for the purpose of computing and payment of royalties and rents. Accordingly, all oil explored offshore was made the property of the Federal Government and revenue accruing from it was paid directly to the states.

The Federal Government contended that southern (seaward) boundary of each of these states is the low-water mark of the land surface of such state, or the seaward limit of inland water within the state. The Federal Government maintained that natural resources located within the continental shelf of Nigeria are not derivable from any state of the federation.

The eight littoral states[34] held a contrary view. They maintained that their territories extended upon to the continental shelf and that natural resources from both the onshore and offshore are derivable

[33] AG Federation v AG Abia & 35 ors (2002) 6 NWLR pt. 164 543-905

[34]Akwa Ibom, Bayelsa, Cross River, Delta, Lagos, Ogun, Ondo and Rivers states

from their respective territories and in respect thereof each is entitled to not less than 13% allocation as provided in the provision of section 162 of the 1999 constitution. The Supreme Court found for the federal government. Justice Walli (JSC) maintained that they could not claim that revenue accruing from mineral resources offshore belong to any of them.

The Federal Government in its bid to maintain peaceful co-existence amongst Nigerians and good inter governmental relationship between the Government at the centre and the federating units opted for a "political settlement", with the oil states. An Onshore/Offshore Dichotomy Abrogation Act of February 2004 made it possible for littoral states to receive derivation revenues on petroleum resources lying within "water depth of 200 meters.

9.0 INDIVIDUAL OWNERSHIP OF LAND AND PETROLEUM

It has been discovered that the federal government does not own land.[35] This is seen in section 3 of the 1999 Constitution that provides that Nigeria is made of 36 states and the FCT. The constitution equally vested ownership of mineral resources in the federal government,[36] but was silent on the question of surface rights. This *lacuna* was partially filled by the section 1 of LUA which provides;

…..all the land comprised the territory of each state of the federation are hereby vested in the military government of the state and such land shall be held in trust and administered for the use and common benefit of all Nigeria in accordance with the provisions of this decree.

However, a lucid look into this provision will reveal that this provision does not vest land in the government as an owner but rather as a trustee. One would at this point be left with no other option except to ask, who then is the real owner of land or who is the beneficiary of this trust property land, since neither the federal government nor the state governments own land.

Therefore, for us to determine the true owner of land, we will have to critically examine the phrase "….such land shall be held in trust and administered for the use and common benefit of all Nigerians…" This shows that the government is only a trustee for all Nigerians. By this, it is therefore meant that Nigerians are the beneficiaries of the trust. Since they are the beneficiaries of the trust, they are therefore the true owners of land. This could be traced to the land tenure system before the creation of Nigeria and subsequently the Land Use Act of 1978. Before, then, land

[35] Except the Federal Capital Territory
[36] Section 44 (3) of 1999 CFRN

belonged to the community, the village or family and by extension to the individual when the community, village or family bequeaths such land to him. The Willink's report 1958 succinctly declared that Nigeria is a group of independent and autonomous kingdoms and peoples with separate languages, culture and religion, equal in status and in no way subordinate to one another but united as a corporate body to form the Federal Republic. It means that these autonomous kingdoms and people, before the advent of the Land Use Act, controlled land.

Upon the advent of the Land Use Act, which was meant to solve the problem of land speculation and make land available for developmental programmes of the government, the people were divested of their ownership rights to land, which was then vested in the Governor as a trustee for the use and common benefit of all Nigerians. Trusteeship, we want to submit, has totally failed since the aims of the trust relationship has not been realized since the advent of the Land Use Act. The Land Use Act has, vis-à-vis communal interests, achieved the following outcomes;

1. Revocation of the peoples' right to their land;
2. Deprivation of owner's choice as to who acquires his or her land;
3. Denying an owner of a choice of due compensation for the acquisition of land
4. Owners living under perpetual likelihood of losing their land to government;
5. Owner's inability to decide activities that should be carried out on his property or in terms of the communities, in their neighborhood;
6. The law invariably vests in the government all the resources in or on the owner's land. The government may well acquire any resource rich-land for any public purpose.

It is rather unfortunate that contrary to the principle of *quic quid plantatur solo solo cedi*, the provisions of our laws in Nigeria vested ownership of mineral resources in the Federal Government, but were silent on the issue of ownership of land, yet oil is entrapped in land and cannot be exploited without access to land. Although this is the position of the law, it is our opinion that adequate compensation should be paid for the owner of such land at the point of acquisition by the Government. Taking into cognizance the nature of our society, the Government is trying to prevent a situation where individuals who own land with mineral deposits and have unfettered access to such land would be richer than the Government and thereby threaten the continued existence of the state.

10.0 LAND USE ACT AND THE PETROLEUM ACT

Section 1 of the Petroleum Act tagged "vesting of petroleum in the state" states that "the entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State" This section applies to all land including land covered by water under the territorial control of the country or which forms part of the continental shelf and that which is within the exclusive Economic Zone of Nigeria. Section 1 of the Land Use Act 1978 equally states that "subject to the provisions of this Act, all Land comprised in the territory of each state of the federation are hereby vested in the governor of the state and such land shall be held in trust and administered for the use and common benefit of all Nigeria in accordance with the provisions of this Act.

The lacuna with the above provision on the issue of ownership concept has been resolved by the provision of Section 44 (3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) which states that "Notwithstanding the foregoing provisions of this section, the entire property in and control of all mineral oils and natural gas in under, or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

The implication of section 1 of the Land use Act and section 1of the Petroleum Act is that although ownership and control has been vested in the state, by the provision of Section 44 (3) of the Constitution and notwithstanding the provision of the Land Use Act and the Petroleum Law, the entire property in and control of all minerals oil and natural gas in, under or upon any Land in Nigeria shall be vested in the Federation. Thus Section 44(3) is an exception to state ownership of the mineral resources in Nigeria.

11.0 COMPARISON WITH OTHER JURISDICTIONS

There are three modes of ownership of natural resource in the world today.

The first is absolute state ownership. This pattern seems to be dominant. It is practiced by countries like Venezuela, Mexico[37], Norway,[38] Russia,[39] Zambia,[40] Botswana,[41]Namibia, Argentina, United Kingdom and of course, Nigeria

The second pattern of ownership is individual ownership of natural resources, which is found under, in or upon his land. This is operated in the states of Texas, Tennessee, Mississippi and Ohio of the USA. This method of ownership is predicated upon the maximum *quic quid plantator solo solo cedit*.

The third pattern is a hybrid of absolute state ownership and individual ownership rights in the natural resources. The USA states of Pennsylvania and California have one form of qualified ownership arrangement on the other.

In the United States, individuals can own the minerals situated on their lands. This is not the case in communist or socialist countries (for example, Cuba and North Korea) where individual ownership of property is stringently controlled by the State. The latter scenario is akin to the situation in Nigeria where most of the oil-related laws were promulgated by military regimes, which are typically unitary in nature and tend to be socialist or centrist inclined. Indeed, Nigeria's military rulers were at the forefront of centralizing the ownership and control of oil and gas resources in the federal government of Nigeria.[42]

Nigeria's dominical legal system of ownership of mineral resources is established by the provisions of the Nigerian Constitution, Petroleum Act and Exclusive Economic Zone Act, amongst other statutes, which vest the exclusive ownership of mineral resources in the federal Government of Nigeria. Private ownership of mineral resources is the prevailing model in the United States. Under qualified ownership in the United States, the landowner is "said not [to] have title to the oil and gas *in situ* because of the fact that he can be divested by drainage without consent

[37] Articles 27-31 of the Mexican Constitution 1917
[38] The Petroleum Act of Norway
[39] Articles 72 of the Russian Constitution
[40] The Zambian Mines and Minerals Act No 32 of 1976
[41] Minerals Act of Botswana 1978
[42] Ekhator, Eghosa Osa (2016) "Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation," *Annual Survey of International & Comparative Law*: Vol. 21: Iss. 1, Article 6.

and without any liability on the part of the person causing the damage Some international instruments have promoted the ownership of mineral or natural resources. For example, the United Nations General Assembly Resolution No. 626 (VII), which was adopted in 1952, states that "the right of people freely to use and exploit their natural resources is inherent
in their sovereignty." Also, in 1962, the General Assembly adopted Resolution 1803 (XVII) (Permanent Sovereignty over Natural Resources), which provides for *inter alia*: the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interests of their national development and of the well-being of the people of the state concerned. In 1974, the United Nations General Assembly adopted Resolution No. 3281 (XXIX). Article 2 of the resolution states that "every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over its wealth, natural resources and economic activities." Also, the Organization of Petroleum Exporting Countries (OPEC), in its Resolution XVI 'Declaratory Statement of Petroleum Policy in Member Countries,' recommended that members should take active participation in and control over the oil and gas operations in their countries.[43]

Due to inherent weaknesses and corruption in the extant regulatory regime in the oil and gas sector of Nigeria, scholars have advocated ownership of mineral resources by the local communities or the indigenous people wherein the oil is found. On the international plane, the various justifications for the ownership of mineral resources by local communities or indigenous people may include a right to development, economic self-determination, permanent sovereignty over mineral or natural resources and the rights of the local communities or people to benefit from the mineral resources, amongst others. An example of an international convention that promotes the ownership and control of mineral resources is the Indigenous and Tribal People's Convention 1989. Article 15 of the Convention provides for the rights of the people to participate in the management, use and conservation of mineral or natural resources. Also, the Convention states that when the State has ownership and control of the mineral resources, the government shall consult with the people before undertaking any exploratory activities in such communities (Article 15(2)). Unfortunately, Nigeria has yet to ratify this Convention. Additionally, the African Charter on Human and Peoples Rights (African Charter), which has been domesticated into Nigerian law, bestows rights upon the

[43] ibid

people to own and control natural resources.[44] For example, Section 1 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act states that the African Charter shall "have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria."

Also, Article 21 of the African Charter provides that all peoples shall have the right to freely dispose of their wealth and mineral or natural resources. Notwithstanding the provisions of the International Convention of Indigenous and Peoples Rights and the African Charter, the federal Government's ownership and control of natural resources in Nigeria is unscathed. In respect of the Indigenous and Tribal People's Convention, Nigeria is yet to ratify it. By virtue of Section 12(1) of the Constitution of Nigeria, no treaty shall have force in Nigeria except such a treaty or convention that has been enacted into law by the National Assembly. Flowing from this premise, the Indigenous and Tribal People's Convention 1989 is not applicable in Nigeria. In respect of the African Charter, it can be argued that the Charter promotes socio-economic rights, which are not justifiable under Nigerian law. By virtue of Section 6(6)(c) of the Constitution, the objectives and principles discussed under the heading of 'Fundamental Objectives and Directive Principles of State Policy' in Chapter II are neither justifiable nor enforceable.49 However, there are contending views that both the African Charter and Section 6(6)(c) of the Constitution are justifiable and enforceable in Nigeria.[45] While an acceptable definition of indigenous peoples that will have global application, still remain elusive in international law, countries that have undisputed indigenous populations, like Australia, Canada, New Zealand and the United States of America, have already been confronted with the implications of indigenous rights claims to mineral resource development

Today, only a few countries, most notably United States and Canada continue to recognize private ownership of mineral rights.[46] In a number of countries where private ownership was recognized, there had been constant reappraisal of the ownership policy, usually reviewed in favour of state

[44] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (2004) Cap. (A9), LFN.
[45] N 42
[46] [46] E. E. Smith, *Ownership of Mineral Rights* in E. E. Smith et al, ed. International Petroleum Transaction (2nd Ed) (Denver: Rocky Mountain Mineral Law Foundation, 2000) pp203-337

ownership. In South Africa, for example, the 2002 South African Mineral Development Act reversed the policy of private ownership of *in-situ* mineral deposit provided for under the 1990 Mineral Act. Under the new legislation, ownership and control of mineral resources is now vested in the State.

There has been some difficulty in managing development of privately owned certain classes of minerals, particularly oil and gas. Oil and Gas are generally considered as migratory specie of minerals and it is possible to extract oil and gas through a particular field even though the deposit are contained or straddles into adjacent land. In such a situation, who will be considered as the actual owner of the resources? The US courts have tried to address this problem by adopting the *law of capture*, based on analogy of the ownership of water or wild animal. Under this rule, land owner will be entitled to oil and gas extracted through a well sunk in their own land irrespective of the original location of the oil.[47]

It should be noted that even in the United State, which is seen as the basis of private ownership of mineral resources, State ownership of mineral resources is very much recognized. Most oil and gas development outside the Texas fields are conducted in government reserve areas, which are owned by the federal government. Even though these areas may be leased out to private individuals, the ownership of mineral is still retained by the federal government.

12.0 CONCLUSION

Having ascertained the true owner of land to be the people, and considered the various modes of ownership across the world, the question now would be, what mode of ownership of oil natural resources is the best for Nigeria?

It has been argued that since state ownership is the dominant mode across the world, Nigeria should also continue with that pattern. The advocates of this mode support their position by relying on UN Resolution 1803 of 1962 on the permanent sovereignty of states over their natural resources. This school of thought equally believes that Nigeria as a developing country needs a uniform development of its resources so that it could be managed for the good of all Nigerians. They argue

[47] See the *Ryan Consol. Petroleum Corp. v. Pickens*, 155 Tex. 221; 285 S. W. 2d 20; Barnard v. Boungahela Natural Gas co. Ltd, 216 Pa. 362; 65 Atl. 801 (1807). See also E. E. Smith, Ibid at pp206-207

further that if the natural resources are allowed to be managed by the individual or state government, it will make some states to be so powerful as to completely intimidate and overawe the other states and indeed the Federal Government.

It is also further arguable that considering the recent internecine wars that have characterized the relationship of oil and gas yielding communities of the Niger Delta one with another and the perennial boundary disputes between states, vesting the ownership of natural resources in individuals, communities or states will be a recipe for anarchy and mayhem, thus there should be no shift in the concept of ownership of petroleum and natural gas. Although vesting of ownership of petroleum and natural gas in the Federal government has not stopped the agitation of some individual, state or community from becoming rich.
Finally, they maintained that private individuals lack the technical capacity to negotiate with multi-national oil companies.

In virtually all other countries, ownership of mineral resources, particularly valuable minerals, such as gold, silver, oil, natural gas, coal, and uranium, is vested in the state.[48] The legal instruments vesting ownership of minerals in the state are usually contained in the constitution or other legislation of the country in issue.[49] This practice is obtainable in both federal and unitary states and in both developed and developing nations. In all jurisdictions that recognize private ownership of mineral resources, it is only limited to on-shore resources. The state has always maintained claim to ownership of offshore mineral resources

13.0 REVISITING THE LAND USE ACT

Until 1978, oil and mining communities have participated in mineral development process through land rights. Perhaps the difficulties encountered in having access to land precipitated the nationalization of land. This divested the communities of basic legal stake in resource development. After testing the difficulties in the application of the Land Use Act for almost 30years, it is perhaps time to have a re-look at it. The stakeholders in mining and oil industry have developed mechanisms for public and community participation in resource development, internationally. Not much could be practically achieved in this direction in Nigeria, unless the

communities have stronger bargaining powers to go into the negotiation process. And this could only be demonstrated by reconsidering community land rights. It has worked well in several jurisdictions, and if carefully managed, there is no reason that it should not work in Nigeria

14.0 RECOMMENDATIONS

It is however recommended that due to inherent weaknesses and corruption in the extant regulatory regime in the oil and gas sector of Nigeria, ownership should vest in the, state communities or indigenous people where mineral oil are found. It is also recommended that there should be an amendment to the law vesting absolute ownership.

[48] E. E. Smith, Ibid, p249
[49] See generally, A. P. Blaustein and G. H. Flannz eds. Constitutions of the Countries of the World, Binder III

Alternatively, appropriate legal framework and monitoring mechanism must be put in place to address the adverse impact of mineral resource development on the communities and where it occurs, a robust mechanism for addressing them. Secondly, there must be a pragmatic mechanism that will enhance the benefits of the communities from resource development. This must have to be integrated into the national economic plans that will give a long term benefit to the communities even after the resources have been mined out.