A Critical Appraisal of The Legal Regime Regulating Ownership and Control of Petroleum and Other Natural Resources in Nigeria

By

Joseph N Agada* and Emmanuel I. Umbu**

Abstract

There has been great controversy over the concept of ownership and control of petroleum and *other natural resources in Nigeria and globally. Several attempts have been made to resolve this through various legislative and judicial pronouncements. Many authors have written and made laudable recommendations to resolve this problem; yet the controversy persists. Governments and other stake holders in the oil industry have participated in this effort to the extent of primarily ensuring that their interests are secured and protected. In Nigeria, the littoral states have been at logger head with the federal government over who should own oil and other natural resources found in the states and the extent tom which the federal government ought to exercise state control. This paper adopting the library based or qualitative research method is aimed at the critical appraisal of the meaning of ownership, the various legislative and judicial pronouncements made in an attempt to resolve the conflict and their appropriateness and applicability to the peculiar Nigerian situation, and the arguments and counter arguments proffered for and against state ownership. While the position of this study is that State ownership is best for Nigeria, strong argument is made for the concept of 'Inclusiveness', that is direct involvement and participation of the littoral states and oil producing communities in the production and management of petroleum and other natural resources. The work also canvasses for more commitment to care, and consideration for the littoral states and oil producing communities in the form of infrastructural development, enhancement of education, health care delivery and environmental impact control as some of the ways out of the quagmire. The work concludes by stating that the application of the recommendations/solutions proffered will go a long way to help the Federal Government in resolving the age long controversy generated over the ownership and control of petroleum and other natural resources in Nigeria thereby ensuring a peaceful, stable and conducive environment suitable for investment, growth and development in the oil rich region, and in Nigeria at large.*

Keywords: Ownership, Control, Petroleum, other Natural Resources, Inclusiveness,

Introduction

The heated controversy and agitation surrounding the concept of ownership[1] and control of petroleum[2]and other resources in Nigeria dates back to the discovery of oil in commercial

*Agada, Joseph N. Esq. LLB (Hons), BL, LL.M., PhD candidate Babcock University, Ilishan-Remo, Ogun State, Nigeria 08038262537, agadaj@babcock.edu.ng, agada4christ@yahoo.com

**Emmanuel I. Umbu, Esq. LLB (Hons), BL, LL.M, Founding Partner, Principality Barristers and Solicitors, 22B Lugard Avenue, Ikoyi, Lagos Nigeria. Tel: +2348068612247; 08059759719, Email: emmanuelumbu@yahoo.com

[1] Ownership [here implies] 'the legal right that a legal system grants to an individual in order to allow him or her to exercise the maximum degree of formalized control over a scarce resource.' This idea can be derived from the civil law concept of dominium, the greatest right in property to 'use and dispose of a thing in the most absolute way alluded to in early Roman texts.' This concept of dominium is the 'ultimate right, that which has no right behind it.' See Bryan Clark, 'Migratory Things on Land: Property Rights and a Law of Capture' (2002) *Electronic J. Comp. L.*, available at http://www.Ejcl.Org/63/Art63-3 last visited March 17, 2017; Aladeitan L. 'Ownership and Control Of Oil, Gas, and Mineral Resources In Nigeria: Between Legality and Legitimacy' *Thurgood Marshall Law Review* (vol. 38:159).

[2] In Nigeria, petroleum or oil and gas is defined as '…mineral oil (or any related hydrocarbon) or natural gas as

quantity in Oloibiri in January, 1956 by Shell D'Arcy.[3] At the inception of the discovery of oil in commercial quantity in Nigeria, it was not difficult for the government to vest ownership and control of petroleum and other resources in the State.[4] Among other things, this was so as at that material time, Nigeria was a British Colony and so fashioned her laws after that of Britain. According to Prof. Ajomo:

> The vesting of ownership and control of minerals and mineral resources in the Nigerian state is historical and dates back to the colonial era. This has had a great impact on the country's legal system and conception of property rights. As a British colony, most laws in Nigeria were fashioned after those of Britain. Nigeria, therefore, inherited a colonial legacy in which ownership of mineral resources was vested in the crown of England. This was due to the fact that the country, as a corporate entity, was regarded as the property of Great Britain. Thus, the then - suzerain authority and, naturally, the minerals in Nigeria—whether oil and gas or solid minerals—also belonged to Britain.[5]

According to Professor Sagay, 'The imperial masters claimed all the minerals in Nigeria for themselves, as was to be expected; Colonial rulers operated in their own interest, not in the interest of the colonized people.'[6] 'It is this concept of state ownership of minerals that Nigeria inherited at independence in 1960, which thereafter became entrenched in the 1963 Republican Constitution.'[7] Consequently, 'After Nigeria gained independence, the new state adopted and institutionalized this vestige of colonial experience.'[8]

It is surprising that even after colonization; Nigeria has not followed countries like the United States of America and others where the practice is what one may safely refer to as shared ownership and control of petroleum and other natural resources. This has in turn led to the seemingly unending agitations, arguments and counter arguments between the central government, littoral states, oil producing communities on who should own and control petroleum and other natural resources in Nigeria.

The Nigerian State has employed the instrumentality of the law in an attempt to resolve the controversy surrounding the concept of ownership and control of petroleum and other natural resources by the promulgation of the various laws vesting ownership and control of petroleum in the government.

The legal documents vesting the power to own, control and regulate petroleum and other natural resources in the central government include: The Constitution of the Federal Republic of Nigeria 1999 (CFRN). The Constitution confers exclusive power on the Nigerian State to

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It exists in its natural state…' In this work, except as otherwise stated, Petroleum or oil and gas is used as a generic term for oil and gas resources. Petroleum Act 1969, re-enacted in the Laws of the Federation 1990, Cap. 350, s14, and further in Cap P10 LFN 2004 (hereinafter PA); Elsvier, P. *The Petroleum Handbook,* (6th ed. The Netherlands: Shell International Petroleum Company Limited, 1983), p1.

[3] Later known as Shell–British Petroleum. Pearson, S. R., 'Petroleum and the Nigerian Economy' (Stanford University Press 1970) p55.

[4] The State referred to here is the Government of Nigeria.

[5] Ajomo M.A., 'The Legal Framework of the Petroleum Industry' (2001) (paper presented at the Centre for Petroleum Environment and Development Studies workshop University of Lagos on essentials of oil and gas law).

[6] Sagay, I, 'Ownership and Control of Nigerian Petroleum Resources: A Legal Angle' in V. Eromosele (ed.), *Nigerian Petroleum Business*: *A Handbook* (1997) p178.

[7] Aladeitan L. Ibid.

[8] Sagay I. Ibid p.44.

own, control and regulate minerals, mineral oils, and by-products. This power is firmly provided for in Section 44(3) of the Constitution[9] and specifically states:

> Notwithstanding the foregoing provision of this Section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon territorial waters and the 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.

Others are the Petroleum Act,[10] The Nigerian Minerals and Mining Act,[11] The Land Use Act.[12] It is equally noteworthy that, apart from legislation, decisions of the courts have also reinstated fact that ownership and control of mineral resources is vested in the federal government. The Supreme Court of Nigeria in the case of *Attorney General of the Federation v. Attorney General Abia State & Ors*[13] held that 'the federal government alone and not the littoral states can lawfully exercise legislative, exclusive and judicial powers over the maritime belt or territorial waters and sovereign rights over the Exclusive Economic Zone subject to universally recognized rights.'[14]

The court further held that 'the mere fact that oil rigs bear the names of indigenous communities on the coastline adjacent to such offshore areas do not prove ownership of such offshore areas'[15]. This position has led to the unending controversy. It is against this background that this study takes a critical look at the legal regime governing the ownership of petroleum in Nigeria, and the arguments and counter arguments in respect of state, individual and even community ownership, control and regulation of petroleum and other natural resources.

While this work aligns with state ownership and control, it recommends for inclusiveness of the oil producing states and communities in the control and ownership of petroleum and other resources in Nigeria.

The legal regime on Ownership and Control of Petroleum and Other Resources in Nigeria

The legal regime or frameworks regulating ownership and control of petroleum and other resources in Nigeria include: The Constitution of the Federal Republic of Nigeria 1999,[16] the Petroleum Act,[17] the Land Use Act,[18] the Nigerian Minerals and Mining Act[19] among others. We shall also discuss the case of *AG. Federation v. AG Abia & Ors*[20] and its effects or otherwise on the agitation of the littoral States and oil producing communities.

The Constitution of the Federal Republic of Nigeria 1999[21]

On attainment of independence in 1960, the Federal Government was vested with the exclusive power to 'legislate on mines and minerals, including oil fields, oil mining,

[9] Ibid.
[10] Cap P10 Laws of the Federation of Nigeria (hereafter referred to as LFN).
[11] Cap N117 LFN 2004.
[12] Cap L5 LFN 2004.
[13] *Attorney General of the Federation v Attorney General of Abia State, & Ors.* (2002) 4 NSCC 51.
[14] p251.
[15] p307.
[16] As amended.
[17] Cap P10 LFN 2004.
[18] Cap L5 LFN 2004.
[19] Cap N117 LFN 2004.
[20] (2002) 4 NSCC 51.
[21] Ibid.

geological surveys, and natural gas in Nigeria.[22] The Constitution of the Federal Republic of Nigeria 1999, which is the extant *grundnorm* confers exclusive power on the Nigerian State to own, control and regulate the activities of minerals, mineral oils and their by-products. This power is firmly provided for in Section 44(3) of the Constitution and specifically states:

> Notwithstanding the foregoing provision of this Section, the entire property in, and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or, in, under or upon territorial waters and the 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.[23]

Interestingly, both the 1960 and 1963 Constitutions maintained the colonial legacy in which ownership of mineral resources was vested in the crown.[24] According to Lanre:

> In addition to the above provision, mines and minerals—including oil fields, oil mining, geological surveys and natural gas—were included in Part I of the Second Schedule of the Exclusive Legislative List in respect of which only the National Assembly have legislative power. The inclusion of this subject matter in the Exclusive Legislative List follows the same pattern in both the Republican Constitution of 1963 and the 1979 Constitution.[25]

Whichever way the provision of the CFRN quoted above is examined, one thing is sacrosanct and that is the fact that the Constitution being the supreme law of the land is binding on all persons and agencies. The Constitution provides that not less than thirteen percent of revenue generated from the crude oil produced from oil producing states shall be given to the state by the federal government in recognition of the states' role. This is the derivative principle.[26]

The Petroleum Act[27]

Apart from the provision of the CFRN which confers on the Federal Government the powers of exclusive ownership and control of petroleum and other resources within the territorial realm of Nigeria, the Petroleum Act further adumbrates this position by its extant provisions. According to Frynas:

> The promulgation of the Petroleum Act of 1969 marked a watershed in the history of petroleum legislation in Nigeria. Its significance is that, among other things, it stipulates for the first time that the entire ownership and control of all petroleum in Nigeria is vested in the Federal Government of Nigeria. It also revised all the terms and conditions under which pre-1969 concessions were granted and indeed repealed in *toto* the Minerals Oils Ordinance of (1914), as amended. One of the fundamental changes introduced by the 1969 Petroleum Act is that it prescribes three types of grants to regulate petroleum operations in Nigeria: (i) the oil exploration license (OEL); (ii) the oil prospecting license (OPL); (iii) and the oil mining lease (OML). The Petroleum Act Cap. P10 Laws of the Federation of

[22] CFRN 1960, item 25, Exclusive Legislative List.

[23] CFRN 1999 s.44; Emiri F. & Gowon D. *Law and Petroleum Industry in Nigeria* (University of Nigeria Press 2009) p147; Emmanuel Uduaghan, 'Solving the Niger Delta Problem: The Law and the People —An Overview of Legislations Impeding on the Socio-Economic Development of The South-South Region: The Land Use Act as Case Study' (2008), available at http://governoruduaghan.org/news/244.txt lasted visited April 13, 2017.

[24] Id 96.

[25] Id 114.

[26] The principle of derivation as currently incorporated in the proviso to s.162(2) of the CFRN, 1999 (as amended).

[27] Cap P10 LFN 2004.

> Nigeria 2004 and its subsidiary legislation, the Petroleum (Drilling and Production) Regulations 1969, apart from vesting ownership and control of crude oil in the Federal Government, form the legal framework for petroleum development in Nigeria.[28]

The promulgation of the Petroleum Act brought direction to issues ranging from the ownership and control of petroleum resources, the long-awaited repeal and or amendment of the oil exploration license, oil prospecting license, and the oil mining lease. The Preamble to the Petroleum Act described it as 'An Act to provide for the exploration of petroleum from the territorial waters and the continental shelf of Nigeria and to vest the ownership of, and all-on-shore and off-shore revenue from petroleum resources derivable therefrom in the Federal Government and for all other matters incidental thereto'[29]

Section 1(1), 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.*'* Section 1(2) further provides for specific description of the extent of coverage as follows:

a) all lands, including land covered by water is in Nigeria; or
b) is under the territorial waters of Nigeria; or
c) forms part of the continental shelf; or
d) forms part of the Exclusive Economic Zone of Nigeria.

The combined effect of these provisions is that ownership and control of petroleum in Nigeria is vested in the federal government to the exclusion of any state, community or individual.

The Land Use Act[30]

According to Lanre[31]

> The significance of the land ownership and tenure system in Nigeria and its impact on ownership of natural resources makes any discussion on the ownership of natural resources incomplete without an appreciation of the country's land ownership and tenure system.

He stated further that prior to the coming into force of the Land Use Act, Nigeria's land ownership and tenure system had undergone historical development in three distinct stages—the pre-colonial, colonial and post-colonial—such that what one obtains in the country before the introduction of the Land Use Act was a dual system of land ownership.[32]

The pre-Land Use Act structure was such that in the Southern States—comprising of the former Western Region, Eastern Region, Midwestern Region and Lagos—there was the communal system of land ownership. According to Professor Ajomo[33] private ownership of land evolved through grants, sales and partition. He further submitted that whereas in the Northern Region, the system of land ownership was governed and regulated by the Land Tenure Law that was enacted in 1962 by the regional government to replace Lord Lugard's Land and Native Rights Ordinance of 1916.[34]

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[28] Frynas, JG, *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Communities* (1st edn, Lit Verlag Munster 2000) p45.
[29] Preamble to the Petroleum Act Cap P10, LFN 2004; *Nigeria Mineral, Mining Sector and Business Guide 82* (1990).
[30] Cap L5 LFN 2004; Allot A. N. 'Nigerian Land Use Decree' (1978) 22 (2) *Journal of African Law* 136–160.
[31] Id p 178.
[32] Ibid.
[33] Ajomo M. A., 'Ownership of Mineral Oils and the Land Use Act' (1982), *Nigerian Current Law Review*, 335.
[34] Id.

It is noteworthy to state that the Land Tenure Law replaced the colonial Land principles and substantially reaffirms the principles and philosophy underlying the Land and Native Rights Ordinances to the extent that, under the Land Tenure Law, the only interest available to an individual throughout the Northern Region is a right of occupancy. The effect of this enactment is that it operated to divest the natives of ownership of their land and facilitated easy dispossession by the authorities.[35] In the words of Lanre,[36]

> It can be submitted that the structure that existed prior to the introduction of the Land Use Act reflects a basic tenet of an ideal federalism. Also, it would appear that the unitary configuration sought to promote uniformity in the country through the Land Use Act and brought an end to the duality in Nigeria's land tenure system. The Land Use Act of 1978 was, therefore, promulgated and became applicable all over the federation as evident in its preamble and Section 1, which vests all lands comprised in the territory of each state in the federation in the Governor of the state, who in turn shall hold it in trust and administer it for the use and common benefit of all Nigerians.

The Land Use Act was specifically entrenched in section 40 (1) of the Constitution[37] and was equally retained in section 44 (1) of the 1999 Constitution[38] by way of exacting the powers of the state. The said constitution[39] is not flexible, making its amendment cumbersome and tedious. This is more so because of the legislative procedure involved in such amendment.

The Land Use Act introduced an entirely new dimension into land ownership in the country by abolishing the ownership rights of communities and individuals to land and turning their interests into rights of occupancy only, thus making land ownership and tenure in Nigeria a qualified one in which absolute title is vested in the Governor. Notwithstanding the vesting of ownership in the Governor in the respective states, one cannot exercise rights over lands that belong to the federal government and its agencies.[40]

The Land Use Act[41] has been one of the most controversial pieces of legislation for decades because it vested all lands within the territorial jurisdiction of a state hitherto vested in individuals and communities in the governor of the state. There have been various calls for reform of the act, by the judiciary, lawyers, town planning and academics; notwithstanding these calls, no serious attempt has been made.[42] The Act has also come under legal, judicial and even legislative criticisms but not much has been achieved in the area of amendment. Take for instance in 2009, President Umaru Yar'Adua established the Presidential Technical Committee on Land Reform and gave it the task of finding a better way for the country to

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[35] Id.

[36] Ibid, Nigerian Minerals and Mining Act; note 61, p1-(1).

[37] CFRN 1979.

[38] CFRN 1999 as amended.

[39] Ibid.

[40] Land Use Act, s49. This includes lands that contain mineral deposit or land used for related purposes. Hence, none of the states that are component units of the federation have any direct control over the exploration and exploitation of minerals. See further the case of *AG. Fed. v AG Abia & Ors* (2002) 4 NSCC 51.

[41] Ibid

[42] Otubu T. 'Land Reforms and the Future of Land Use Act in Nigeria', Omotola J.A. 'Law and Land Rights: Whither Nigeria' (University of Lagos Akoka Inaugural Lecture Series 1988) p6; Olagbaiye T. 'Statutory Regulation of the Environment – An appraisal of the Lagos State Environmental Sanitation Edict 1985' in Omotola J (ed.) *Environmental Law in Nigeria including Compensation* (Faculty of Law University of Lagos Akoka) p1; Datong PZ. 'The Role of the State Government in the Implementation of the Land Use Act' in Adigun O (ed.), *The land Use Act Administration and Policy Implication* (Unilag Press 1991) p64.

handle the administration and recording of land ownership, the issuance of titles and the process for registration, as well as other land-related matters. Professor Akin Mabogunje, the 2009-2011 Chairman of the Committee, described the Land Use Act as 'a clog in the wheel of development.' The Mabogunje Report states that:

> Although the decree has made it easy for governments to acquire land for public purposes, drastically minimised the burden of land compensation and considerably reduced court litigations over land, it has, since its inception…created a new genre of serious problems for land management in the country.[43]

There are various arguments for, and against the retention of the Land Use Act. One of them is the issue of Nationalization of all Lands in Nigeria. On one side of the divide are the views of J.A. Omotola,[44] James,[45] Fekumo[46] and Smith[47]among others who argued that the Act particularly in Section 1[48], cannot be said to have nationalized all lands in the country thereby divesting Nigerians of their titles. Their position is based on the argument that the section should not be read in isolation, but subject to other provisions of the Act. When jointly read as such according to them, it becomes clear that the rights of the citizen in land, although regulated, are in no way destroyed. The right to enjoy remains, the right to dispose is only impaired except the transaction relates to land coming under section 36 of the Act which bars completely transactions in land.[49]

The anti-nationalization school of thought argued further that the governor is not the beneficial owner of the land by virtue of section 1 of the Act, but only a trustee, for the section created a trust[50] in favour of all Nigerians. There are also those who believe that one of the ills of the Act is that it nationalized all lands in Nigeria thereby dispossessing Nigerians and reducing their rights to that of tenants. This school of thought is represented by the view of Eso JSC in the case of *Nkwocha v. Governor of Anambra State*[51] where his Lordship held *inter alia*:

> The tenor of that Act as a single piece of legislation is the nationalization of all lands in the country by the vesting of its ownership in the state leaving the private individuals with an interest in land which is a mere right of occupancy.

Obaseki JSC expressed the same sentiment when he said, 'It is an understatement to say that this Decree or Act abrogated the right of ownership of land hitherto enjoyed by all

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[43] Aboderin A. 'The Imperatives of reforming the Land Use Act' *The Nations Newspaper* (Lagos, July 2, 2015), available at www http://thenationonlineng.net/imperatives-of-reforming-the-land-use-act/ last accessed August 23, 2020.

[44] Omotala JA. 'Does the Land Use Act Expropriate?' (1985) 3 JPPL p1.

[45] James, RW *Nigerian Land Use Act, Policy and Principles*, (Unife Press 1987) p33.

[46] Fekumo JK, 'Does the Land Use Act Expropriate – A rejoinder' (1988 & 1989) 10 & 11 JPPL p5.

[47] Smith, IO, 'Practical Approach to Law of Real Property in Nigeria' *Ecowatch* (1999) p. 306.

[48] Cap L5 LFN 2004.

[49] LUA 1978 s36 (5); Adekoya, CO, 'Land Use Act and Constitutional Matters Arising' in Smith I. O (ed), *The Land Use Act Twenty-Five Years After* referred to by Ayoade MA, in 'Environmental Risk and Decommissioning of Offshore Oil Platforms in Nigeria' available at http://www.nials-nigeria.org/journals/ELJ%20Original%20corrected%20copies.pdf last visited April 7, 2017.

[50] Critics have commented that the character, nature and incidence of the Trust allegedly created is not clear and defined. See Omotola JA, 'Does the Land Use Act Expropriate'; Banire, MA, 'Trusteeship Concept Under the Land Use Act: Mirage or Reality?' in Smith I.O (ed) *Land Use Act Twenty-Five Years After*. p. 91, referred to byAyoade M. A supra, R.W. James: Land Use Act Policy and Principles p. 51, Nwabueze: Nigeria Land Law (Nwanife publishers) 1972 p. 239.

[51] *Nkwocha v Governor of Anambra State* (1984) 6 SC 362 at 404.

Nigerians'.[52] In the academic circle this opinion finds expression in the works of Umezulike[53] where he posited among other things that section 1 of the Act hints at only one radical possibility, namely the expropriation or nationalization of land.
Finally, we agree with Tunde Otubu[54] when he said:

> …the Act is nothing but a nationalization instrument which took away the right of ownership and management of land from the citizens and vested it in the state. In fact, the tenor and essence of the Act as reflected from the readings of its provisions is that it has succeeded at turning landlords into tenants over the lands and impoverishing citizens as it sought to remove the economic and wealth creation attributes of land. This conclusion is founded on the fact that under the Act, individual rights and interests in land is curtailed and limited only to right of occupancy and the fact that a bare and undeveloped land under the Act bears no economic value as no compensation is paid for its acquisition by the state.

One would have ordinarily expected that since the Land Use Act has vested all lands that exist in each state in the state, petroleum, and other resources in and under the land would equally be vested in the government of the littoral state. This radical departure is one that has come with surprise.

The Nigerian Minerals and Mining Act[55]

The Minerals and Mining Act repeals the Minerals and Mining Act of 1999. The Act in Section 1(1) provides that:

> The entire property in and control of all mineral resources in, under or upon any land in Nigeria, its contiguous continental shelf and all rivers, streams and watercourses throughout Nigeria, any area covered by its territorial waters or constituency and the Exclusive Economic Zones is and shall be vested in the Government of the Federation for and on behalf of the people of Nigeria.

It further provides in Section 1(2) that 'All lands in which minerals have been found in commercial quantities shall, from the commencement of the Act, be acquired by the Government of the Federation in accordance with the provisions of the Land Use Act.'[56]
However, by virtue of Section 3, some lands are excluded from mineral exploration and exploitation and, as such, no mineral title can be granted in respect of such land.[57] Perhaps due to the importance attached to mining, Section 22 of the Act provides that the use of land for mining operations shall have a priority over other uses of land and shall be considered for the purposes of access, use and occupation of land for mining operations as constituting an overriding public interest within the meaning of the Land Use Act.[58]

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[52] Paper delivered at the Law Teachers' Conference 1988.
[53] Umezulike 'Does Land Use Act Expropriate: Another View' (1986) 5 JPPL p. 61.
[54] Tunde Otubu, ibid last visited April 17, 2017.
[55] Cap N117 LFN 2004 as updated on the 31st of December, 2010.
[56] Id.
[57] land set apart for, or used for, or appropriated, or dedicated to any military purpose except with prior approval of the president; land within fifty meters of an oil pipeline license area; land occupied by town, village, market, burial ground, or cemetery, ancestral, sacred, or archaeological site; land appropriated for a railway, public building, reservoir, dam, or public road; and land that is subject to the provisions of the National Commission for Museum and Monument Act, Cap. N19, LFN 2004 and the National Parks Service Act, Cap.
N65, LFN 2004.
[58] Id.

It should be noted that notwithstanding the fact that mining rights and lands are vested in the Federal Government, the host communities' right pertaining certain resources on the land are secured.[59]

The case of *AG Federation v. AG Abia & Ors*[60]

International law recognises Nigeria as a coastal state with some littoral states as parts of the federating units. Since most of the offshore oil drilled in Nigeria is found in the waters around the areas of these states that include; Akwa-Ibom, Rivers, Bayelsa, Delta, Ondo and Cross Rivers, these states agitated and advocated for the strict application of derivation principle as enshrined in the CFRN. This agitation became heightened at the commencement of democratic rule in Nigeria after a chain of military dictatorships from 1966 t0 1979.[61]

Facts/Preamble

Section 162(1) of the Constitution established the Federation Account into which shall be paid all revenues collected by the Government of the Federation, with a few exceptions not relevant to our discussion. Sub-section (2) of section 162 of the Constitution empowers the National Assembly to determine the formula for the distribution of funds in the Federation Account. Sub section (2) provides:

> The President, upon the receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density; Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources.

The proviso to the sub-section entrenches, with respect to natural resources, the principle of derivation in any formula the National Assembly may come up with. By this principle 'not less than thirteen per cent' of the revenue accruing to the Federation Account directly from any natural resource shall be payable to a State of the Federation from which such natural resources are derived. For a State to qualify for this allocation of funds from the Federation Account the natural resources must have come from within the boundaries of the State, that is, the resources must be located within that State.

There arose a dispute between the Federal Government, on the one hand, and the eight littoral States of Akwa- Ibom, Bayelsa, Cross-River, Delta, Lagos, Ogun, Ondo and Rivers State on the other hand as to the southern (or seaward) boundary of each of these States which will by extension determine or affect what each of them is entitled to or can claim.

The Federal Government contends that the southern (or 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 waters within the State, as the case so requires. The Federal government, therefore, maintains that natural resources located within the Continental Shelf of Nigeria are not derivable from

[59] Nigerian Minerals and Mining Act, supra note 61, 97-(1).

[60] (2002) 6 NWLR, (Pt 746), p.542.

[61] Adekunle AA, 'Attorney-General of The Federation v Attorney-General of Abia State and 35 Ors; The Question of Ownership of Petroleum in Nigeria Seabed and the Consequential Quagmire: Urgent Need to Diversify' available at https://www.nigeriancasesonline/2002/03 last visited April 17, 2017.

any State of the Federation, and as such no state can lay claim to any percentage of the proceed of such resources.

The eight littoral States did not agree with the Federal Government's contentions. Each claims that its territory extends beyond the low-water mark onto the territorial water and even onto the continental shelf and the exclusive economic zone. They maintain that natural resources derived from both onshore and offshore are derivable from their respective territory and in respect thereof each is entitled to the 'not less than 13 per cent' allocation as provided in the proviso to subsection (2) of section 162 of the Constitution.

In order to resolve this dispute, the Plaintiff took out a writ of summons praying for: A determination of the seaward boundary of a littoral State within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from that State pursuant to section 162(2) of the CFRN 1999. It should be noted that the issue before the Supreme Court was not merely a determination of the seaward limit of littoral states, but more importantly, a determination of the ownership of the sea-bed between the littoral states and the Federal Government. The Federal Government (the Plaintiff) based its case on the constitutional powers of the Federal Government as the only authority in Nigeria empowered to legislate on external matters, its sovereign powers as a Nation State recognised by international law, on the 1982 United Nations Convention on the Law of the Sea, and the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.

Willing to disentangle the legal issues involved, but unable to find Nigerian legislation's dealing expressly on the issue, the Supreme Court embarked on a voyage through the instrumentality of the political history of Nigeria and in the end relied heavily on colonial Orders-in Council, foreign cases, and international law.[62]

Delivering the lead judgment, Michael Ogundare Ekundayo J.S.C taking cognizance of the various claims of the plaintiff and the defendant littoral states held *inter alia*:

> What then is the position in law, as Chief Williams relies on law? As I have found earlier in this judgment, the southern boundaries of the littoral States of Nigeria are the sea. This makes them riparian owners. And as riparian owners the seaward extent of their land territory, at common law, is the low-water mark or the seaward limit of their internal waters. This is so, because at common law, the seashore or foreshore (both mean the same thing) belongs to the Crown. …the seaward boundary of a littoral state within the Federal Republic of Nigeria for the purpose of calculating revenue accruing

[62] 'There appears to be no Nigerian legislation dealing expressly with the precise location of the seaward boundary between the littoral states and the Federal Government. When the Federal Government through its counsel, attempted to establish the precise location by inference from the Nigerian Territorial Waters Act, Cap. 428, Laws of the Federation of Nigeria, 1990, as amended by Territorial Waters (Amendment) Act No. 1 of 1998, the purport of this amendment, was to reduce the breadth of Nigeria's territorial sea from 30 nautical miles to 12 nautical miles; the Exclusive Economic Zone Act Cap. 116, Laws of the Federation of Nigeria 1990 and the Sea Fisheries Act, Cap.404, Laws of the Federation of Nigeria, the inferences, were rejected by the Court. Uwais, C.J.N., above, n. 28 at 721-722, where His Lordship said 'Chief Williams has tried to show this by inference or implication under the provisions of the Territorial Waters Act, the Sea Fisheries Act and the Exclusive Economic Zone Act, all of which made reference to the territorial waters of Nigeria. However, with respect, none of the legislations (sic) expressly defines the seaward boundary of the littoral states. This in our opinion cannot be inferred from the legislations (sic).' Even the 1999 Constitution does not have an express provision on the seaward limit of littoral states.'

> to the Federation Account from any natural resources derived from the state is the low water mark'[63]

This indicates that the seaward boundary of a littoral state within the Federal Republic of Nigeria does not extend to and does not cover territorial waters of Nigeria, and this disentitles the littoral states to revenue from oil drilled offshore.

The judgment under consideration further adumbrated the provisions of the various laws referred to earlier vesting the ownership and control of petroleum and other resources in the Federal Government of Nigeria. The Supreme Court judgment quoted in part above attracted widespread criticisms from the littoral states as soon as it was delivered. They claimed that what belonged to them was taken away by the federal government. The decision portrays the extant position of the law.

Argument for and against State or Absolute ownership[64]

One of the prominent proponents of absolute[65] ownership, especially as it relates to the oil and gas industry, is Professor Ajomo.[66] Professor Ajomo supported his position by arguing that ownership and control of petroleum is an important political symbol in most developing countries, and as such should not be left in the hands of private individuals or community.[67] He observed that private ownership of oil will create enormous wealth for a few private individuals, who might not apply such fortunes towards productive ends in consonance with national priorities but rather that such wealth may only intensify the class division in the country.[68] On the other hand, Professor Sagay, argued that Ajomo's argument cannot stand up to a rigorous examination or analysis, based on Nigeria's national experience.[69] Prof. Sagay asked the question whether central ownership and control have prevented the emergence of a class of enormously wealthy individuals, and whether the proceeds of oil has been prudently and patriotically put to the use for the country[70]. We submit that the question asked by Professor Sagay emanated from the deep corruption in the country and the lack of respect for due process.

Professor Ajomo further argued that State ownership of petroleum resources will further enhance the drive for national unity as whatever is gotten from the resources is shared among all the component states of the federation and not left in the lands of individuals or few states who will not have the interest of the populace at heart.[71] In response to this argument, Professor Sagay posited that, instead of promoting unity, the federal government's exclusive

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[63] His Lordship referred to Hales: (Hargrave's Tracts. p 12, 25 &26) which states that The shore is that ground that is between the ordinary high-water and low-water mark. Thus, both prima facie and of common right belong to the King, both in the shore of the sea, and the shore of the arms of the sea, Halsbury's Laws of England 4th Edition in Vol.4 (l) paragraph 921: states that 'Seashore or foreshore ... The boundary line between the seashore and the adjoining land is in the absence of usage or evidence to the contrary, the line of the median high tide between the ordinary spring and ebb tides.'

[64] In this work, the words absolute, state, sovereign or totalitarian ownership of petroleum resources mean the same and are used interchangeably.

[65] Also referred to as Totalitarian ownership theory by Aladeitan L. supra.

[66] Ajomo, MA 'The 1969 Petroleum Decree: A Consolidation Legislation, Resolution in Nigeria's Oil Industry', (1979) *Nigerian Annual Journal of Int'l Law*, 57.

[67] Op Cit p17.

[68] Id.

[69] Sagay, I, 'Ownership and Control of Nigerian Petroleum Resources: A Legal Angle' in V. Eromosele (ed.), *Nigerian Petroleum Business*: *A Handbook* (Advent Commc'ns Ltd. 1997) p100.

[70] Ibid.

[71] Id.

ownership and control of our oil resources has caused deep bitterness, resentment, and a sense of majority oppression of the minority producers of oil.[72]

He[73] went on to say that the country has witnessed rebellions, revolts and cries brought about by the exclusive ownership and control of petroleum and other mineral resources by the federal government.[74] Professor Sagay submitted further that, as a result of the state totalitarian ownership and control policy, the people of all the oil producing areas naturally felt 'cheated and exploited' by a policy under which the wealth on their land is carted away, leaving them with a polluted and devastated environment.[75] According to Lanre[76]

> Since Professor Ajomo's position cannot answer Sagay's questions including the one on private ownership creating individuals with enormous wealth to the detriment of others, it is humbly submitted that the points as canvassed by learned Professor Ajomo, while not illogical, are not justifiable reasons in the Nigerian experience.

With due respect to Aladeitan Lanre's position, we submit that Professor Ajomo's argument properly addressed the issue it was aimed at. What has created individuals with enormous wealth to the detriment of others, bitterness, and the feeling of being abandoned in the Niger Delta people is the deep corruption and lack of respect for the rule of law in Nigeria and not the vesting of ownership and control of petroleum and other petroleum resources in the federal government.

Furthermore, Professor Ajomo asserted that the question of the government or authority to whom revenues should be paid, and the power and resources derivable from it, was an issue in the crises that led to the Nigeria civil war, therefore, necessitating the federal government to claim that right exclusively.[77]

He contended further that, since oil has a vital influence on the life of the people because of the benefit of petroleum to the economy, exclusive federal control permits the promulgation of uniform regulations in the oil industry.[78] This position we think is apposite as allowing individual ownership of petroleum and other resources will lead to a situation where there are differing laws for the various communities and states blessed with these resources in Nigeria thereby leading to further agitations, confusion, and violence.

Professor Ajomo still justifying his position noted that the federal government is the only authority that can successfully pursue, in collaboration with oil companies, a policy that will not adversely affect Nigeria's foreign exchange position.[79]
In the same vein, he argued that, because of the strategic importance of oil in the twentieth[80] century and its importance to national life, it was only natural for oil to be centrally controlled in the interest of the nation.[81] He premised his opinion on the ground that the deposits of petroleum on land in Nigeria represent 'part of the National heritage' while those deposited in the maritime areas are subject to the sovereignty of the state, under various international

[72] Id.
[73] Sagay I. Ibid.
[74] Id.
[75] Id.
[76] Ibid.
[77] Ajomo MA. Op Cit p 72.
[78] Id.
[79] Id.
[80] When he made his submissions.
[81] Op Cit p 58.

conventions thus implying that, no matter where the resources are found, they are to be centrally controlled.[82]

According to Lanre,[83] it was also the contention of Professor Ajomo, that only the federal government has capacity to operate in the petroleum industry given the huge capital outlay and the high degree of technical expertise required. Similarly, he asserted that only the federal government has the capacity to compel the multinationals operating in the industry to share the necessary technical knowledge with Nigerians.

Other authors have lent credence to the argument against state ownership. One of them is Profesor Duruigbo. In his words,[84]

> In private ownership, oil and gas are essentially treated as any other commodity found on land. The landowner decides what to do with the resource and reaps any attendant benefits, subject to compliance with applicable public regulations on such issues as environmental protection and taxation.

He was however quick to identify and emphasize a significant downside of private ownership, which more or less does not consider the externalities of resource development, such as environmental degradation and its attendant implication on the society as a whole.[85] He posited that, 'if a government can internalize the externalities through adequate environmental regulation and taxation of profits, society could benefit from the resources found on, and developed from, private land.[86]

Apart from the two extreme positions examined above, there are also those who believe, and so argue for a middle position or what they called state and individual ownership arrangement. One of such is I. Omuli. According to him[87]

> the doctrine of national ownership is not the single answer to proper utilisation and control of resources, as countries like the United States of America, who recognise both the national and individual ownership of resources, are still able to achieve this unified goal, without conflict of both forms of ownership. Since the national ownership deprives individuals of their lands upon which these mineral resources are found, there will be adverse effects and reactions from these individuals.

This position brings to mind the need to compare the state ownership position in Nigeria with what obtains in Texas State, in United States of America where both forms of ownership and control co-exist. Although the position of Professor Ajomo may be opened to criticisms because of the endemic nature of corruption in Nigeria, coupled with neglect of the Niger Delta region, this work still agree with his position because the converse may open the Nigerian state to further crisis, disintegration and another civil war.

By way of solution, this paper shall make recommendations on how to tackle corruption and the problem of neglect of the Niger Delta region by successive governments and advocated the concept of inclusiveness in the management of Nigeria's resources.

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[82] Id.

[83] Op Cit at p.18.

[84] Duruigbo,E. 'The Global Energy Challenge and Nigeria's Emergence as a Major Gas Power: Promise, Peril or Paradox of Plenty?', (2009) 12 *Geo. Int'l Envtl. L. Rev;* 395, 442.

[85] Id.

[86] Id.

[87] Omuli, I. 'What Effect Does the Ownership of Resources by the Government Have on its People: A Case Study of Nigeria' O.Iwere@dundee.ac.uk last accessed April 1, 2017.

Conclusion and recommendations

Having considered the concept of Ownership and Control of Petroleum and other Resources in Nigeria, with particular focus on the legal regime on Ownership and Control of Petroleum and other petroleum Resources in Nigeria taking cognizance of the relevant provisions of the relevant laws and case law, the arguments for, and against absolute state ownership from the point of views of various legal writers, this paper make the following recommendations:

1. *State ownership of petroleum and other resources in Nigeria be maintained*: This is because divesting the state of such powers will amount to reducing its sovereignty to mere paperwork. It will as Professor M. A. Ajomo has rightly argued deflate the federal might of the state and create a more destructive oppressive system. However, the littoral states and oil producing communities should be allowed better participation in the management of the resources generated from their states and communities.
2. *Adoption of the principle of inclusiveness in the management of petroleum and other resources:* The Nigerian government should put in place a multi-stakeholder approach to oil exploration and exploitation involving the trio of government (both federal and states), oil companies and host communities. The multi-stakeholder mechanism should address issues of pollution as it relates to biodiversity conservation and regeneration. This way the host communities will help in the monitoring of oil companies in their communities. This will in turn help reduce the incidence of pollution to the barest minimum. Once the people of the oil rich region are fully and properly involved in the administration of oil and its revenue, the agitation will stop.
3. *Intentional fight against corruption*: Apart from the fact that what the littoral states are getting by way of derivation is quite infinitesimal compared to the discomfort they suffer, one sad thing is that even what is paid to the states does not positively impact the lives of the people because of corruption. Political leaders keep sharing the money between themselves until there would be nothing left for the common masses or for development. The federal and state governments should be more intentional and wilful in the fight against the prime enemy of the Nigerian state-corruption and stop paying lip services the crusade.
4. *Upward review of the Derivative Principle*: An upward review of the derivation principle from the current 13% to 30% is recommended. The proposed increase is permissible under the 1999 Constitution which merely specifies the lowest limit of the derivation principle in the proviso to s. 162 (2) thereof. The proposed increase will make more funds available to the oil-producing states to enable them to address the infrastructural deficit in the region and the other social externalities associated with natural resource extraction in the region and douse the tension already mounting.
5. *Corporate Social Responsibility*: Oil companies operating in the host communities should take up their social responsibilities in their host communities by developing the area, and also employ the youths instead of using the security personnel to intimidate their host communities. This practice has left the youths thinking that those they invited to come and eat have deprived them from eating themselves.