

**AN ANALYSIS OF THE LEGAL RIGHTS OF THE NIGER DELTA STATES IN  
RELATION TO OWNERSHIP AND CONTROL OF MINERAL RESOURCES  
UNDER NIGERIAN LAW**

**BY**

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## **DECLARATION**

I declare that the work in this dissertation titled *An Analysis of the Legal Rights of the Niger Delta States in Relation to Ownership and Control of Mineral Resources under Nigerian Law* has been carried out by me in the Department of Private Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this dissertation was previously presented for another degree or diploma at this or any institution.

Chinyere Immaculata EMEH

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Signature

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Date



## **DEDICATION**

I dedicate this dissertation to the MOST SACRED HEART OF JESUS and the  
IMMACULATE HEART OF MARY.

## ABSTRACT

*Natural resources worldwide are a gift of nature and an endowment of comfort that makes the existence of mankind complete. As nature's priceless gift to man and because nature's endowment of these resources is without reference to people or nation, the subject of ownership and control is one that has generated a great deal of passion and controversy amongst people and nations. Unfortunately, these resources have been identified as playing key roles in triggering conflicts, and, all through history, the struggle for possession and control of natural resources has been the remote, if not the immediate, cause of agitations and human tragedies. The Federal Republic of Nigeria is endowed with abundant mineral resources and hydrocarbons but the scope of this dissertation is oil and gas. Its vast oil fields are concentrated in the Niger Delta region, which comprises of Akwa Ibom, Bayelsa, Cross Rivers, Rivers, Delta, Edo and Ondo States. When God provided Nigeria with mineral resources, his purpose was to lift up the country's economic and social status and make the citizens enjoy respect and honour among the comity of nations. But like in the story of creation where God created man and put him in the Garden of Eden; the Garden of hope and comfort, man lost this great free gift due to greed and selfishness which led him to sin. The crisis over ownership of mineral resources in Nigeria is in diverse folds which have led to several heated debates, conflicts and misinterpretations. Some of these conflicts are between the Federal and State Government and the Local Communities and the Government. The Federal and State conflict that is branded "Resource Control" calls for fair, just, equitable and manageable natural resources sharing formula that shall be favourable to every Nigerian. This dissertation is aimed at considering the legal rights of the Niger Delta States in relation to the ownership and control of mineral resources under Nigerian Law. The choice of this topic stems from the fact that though the course is a viable one and many scholars have written on this concept but have concentrated more on state sovereignty over her natural resources. What then is the position of the people who are at the end point of every move in Nigeria? As is traditional with legal research, the methodology shall essentially be the doctrinal method which entails the study of major laws and textbooks written by distinguished scholars on the subject matter and other relevant materials such as academic journals, articles and judicial decisions or case laws as well as the internet.*

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## LIST OF ABBREVIATIONS

ANP	--	--	--	--	--National Petroleum Agency
CAMA	--	--	--	--	--Companies and Allied Matters Act
CFRN	--	--	--	--	--Constitution of the Federal Republic of Nigeria
CIA	--	--	--	--	--Central Intelligence Agency
CO2	--	--	--	--	--Carbon Dioxide
ERA	--	--	--	--	--Environmental Rights Action
EEZ	--	--	--	--	--Exclusive Economic Zone
GHG	--	--	--	--	--Green House Gas
ICCPR	--	--	--	--	International Covenant on Civil and Political Rights
ICESCR	--	--	--	--	International Covenant on Economic, Social and Cultural Rights
ICJ	--	--	--	--	International Court of Justice
LFN	--	--	--	--	Laws of the Federation of Nigeria
MA	---	--	--	--	Minerals Act
MEPC	--	--	--	--	Mineral and Energy Policy Centre
MOSOP	--	--	--	--	Movement for the survival of the Ogoni People
MPRDA	--	--	--	--	Minerals and Petroleum Resources Development Act
NDDC	--	--	--	--	Niger Delta Development Commission
OMPADEC	--	--	--	--	Oil Mineral Producing Areas Development Commission
RDP	--	--	--	--	Reconstruction and Development Programme
UNCLOS	--	--	--	--	United Nations Convention on the Law of the Sea

UNDP	--	--	--	--	United Nations Development Programme
UNGA	--	--	--	--	United Nations General Assembly
WCAR	--	--	--	--	World Conference against Racism, Racial Discrimination and Related Tolerance



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## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.1. Background to the Study

The Federal Republic of Nigeria is endowed with abundant mineral resources and hydrocarbons.

There is no state of the federation that does not have one natural resource or the other. Here is a table of the mineral resources available in different states of the federation:

Abuja (FCT) Marble, clay, tantalite	Abia Gold, salt, limestone, lead / zinc, oil and gas
Adamawa Kaolin, bentonite, gypsum, magnesite, barytes, bauxite	Akwa Ibom clay, limestone, lead/zinc, uranium, salt, lignite, oil and gas
Anambra Lead/zinc, clay, limestone, iron-ore, salt, glass sand, phosphate, gypsum	Bauchi Amethyst, gypsum, lead/zinc, uranium
Bayelsa Clay, limestone, oil and gas	Benue Lead/zinc, limestone, iron-ore, coal clay, marble, bauxite, salt, barites, gemstone, gypsum
Borno Diatomite, clay, limestone, gypsum, kaolin, bentonite	Cross River Limestone, uranium, manganese, lignite, lead/zinc, salt, oil and gas
Delta Marble, glass sand, clay, gypsum, lignite, iron-ore, kaolin, oil and gas	Ebonyi Lead/zinc, salt, gold
Edo Marble, clay, limestone, iron-ore, gypsum, glass sand, gold, dolomite, phosphate, bitumen, oil and gas	Ekiti Kaolin, feldspar, tatum, granite, syenites
Enugu Coal, limestone, lead/zinc	Gombe Gemstone, gypsum
Imo Lead/zinc, limestone, lignite, phosphate, marcasite, gypsum, salt, oil and gas	Jigawa Barites
Kaduna Sapphire, kaolin, gold, clay, serpentinite, asbestos, amethyst, kyanite, graphite,	Kano Pyrochlore, cassiterite, copper, glass sand, gemstone, lead/zinc, antalite



silimanlie, mica, aquamarine, rubyrock, crystal, topaz, flouspar tourmaline, gemstone, tantalite	
Kastina Kaolin, marble, salt	Kebbi Gold
Kogi Iron-ore, kaolin, gypsum, feldspar, coal, marble, dolomite, talc, tantalite, limestone, gemstone, bitumen	Kwara Gold, marble, iron-ore, cassiterite, columbite, tantalite, feldspar
Lagos Glass sand, clay, bitumen, sand, tar, oil and gas	Nasarawa Beryl ( emerald, acquamarine and hellodor), dolomite/marble, sapphire, tourmaline, quartz, amethyst ( garnet, topaz), zircon, tantalite, cassiterite columbite, ilmenite, galena, iron-ore, barites, feldspar, limestone, mica, cooking coal, talc, clay, salt, chalcopyrite
Niger Gold, talc, lead/zinc, iron-ore	Ogun Phosphate, clay, feldspar
Ondo Bitumen, kaolin, gemstone, gypsum, feldspar, granite, clay, glass sand, dimension stones, coal, bauxite, oil and gas	Osun Gold, talc, tantalite, tourmarine, columbite, granite
Rivers Glass sand, clay, marble, oil and gas	Sokoto Kaolin, gold, limestone, phosphate, gypsum, silica sand, clay, laterite, potash, flakes, granite, gold, salt
Taraba Kaolin, lead/zinc	Yobe Diatomite, soda, ash
Zamfara Gold	

But my main focus would be on petroleum (oil) and gas which is the mainstay of the economy. Nigeria's oil and gas activities are largely carried out in the Niger Delta region of Nigeria, in an area covering about 70,000 square kilometers<sup>1</sup>. The Niger Delta region comprises of Akwa Ibom, Bayelsa, Cross Rivers, Rivers, Delta, Edo and Ondo States. When God provided Nigeria with mineral resources, his purpose was to lift up the country's economic and social status and make

<sup>1</sup>Sagay, I.E., (2007), Human Rights, Justice and the Niger Delta: Issues and Challenges Being a Paper Presented at the Opening Ceremony of the 2007 Law Week of the Nigerian Bar Association ( Warri Branch) at Chevron Staff Club, p.3.

the citizens enjoy respect and honour among the comity of nations. But like in the story of creation where God created man and put him in the Garden of Eden; the Garden of hope and comfort, man lost this great free gift due to greed and selfishness which led him to sin.

Nigeria entered the world map of oil producing countries when the first barrels of crude oil to be exported from Nigeria were drilled from the wells. Since then life has never been the same again, not only for the Niger Delta region, but for Nigeria as a whole. Huge revenues accrued from this black gold, Government embarked on development projects that would make life easier for Nigerians but not without neglecting our traditional sources of revenue, i.e. agriculture, mining and craft. The result is the disappearance of cocoa and palm plantations in the south as well the groundnut pyramids in the north.

Mineral Resources which comprise of oil and gas, a whole lot of which Nigeria is blessed with is one of the most important sources of energy in the world today. World energy statistics indicate that it presently accounts for about 53% of world energy supply<sup>2</sup>. In Nigeria, the oil sector has continued to remain the mainstay of the national economy. Presently, it accounts for about 90% of Nigeria's total export earnings and over 70% of Federal Government revenue<sup>3</sup>. Oil and gas are treated as two separate but overlapping mineral concepts. In actual fact the Nigerian law tends to deal with "Petroleum" as an embodiment of both "oil and gas", and to try and legislate thus, the evidence of this may be seen in the definition of petroleum that may be found, upon curious enquiry of some of our statute books and in case laws which state that "petroleum can be defined as mineral oil or any related hydrocarbon or natural gas as it exists in its natural state. It also defines natural gas as gas obtained from boreholes and wells and consisting primarily of

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<sup>2</sup>Oge, O., Oil and Nigeria, <http://www.nigeria-planet.com/oil-and-nigeria>, Accessed on the 5/4/2013 at 11.53am.

<sup>3</sup> Ibid.

hydrocarbons”<sup>4</sup>. So within the definitions of petroleum and gas, the law recognizes the overlap between the two mineral resources.

Furthermore, the origin of oil and gas industry is often traced to the discovery of rock oil in the 1850s and the first oil well striking petroleum in 1859 in Titusville, Pennsylvania, United States of America<sup>5</sup>. From this humble beginning came the multi trillion dollar oil industry and the development of the framework for the commercial exploration and exploitation of the fuel that will power the great technology advances of the late 19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> centuries.

However, in Nigeria, the first commercial discovery of oil was in June, 1956, by the then Shell D’Archy Petroleum Development Company in Oloibiri, in present day Bayelsa State<sup>6</sup>. Within our current regime which was established under the Petroleum Act 1969<sup>7</sup>.

## **1.2. Statement of the Problem**

The crisis over ownership of mineral resources in Nigeria is in diverse folds which have led to several heated debates, conflicts and misinterpretations. Some of these conflicts are between the Federal and State Government and the Local Communities and the Government. The Federal and State conflict that is branded “Resource Control” calls for fair, just, equitable and manageable natural resources sharing formula that shall be favourable to every Nigerian. Resource control is the legal incidence of ownership of natural resources. The basic principle of our Property Law is that he who owns a thing of value manages it. In the words of Hon. Justice Tobi JCA (as he then

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<sup>4</sup> Sections 14(1) and 15(1) Petroleum Act, Cap P10 Laws of the Federation of Nigeria, 2004. This Definition was also adopted by Section 22 Nigerian National Petroleum Corporation Act, Cap N123 Laws of the Federation of Nigeria, 2004.

<sup>5</sup> OseIgehon, M., (2012), The International Legal Regime Relating to Oil and Gas Being a Paper Presented at the Conference for Judges at the National Judicial Institute, Abuja, p. 4.

<sup>6</sup> Udosen, C., et al., (2009), Fifty Years of Oil Exploration in Nigeria: The Paradox of Plenty, Global Journal of Social Sciences, Vol. 8, No.2, p. 37.

<sup>7</sup> Cap P10, (Ibid).

was), in **Abraham & Anor v. Olorunfumi & Ors**<sup>8</sup>, the distinguished jurist observed thus: “in so far as the property is his and inheres in him, nobody can say anything. He is the alpha and omega of the property. The property begins with him and ends with him”.

When one considers the above principle of our property law and the case cited above in the light of ownership pattern in Nigeria, one would be left with the view that our laws contradict each other. This is because the Constitution<sup>9</sup> and the Petroleum Act<sup>10</sup> has vested the control and ownership of all mineral resources on the Federal Government.

Another puzzle that will prick the mind of any close observer of this area of our jurisprudence is the provision of the Land Use Act. This is because we cannot talk about mineral resources without mentioning land that actually houses these mineral resources. The Act states thus<sup>11</sup>:

Subject to the provision of this Act, all the 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 Nigerians in accordance with the provisions of this Act.

The question is what is the place of the people who were the original owners of the land since trusteeship of the lands in any state in Nigeria has been vested on the state governor and the mineral resources found on the land is owned by the Federal Government. This is the problem with the Land Use Act. In the raging debates over who should control what resources, the interest of the oil producing communities and the occupiers of the land have been relegated to the background. The pertinent questions now are:

1. Can the existing laws relating to the ownership of mineral resources in Nigeria be said to be beneficial to the people of the Niger Delta region?

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<sup>8</sup> (1991) 1 NWLR, pt. 165, p. 53.

<sup>9</sup> Section 44(3) Constitution of the Federal Republic of Nigeria, 1999 (as amended).

<sup>10</sup> Section 1 Petroleum Act, (Op. Cit).

<sup>11</sup> Section 1 Land Use Act, 1978, Cap L5 Laws of the Federation of Nigeria, 2004.

2. Can the concept of ownership of the natural resources be said to be the root cause of the agitation in the Niger Delta region?
3. Why has oil wealth failed to translate into rapid economic growth and increased standard of living for the Niger Delta region and Nigerians?
4. Should the people of the Niger Delta region be blamed for the natural resources bestowed on them by Mother Nature?
5. Is the issue of resource control merely a struggle control of the resources of the Niger Delta?

### **1.3 Aims and Objectives of the Research**

This dissertation is aimed at considering the rights of the Niger Delta States in relation to the ownership and control of mineral resources under Nigerian Law. The choice of this topic stems from the fact that though the course is a viable one and many scholars have written on this issue but have concentrated more on state sovereignty over her natural resources. What then is the position of the people who are at the end point of every move in Nigeria? However some lacuna has been discovered. Accordingly, my objective in this work will be

1. To examine the legal framework of ownership of mineral resources in Nigeria vis-à-vis its application and impact on the people.
2. To assess the adequacy of the existing provisions of our local legislations in relation to ownership and control of mineral resources.
3. To highlight defects and shortcomings in the existing laws.
4. To re-examine the rights of the oil producing communities in Nigeria
5. To ensure that suggestions made would be geared towards improvement that would enhance Nigeria's ownership right over her mineral resources.

#### **1.4 Justification of the Research**

Countries, which are largely dependent on their resources have created legislations which devolve ownership of those resources from the hands of citizens in whose lands they are found and placed them under the care of the government. The rationale behind this is basically to secure and ensure that such resources are utilized in a sustainable manner which is beneficial not only to the government in whose hands the resources are controlled, but the generality of the people in the country as well as posterity after them. This topic is as relevant today, as indeed any other period in our socio-economic history on account of the restiveness associated with the ownership, control and management of these God-given natural endowments.

Common sense and simple economics suggest that countries endowed with an abundance of natural resources should prosper. Yet over many years, it has been observed that developing nations such as Nigeria rich in oil, gas or mineral resources have been disadvantaged in the drive for economic progress. It is rather unfortunate, that after over fifty years of oil exploration and exploitation in Nigeria, the basic infrastructures seem to be in decay. Poverty is an endemic problem as most of the erstwhile fertile lands in the Niger Delta region are infertile and devastated by pollution.

#### **1.5 Scope of the Research**

The scope of this research work is the legal rights of the Niger Delta states with respect to ownership and control of mineral resources under Nigerian law. Hence, this dissertation would cover relevant areas such as:

To analysis the legal framework regulating the rights of ownership of mineral resources by the Federal Government

The various laws regulating ownership of mineral resources, pointing out their adequacies, shortcomings and make suggestions

The examination of the term resource control in Nigeria

The assessment of the environmental impact/pollution of oil exploration in the Niger Delta region and

Findings and recommendations

## **1.6 Research Methodology**

As is traditional with legal research, the methodology shall essentially be the doctrinal method which is broken down into primary and secondary documents. Primary documents include statutes, case laws of superior courts of records or recommendations of tribunals. Secondary documents include opinions of eminent jurists and scholars expressed in journals, magazines, textbooks and the internet.

## **1.7 Literature Review**

A significant number of literatures in this subject matter dwells more on the causes of militancy in the Niger Delta. However, we shall be analysing the legal rights of the Niger Delta states in relation to the ownership and control of mineral resources under Nigerian laws. Moreover, since mineral resources are found on lands, we will also briefly examine the vesting of lands on which

these mineral resources are housed on the State Governors as trustees for the people of their states. Also we will examine the various laws regulating the ownership of mineral resources in Nigeria. Particularly, we will look at how scholars have treated the relationship between the legal regime of ownership of mineral resources in Nigeria.

In the municipal jurisdiction, the concept of economic self-determination is limited to the provisions of the state law. Therefore, state law on the ownership pattern of mineral resources is exclusively within the prerogative of the federal authorities. According to Cotula,

The ability of states to regulate activities within their territory is a key attribute of sovereignty. It is also important for the quest for economic development and sustainable development of the environment in such a way that long term benefits would be sustained and derived from their natural resources<sup>12</sup>.

In his work, *Oil and the Niger Delta People: The Injustice of the Land Use Act*<sup>13</sup> painted a gloomy picture of how the expropriation of mineral resources and land by the Federal Government of Nigeria has negatively affected the participation of the Niger Delta people in the petroleum industry inspite of the fact that the commodity is exploited from and on their land. According to him, the Petroleum Act vested the ownership of every mineral oil found on any land in Nigeria on the Federal Government. The result is that the Federal Government has absolute right and control over mineral resources in Nigeria.

The Land Use Act on the other hand did vest all the lands comprised in the territory of each state of the federation on the State Governor in “trust” for the people of his state. This implies that the governors stand in trusteeship position of all lands in their states.

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<sup>12</sup> Cotula, L., The Regulatory Takings Doctrine <http://www.iied.org/pubs/pdf>, Accessed on the 26/7/2015 at 5:34pm.

<sup>13</sup> Ebeku, K., *Oil and the Niger Delta People: The Injustice of the Land Use Act*, Centre for Energy Petroleum and Mineral Law Policy Journal, <http://www.dundee.ac.uk/cepmlp/journal/html/vol9>, Accessed on the 26/7/2015 at 5:58pm.



The United Nations Development Programme (UNDP) describes the Niger Delta region as suffering from administrative neglect, crumbling social infrastructure and services, high unemployment, social deprivation, abject poverty, filth, squalor and endemic conflict<sup>14</sup>. Meanwhile, the poverty in the region contrasted with the wealth generated by oil which has become one of the world's most disturbing examples of the resource curse<sup>15</sup>.

The fact that the people of the Niger Delta region have not benefitted from oil wealth is only one part of the story. The most unfortunate thing is the deleterious effect which the exploration and exploitation of mineral resources has had on the people's livelihood, health, human rights and local economy. Unchecked activities relating to mineral resources have pushed many people in the Niger Delta region into poverty and deprivation, fuelled conflict and led to a pervasive sense of powerlessness and frustration.

While oil spills<sup>16</sup> and gas flaring<sup>17</sup> are the most frequently referenced forms of oil related pollution in the Niger Delta, there are in fact several other ways in which the oil industries have continued to harm the environment, such as disposal of waste and effluents, dredging, drilling and seismic activities<sup>18</sup>.

Another set of literature has focused on how oil legislation in Nigeria is a consequence of power politics in the country. This can be seen in the dwindling fortunes of the derivation principles in

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<sup>14</sup> UNDP, Niger Delta Human Development Report, 2006.

<sup>15</sup> See Amnesty International, Nigeria, (2009), Petroleum, Pollution and Poverty in the Niger Delta, p.9.

<sup>16</sup> Sinden, A., (2008), An Emerging Human Rights to Security from Climate Change: The Case against Gas Flaring in Nigeria, in Burns and Osofsky, (Eds.), Adjudicating Climate Change Sub-National, National and Supranational Approaches, Cambridge University Press, p. 3

<sup>17</sup> The practice of gas flaring has been on in the Niger Delta since oil production started in the 1950s. See The Climate Justice Programme and Environmental Rights Action/ Friends of the Earth Nigeria, Gas Flaring in Nigeria: A Human Rights Environmental and Economic Monstrosity, <http://www.climatelaw.org/media/gas.flaring/report/gas.flaring.in.nigeria.html>, Accessed on the 26/7/2015 at 6:46pm.

<sup>18</sup> Ibid.

the Constitution. Thus, an author<sup>19</sup> noted the progressively diminishing revenue accruable from oil that has been allocated to the region by the Federal Government since independence to its present 13percent. He observed that this percentage has failed to satisfy the yearnings of the people of the Niger Delta region. This state of affairs has served to exacerbate insurrection and create violence, instability and conflict in the Niger Delta.

Furthermore, commenting on the issue of resource control, an author<sup>20</sup> did not go in-depth to distinguish the difference between resource control and mere increase in revenue which is just a part of resource control. He writes with passion and uses some emotive languages. He describes the neglect of the oil producing communities in very strong language. For instance he describes the treatment of Bayelsa state, one of the states in the Niger Delta region as pathetic and the overall neglect of the region as unconscionable.

I tend to agree with all the above postulations especially the statement made by Mahler. But the pertinent question missing is how well has the current 13percent derivation fund accruable to the oil producing states been put to proper use. It is my opinion that the states should also properly utilize and give account of the 13percent derivation fund accruing to their states and this could be done through provision of basic infrastructures in the state where oil is being explored.

## **1.8. Organizational Layout**

This dissertation is a devoted study on the legal rights of the Niger Delta States in relation to the ownership and control of mineral resources under Nigerian Law. Its purpose is to analyse some

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<sup>19</sup> Mahler, A., (2010), Nigeria: A Prime Example of the Resource Curse: Revisiting the Oil Violence Link in the Niger Delta, GIGA Research Programme (Violence and Security) Working Paper, No. 120, p.16.

<sup>20</sup> Dibua, J., Citizenship and Resource Control in Nigeria: The Case of Minority Communities in the Niger Delta, Africa Spectrum, Institute of Affairs, GIGA, Hamburg Germany, Vol. 40, No.1, p.9

of the existing laws regulating ownership and control of mineral resources by the Federal Government and give recommendations. This dissertation is made up of five chapters.

Chapter one begins with the background to the study which consists of the importance of mineral resources in Nigerian economy, the main ethnic groups of the Niger Delta region, history of oil exploration in Nigeria, etc. It also has the statement of the problem, aims and objectives of the study, scope of the research, justification for the research etc.

Chapter Two elaborates on the Legal Framework on the Ownership of Mineral Resources in Nigeria. On independence, Nigeria adopted some significant laws that vested the ownership of mineral resources on the Federal Government and also vested the trusteeship of land on which mineral resources is found on the State Government. Some of these laws are the Constitution of the Federal Republic of Nigeria, 1999, Petroleum Act, 1969, Cap P10 Laws of the Federation of Nigeria, 2004, Minerals and Mining Act, No. 20 of 2007, Exclusive Economic Zone Act, 1978 Cap E17 Laws of the Federation of Nigeria, 2004 and Land Use Act, Cap L5 Laws of the Federation of Nigeria, 2004.

Chapter Three is a Comparative Analysis on the Ownership of Mineral Resources in other Jurisdictions. This chapter focuses on countries like the United States of America and Brazil which operate the same federal system of government like Nigeria and how the ownership of mineral resources by their respective government has improved their countries' economies and if Nigeria could borrow a leaf from them.

Chapter Four dwells on The Effect of the Ownership of Mineral Resources by the Federal Government on the People of the Niger Delta Region. This would include the principle of self determination, the principle of derivation, the resource control question and the impact of oil

exploration on the people of the Niger Delta region. In this chapter, issues such as oil exploration, gas flaring, oil spillage, deforestation and vulnerability to natural disasters were highlighted, their losses and gains and how the government and the relevant corporate entities operating in the region can better the lot of both the environment and people.

Chapter Five is devoted to Summary, Findings, Recommendations and Conclusion

## CHAPTER TWO

### LEGAL FRAMEWORK FOR OWNERSHIP OF MINERAL RESOURCES INNIGERIA

#### 2.1. Introduction

It can be said that the direct powers of the legislators to determine the impact of their laws, for the effects of legislation are conditioned by processes only some of which fall within the purview of the state. The distinction between legislative intention and effects is an impact of the disconnection between law and custom. In any case, where legislation produces an unintended effect or works hardship, an occasion arises for the repeal or amendment of the legislation in order to end the unintended result or injustice.

On attaining independence, Nigeria adopted some significant number of laws that were passed by the British colonial power before independence. One of these laws was the Minerals Act 1958 now Minerals and Mining Act, No. 20 of 2007 which vested the right to all minerals found in the country in the crown.<sup>1</sup>

Section 1 of the Minerals and Mining Act states:

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 water courses throughout Nigeria, and area covered by its territorial waters or constituency and the Exclusive Economic Zone is and shall be vested in the Government of the Federation for and on behalf of the people of Nigeria.

In order to underscore the right of ownership of the states to mineral resources, the provisions of the Minerals Act were incorporated into the various Constitutions of Nigeria. The Constitutions accorded exclusive power to legislate on mines, minerals, including oil fields, oil mining, geological surveys and natural gas to the Federal Government.

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<sup>1</sup> This Act consolidated all the existing Legislations on Mines and Minerals.

For a proper understanding of this discussion an explanation of the concept of ownership is very important.

## **2.2 The Concept of Ownership**

The Black's Law Dictionary<sup>2</sup> defines Ownership as the collection of rights to use and enjoy property, including the right to transmit it to others. This implies the right to possess a thing regardless of any actual or constructive control.

The Oxford Advanced Learners Dictionary<sup>3</sup> also defined Ownership as the fact of owning something. Owner literally means a person who owns something. To own means to have something as one's property; to possess. The term ownership is used with reference to things. Dias defines it as consisting of an innumerable number of claims, liberties, powers and immunities with regard to the things owned<sup>4</sup>.

At common law, the owner of a piece of land owns whatever is found under the land or attached to the land. This is the legal principle of *quic quid plantatur solo solo cedit*. A landowner will, therefore, exercise the right of ownership, which includes the right to use, enjoy, manage and even to abuse, over his parcel of land.

Austin who wrote at the beginning of the 19<sup>th</sup> century defines ownership as "a right indefinite in point of user-unrestricted, in point of disposition-and-unlimited, in point of duration over a determinate thing"<sup>5</sup> The right of an owner of property to use the property as he likes is not unlimited. A person can only do what he likes with what he owns within certain limits which are determined by the interest of others.

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<sup>2</sup> Garner, B.A., (2009), Black's Law Dictionary, 9<sup>th</sup> Ed. St. Paul, Minn.: West Thompson Reuters, p. 955.

<sup>3</sup> Hornby, A.S., (1997), Oxford Advanced Learners Dictionary, Oxford University Press, 7<sup>th</sup> Edition, p.1045.

<sup>4</sup> Dias, R.W.M., (1970), On Jurisprudence, Butterworth's 3<sup>rd</sup> Ed. London, p.361.

<sup>5</sup> Ewa Odu, R. I., (2008), Resource Control: Legal Right of Niger Delta Region of Nigeria, Lagos, University of Lagos Press, p.113.

Furthermore, ownership connotes a complete and total right over a property. This includes the power to enjoyment, to determine the use to which the thing is to be put, to deal with, produce or to destroy it, as the owner pleases, the power of possession, the power to alienate, the power to bequeath, the power to charge as security and the power to grant to another person any or all of the rights for a stipulated time period. In *Nigeria National Petroleum Corporation v. Sele*,<sup>6</sup> the court held that the owner of land adjoining, abutting or encompassing waterways are entitled not only to fish there but also to settle or erect structures and even extract rent from others seeking to use the land.

Hence, from the above definitions, it can be said that the owner of a thing manages and controls it. The most conclusive evidence of ownership is the owner's ability to do as he pleases with his property without any super-imposed restrictions. But by the effect of Section 1, Land Use Act, 1978<sup>7</sup>, the Governor of a state is the trustee of all the land comprised in the territory of the state. The result is that land rights are now vested in the state depriving the people their means of livelihood. The Land Use Act has become outdated in the Nigerian context because the desired result was not felt by the people for which the law was promulgated. The trusteeship talked about in Section 1, Land Use Act has failed completely since the beneficiaries of the trust have turned to victims. As they stand today, they are simply an imposition. Chukwuemeri<sup>8</sup> captured imposition thus:

As an imposition, it cannot be sustained for all times, not even with fiercest use of the federal might. It can definitely not be sustained for so long in the face of the determined social and popular quest for change. A legal framework perceived as unjust and anachronistic cannot be long sustained. The will of a people at the end of the day will normally win over Force however awesome or brutal the force may be.

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<sup>6</sup> (2004) 5 NWLR, pt. 866 at 379.

<sup>7</sup> Cap L5 Laws of the Federation of Nigeria, 2004.

<sup>8</sup> Martins C., A Critical Appraisal of the Legal Regime of Ownership of Petroleum and Land in Nigeria <http://www.martinslibrary.blogspot.com>, Accessed on the 31/5/2015 at 12:14pm.

### 2.3 Ownership and Control of Mineral Resources in Nigeria

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<sup>9</sup>. 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<sup>10</sup> and, naturally the minerals in Nigeria whether oil and gas or solid minerals also belonged to Britain<sup>11</sup>. According to Sagay, "The imperial masters claimed all the minerals in Nigeria for itself, as was to be expected; Colonial rulers operated in their own interest, not in the interest of the colonised people"<sup>12</sup> It was this concept of state ownership of minerals that Nigeria inherited at independence in 1960, which thereafter became entrenched in the 1963 Republican Constitution.

To put it in Sagay's words, "After Nigeria gained independence; the new state adopted and institutionalised this vestige of colonial experience"<sup>13</sup>. It is important to note that the issue of ownership was of no consequence in the Mineral Oils Ordinances of 1914 as amended in 1925, and only began to feature as a legal provision in the Minerals Act of 1958, now Petroleum Act, 1969<sup>14</sup>

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<sup>9</sup> Aladeitan, L., Ownership and Control of Oil, Gas and Mineral Resources in Nigeria: Between Legality and Legitimacy, Thurgood Marshall Law Review, Vol. 38, <http://www.ownership-of-oil.com>, Accessed on the 1/7/2016 at 12:56pm.

<sup>10</sup> Controlling Nation: A Ruler or Nation that controls a dependent Nations International Affairs but allows it to control its Internal Affairs.

<sup>11</sup> Ajomo, M.A., (2001), The Legal Framework of the Petroleum Industry, Being Paper Presented at the Centre for Petroleum, Environment and Development Studies with the theme Essentials of Oil and Gas Law, Lagos State, p.165.

<sup>12</sup> Aladeitan, L., Ownership and Control of Oil, Gas and Mineral Resources in Nigeria: Between Legality and Legitimacy, (Ibid).

<sup>13</sup> Ajomo M.A., (2001), The Legal Framework of the Petroleum Industry (Ibid).

<sup>14</sup> Section 1 Petroleum Act (Op.cit)



According to Ajomo, the provision of Section 1 of the Petroleum Act on ownership of mineral resources was remodeled under the Constitution of the Federal Republic of Nigeria, 1979 to read: “Mineral oil and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone (EEZ) of Nigeria shall vest in the Government of the Federation”.

The Exclusive Economic Zone (EEZ) was added following a new resource regime of the sea created by Decree No. 28 of 1978, now called the Exclusive Economic Zone Act. This new creation is a resource regime, which has now been conceded to littoral States under the United Nations Montego Bay Convention on the Law of the Sea of 1982. Presumably, it is against the recognition of territory as an attribute of statehood. The inspiration drawn from the United Nations General Assembly Resolution of 1962, which declared that the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State<sup>15</sup>. The current legal regime governing ownership of mineral resources and land in Nigeria retains and vests ownership in the Government of the Federation.

#### **2.4 The Current Applicable Legal Regime**

The applicable legal regimes are:

Constitution of the Federal Republic of Nigeria, 1999 (as amended)

Petroleum Act, 1969 Cap P10 Laws of the Federation of Nigeria, 2004

Nigerian Minerals and Mining Act, No. 20, 2007

Exclusive Economic Zone Act, 1978 Cap E17 Laws of the Federation of Nigeria, 2004

Land Use Act, 1978 Cap L5, Laws of the Federation of Nigeria, 2004

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<sup>15</sup>Permanent Sovereignty over Natural Resources, General Assembly Resolution, 1803 (XVII) (Dec. 14, 1962), [http://www.untreaty.un.org/cod/avl/ha/ga\\_1803.html](http://www.untreaty.un.org/cod/avl/ha/ga_1803.html), accessed on the 1/7/2016 at 4:31pm

#### **2.4.1. Constitution of the Federal Republic of Nigeria, 1999**

The Constitution of the Federal Republic of Nigeria, 1999 made provisions for the ownership and control of mineral resources in Nigeria. Section 44(3) of the Constitution provides thus:

Notwithstanding the foregoing provisions of this Section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.<sup>16</sup>

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 Constitution of the Federal Republic of Nigeria, 1979.

The implication of the above provision is that no state government or local government has a legal right of ownership of mineral resources found within its territory. Consequently, it cannot make laws governing the exploration, development and production of mineral resources. All such matters are within the Exclusive Legislative List as provided by the Constitution<sup>17</sup>. What the Constitution on the above provision did was to cloth the provision of Section 1 of the Petroleum Act with constitutional flavor with an order that the management of the resources shall be in accordance with the prescription of the National Assembly including the formula for distribution of the proceeds thereof.

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<sup>16</sup> Similar provisions are contained in Section 1, Minerals and Mining Act, No, 20, 2007.

<sup>17</sup> Second Schedule of the Constitution of the Federal Republic of Nigeria, 1999.

The Federal Government is the only authority that can lawfully grant licences or leases to prospective explorers and concessionaries to enter upon any land or water in Nigeria. It equally has full jurisdiction to enact and enforce laws governing the development of mineral resources, the pricing of oil and gas within the territory of Nigeria and also the seabed and subsoil of her territorial waters. As a corollary to this law, nobody can undertake activity for the exploration, exploitation of oil and gas without the express authority of the Federal Government.

The Constitution also allowed a derivation fund of not less than 13percent of the revenue accruing to the federal account directly from any natural resource to the state from where it is derived<sup>18</sup>. Following a widespread protest, the Federal Government instituted a case against the states of the federation asking the Supreme Court to interpret what constituted the seaward boundary of a littoral state in Nigeria<sup>19</sup>. The Federal Government maintained that natural resources located within the Continental Shelf of Nigeria are not derivable from any state of the federation. The Constitution, being the grundnorm is supreme, and if any other law is inconsistent with its provisions the Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.

#### **2.4.2 Petroleum Act**

The most important petroleum ownership/control legislation in Nigeria is the Petroleum Act, 1969<sup>20</sup>, which explicitly and intricately defines the issues of petroleum resource ownership and control. This Act provides for the exploration of petroleum from 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 in the Federal Government.

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<sup>18</sup> Section 162(2) Constitution of the Federal Republic of Nigeria, 1999 (as amended).

<sup>19</sup> **Attorney-General of the Federation v. Attorney-General, Abia State & 35Others** (2002) 6 NWLR pt 764, 543-903.

<sup>20</sup> Cap P10, (Op. cit).

The preamble to the Act<sup>21</sup> describes it thus:

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 offshore revenue from petroleum resources derivable therefrom in the Federal Government and for all matters incidental thereto.

The Petroleum Act, 1969 in a manner identical to Section 44(3) of the Constitution of the Federal Republic of Nigeria, 1999 makes it clear in its preamble the dispossession of land rights of every individual who happens to own land sitting upon oil. The Act cleans the slate of any property ownership if there is oil or the possibility of oil, land ownership vest in the Federal Government solely. The government may pay compensation for improvement on land<sup>22</sup>.

Section 1 of the Act states:

The entire ownership and control of all petroleum in, under or upon any lands to which the section applies in the state. The Section in turn applies to all land, including land covered by water which is in Nigeria, land under the territorial waters, or land which forms part of the continental shelf, or which forms part of the Exclusive Economic Zone of Nigeria<sup>23</sup>.

Section 2 of the Petroleum Act, 1969 sets the stage for the participation of Nigerian companies and Nigerian citizens in the oil enterprise by stating that only Nigerian citizens and companies duly incorporated in Nigeria may be granted

1. Licences to be known as oil exploration license
2. Licence to be known as oil prospecting license
3. A lease to be known as oil mining lease

Section 2(2) of the Act granted concession to a citizen of Nigeria or a company duly incorporated in Nigeria under the Companies and Allied Matters Act<sup>24</sup>. Simply put only

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<sup>21</sup> Ibid.

<sup>22</sup> Section 2(c) Land Use Act, (Op.cit).

<sup>23</sup> Section 1(2) (a-d) Petroleum Acts, (Op. cit).

<sup>24</sup> Cap C20, Laws of the Federation of Nigeria, 2004.

an unregistered company cannot be granted concession. This is why most foreign oil industries incorporate Nigerian subsidiaries through which they obtain licences and carry on operations. (This is legal and within the ambit of the law since the law does not require a company incorporated in Nigeria to be owned by Nigerians alone).

Furthermore, Section 2(1) of the same Act empowered the Minister of Petroleum to grant oil mining lease to search for, win, work, carry away and dispose of petroleum. The effect of this is that ownership of produced oil under a license is well settled and free from controversy. Also Section 1(2) of the Petroleum Act made the provisions in Section 1 applicable to all lands including lands covered by water that is in Nigeria or is under the territorial waters of Nigeria or form part of the continental shelf.

The logical consequence of the Nigerian government's right to the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters is that the government can condemn private land for any aspect of petroleum development. In other words, while individuals' land surface improvements (in the form of buildings, crops, tombstones, shrines and ancestral cemeteries) remain private, minerals, mineral oils and natural gas in, under or upon the land are viewed by the state as public goods and government's intervention in their exploitation becomes simply a case of public use.

### **2.4.3 Minerals and Mining Act**

The Nigerian Minerals and Mining Act, 2007 repealed the Minerals and Mining Act, 1999.

Section 1 of the Act provides:

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 Zone is

and shall be vested in the Government of the Federation for and on behalf of the people of Nigeria<sup>25</sup>.

Consequent upon this provision, the Act<sup>26</sup> provided 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. 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. The lands referred to in Section 3 includes 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<sup>27</sup> and the National Parks Services Act<sup>28</sup>.

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 even though the ownership of mineral resources is entirely vested in the Federal Government.

Furthermore, the Act has vested 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 water courses throughout Nigeria, any area covered by its territorial waters or constituency and the Exclusive Economic Zone in the Federal Government of Nigeria.

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<sup>25</sup> Section 1, Minerals and Mining Act, No. 20, 2007

<sup>26</sup> Section 1(2) (Ibid)

<sup>27</sup> Cap N19 Laws of the Federation of Nigeria, 2004

<sup>28</sup> Cap N65 Laws of the Federation of Nigeria, 2004

This provision essentially mirrors the Constitution of the Federal Republic of Nigeria, 1999<sup>29</sup>.

The most striking aspect of this Act is the mentioning or inclusion of the Continental Shelf. This was one of the reasons for the heated argument in the case of **Attorney-General of the Federation v. Attorney-General of Abia State & 35ors**<sup>30</sup>. The argument was whether the littoral states could claim offshore of the sea adjacent to boundaries of their states so as to enhance their revenue derivation potentialities. This argument was struck off on the ground that whatever revenue that accrues from drilling offshore belongs to the whole Federation of Nigeria based on Section 162(2) Constitution of the Federal Republic of Nigeria, 1999<sup>31</sup>. The Section states thus:

The president, upon the receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission, shall table before the National Assembly proposal 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; 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 percent of the revenue accruing to the Federation Account directly from any natural resources.

The Federal Government of Nigeria in trying to create an enabling environment for business to thrive developed this legislative framework. The Act contains specific provisions that will enhance private sector participation in the development of the mining industry in the country. One of the provisions contained therein is the vesting of ownership and control of minerals in the Federal Government.

Moreover, The Act gives priority for the use of land for mining over other uses of land and shall be considered for the purposes of access, use and occupation as constituting overriding public interest under the Land Use Act. The provision of the Land Use Act,

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<sup>29</sup> Section 44(3) CFRN,(Op.cit).

<sup>30</sup> (Supra), p. 18.

<sup>31</sup> Aboki, Y., (2008), Law and Society: The Land Use Act Catalyst for Food Security, Protector of Health, Provider of Good Environment, An Inaugural Lecture, Ahmadu Bello University Press Limited, p.11.

which regulate matters relating to access to land for mining purposes contemplate that land, has a special status. Hence, the Governor has the right to grant a Right of Occupancy and a corresponding power to revoke the Right of Occupancy for overriding public interest<sup>32</sup>. In practice, however, since the Land Use Act vests ownership of land comprised within the territory of a State in the Governor of the State, the process is not so simple particularly where both tiers of Government work at cross-purposes.

#### **2.4.4 Exclusive Economic Zone Act**

The scope of the Act is encapsulated in its preamble which states categorically that the objective of the Act is to declare Nigeria's exclusive sovereign right over the natural resources of the Exclusive Economic Zone which natural resource are minerals(only to be found in the continental shelf) and living species found in the superjacent waters.

It also claims sovereign and exclusive rights to the natural resource of the superjacent waters i.e.; the sea itself for 200 nautical miles. In other words, the Exclusive Economic Zone Act contains two major aspects, the aspect relating to the sea and its natural resources and the part relating to the Continental Shelf and its mineral resources. Sections 1(1) and 2(1) categorically buttress these points.

Section 1(1) provides thus:

Subject to the other provisions of this act, there is hereby denominated a zone to be known as the Exclusive Economic Zone of Nigeria (hereinafter referred to as the "Exclusive Zone") which shall be an area extending from the external limits of the territorial waters of Nigeria up to a distance of 200 nautical miles from the baseline from which the breadth of the territorial waters of Nigeria is measured<sup>33</sup>.

Section 2(1) also states:

Without prejudice to the Territorial Waters Act, the Petroleum Act or the Sea Fisheries Act, sovereign and exclusive rights with respect to the exploration and exploitation of the natural resources of the sea bed, subsoil and Superjacent waters of the exclusive zone shall vest in the Federal Republic of Nigeria and such rights

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<sup>32</sup> Section 28(1) Land Use Act, (Op.cit).

<sup>33</sup> Cap E17 Laws of the Federation of Nigeria, 2004.



shall be exercisable by the Federal Government or by such minister or agency as the government may from time to time designate in that behalf either generally or in any special case<sup>34</sup>.

Another very interesting and revealing aspect of the Act is that it recognizes that some parts of the Nigerian Continental Shelf may extend into the continental shelves of other states and consequently clear provisions are made in section 1(2) and (3) of the Act resolving all conflicts in advance.

It should be noted that Nigeria first lays claims to 200 nautical miles of continental shelf. It then provides that in areas of the sea where a neighboring state's continental shelf might also extend into Nigeria's continental shelf the delimitation (division) of the continental shelves of the other state or states and Nigeria shall be based on a treaty or written agreement<sup>35</sup>.

As the International Court of Justice declared in the *Malta v. Libyan Arab Jamahiriya*<sup>36</sup>, "although there can be a Continental Shelf where there is no corresponding Exclusive Economic Zone, there cannot be an Exclusive Economic Zone without a corresponding Continental Shelf". Indeed not only has Nigeria claimed a continental shelf of 200 nautical miles, it has also empowered oil companies to erect artificial islands and installations and structures, meaning off shore drilling platforms on the continental shelf of Nigeria for up to 200 nautical miles<sup>37</sup>.

#### **2.4.5 Land Use Act**

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

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<sup>34</sup> Ibid.

<sup>35</sup> Itse, S., The On-Shore, Off-Shore Bill: An Addendum, <http://www.notes.on.exclusive.economic.zone.act.com>, Accessed on the 9/2/2015 at 1.09pm.

<sup>36</sup> **Continental Shelf Case 1985**, <http://www.icj-cij.org/docket.com>, Accessed on the 26/5/2015 at 2:31pm.

<sup>37</sup> Itse, S., The On-Shore, (Ibid).

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 which are the pre-colonial, colonial and post-colonial such that what obtained in the country was the dual system of land ownership<sup>38</sup>. 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, the communal system of land ownership held sway and it was from this system, that private ownership of land evolved through grants, sales and partition.

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<sup>39</sup>. It is noted that the Land Tenure Law replaces Lord Lugard's and substantially reaffirms the principles and philosophy underlying the Land and Native Rights Ordinances<sup>40</sup>. The effect of this enactment is that it facilitated easy dispossession of lands from the natives by the authorities.

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. The Land Use Act, 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 on 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 the 1979 Constitution<sup>41</sup> and also retained in the Constitution of the Federal Republic of Nigeria, 1999, thus making its repeal cumbersome and tedious.

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<sup>38</sup> Smith, I.O., (1995), *The Law of Real Property in Nigeria*, Law Centre, Lagos State University, Lagos, p.5.

<sup>39</sup> *ibid*

<sup>40</sup> Ajomo, M.A., (1982), *Ownership of Mineral Oils and the Land Use Act*, Nigerian Current Law Review, Lagos, p.335.

<sup>41</sup> Section 274(5)(d) Constitution of the Federal Republic of Nigeria, 1979

The Land Use Act introduced an entirely new dimension into landownership in the country. It is therefore clear that land ownership and tenure in Nigeria is a qualified one in which the governor is vested the trusteeship of all lands in his state.

However, it must be mentioned that, notwithstanding the vesting of title to land in the Governors of the respective states, one cannot exercise rights over lands that belong to the Federal Government and its agencies<sup>42</sup>. 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.

It is equally noted that, apart from legislation, case law has also acceded to the fact that ownership and control of mineral resources is vested in the Federal Government. This was confirmed by the Supreme Court of Nigeria in the case of **Attorney General of the Federation v. Attorney General Abia State & 35 Ors**<sup>43</sup> where it was held that the Federal Government alone and not the littoral states can lawfully exercise legislative, executive and judicial powers over the maritime belt or territorial waters and sovereign rights over the Exclusive Economic Zone subject to universally recognized rights. The court went on to decide that the mere fact that oil rigs bear the names of indigenous communities on the coastline adjacent to such offshore area does not prove ownership of such offshore areas.

There is no doubt from the pronouncement of the Supreme Court that ownership and control of mineral resources whether onshore, offshore, in Nigeria's territorial waters, the Exclusive Economic Zone<sup>44</sup> or the Continental Shelf<sup>45</sup> is vested in the Federal Government of Nigeria.

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<sup>42</sup> Section 49 Land Use Act, (Op.cit)

<sup>43</sup> (Supra), p. 22.

<sup>44</sup> The Exclusive Economic Zone is a resources regime of the sea created by the EEZ Act No 28 of 1978 and which has been conceded to coastal states by International Law under the United Nations Convention on Law of the Sea, 1982.

<sup>45</sup> Continental Shelf means the Seabed and Subsoil of those Submarine Areas adjacent to the Coast of Nigeria the surface of which lies at a depth no greater than 200 meters or, where its natural resources are capable of exploitation, at any depth below the surface of the Sea, excluding so much of those areas as lies below the Territorial Waters of Nigeria.

## **2.5 The Landmark Decision of the Supreme Court of Nigeria on the Seaward Limit of Littoral States**

Nigeria is located on the West Coast of Africa in the Gulf of Guinea with an approximate coastline of about 853 kilometers<sup>46</sup>. The country is endowed with enormous oil and gas resources found both onshore on the swampy areas of the Niger Delta region and offshore on her territorial sea and continental shelf. The Federal Government currently owns all natural resources in Nigeria. The National Assembly is empowered by the Constitution to determine the formula for the distribution of funds in the Federation Account.

The issue which was not, however, addressed by the derivation formula<sup>47</sup> was whether the offshore bed of the territorial sea, Exclusive Economic Zone and Continental Shelf belonged either to the littoral states or the Federal Government. This culminated in a legal battle between the Federal Government and the 36 States of the Federation, including the eight Littoral States as to the Southern (or seaward) boundary of each of the Littoral States.

The boundary was important because of the extensive petroleum reserves that lay both onshore and offshore of the states coast. At stake were each party's proportionate share of the reserve, which would be based on where the state's legal shoreline was determined to be, and the extent of the state's seaward jurisdiction. The fact of the case is hereby discussed:

### **2.5.1. Attorney-General of the Federation v. Attorney-General of Abia State & 35 Ors<sup>48</sup>**

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

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<sup>46</sup> Egede, E., (2004), The Nigerian Territorial Waters Legislation and the 1982 Law of the Sea Convention, Vol. 19, No. 2, International Journal of Marine and Coastal Law, p.151

<sup>47</sup> For more information on the Historical Analysis of the Derivation Principle, see Ebeku, K., (2003), Nigerian Supreme Court and Ownership of Offshore Oil, 27th National Resources Forum, pp. 291-299

<sup>48</sup> (Supra), p.22.

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, and on the 1982 United Nations Convention on the Law of the Sea and 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.

The Federal Government asserted that the southern (or seaward) boundary of each of the littoral 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. In addition, the Federal Government contended that natural resources located beyond the low-water mark and within the Continental Shelf of Nigeria are not derivable from any state of the federation. The defendants including the eight littoral states, which are Akwa Ibom, Bayelsa, Cross River, Delta, Lagos, Ogun, Ondo and Rivers States contended that the territory of the littoral state extended offshore as far as the Continental Shelf and even beyond. The states relied in their defence on Section 1(1) of the Offshore Oil Revenue (Registration of Grants) Act<sup>49</sup> as evidence of the Federal Government's acknowledgement or acceptance that the Continental Shelf forms part of the littoral states to which it is contiguous<sup>50</sup>. They maintained that natural resources derived from both onshore and offshore are derivable from their respective territory and in respect thereof each is entitled to "not less than 13 percent" allocation as provided in the proviso to Subsection (2) of Section 162 Constitution of the Federal Republic of Nigeria, 1999. And this is where the issue was joined. The Supreme Court was then saddled with the first opportunity ever to determine

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<sup>49</sup> Cap 336 Laws of the Federation of Nigeria, 1990 now Cap 04 Laws of the Federation of Nigeria, 2004

<sup>50</sup> Section 1(1) states that: All registrable instruments relating to any lease, license, permit or right issued or granted to any person in respect of the territorial waters and the Continental Shelf of Nigeria shall, notwithstanding anything to the contrary in any enactment continue to be registrable in the States of the Federation, respectively, which are contiguous to the said Territorial Waters and the Continental Shelf.

the southern (or seaward) limit of each of the eight littoral states. Willing to disentangle the legal issues involved, but unable to find Nigerian legislation 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<sup>51</sup>, foreign cases<sup>52</sup> and international laws<sup>53</sup>.

In the final analysis, the Court decided that the offshore seabed of the Territorial Sea, Exclusive Economic Zone and the Continental Shelf belonged to the Federal Government and consequently did not form part of the littoral states. The Supreme Court held that the southern boundary of each of the littoral states (except Cross River State) end at the low watermark along the coast. It was also held with respect to the boundary of Cross River State, which has an archipelago constituting part of its territory, that the boundary is the seaward limit of its inland waters.

The Supreme Court ruling is of course right. The Supreme Court has read the law properly, stating the law as it is. It must be realised that the responsibility of the Court is juridical and not jurisprudential. The Court is to interpret the meaning of the language of the law as presently couched and not to rewrite or amend them or declare them wrong

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<sup>51</sup> According to the Supreme Court, the first instrument that defined the boundaries of Nigeria was the Colony of Nigeria (Boundaries) Order in Council 1913, reaffirmed in the Nigerian Protectorate Order in Council 1922. Section 11 of the 1922 Order in Council defined the Protectorate of Nigeria as: The territories of Africa which are bounded on the South by the Atlantic Ocean, on the West, North and North-East by the line of the frontier between the British and French territories, and on the East by the territories known as the Cameroon's.

<sup>52</sup> See *R v. Keyn* (1876) 2 EX.D.63; *New South Wales v. Commonwealth* 8 ALR (1975-6) 1; *Re: Ownership Offshore Mineral Rights*, Vol.65 DLR, 354, 1967.

<sup>53</sup> 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. E17, Laws of the Federation of Nigeria 2004 and the Sea Fisheries Act, Cap.404, Laws of the Federation of Nigeria, the inference, were rejected by the Court. On this point, Hon. Justice Uwais, CJN (as he then was) stated that "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 my 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.

choices of words. It is not to declare whether the law as it is, at the moment is proper, just and equitable or not but to state what they provide and at best whether they have been validly made<sup>54</sup> by competent legislatures<sup>55</sup>. To expect otherwise from the court is to be sentimental and not juridical. The court has therefore done its work.

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<sup>54</sup> See **Attorney-General, Bendel State v. Attorney-General of the Federation & Ors** (1982) 3 NCLR, 1.

<sup>55</sup> **Attorney-General of the Federation v. Attorney-General, Abia State** (Supra).

## CHAPTER THREE

### COMPARATIVE ANALYSIS ON THE OWNERSHIP OF MINERAL RESOURCES IN OTHER JURISDICTIONS

#### 3.1 Introduction

Mineral resources particularly oil and gas has been said to be a source of blessing to nations endowed with it. Thus, oil wealth has transformed the economic fortunes of most countries in which it has been discovered. Some examples are the United States of America, the United Kingdom, Brazil, Venezuela, Algeria, Tunisia and South Africa; to mention but a few. Nations like Kuwait and the United Arab Emirates (UAE) have world class infrastructures today because of the providential wealth of mineral resources.

Most countries have conferred the power /ownership of their resources on their Government, not allowing individuals to lay claim to it. Countries, which are largely dependent on their mineral resources have created legislations which devolve ownership of these resources from the hands of citizens in whose lands they are found and place them in the care of the government. This is also known as the National Ownership Theory<sup>1</sup>. The rationale behind this theory is basically to secure and ensure that such resources are used in a sustainable manner which is beneficial not only to those in whose lands the resources are found, but also their future generation at large.

It can be argued that the doctrine of national ownership which is employed by developing countries; that is third world countries including Nigeria has emphasised the above opinion as not the single answer to proper utilization and control of resources as countries like the United States of America, who recognize both the national and individual ownership of resources are still able to achieve this unified goal without

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<sup>1</sup> Wright, G., and Czelusta, J., (2003), Mineral Resources and Economic Development, Conference on Sector Reform in Latin America, Stanford Center for International Development, <http://www.siepr.stanford.edu/workp/swp.04004.pdf>, Accessed on the 29/9/2016 at 8:38am.



compromising both forms of ownership. It should be noted that since the national ownership theory deprives individuals of their lands upon which these mineral resources are found, there will be adverse reactions from these individuals.

This chapter sets to compare and analyse the nature of ownership of mineral resources in Nigeria and two other countries. These countries are the United States of America and Brazil. This choice is based on the fact that these countries operate the Federal System of Government just like Nigeria. Currently, Nigeria operates a Federal System of Government with a government at the centre, 36 States with the FCT and 774 Local Government Areas. In such a multilevel arrangement, fiscal responsibilities are vested in the central, state and local governments. This gives rise to decentralized fiscal system or fiscal federation. The need hereby arises to briefly define the word federal. Federal is having a system of government in which the individual states of a country have control over their own affairs, but are controlled by a central government for national decisions<sup>2</sup>.

Although the law on federal government ownership of mineral resources is not unique to Nigeria alone, the application of this law in practice has been a source of controversy. This chapter examines the origins and content of this practice in these countries mentioned above with similar laws on ownership of mineral resources as Nigeria. It would also provide insights into how this issue has been dealt with, and whether Nigeria can learn any lessons from the experiences of these countries.

### **3.2 Ownership of Mineral Resources**

Ownership of mineral resources has been given international recognition in a vast set of international regimes from the United Nation General Assembly (UNGA) Resolution 1803 of 1962 to the Rio Declaration on environment and development of 1992. It has been recognized as the sovereign right of a nation.

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<sup>2</sup>Hornby, A.S., (1997), Oxford Advanced Learners Dictionary, Oxford University Press, 7<sup>th</sup> Edition, p.539.

Article 1 of the UNGA 1803 of 1962 provides:

“The right of the peoples and nations to the permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned”<sup>3</sup>.

Furthermore, the Rio Declaration which follows in line with the Stockholm Conference provides in Article 2, that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction<sup>4</sup>.

What is important to note is that these conventions did not specify the prohibition of ownership of resources by individuals; rather they stressed the protection of the individual's interest. It is, therefore, left to the national or municipal laws of each country to develop its own system of ownership. This, Nigeria has complied with by promulgating municipal laws.

### **3.3 Ownership Theory: A Comparative Analysis**

There are different modes of ownership of mineral resources in the world today but I will be writing on the forms of ownership relating to the two countries earlier mentioned.

#### **3.3.1 Unites States of America (USA)**

Federal lands and resources have been of great importance in American history. It has added to the strength and stature of the Federal Government, serving as an attraction and opportunity for settlement and economic development, and providing a source of revenue

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<sup>3</sup> Audiovisual Library of International Law, <http://www.legal.un.org/avl> Accessed on the 30/9/2014 at 10:31am.

<sup>4</sup>Rio Declaration on Environment and Development, <http://www.unep.org/documents.multilingual/default.asp> Accessed on the 30/9/2014 at 11:31am.

for schools, health, transportation, national defense, and other national, state, and local needs. The formation of the United States Federal Government was particularly influenced by the struggle for control over what were then known as the “western” land. These were the lands between the Appalachian Mountains and the Mississippi River that were claimed by the original colonies<sup>5</sup>. The original states reluctantly ceded the lands to developing new government; this cession, together with granting constitutional powers to the new federal government, including the authority to regulate federal property and to create new states, played a crucial role in transforming the weak central government under the Articles of Confederation into a stronger, centralized federal government under the United States Constitution<sup>6</sup>.

Ownership of oil and gas in the United States of America is in contradistinction with that of Nigeria and a bit more complex. This is because the United States of America practices true federalism in which states control all activities except foreign policies, military and monetary.

In the United States of America, there are three main theories on ownership of mineral resources. They are:

The Absolute Ownership Theory also known as the Texas Theory,

The Qualified Interest Theory also known as the Pennsylvanian theory

The Non-Ownership Theory also known as the Oklahoma theory

### **The Absolute Ownership Theory<sup>7</sup>**

This theory originated from Texas, which is the largest oil producing state in the United States of America. The theory is a relic of feudalism and postulates the fee simple

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<sup>5</sup> Appalachian Mountains, <http://www.newworldencyclopedia.org>, Accessed on the 14/9/2015 at 1:31pm.

<sup>6</sup>Ross, W.G, Vincent, C.H., et al, (2012), Federal Land Ownership: Overview and Data, Congressional Research Service, p. 1.

<sup>7</sup> Chukwura, C., An Appraisal of the Legal Regime for the Definition and Classification of Theories of Ownership of Mineral Resources in Nigeria, <http://www.globalacademicgroup.com>, pp.284-287, Accessed on the 29/9/2016 at 8:54am.

ownership of oil and gas of the land under which it is found. This method of ownership is predicated upon the Latin maxim *quic quid platatur solo solo cedit* which affirms that he, who owns a land, owns what is on it<sup>8</sup>. Under the Absolute Ownership Theory, the owner of a piece of land owns whatever is found beneath the soil including oil. One of the flaws of this theory is that an individual cannot claim ownership on hydrocarbon as it has a fugacious and vagrant nature and straddles between different lands or zones. The implication of this is that he is not a co-owner when the reservoir cuts across lands owned by different persons. However, he loses title if the oil migrates to an adjacent land. This is why in recent days, states and international oil companies have developed agreements such as the joint development and unitization to put to rest the issue of ownership where such hydrocarbon straddles between zones<sup>9</sup>.

Another flaw of the Absolute Ownership Theory is that it did not take into consideration that a reasonable percentage of the world's petroleum deposit is found in the Continental Shelves or Exclusive Economic Zones (EEZ) of states. Whoever then owns such deposit as an individual cannot lay claim to ownership of these areas other than the states as contained in the 1982 United Nations Convention on the Law of the Sea (UNCLOS)<sup>10</sup>. One can only say the theory is politically convenient, particularly in the administration of petroleum revenue.

Furthermore, another argument against this theory is the inherent potential absurdities in the theory, especially when the ownership of airspace is viewed as an exclusive private possession, because, in reality, the concept of private property will not transcend the point where the owner of the surface soil cannot make actual or beneficial use of the airspace. Therefore, this is a conceptual flaw with the absolute ownership theory. A point of divergence from this view is that, in the absence of any other logical approach to

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

determine the ownership of airspace or subsoil depth, the theory appears to be the most acceptable basis for resolving a rather complex situation and provides a sound justifiable ground for nations to exercise ownership rights over their airspace based on their geographical landmass and territorial water coverage. To reject this theory of ownership completely would likely lead to confining airspace rights and subsoil depth to the realm of common heritage of mankind and its attendant difficulties.

Furthermore, this theory has been undermined and subjected to serious criticism. Firstly it will amount to an illusion and at best a creation of dichotomy in owning mineral resources in the same country given the fact that crude oil is capable of flowing from one man's land to another or one geographical entity to another. By illustration petroleum found in White Acre today in X State may flow or disappear to Green Acre in Y State. If it does X state loses its claim of ownership then only Y state can assume ownership; however Y state's claim of ownership may equally be defeated therefore defeating absolute ownership theory. Secondly, the theory cannot be applied to petroleum found in the land under the territorial sea that is continental shelf as it is incapable of individual ownership.

### **The Qualified Ownership Theory<sup>11</sup>**

This theory had its root in Pennsylvania and is based on the concept of petroleum as akin to "*animal farea natural*" which implies that until wild animal is captured and kept in the exclusive custody of the captor; the captor can lay no exclusive claim to it. This is called the Rule of Capture in the United States of America<sup>12</sup>. The interest of the individual is a qualified one and subject to his ability to reduce hydrocarbon to captivity (possession). By this theory therefore, someone who believes he has oil reservoir on his land can be

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<sup>11</sup> Chukwura, C., An Appraisal of the Legal Regime for the Definition and Classification of Theories of Ownership of Mineral Resources in Nigeria, (Op.cit).

<sup>12</sup> Ross, W.G, Vincent, C.H., et al, (2012), Federal Land Ownership: Overview and Data, (Op.cit)

divested of it if a nearby neighbour helps himself to capture the oil and gas to his possession. In **Barnard v. Monongahela Natural Gas Co**<sup>13</sup>, the court refused to restrain drilling by an adjacent landowner alleged to be drilling from a reservoir under the plaintiffs land, holding that the plaintiffs remedy was self help by drilling his own well. The flaw here is that the vibrant nature of hydrocarbon is equated with wildness.

### **The Non-Ownership Theory**<sup>14</sup>

This theory originated from Oklahoma. The theory contends that petroleum is incapable of ownership either absolutely or in a qualified manner. It is hinged on the flowing nature or state in which the mineral occurs under the surface of the earth. One may say this theory is nihilistic in its approach, as petroleum is known to also be in a physical state and should therefore be owned. It will be too naïve to conclude that petroleum is incapable of ownership because it occurs in a fugacious nature. The reality is that presently, oil is capable of ownership.

This theory developed and became entrenched in American jurisprudence based on such authorities as **Westmoreland & Cambria Natural Gas Co. v. Dewitt**,<sup>15</sup> where oil and gas were described:

...As minerals *ferae naturae*. Like animals, they have the power and the tendency to escape without the volition of the owner. Their fugitive and wandering existence within the limits of a particular tract was uncertain. They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily the possession of the oil and gas. If an adjoining, or even a distant, owner, drills his own land, and produces gas from another's land, so that it comes into his well and under his control, it is no longer owned by the owner of the other land, but becomes his<sup>16</sup>.

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<sup>13</sup> (1906), 21 PA, 362,66A, 801.

<sup>14</sup> Chukwura, C., An Appraisal of the Legal Regime for the Definition and Classification of Theories of Ownership of Mineral Resources in Nigeria, (Op.cit).

<sup>15</sup> 18A, 724-725, (Pa. 1889).

<sup>16</sup> Aladeitan, L., Ownership and Control of Oil, Gas and Mineral Resources in Nigeria between Legality and Legitimacy, pp. 161-165, <http://www.ownership-of-oil.com>, Accessed on the 7/6/2016 at 7:53pm.

Another important case worthy of consideration in the development of the non-ownership theory is **Frost-Johnson Lumber Co. v. Sailings Heirs**<sup>17</sup>, where the court held:

. . . It is the settled jurisprudence of Louisiana that oil and gas in place are not subject to absolute ownership as specific things apart from the soil of which they form part; and a grant or reservation of such oil and gas carries only the right to extract such minerals from the soil. We may hold, and we do hold, that no matter what the intention of the parties be, the owner of lands cannot convey or reserve the ownership of the oils, gases, and waters therein apart from the land in which they lie because the owner himself has no absolute property in such oils, gases, and waters, but only the right to draw them through the soil and thereby become the owner of them.

It is on the basis of these above mentioned ancient authorities that the doctrine of mineral resources as incapable of being owned *in situ* is entrenched in American jurisprudence, and fugacious minerals, such as oil and gas, can only be subject to ownership when they are captured.

However, the Theories of Absolute Ownership and Qualified Ownership seem to be similar in their affairs if we consider the fact that in both theories the land owner is not in fact entitled to oil and gas beneath his land. What he has are the right to sink as many wells as he desires subject to good operating practices, and to extract as much oil and gas as he can produce.

Having mentioned the three ownership theories in the United States of America, the difference between them is primarily of import in determining remedies. Subsurface ownership boundaries are the same as those upon the surface, projected downward to the centre of the earth. This implies that an individual land owner who discovers oil on his land, explores the oil and pays a certain percentage of tax to the government.

Under the Nigerian system, the Federal Government owns all mineral resources. This, therefore, excludes completely the application of the “Rule of Capture rule”, but admits of conservation. The right of action in Nigeria lies with the Federal Government; while in

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<sup>17</sup> 91, SO.207 at 243 – 245, (La. 1920).

the United States of America, the right of action lies with the individual upon whose land there is trespass by another for the purpose of capturing oil and gas with the exclusion of Texas.

### **3.3.2 Brazil**

The Federative Republic of Brazil as it is known is the fifth largest country in the world and the largest in the South American continent. Brazil contains extremely rich mineral reserves that are only partly exploited and has huge offshore reserves of petroleum and natural gas notably in the southeast<sup>18</sup> along the Continental Shelf. Oil was discovered in 1930, in Bahia, Brazil. In 1968, the first project was developed for extracting oil offshore (out of the land, in deep waters) and six years later the biggest Brazilian oil basin was finally found in Rio de Janeiro, the Bacia de Campos. As time passed by, Brazil became the only country to dominate offshore oil extraction and nowadays the country occupies the 16<sup>th</sup> position in the world rank of countries with the largest oil reservoirs<sup>19</sup>.

Drilling was confined to the Northeast, in Bahia basin just north of Salvador, from 1940 to the 1960s, after which the area of exploration expanded to include wells on the mainland and offshore from Fortaleza in the North to Santos in the South<sup>20</sup>. Brazil extracts more than two-third of its petroleum from the Campos basin on the Continental Shelf off Rio de Janeiro state. Most of the country's mineral resources come from Bahia and Sergipe state.

The key laws which regulate the ownership of mineral resources in Brazil are the Constitution of Brazil, 1988 and the Petroleum Law No. 9478 of 1997<sup>21</sup>. Article 20(ix) of the Constitution of Brazil confers all rights in mineral resources, including those of the

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<sup>18</sup> Ownership of Mineral Resources in Brazil, <http://www.britannica.com>, Accessed on the 21/10/2014 at 10:23am.

<sup>19</sup> Duran, R., Oil Industry in Brazil <http://www.oil-in-brazil>, Accessed on the 31/10/2104 at 10:39am.

<sup>20</sup> Ibid.

<sup>21</sup> Madaki, O.A., Ownership and Control of Mineral Resources: Can the Brazilian Model be Used to Douse Resource Control Agitation in Nigeria's Oil Producing States, <http://www.ownership-of-oil-in-nigeria.com>, Accessed on the 1/10/2014 at 12:47pm.



subsoil on the Federal Government. Similarly, Article 177(v) of the Constitution of Brazil confers monopoly on the Federal Government to all oil and gas exploration and production activities, including prospecting, refining, import, export and transportation of crude petroleum or basic by-products. The same article, however, empowers the government to grant concessions to public and privately owned companies to carry out such operations through contracts regulated by the Petroleum Law<sup>22</sup>. In addition, Article 176 Constitution of Brazil, vest all mining reserves, whether active or not, and other mineral resources and the potential for hydroelectric power, as a type of property that is different from the property of the soil, for the purposes of exploitation or use, and as such they belong to the government. However, the grantee has a right to own the product that is mined from such area.

This, therefore, implies that Brazil operates the national ownership theory which allows for the vesting, total ownership and control of mineral resources in the government of the state. It is an effective theory in terms of attracting foreign direct investment for countries. This ownership theory is also obtainable in Nigeria. Both countries are rich in natural resources, and their laws are similar in terms of state ownership of mineral resources. But, the manner of allocation of revenue from the resources differs significantly.

However, Brazil operates a concession system in its oil and gas production, with the concessionaire producing the oil and gas at its sole risk and cost. The title of the concessionaire to the oil and gas is guaranteed after extraction, subject to the payment of government take which consists of the following four elements:

- i. Signature Bonus
- ii. Royalties
- iii. Special Participation

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<sup>22</sup> Ibid.

iv. Annual Payment of Rents for Retention of the Concession Area

For clarity, these elements will be discussed briefly.

i. Signature Bonus

The Petroleum Law was the first Brazilian law to foresee the signature bonus. By legal definition, signature bonus is the amount offered by the bidders during the public bidding processes, and its minimum amount is established by the bid invitation. The signature bonus must be paid in Brazilian currency, at once, prior to the execution of the concession agreement resulting from the applicable bidding process. A portion of the amount collected upon the payment of the signature bonus will be set aside as income, to meet its operating needs previously specified in the approved budget<sup>23</sup>.

ii Royalties

Royalties are a financial compensation that must be paid by the concessionaire, on a monthly basis, in Brazilian currency, as of the date at which the concessionaire starts producing oil and gas in a given field. The Petroleum Law establishes the royalty rate from a fixed five percent (5%) to ten percent (10%) of the hydrocarbon production, according to its reference price. The ANP (National Petroleum Agency) is the federal regulatory agency in charge of contracting, regulating and inspecting. Brazilian oil and gas sector may reduce this royalty rate, in the corresponding bid invitation, down to a minimum of five percent (5%) of the production, taking into account geological risks, production forecasts, and other relevant factors<sup>24</sup>.

iii Special Participation

Special participation is an extraordinary financial compensation due by the concessionaires only in cases of large volume of production or high profitability, payable,

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<sup>23</sup> Baker and McKenzie, (2012), Latin America Oil and Gas Handbook, pp. 28-30.

<sup>24</sup> Ibid.

on a quarterly basis, in connection with each field of a given concession area. The special participation will be assessed by applying progressive rates varying from 10 to 40 percent over the net revenue of the quarterly production of each field, considering the deductions provided for in the applicable legislation. Such deductions depend on the area of the deposit, the number of years of production, and the respective volume of quarterly production<sup>25</sup>.

iv Annual payment of rents for retention of the concession area.

The payment for the occupation or retention of the area was created by Article 51 of the Brazilian Petroleum Law. The bid invitation and the concession agreement will provide for the amount payable for the occupation or retention of the concession area, to be assessed at each calendar year, as from the execution date of the concession agreement, falling due by each January 15 of the subsequent years<sup>26</sup>.

In addition to the above, the companies are also liable to income taxes applicable to other businesses in Brazil at the federal, state and municipal levels, as there is no special treatment/ waivers of income for oil and gas operations for tax purposes.

It is important to note that no government has been able to establish that its nation has triumphed or been able to meet its obligations, simply because all resources in the State are owned by the Federal Government. They may argue that for administrative purposes, it has been helpful in securing foreign investment, as only one body guided by one set of rules is involved, thereby giving the foreign investor a sense of security.

In a random opinion sought amongst my colleagues, they were of the opinion that since Nigeria is a developing country, it needs uniform development of its resources so that it could be managed for the good of all Nigerians. They argued that if mineral resources are allowed to be managed by individuals or state government, it will make some states to be

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

so powerful as to completely intimidate and overawe the other states and indeed the Federal Government. Furthermore, with the perennial boundary disputes between states, vesting the ownership of mineral resources in individuals, communities or states will be a recipe for anarchy and mayhem.

But on the other hand, Nigeria should not adopt any mode of ownership because it is the dominant; this is because Nigeria is an independent country with peculiar economic, social, geopolitical considerations and realities. It should consider its diversity in adopting any mode of ownership.

## CHAPTER FOUR

### THE EFFECT OF OWNERSHIP AND EXPLORATION OF MINERAL RESOURCES BY THE FEDERAL GOVERNMENT ON THE PEOPLE OF THE NIGER DELTA REGION

#### 4.1 Introduction

Nigeria has abundant deposits of oil and natural gas and their exploration and exploitation has improved the economy substantially, but with severe environmental consequences. Serious ecological devastation has occurred in the Niger Delta region where almost all the extractive industries are located. During the last four decades, hundreds of billions worth of crude oil have been extracted from the Niger Delta wetlands, earning huge profits for the government, while virtually robbing the oil-producing communities of both life and livelihood. Environmental problems associated with petroleum development in Nigeria are numerous. They range from oil spills, air pollution, loss of biodiversity; socio-cultural dislocations, etc. We would look at these environmental problems in this chapter. The right to natural resources is probably one of the most contested of the rights by the people of the Niger Delta region. This may have arisen due to the provisions of the common law principle of *quicquid plantatur solo, solo cedit*, which most countries including Nigeria have altered via legislation. In spite of the fact that our respective laws in Nigeria have vested ownership of mineral resources on the Federal Government, the right to control activities relating to the exploration and exploitation of mineral resources, still remains a challenge to the people of the Niger Delta region. These shall be discussed under the principles of self-determination, derivation and what I call the resource control question.

## 4.2 The Principle of Self Determination

This principle has been established in international law, although it is not recognised by the Nigerian Constitution. The right to self-determination is a fundamental principle of human right and it embodies the right for all peoples to realise their economic, political, social and cultural development. It has been defined by the International Court of Justice (ICJ) as the need to pay regard to the freely expressed will of the peoples<sup>1</sup>. Freely expressed will includes the establishment and maintenance of political, economic, legal, cultural and social institutions of choice. In a sense, it refers to the right or freedom of a people that are subordinated, oppressed, dominated, colonised or even marginalized to assert and constitute itself into a separate state. Self-determination connotes the desire of a people for self-existence, self-management, self-development and sovereignty over resources. This, in one word, is autonomy. Self-determination does not necessarily mean separate and independent existence. Its end may be, at least for a while, the desire for cultural autonomy, ethnic rights and justice, political representation and inclusion, development, resource flow and participation in their own development<sup>2</sup>.

The right or freedom to self-determination has driven numerous peoples all over the world, to mobilise, solidarise and build nationalism, and to organise resistance through popular movements and institutions of violence. Self-determination struggles have been fierce and violent and have several times manifested in inter-ethnic, religious and regional conflicts, as well as rebellions and civil wars. The issue of self-determination has arisen in Nigeria, first out of ethnic deprivation, exclusion, exploitation, discrimination and

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<sup>1</sup> See **Western Sahara Case**, Advisory Opinion, (1975), International Court of Justice, p.12.

<sup>2</sup>Eghosa, E. O., Ikelegbe, A., et al., (2011), Youths Militias, Self Determination and Resource Control Struggles in the Niger Delta Region of Nigeria, Consortium For Development Partnership Conflict and Conflict Resolution in Africa Research Report No. 5, Dakar Senegal, pp. 8-9.

disadvantage, particularly in relation to resource contribution and distribution, political representation and developmental attention<sup>3</sup>.

The right to self-determination is a fundamental principle of international law, enshrined in the Charter of the United Nations, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Article 1, paragraph 1 of these Covenants provides:

“All peoples have the rights of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”<sup>4</sup>.

This right has been recognised in international and regional human rights instruments<sup>5</sup> and was equally reflected in an international event: the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR). However, the extent to which the right to self-determination could be exercised in the context of a people’s right remains an issue in most international fora. The right does not necessarily imply secession from the state but that the people are entitled to the fullest possible autonomy in matters relating to their local affairs, within the limits of human rights, rule of law and the legitimate rights of other peoples within the same country. Under traditional notions of self-determination, acknowledgment of a population’s right to self-determination cannot be construed to authorize or encourage any action that would impair the territorial integrity and political unity of sovereign and independent states.

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<sup>3</sup> Ibid.

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights, 16<sup>th</sup> October, 1966 came into force on the 3<sup>rd</sup> January, 1976, [http://www.unhchr.ch/html/menu3/b/a\\_cescr.html](http://www.unhchr.ch/html/menu3/b/a_cescr.html) Accessed on 6/8/2013 at 9.45am; International Covenant on Civil and Political Rights. 16<sup>th</sup> December, 1966 came into force on the 23<sup>rd</sup> March, 1976 [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.html](http://www.unhchr.ch/html/menu3/b/a_ccpr.html) accessed on 6/8/2013 at 10.11am.

<sup>5</sup>For example, Part VII of the Helsinki Final Act 1975 and Article 20 of the African Charter on Human and Peoples’ Rights as well as the Declaration on the Granting of Independence to Colonial Territories and Peoples. African Charter on Human and Peoples Rights, 27 June 1981, 21 I.L.M. 58, came into force on 21<sup>st</sup> October 1986, <http://www1.umn.edu/humanrts/instree/z1afchar.html> accessed 6/8/2013 at 10.40am.

It is clear that many governments often oppose international recognition of people's rights to self-determination, perhaps more through the fear of losing control over lands and natural resources than the fear of losing some of their overall political power. The issue of land and resource rights is the most important question for the Niger Delta region. This is therefore no surprise that the people of the Niger Delta region are beginning to call for the implementation of the principle of self-determination to be enshrined in the Constitution<sup>6</sup> as this would give them some form of control over the resources which is extracted on a daily basis from their land.

### **4.3 The Principle of Derivation**

This is a constitutional device set up by the Federal Government to compensate for the minerals that are being extracted from states in which the minerals are found. It is the recognition of a prior beneficial right that was subsequently expropriated<sup>7</sup>. It is a constitutional directive which constitutes a form of reparation for an expropriated interest and can be waived or derogated from by either the State or Federal Government. The principle is the basis for revenue allocation under the present Constitution and dates back to the pre-independence era<sup>8</sup>.

This principle ensures that a region or state retains a certain percentage from oil tax revenues derived from the exploitation and extraction of mineral resources (i.e. oil and gas) in its region. This revenue is calculated based on the direct contributions from a natural resource state. As it was originally practiced, after deduction of the percentage derivation, the remainder is sent to the federation account for onward sharing amongst

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<sup>6</sup> Niger Delta Women for Justice, <http://www.ndwj.kabissa.org/declaration/html>, accessed on the 5/7/2016 at 10:00am.

<sup>7</sup> Akpo, M.O., (2002), True Federalism and the Resource Control in Nigeria, Quadro Impressions Ltd, p. 370

<sup>8</sup> Ejibowah, J., The Politics of Ethnicity in the Niger Delta of Nigeria, Africa Today, Indiana University Press, Vol. 47, No. 1, p. 29.



states. Unfortunately, today the case is different. Revenue allocation in Nigeria has been one of the most controversial issues. The principle of derivation has been highly contentious in the country's fiscal federalism since the discovery of oil in 1956.

The derivation principle seeks to allocate mineral resources revenues accruable to the federation's account on the basis that is perceived to be equitable, given particular consideration to the resource-producing states and regions. The principle of derivation, according to author<sup>9</sup> is the most common concept advocated and generally applied in the history of Revenue Allocation in the Nigerian federation but equally, perhaps no principle has evoked more rivalry and bitterness than this principle. He opined that the principle of derivation requires that all revenues which accrue from or are attributable to a particular state should be allocated in part or in full to such a state, irrespective of the fiscal jurisdiction involved or the machinery for the collection. The principle is closely related to the benefit principle of taxation. Its main attraction is that it ensures that a state of origin of any particular revenue would receive more than any other state from the revenue accruing from within its geographical boundary or area of jurisdiction. This is what an author<sup>10</sup> called taking care of the goose that lays the golden egg.

Furthermore, he<sup>11</sup> opined that at the time of amalgamation of the Northern and Southern regions, the principle of derivation was in vogue. Each of the regions collected revenue of its internal resources mainly from agricultural cash or export crops, taxable import and excise duties. He also pointed out that the principle of derivation has always been applied in various revenue allocation formulae with the regional governments (i.e. the states

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<sup>9</sup>Nwokedi, C.R., (2007), *Nigerian Federalism at a Glance*, Enugu, Snaap Press Ltd, pp. 8-16.

<sup>10</sup> Obi, E.A., (2007), "Inter-Governmental Fiscal Relations: The Nigerian Experience" in Onuoha, J. and Nwanegbo, C.J. (Eds), *Theory and Practice of Intergovernmental Relations in Nigeria*, Enugu, Quintagon Publishers, p. 135.

<sup>11</sup>Nwokedi, C.R., (2005), *Power Sharing in Nigerian Federation: Special National Political Reform Conference Edition*, Enugu, Snaap Press Ltd, p. 28.

presently) receiving the proceeds and utilizing it for the development of the regions. Indeed, until March 2000, the states were receiving revenue allocation based on the derivation principle<sup>12</sup>.

However, Ofuebe<sup>13</sup> maintained that the importance placed on the principle of derivation virtually excludes the majority of the states from benefiting from such productive sources of federal revenues as mining rents, royalties and petroleum profit tax.

Unfortunately, the principle of derivation began to be de-emphasized in the revenue sharing formulae at a time when the oil-producing state were to have the opportunity to enjoy special advantages accruing from oil from their region which has now become the fastest growing sources of revenue as was seen in Section 162(2) Constitution of the Federal Republic of Nigeria, 1999.

Section 162(2) Constitution of the Federal Republic of Nigeria, 1999 states:

The president, upon the receipt of advice from the Revenue mobilization Allocation and Fiscal Commission, shall table before the National Assembly proposal for revenue allocation from the federation Account, and in determining the formulae, the National Assembly shall take into account, the allocation principles especially, those of Population, equality of states, internal revenue generation, landmass, 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 percent of the revenue accruing to the Federation Account directly from any natural resources.

The unfaithfulness in the application of the principle of derivation and the meagerness of the 13percent recommended by the Constitution of the Federal Republic of Nigeria, 1999 coupled with its concomitant onshore-offshore dichotomy, alongside their claim on the former Republican Constitutional 50percent derivation recommendation and the apparent subjugation and sidelining of the derivation principle, led the oil producing states to

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<sup>12</sup> Ibid.

<sup>13</sup>Ofuebe, C., (2005), Scramble for Nigeria: Essay on Administrative and Political Engineering, Enugu, New Generation Books, pp. 180-181.

clamour and demand for Resource Control<sup>14</sup>. But the concept of resource control is fuzzy and ambiguous such that the understanding of the main contention of this dissertation may be displaced without a clear conceptualization of the concept of resource control and subsequently, identify the relationship between the principle of derivation and resource control.

#### **4.4 Resource Control and Revenue Allocation in Nigeria**

The clamor for resource control is based on the belief that nature and God do nothing in vain, including allocation of natural resources. While some parts of the world pray for the sun to assist in drying their washed clothes, others beg for rain to water their farms and grazing fields. God cannot be mocked not by the best of scientist. Can the best of scientist with all his knowledge in physics, chemistry and biology query God for making certain natural resources be available in specific places? No. can man in the bid to reorder natural resources location recreate the universe? No. not allowing the people of the Niger Delta region to own, control and enjoy the natural resources given to them by God is tantamount to querying Gods distribution of natural resources. In effect, God has his reasons for distributing mineral resources found in any country, state or region. This forgoing succinctly explains the persistent clamor and demand for natural resource control. Each geographical region or political state in Nigeria is endowed with mineral resources to survive.

Central to the discussion of resource control in Nigeria and the Niger Delta in particular are the twin issues of revenue allocation and revenue allocation formula. This subject has in many cases not been treated with much clarity. Increase in revenue is only a part of

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<sup>14</sup>Emeh, I. E. J., (2010), Nigerian Fiscal Relations; A Case of the Principle of Derivation Being a B.SC. Project Submitted in the Department of Public Administration, University of Nigeria, Nsukka, p. 52.

resource control<sup>15</sup>. It is an inevitable consequence of resource control. The resource control issue is what has been described as the Niger Delta question.

Writing on the subject of resource control and revenue allocation, an author<sup>16</sup> describes it as the conflict arising from the Federal Government's control of oil resources and the distribution of their revenue among the constituent states of the federation, and oil communities' ownership claims to the resources. The author maintains that conflict over issues of federal revenue allocation has been a part of Nigeria's political history. The author traces it back to the debates in the mid-1940s, Arthur Richards Legislative Council that resulted in the appointment of the Sydney Philipson Commission. The Arthur Richard's Legislative Council is named after Arthur Richard, the Governor General appointed by the British colonial administration in Nigeria in 1946. The Constitution in Nigeria in 1946 like other Nigerian Constitutions of the colonial era was named after the Governor General at that time<sup>17</sup>.

Next in line was the Richard's Constitution which put in place the legislative council of Nigeria. This comprised of 26 members to be nominated. This council drafted the constitution which was the first to define the protectorate of Nigeria in terms of regions. The council also dealt extensively with the issues of revenue allocation. There was lack of consultation during the constitution making process. This was not appreciated by the Nigerian people. An important innovation of the constitution was the fact that the legislative council included members from all the regions of the country<sup>18</sup>.

The Richards Constitution was later followed by the Louis Chick Commission which recommended the principle of derivation in the sharing of revenue prior to Nigeria's

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<sup>15</sup>Akaninyene, S.T., (2010), *The Right of the Niger Delta People of Nigeria to Resource Control Being a Master's Thesis in Global Political Studies, Malmo University, Sweden, June, p.15.*

<sup>16</sup>Ejibowah, J., *The Politics of Ethnicity in the Niger Delta of Nigeria, (Op.cit).*

<sup>17</sup> Ibid.

<sup>18</sup>Adamolekun, L., (1986), *Politics and Administration in Nigeria, Spectrum Books Ltd, Ibadan, p. 42.*

independence and during a few years of post-colonialism. The Louis Chick Commission was set up during the nationalist struggle for independence for Nigeria. It was preceded by two constitutional conferences of August 1953 and February 1954. The 1954 constitutional conference created the Chick commission which was named after Sir Louis Chick the British head of the commission<sup>19</sup>. The commission adopted the derivative principle of revenue allocation. Under this principle, priority is given to the area under which the resources that generate wealth are exploited or derived from<sup>20</sup>.

Hence, it could be said that the issue of the control of the wealth derived from natural resources and the manner of resource allocation has been contentious right from colonial period, particularly with the emergence of the federal system of government. An author, in his views, discusses the weight attached to the principle of derivation in the revenue allocation formula as “derivation is seen as the primary vehicle through which the people from whose resources wealth is generated would exercise control over a significant portion of their wealth”<sup>21</sup>.

Dibua’s view puts the political issues surrounding revenue allocation in Nigeria in proper perspective and makes the issues more discerning to the reader. However he lays so much emphasis on the concept of citizenship as the underlying basis of the politics surrounding

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<sup>19</sup> Nwokedi, C.R., (2007), Nigerian Federalism at a Glance, (Op.cit).

<sup>20</sup> Ekpo, A., Intergovernmental Fiscal Relations: The Nigerian Experience, <http://www.ff.co.za/conf/papers/nigeria-igfr.pdf>, p.5.

<sup>21</sup> Dibua, J., Citizenship and Resource Control in Nigeria: The Case of Minority Communities in the Niger Delta, Africa Spectrum, Institute of Affairs, GIGA, Hamburg Germany, Vol. 40, No.1, p.9



revenue allocation in Nigeria. He views the clamor for resource control as a shift in allegiance from national to ethnic allegiance. He calls it ethnic citizenship. He makes an interesting point when he notes that it is debatable whether increasing the amount of revenue allocated to the government of a particular region or state through derivation actually translates to the control by the ordinary people over the wealth generated from the exploration of their natural resources. This is one of the key points of the subject of resource control. It is the fact that increasing revenue to any tier of government, (however close its proximity to the host communities) without members of these communities having a direct say in the business of the downstream oil sector will yield very minimal results.

#### **4.5 The Impact of Oil Exploration in the Niger Delta**

Mineral resources development has resulted in the devastation of the environment with tremendous effects on human health and the environment. These developments have not only generated local, national and international attention, but have prompted the environmental regulation of oil and gas activities to minimise or prevent environmental pollution.

Oil exploration in the Niger Delta region of Nigeria covers a wide expanse of land, forest, mangrove swamps, fresh water and even the continental shelf. The enormity of the impact of oil exploration in the Niger Delta region cannot be easily comprehended by having a very quick look at the region. Oil exploration involves “cadastral and seismic surveys, transportation of men and materials on creeks, rivers and by roads and air, dredging of creeks and rivers, drilling of oil wells and associated activities like gas flaring and

discharge of effluent into creeks/rivers<sup>22</sup>. Most of the activities mentioned above are inimical not only to the environment but to the inhabitants of the region. Virtually every facet of life and every part of the region have been impacted directly or indirectly through exploratory activities of the oil industry or through neglect by the industry.

Oil exploration had brought some level of development into the Niger Delta region no doubt. A few communities like Warri in Delta State, Eket in Akwa-Ibom State and cities like Port-Harcourt have benefitted from the oil industry. The economies of these places have been boosted over the years by the presence of oil companies and the location of refineries. Employment opportunities have also been created by the oil companies and other oil servicing firms. Even allied industries and petty businesses have sprouted in the region due to the presence of oil companies in the region. The oil companies have in some way carried out developmental projects like tarring of roads, building of schools and sinking of boreholes *albeit* on a limited scope. It can thus safely be said that the impact of oil exploration in the Niger Delta region of Nigeria has not been all negative<sup>23</sup>.

Despite the positive impact of oil exploration highlighted above, the negative impact of oil exploration far outweigh whatever benefit the Niger Delta region has received over the years. Oil has brought untold hardship and misery to the Niger Delta. It has also brought violence and a dying ecosystem. The indigenes of the region live below the poverty line, even below the national average due to the fact that they had been dislodged from their traditional professions like fishing, farming and hunting due to environmental pollution caused by gas flaring, oil spillage and other exploratory activities of oil companies. There is massive degradation of the environment, serious deforestation including the destruction of wild lives, contamination of rivers and destruction of aquatic creature without adequate

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<sup>22</sup>Nnamani, T., (2004), Shell Oil and Corporate Morality: A Case Study of Shell Oil Environmental Pollution in Nigeria, Bigard Theological Studies, Vol. 24, No. 2, pp 22-23.

<sup>23</sup> Ibid.



compensation to the people. This has led to the impoverishment of the people<sup>24</sup>. This supports the resource curse theory that the discovery of oil in many developing countries rather than bring prosperity to the country usually delivers the opposite. The people of the Niger Delta region have been ill-treated.

A look at the Niger Delta region would reveal communities in decay. The pictures are indeed dismal and the stories behind them both pathetic and appalling. There are a litany of woes, squalor, and abandonment. Suffice it to say that this is a region that is slowly dying, rotting and decaying. Martin, a BBC journalist visited the region in 1995 and had this to say:

The story of the devastation of villagers' lands and livelihood is terrible. The fishes have died in the creeks and rivers because of the mixing of fresh and salt water, and it takes fishermen two or three days to "pull out" to good fishing grounds now. Even children no longer catch "small fry" for their mothers because of the danger of strong currents and pollution of the water. Crops have died and great stretches have become infertile due to water-logging caused by high muddy banks along the sides of the channel. Above all, the water is polluted, "sometimes purely green, sometimes purely blue"<sup>25</sup>.

The above report gives a good picture of the level of degradation of the Niger Delta region as a result of oil exploration. An Environmental Rights Action team (ERA) recently condemned the ecological damage caused by the activities of oil companies in the region. There is a high concentration of sulfur in the region, a substance highly corrosive to the roofing sheets and even to the human skin. This has resulted in acid rain<sup>26</sup>.

The degree of ecological damage and environmental pollution in the Niger Delta is amazing. Conservative oil-industry estimates that there were almost 7,000 oil spills

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<sup>24</sup> Okonta, I. et al, (2003), *where Vultures Feast; Shell, Human Right and Oil*, London: Version, p. 43.

<sup>25</sup> Nussbaum, M., (2000), *Women and Human Development: The Capabilities Approach*, Cambridge University Press, p.82.

<sup>26</sup> Ibid.

between 1970 and 2000. In 2011, Shell, one of the oil companies operating in Nigeria admitted to an oil spill that is likely to be the worst in the area for a decade. The company said up to 40,000 barrels of crude oil was spilled while it was transferring from a floating oil platform to a tanker 75 miles off the coast of the Niger Delta. Satellite pictures obtained by independent monitors Skytruth suggested that the spill was 70km long and was spread over 923 square kilometers<sup>27</sup>.

Gas flaring is also rampant in the region. The term gas flaring refers to the releasing of excess gas, liquids associated with oil and gas production pipelines and refineries along with any other by-products into the atmosphere in order to protect the pipelines and infrastructure from over pressuring. Gas flaring has been an ongoing daily occurrence in the region in the last four decades. Due to this, Nigeria has been reported to be more responsible for greenhouse gas emission than the combined oil fields of the rest of the world<sup>28</sup>. When oil is brought to the surface, natural gas rises too. This is called “associated gas”. Oil companies usually have several options for dealing with flaring. They include; transporting it to customers elsewhere, reinjection into the earth or burning it off. Oil companies avoid the environmentally safer options like reinjection due to the huge cost associated with them. Writing on this subject Maas succinctly states<sup>29</sup>:

Flaring is the cheapest way to deal with, though it’s environmental and health costs are colossal. The carcinogens that flaring releases include benzene, Benzopyrene and toluene. The metals emitted include mercury, arsenic and chromium. The released Greenhouse gases, which cause global warming, include carbon dioxide and Methane. Emissions of sulphurdioxide and nitrogen oxide are so severe in the delta that acid rain eats through sheet-metal roofs. This does not happen in developed countries, where oil firms are obligated to invest in technology and infrastructure that reduce flaring to almost nothing<sup>30</sup>.

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<sup>27</sup> Oil Spills in Nigeria. [http:// www.nigeria-shell-oil.com](http://www.nigeria-shell-oil.com) Accessed on the 2/7/2013 at 10.18am.

<sup>28</sup> Ibid.

<sup>29</sup> Mass, P., (2009), *The Violent Twilight of Oil*, Knoph, Barzoi Books, New York, p.59.

<sup>30</sup> Ibid.

The above observation by Maas, a researcher who had carried out an on-the-spot assessment of the Niger Delta region of Nigeria clearly describes the situation in the region. The oil companies operating in the region do not carry out good oil-field practices. They ignore most safety rules concerning oil exploration because Nigeria like most developing nations lacks strong institutional structures for enforcing rules. The government also lacks the political will to instill sanity in the downstream oil sector.

#### **4.5.1 Environmental Hazards/ Pollution**

The social and environmental costs of oil production have been very extensive. They include destruction of wildlife and biodiversity, loss of fertile soil, pollution of air and drinking water, degradation of farmland and damage to aquatic ecosystems, all of which have caused serious health problems for the inhabitants of areas surrounding oil production. It is ironical that environmental regulations which are common practice in developed nations are often not followed due to the lack of power, wealth and equity of the affected communities. As a result, oil companies often evacuate inhabitants from their homelands, further marginalizing them<sup>31</sup>. The system of oil production in Nigeria is skewed in favour of the multi-nationals and government elite who are the direct recipients of oil production revenue.

In the over 50 years of oil and gas exploration and exploitation in the Niger Delta, there has been serious negative environmental effects on the ecosystem such as:

Oil Exploration and Exploitation

Gas Flaring

Oil Spillage/ Oil Pipeline Explosion

Land Degradation/ Deforestation

Loss of Forest Animals

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<sup>31</sup> Ibid.

## Socio-Cultural Damage

For better understanding, these negative environmental effects will be discussed in detail

### Oil Exploration and Exploitation:

The exploration and prospecting for oil in the Niger Delta has not only altered people's livelihood, but continues to disrupt the natural balance of the regions earth crust. There are three methods of exploration, namely Analysis of existing geological and other information, Seismic surveys and exploration drilling<sup>32</sup>. Of particular destructive impact to the earth's make-up is the use of Seismic survey which involves the gathering of information through the sound waves into earth's crust to measure the depth of the rock layers and the use of dynamites and other explosives. The explosives are either detonated in the bowels of the earth through water bodies or dry ground. In addition to its direct impact on the aquatic stocks in the area as well as the fauna, the aftershocks are known to cover as much as a radius of 10 kilometers<sup>33</sup>. The result is that the more oil is explored in the region using this method, the more the regions natural environment witnesses shocks and rifts in its environment.

### Gas Flaring:

Gas flaring which represents a significant source of global warming is one of the biggest environmental problems associated with oil exploration and exploitation in the Niger Delta. Just as the Western oil companies are inflicting untold hardship on the citizens of the Niger Delta by engaging in oil exploratory activities with total disregard for the political and economic sensibilities of the people, they are also wrecking the fragile ecosystem of the region through uncontrollable gas flaring. Gas flaring takes place 24

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<sup>32</sup>Umeh, R.S., (2012), *Oil Politics in Nigeria and the Niger Delta Crises*, Solar Press, Okigwe, pp. 25-26.

<sup>33</sup> Ibid.

hours a day and some have been burning for over 30 years<sup>34</sup>, thereby resulting in the release of hydrogen sulphide (sour gas).

A Report by the American Central Intelligence Agency (CIA) indicated that “Every day, 8million cubic feet of natural gas are burned off in flares that light the skies across the Delta, thereby contributing to global warming”. Thus, the oil companies are not only destroying the Niger Delta, they are also contributing to global warming. A statement by MOSOP on the effect of gas flaring on the people of Ogoni would show how it has negatively affected the life of the people. It reads: “The once beautiful Ogoni country side is no more a source of fresh air and green vegetation. All one sees and feels around is death”<sup>35</sup>.

About ninety-five percent of waste gases from the production fields and operation are flared<sup>36</sup>. Gas flaring pollutes the air and it is common practice among companies in Nigeria especially in the Niger-Delta region which is hazardous to the ozone layer of the area and leading to climate change<sup>37</sup>. The flaring of gas has been practised in the Niger-Delta for over four decades. This is the major source of air pollution in the area as well as untreated waste disposal on the environment. Today, there are about 123 flaring sites in the region making Nigeria one of the highest emitter of greenhouse gases in Africa. Some 45.8 billion kilowatts of heat are discharged into the atmosphere of the Niger-Delta from 1.8 billion cubic feet of gas every day<sup>38</sup>. It is not an exaggeration that gas flaring is environmentally unethical and has contributed significantly to the degradation of the environment in the region. This practice may have altered the vegetation of the area, replacing natural vegetation with stubborn grasses and the presence of these grasses

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<sup>34</sup> Ibid.

<sup>35</sup> Factsheet on the Ogoni Struggle, <http://www.insular.com/tmc/politics/africa/ogoni.fact.html>, Accessed on the 30/7/2015 at 10:36am.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Aaron, K.K.,(2006), Human Rights Violations and Environmental Degradation in the Niger Delta in Elizabeth Porter and Baden Offord (Eds), Activating Human Rights, Oxford, Barne, New York, p.116.

indicates that the soil is no longer fertile for cultivation of crops. A major example could be seen in Opuama and Sekewu communities in the Warri North Local Government Area of Delta State, where gas flaring activities still take place. It is evident that gas flaring has affected the ozone layer of the region leading to climate change that is unhealthy to crops cultivation<sup>39</sup>.

The discovery of oil in the Niger Delta region, coupled with its ascendancy as a major foreign exchange earner for the country has led to the aggressive expansion of the petroleum industry in a manner that not only degrades the Niger Deltas immediate environment, but also tips delicate balance between the incoming and outgoing energy of the earth. Oil exploration activities have not only contributed to the degradation of the natural environment of the Niger Delta but have also caused major climate change in the area.

As these forests ecosystem are being depleted, the rate at which Co<sub>2</sub><sup>40</sup> is withdrawn is further reduced. In the Niger Delta region, consumption and development patterns have reached unsustainable levels manifested by widespread land degradation, erosion, deforestation, air, water and soil pollution. Under this kind of production and utility system, natural hazards can impact on society and its development process. Furthermore, In spite of the environmental and health risk posed to the Niger Delta people by gas flaring, government is yet to take a definite stand on when and how to stop the practice of gas flaring.

#### Oil Spillage/ Oil Pipeline Explosion:

Oil spillage is a global issue that has been occurring since the discovery of crude oil, which was part of the industrial revolution. The total spillage of petroleum into the

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<sup>39</sup> Ibid.

<sup>40</sup> Carbon dioxide. It is a colourless and odorless gas vital to life on earth.

oceans, seas and rivers through human activities is estimated to range 0.7-1.7 million tons per year<sup>41</sup>. Oil spills have posed a major threat to the environment of the oil producing areas, which if not effectively checked can lead to the total destruction of ecosystems. The Niger Delta is among the ten most important wetland and marine ecosystems<sup>42</sup> in the world. The oil industry located within this region has contributed immensely to the growth and development of the country which is a fact that cannot be disputed but unsustainable oil exploration activities has rendered the Niger Delta region one of the five most severely petroleum damaged ecosystems in the world. Studies have shown that the quantity of oil spilled over 50 years was at least 9million -13million barrels, which is equivalent to 50 times the estimated volume spilled at Exxon Valdez spills, Alaska in 1989<sup>43</sup>.

Oil spillage/oil pipeline explosion is another major devastating environmental problem associated with the oil industry. To a certain extent, there is a relationship between pipeline explosions and oil spillage. In another sense, the two are not directly related. A spillage can take place while drilling is in progress. On the other hand, there is always spillage when there is an explosion<sup>44</sup>. Pipeline explosions take place due to the following reasons:

- a. Drilling activity at new site,
- b. Accidental bursting of pipeline during drilling,
- c. Old pipeline that has not been checked for maintenance,
- d. Vandalisation by angry youth and members of the host communities,
- e. Oil thieves who steal crude oil by intentionally breaking the pipelines.

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<sup>41</sup>Adati, A. K., Oil Exploration and Spillage in the Niger Delta of Nigeria, <http://www.science.irank.com> Accessed on the 5/11/2013 at 12.31pm.

<sup>42</sup> Ibid.

<sup>43</sup>Adati, A. K., Oil Exploration and Spillage in the Niger Delta of Nigeria, (Op.cit).

<sup>44</sup>Torulagha, P.S. The Niger Delta Oil and Western Strategic Interest, The need for Understanding <http://www.unitedijawstates.com> Accessed on the 23/10/2013 at 12.24pm.

As a result of the consequences of oil explosion to lives, properties and environment, people of the Niger Delta have consistently blamed the oil companies and the Federal Government of Nigeria for showing non-challant attitudes and lacking any systematic mechanism to come to the aid of its citizens when emergency assistance is needed as a result of oil exploitation. A case in point was the Jesse, Delta State, pipeline explosion of October, 1998 in which over 1000 persons reportedly lost their lives. It was alleged that Government did not respond immediately to assist those affected like it would have been done in industrialized countries<sup>45</sup>.

#### Land Degradation/ Deforestation:

Vegetation in the Niger-Delta is comprised of extensive mangrove forests, brackish swamp forests and rainforests. Mangroves remain very important to the indigenous people of Nigeria as well as to the various organisms that inhabit these ecosystems. It is unfortunate that these oil activities have destroyed the extensive mangrove forests in the area. Apart from the illegal logging brought on by increased accessibility to forests, oil exploration itself has depleted biodiversity, especially at ramp sites, flow stations and terminals. A lot of land degradation and forest deforestation were caused by oil induced fire and pollution on the environment. A number of oil induced fire outbreak has occurred in the Niger-Delta leading to deforestation and destruction of farmland such as the Jesse fire incident that occurred in October 17, 1998. The unfortunate thing was that this fire incident did not only destroy farm lands or natural ecology, but also killed more than 1000 people of the community<sup>46</sup>.

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<sup>45</sup> *ibid*

<sup>46</sup> Eregha, P. B. and Irughe, I. R., (2009), Induced Environmental Degradation in the Nigeria's Niger Delta: The Multiplier Effects, *Journal of Sustainable Development in Africa*, Vol. 11, No. 4, pp 164-165.



Another fire incident occurred in September, 2004 in Okirika community in Rivers State that lasted for 3 days and destroyed the plants and animals inhabiting the affected area<sup>47</sup>. Next in line was the fire scourge that occurred in Ugbomro community in Delta State which necessitated the need to carry out a study to ascertain the effect of the fire scourge on the soil. It was discovered that contrary to the popular opinion that fire improvises bush fallowing for cropping, the site witnessed severe impoverishment not only from the fire incidence but also from the oil spill on the site<sup>48</sup>.

It can be said that the exploration of oil has increased the rate of deforestation in the Niger Delta. Massive exploration, drilling and the construction of pipelines for the transportation of oil and gas products within and beyond the Niger Delta region has led to the clearing of forests to construct pipelines and other oil facilities. This further devastates the already delicate ecosystem of the region. The destruction of forests in the region contribute both to the vulnerability of the region to natural disasters and the global climate change.

The tragedy of oil exploration/ pollution lies in the fact that land generally should be protected to sustain both the current generation and the generation yet unborn. The devastation of the land leaves no legacy for the future generation that would be saddled with sterile land, lakes and rivers. The rejuvenation of the land normally will take a very long process and the possibility of restoration of the land to its natural state would be almost impossible.

#### Loss of Forest Animals:

The significance of mangrove forests for the people of Niger Delta region cannot be over emphasised. However, this valuable asset has been contaminated, degraded and destroyed

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<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

by oil pollution. Petroleum development has also threatened several endangered species such as the Delta elephant, the white-crested monkey and the river hippopotamus<sup>49</sup>.

#### Socio-Cultural Damage:

Petroleum development has attracted many people both local and foreigners into the local communities resulting in the dislocation of social values in the oil producing communities such as Bonny in Rivers State, Eket in Akwa Ibom State etc.

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<sup>49</sup> Clark, Henry et al, Oil for Nothing: Multinational Corporation, Environmental Destruction, Death and Impunity in the Niger Delta, A United States of America Non-governmental Organisation Trip Delegation Report, September 6-20, 1999, p. 8.

## CHAPTER FIVE

### CONCLUSION

#### 5.1 Summary

This dissertation examined the legal rights of the Niger Delta region to the ownership and control of mineral resources under Nigerian law. It appreciated the availability of mineral resources in specific locations of the country. The facts presented in this research demonstrate that the Constitution of the Federal Republic of Nigeria, 1999 (as amended), Petroleum Act, 1969, Minerals and Mining Act, 2007 as well as the Exclusive Economic Zone Act, 1978 has vested ownership of mineral resources in Nigeria on the Federal Government just like some countries of the world not allowing individuals to lay claim to it. It is also important to note that no government have been able to establish that its nation has triumphed or been able to meet its obligations simply because all mineral resources in the state are owned by the Federal Government. They may argue that for administrative purposes, it has been helpful in securing foreign investments, as only one body guided by one set of rules is involved thereby giving the foreign investor a sense of security.

The ownership of mineral resources is vested in the Federal Government, yet oil is entrapped in land and cannot be exploited without access to land which is vested in the State Governor. This has resulted in the crises tagged resource control which calls for fair, just, equitable and manageable natural resource sharing policy that should be favourable to all Nigerians. To drive their point home, the youths of the Niger Delta region have embarked on various forms of attack on the federal and state governments, multinational oil companies and even individuals. This situation has led some pundits to conclude that the discovery of oil in Nigeria is a curse instead of the blessing that God intended it to be.

The research also considered what interest in the land is left for the occupants especially when the Federal Government comes to exercise its right of expropriation of mineral resources in the land. The implication is that the individual or community is only entitled to compensation for destruction of improvements on the land. The dissertation also looked at the environmental degradation of the Niger Delta region in the form of oil pollution, oil spillage; gas flaring etc. The total picture is one of complete degradation and total loss of individual's dignity as a human person.

## **5.2 Findings**

Clearly and exhaustively, Section 44(3) Constitution of the Federal Republic of Nigeria, 1999, Section 1 Petroleum Act, 1969, Section 1 Minerals and Mining Act, 2007 and the Exclusive Economic Zone, Act, 1978 expressly vests with every available language, ownership and control of mineral resources in the Nigerian State on the Government of the Federation of Nigeria.

The Ownership of mineral resources is vested in the Federal Government, yet oil is entrapped in land and cannot be exploited without access to land which is vested in the state governor. Therefore on the mode of ownership of petroleum and land in Nigeria, the research aligns with the views of Angaye which states that: "The logic that one owns the land and another owns the oil extracted from beneath the land is Nigerians logic or illogic propounded by parochial logicians"<sup>50</sup>.

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<sup>50</sup> Prof. Angaye, G., Who Owns Land and Oil in Nigeria, <http://www.nigerdeltacongress.com/article>, Accessed on the 27/5/2015 at 8:27pm

Thus the following findings:

- 5.2.1. That the ownership and control of mineral resources vested on the federal government by our laws is not favourable to the states where these mineral resources are explored as well as the speedy development of Nigeria.
- 5.2.2. That mineral resource alone cannot boost or be the source of revenue generation of any country.
- 5.2.3. That there is the need for government and the oil companies to take proactive steps in curbing the constant agitation in the Niger Delta region
- 5.2.4. That the provisions of Section 162(2) Constitution of the Federal Republic of Nigeria, 1999 is inadequate
- 5.2.5. That our existing Environmental Laws should be strengthened.

### **5.3 Recommendations**

In view of the forgoing legal problems, I make the following recommendations.

- 5.3.1. That the theory of the federal government being the sole owner of mineral resources in Nigeria be constitutionally modified to accommodate the States where these mineral resources are situated as co-owners. This will bring about healthy competition amongst the states.
- 5.3.2. That Nigeria should diversify into agriculture, industrialisation and massive exploration of solid minerals. This is because the right to proper feeding is a fundamental one in the democratic process, and must be satisfied by every responsible government.
- 5.3.3. That there should be creation of job placements for the qualified youths of the Niger Delta region where they can work and earn monthly salaries because an idle mind is the devils workshop.

- 5.3.4. That Section 162(2) Constitution of the Federal Republic of Nigeria, 1999 be reviewed to give to states where mineral resources are found 25percent of the revenue derived from the natural resources within their states. This would increase the fund available for development. However, such revenue should be properly utilized and accounted for by the states too. Also, the derivation principle should be extended to other resources including solid minerals and agricultural resources. This will not only bring about peace which creates the right environment for development in all its ramifications but also stability in the country.
- 5.3.5. That the Federal Government should review the existing Environmental Laws with a view to ensuring effective and sincere implementation and enforcement.

#### **5.4 Conclusion**

The issue of mineral resources found on any land in Nigeria will continue to remain contentious as long as conscious efforts are not made to adopt an all inclusive approach towards the distribution of the revenue. In addition to the allocation of revenue from the resource, there is also the need to tie the revenue to specific expenditure on infrastructure with long term benefits to the people, like public transportation, education, healthcare and social security, to ensure that the benefits spread to all facets of the society, basically because of the nature of oil and gas as a depleting resource.

In consideration of the present state of our economy and the possible consequence of a total collapse, it has become imperative that the above mentioned recommendations be addressed without delay. The implementation of each recommendation should be sincere, professional and articulate if we must realise the purpose for which they have been put in place. It is believed that when this is done, Nigeriawill be on the path to progress and development and only then, shall we justify the name “Giant of Africa”.

Finally, Nigeria must equally allow our laws to grow with the people. Since society is forward looking, law as an instrument of social change should be progressive to aid speedy economic growth and transformation in any nation.

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