

# OWNERSHIP AND CONTROL OF OIL, GAS, AND MINERAL RESOURCES IN NIGERIA: BETWEEN LEGALITY AND LEGITIMACY

LANRE ALADEITAN\*

## I. INTRODUCTION

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 great wars and human tragedies. The scramble for partition of Africa at the Berlin Conference of 1884, the Boer wars of South Africa, the institution and sustenance of the obnoxious apartheid system of South Africa, even Hitler's Second World War, apart from its much-vaunted desire to create a master Aryan race, had as its sole motivation the economic domination of Europe by Germany as exemplified by its annexation and conquest of most of Europe.

In contemporary times, the desire of the industrialized North in continuing to do business with developing countries, apart from finding sales outlets (markets), is to exploit and take the minerals and natural resources of these countries to their maximum benefit. The possession of mineral resources is therefore crucial to a nation's wealth and well-being. Thus, the ownership and control of such resources are issues that cannot be taken for granted.

Ownership [here implies] "the legal right that a legal system grants to an individual in order to allow him or her to exercise the maximum degree of formalized control over a scarce resource." This idea can be derived from the civil law concept of *dominium*, the greatest right in property to "use and dispose of a thing in the most absolute way alluded to in early

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\* Lanre Aladeitan is a lecturer in the Department of Public and International Law for the Faculty of Law, University of Abuja.

Roman texts.” This concept of *dominium* is the “ultimate right, that which has no right behind it.”<sup>1</sup>

On the other hand, the idea of ownership, as understood under civil law, has been recognized, to some extent, under common law.<sup>2</sup> For example,

[a]ccording to Blackstone, ownership could be considered as “the sole and despot *dominium* of an individual over a thing.”

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[H]owever, [unlike the right of ownership under common law, it] is seldom an absolute right. As Mattei notes “[c]ommon law countries have been traditionally cautious to emphasize the extent of the owner's powers, always employing the idea of reasonableness to limit him or her in the interest of his or her neighbors. It is of no surprise therefore that the most important contribution of Anglo-American legal scholarship to property law is the metaphor of the bundle of rights. This clever metaphor defines ownership (and property) as a bundle of rights (and duties) enjoyed by an individual over a thing.”<sup>3</sup>

Following the importance of natural resources as essential commodities, which are at the heart and soul of a nation's economic survival and the definition of natural resource ownership as a bundle of rights, different theories of ownership and control of natural resources based on the different nations' political, social, and economic considerations have evolved differently across the world.

## II. THEORIES OF OWNERSHIP AND CONTROL OF NATURAL RESOURCES (OIL AND GAS)

Although there are varying structures of the theories of ownership and control of natural resources, most of the classifications share similar characteristics. Some of the more common theories are “ownership in place theory,” “non-ownership theory,” “qualified ownership theory,” “ownership in strata,” and “servitude theory.”

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1. Bryan Clark, *Migratory Things on Land: Property Rights and a Law of Capture*, 6.3 ELECTRONIC J. COMP. L. 2, Oct. 2002, <http://www.ejcl.org/63/art63-3.pdf> (footnotes omitted).

2. UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION 77 (2000).

3. Clark, *supra* note 2, at 2–3.

### A. Ownership in Place Theory

The “ownership in place” theory derives from the general common law principle of fee simple absolute and is sometimes referred to as the “Fee Ownership Theory.” Under this theory, the owner of a parcel of land has a right to all minerals below the surface of his land that he may work or lease to another. In other words, the ownership in place theory is an offshoot of the ownership of land in fee simple absolute, which, at common law, meant ownership of “land to an indefinite extent, upwards as well as downwards.”<sup>4</sup> The Latin maxim “*cujus est solum, ejus est usque ad coelum ad inferos*,” which literally translates as: “to whomever the soil belongs he owns also the sky and to the depth,” colourfully describes the indefinite extent of ownership in fee simple absolute.<sup>5</sup>

By ownership in place theory, the landowner alone was entitled to deal with the land and dispose of it in accordance with his wishes—subject however, to regulatory laws of government or the interest of adjoining land owners.<sup>6</sup> He could,

[b]y . . . appropriate instrument, [separate] the ownership of certain . . . rights, powers, privileges and immunities . . . from the estate in fee simple absolute in the land. [Thus, b]y an appropriate grant or reservation, one person may be exclusively authorized to drill a well for the purpose of [exploring and producing oil and gas, solid minerals, or other resources,] while another person is [granted] other rights and privileges . . . .

“[T]he land owner may [also] grant to another what is described as a mineral interest,<sup>[8]</sup> a royalty interest,<sup>[9]</sup> or a leasehold interest;<sup>[10]</sup>

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4. PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS, OIL AND GAS LAW § 202 (2012).

5. *See id.*

6. *See Marrs v. R.R. Comm’n*, 177 S.W.2d 941, 948 (Tex. 1944).

7. MARTIN & KRAMER, *supra* note 5, at § 201.

8. A mineral right is “[a]n interest in minerals in land, with or without ownership of the surface of the land. [It is a] right to take minerals or a right to receive a royalty.” *Mineral Right*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Mineral+Right> (last visited May 15, 2013).

9. Mineral royalty is the income received from lessees of mineral land. *See Logan Coal & Timber Ass’n v. Helvering*, 122 F.2d 848, 850 (3d Cir. 1941).

10. “‘Leasehold interest’ means the interest of the lessor or the lessee under a lease contract.” U.C.C. § 2A-103(1)(m) (2012).

alternatively, he may convey the land to another, excepting or reserving from the grant a mineral interest, a royalty interest, or a leasehold interest.”<sup>11</sup> The implication of the ownership in place theory is that the landowner owned the land and the resources beneath his land absolutely and could confer separate titles to them by reservation, separation, or severance. In this theory, the landowner can sever the surface rights<sup>12</sup> from the mineral rights and grant the latter in perpetuity and in fee simple,<sup>13</sup> either through sales or reservation. The rationale for this theory is that oil, gas, and solid minerals in the soil are a part of the real estate of the land owner, who has the right to sell, lease, or use the property in any lawful way as the incidence of ownership will permit.<sup>14</sup> The ownership in place theory enjoys wide recognition and application in many states in the United State of America.<sup>15</sup>

The arguments against this theory, to which the author subscribes, are 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 ownership in place theory. A point of divergence from this view is that, in the absence of any other logical approach to 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.

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11. MARTIN & KRAMER, *supra* note 5, at § 201.

12. See *Bodcaw Lumber Co. v. Goode*, 254 S.W. 345, 349 (Ark. 1923).

13. See *Simson v. Langholz*, 293 P.2d 302, 306 (Colo. 1956).

14. See *Attorney Gen. v. Pere Marquette Ry.*, 248 N.W. 860 (Mich. 1933).

15. Arkansas, Colorado, Kansas, Maryland, Michigan, Mississippi, Montana, New Mexico, North Dakota, Pennsylvania, Tennessee, Texas, Washington, and West Virginia have all adopted the ownership in place theory. MARTIN & KRAMER, *supra* note 5, at § 201.

*B. Non-Ownership Theory*

The non-ownership theory applies more to oil and gas than other resources, partly due to the fact that oil and gas in the ground is considered migratory or “fugacious” in nature and, therefore, is incapable of being owned until it is produced and reduced to possession.<sup>16</sup> In jurisdictions where the non-ownership theory has been adopted, “[o]wnership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form.”<sup>17</sup> The non-ownership theory does not, however, imply that “any person may ‘capture’ the oil and gas if able to do so,” because “one may not go upon the land of another [for the purposes of capturing the resource]” without authorization for such an interest in the land.<sup>18</sup>

The non-ownership theory originates from American jurisprudence and dates back to the late 19<sup>th</sup> century when, in the development of oil and gas law, minerals were thought to be “migratory [in nature] as birds in the air, or at least as migratory in character as underground waters.”<sup>19</sup> This theory developed and became entrenched in American jurisprudence based on such authorities as *Westmoreland & Cambria Natural Gas Co. v. Dewitt*,<sup>20</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

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16. *Id.* at § 203.1. “Fugacious” as a word implies transience or non-permanence. When used from an oil and gas user’s perspective, this non-permanence of the resource—or his ability to exploit it—has two connotations. One is that rivals may forestall his efforts, diverting or taking some of the resource and leaving less or nothing for him. The other is that the period of the resource’s availability is naturally short, terminating when it flows or migrates away.

17. *Id.* (quoting LA. REV. STAT. ANN. § 31:6 (2012)).

18. *Id.*

19. *Id.* at § 203.

20. *Id.*; *Westmoreland & Cambria Nat. Gas Co. v. De Witt*, 18 A. 724, 725 (Pa. 1889).

control, it is no longer [owned by the owner of the other land], but [becomes] his.<sup>21</sup>

The non-ownership theory of oil and gas in the ground has therefore been likened to “non-ownership by the landowner of . . . wild animals, air and sunshine” across or over his land.<sup>22</sup> The premise of the non-ownership theory, which was upheld in *State v. Ohio Oil Co.*,<sup>23</sup> is as follows:

To say that the title to natural gas vests in the owner of the land in or under which it exists today, and that tomorrow, having passed into or under the land of an adjoining owner, it thereby becomes [the property of that adjoining owner], is no less absurd, and contrary to all the analogies of the law, than to say that wild animals or fowls, in ‘their fugitive and wandering existence,’ in passing over the land, become the property of the owner of such land, or that fish, in their passage up or down a stream of water, become the property of each successive owner over whose land the stream passes. [Hence, the court reasoned that to hold otherwise will be] as unreasonable and untenable as to say that the air and the sunshine which float over the owner’s land is a part of the land, and is the property of the owner of the land. [The court] therefore [held] that the title to natural gas does not vest in any private owner until it is reduced to actual possession.<sup>24</sup>

Similarly, the decision in *Kelly v. Ohio Oil Co.* also upheld the non-ownership theory.<sup>25</sup> In that case, it was held:

Petroleum oil is a mineral, and while in the earth it is part of the realty, and, should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and, if it moves to the next adjoining tract, it becomes part and parcel of that tract; and it forms part of some tract until it reaches a well, and is raised to the surface, and then for the first time it becomes the subject of

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21. MARTIN & KRAMER, *supra* note 5, at § 203 n.2.

22. *Id.* at § 203.

23. *State v. Ohio Oil Co.*, 49 N.E. 809, 812 (1898).

24. MARTIN & KRAMER, *supra* note 5, at § 203 n.4 (quoting *State v. Ohio Oil Co.*, 49 N.E. at 812).

25. *Kelly v. Ohio Oil Co.*, 49 N.E. 399, 401 (Ohio 1897).

distinct ownership, separate from realty, and becomes personal property,—the property of the person into whose well it came.<sup>26</sup>

Another important case worthy of consideration in the development of the non-ownership theory is *Frost-Johnson Lumber Co. v. Sailings Heirs*, 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.

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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.<sup>27</sup>

It is on the basis of these ancient authorities and others<sup>28</sup> that the doctrine of oil and gas is 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.

### C. *Qualified Ownership Theory*

There is only a slight difference in the qualified ownership theory and the non-ownership theory considered earlier.<sup>29</sup> The difference lies in the fact that,

. . . under the qualified ownership theory[,] each owner of land lying over the common reservoir ha[s] certain correlative rights (and duties)

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26. MARTIN & KRAMER, *supra* note 5, at § 203 n.5 (quoting *Kelly v. Ohio Oil Co.*, 49 N.E. at 401).

27. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 91 So. 207, 243, 245 (La. 1920).

28. *See, e.g.*, *Townsend v. State*, 47 N.E. 19 (Ind. 1897); *Hammonds v. Cent. Ky. Natural Gas Co.*, 75 S.W.2d 204 (Ky. Ct. App. 1934), *overruled by* *Tex. Am. Energy Corp. v. Citizens Fid. Bank & Trust Co.*, 736 S.W.2d 25 (Ky. 1987); *Barnard v. Monongahela Natural Gas Co.*, 65 A. 801 (Pa. 1907); *Gray-Mellon Oil Co. v. Fairchild*, 292 S.W. 743 (Ky. 1927).

29. MARTIN & KRAMER, *supra* note 5, at § 203.2.

[with respect to] the oil and gas below. Each landowner had the duty not to waste the oil and gas and not produce it in such manner as to damage the formation and reduce the ultimate recovery; each landowner ha[s] a corresponding right in the common pool. So long as waste or reservoir damage was not threatened, each landowner had the right to take as much oil or gas as his[her] wells would produce, [notwithstanding that the oil and gas] may have been drained from the land of others.<sup>30</sup>

#### D. Ownership of Strata Theory

Under this theory, “the landowner owns the sedimentary layer containing the oil and gas within the limits of the vertical planes representing the boundaries of his tract.”<sup>31</sup> It is important to note that in jurisdictions where this theory is in application, there is usually an adoption of one of the other theories mentioned earlier.<sup>32</sup>

#### E. Servitude Theory (*Profit a’ Prendre*)

The servitude theory is mostly applied to solid minerals rather than to oil and gas resources. This is in view of the differences in geological nature of the two mineral resources and the mineral interest owner’s exclusive right to exploit the mineral underground.<sup>33</sup> Essentially, solid minerals are non-migratory, hence the inapplicability of the rule of capture. Under the servitude theory, minerals are not capable of possession by the surface owner prior to removal from under the ground.<sup>34</sup> Ownership is, therefore, a prelude to possession, rather than the other way around in the case of migratory and fugacious minerals. The import of the servitude theory is that, once a person has full mineral right, he can proceed to reduce the mineral to possession (possession of the surface soil is constructive possession of the minerals underground). However, where there is a severance between the ownership of the surface soil and ownership of the mineral underground, the owner of the mineral has a *profit a’ prendre*.<sup>35</sup>

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30. *Id.*

31. *Id.* at § 203.4.

32. *Id.*

33. *Id.* at § 216.

34. *Id.*

35. *See id.* at § 209; “Profit a’ prendre” is also called “right of common.” It is a right exercised by one person in the soil of another, accompanied with participation in the profits

Under both American and English law, *profit a' prendre* is only recognized as an easement for the purposes of exploitation of the resources and has no bearing on the ownership of the surface soil.<sup>36</sup>

The various theories of ownership and control of natural resources considered above have significantly influenced and formed the basis of the legal system and concept of property rights adopted by different countries across the world in the regulation, use, management, transfer and alienation of their natural resource endowment. While some countries have adopted a single theory as the philosophical basis of their concept of property rights, others have adopted a combination of the theories. Consequently, ownership of natural resources, as adopted by states, have been classified as “Private Ownership” or “State Ownership” and, in some instances, a mix of both “Private and State Ownership.”

Private ownership basically implies that the owner of the land in which the oil is located automatically owns the oil and gas and other minerals found in it.<sup>37</sup> The ownership structure is purely private, with individuals as the owners of minerals found in their land. In jurisdictions where private ownership as a concept of property right is recognized, an individual can either raise the capital to win the oil or sell his rights to another individual or company with the appropriate capital and expertise.<sup>38</sup> It is important to emphasize that the owner of such land can drill wells on his land to recover oil and gas on it, subject, however, to regulatory provisions governing the operations of the industry, like health and safety, pollution, etc.

Apart from the restrictions imposed by regulation, the right of a landowner to explore and produce minerals from his land is unlimited.<sup>39</sup> Furthermore, under private ownership, the landowner may grant a mineral interest, royalties or leasehold interest.<sup>40</sup> It is therefore possible, through the appropriate contractual agreement, for a landowner to grant to one person the right to drill a well for oil and to another, other interests over the land, e.g. farming, construction, etc.<sup>41</sup> The other extreme is state ownership, which is a situation where the state appropriates all minerals to

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of the soil thereof. It is a right to take a part of the soil or produce the land. It is a right to take from the soil such as logging, mining, drilling etc. The taking (profit) is the distinguishing characteristic from an easement.

36. *Id.* at § 204.

37. WILLIAMS & MEYERS, OIL AND GAS LAW (abr. 3d ed. 2007).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

itself, leaving the owners of the land only the right to compensation for the loss of surface rights in their land.<sup>42</sup> State ownership, as will be observed shortly, is the applicable regime in Nigeria.

### III. OWNERSHIP AND CONTROL OF NATURAL 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. Nigeria, therefore, inherited a colonial legacy in which ownership of mineral resources was vested in the crown of England. This was due to the fact that the country, as a corporate entity, was regarded as the property of Great Britain. Thus, the then-suzerain authority and, naturally, the minerals in Nigeria—whether oil and gas or solid minerals—also belonged to Britain.<sup>43</sup> According to Professor Sagay, “[T]he 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>44</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.<sup>45</sup> To put it in Professor Sagay's words, “After Nigeria gained independence, the new state adopted and institutionalised this vestige of colonial experience.”<sup>46</sup>

It is important to note that the issue of ownership was of no consequence in the Mineral Oils Ordinances of 1914<sup>47</sup> as amended in 1925, and only began to feature as a legal provision in the Minerals Act of 1958,<sup>48</sup> which expressly emphasized:

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42. *Id.*

43. M.A. AJOMO, THE LEGAL FRAMEWORK OF THE PETROLEUM INDUSTRY 4 (Lagos Oct. 17–18, 2001) (paper presented at the Centre for Petroleum Environment and Development Studies workshop on essentials of oil and gas law).

44. ITSE SAGAY, OWNERSHIP AND CONTROL OF NIGERIAN PETROLEUM RESOURCES: A LEGAL ANGLE, NIGERIAN PETROLEUM BUSINESS: A HANDBOOK 178 (Victor Eromosele ed., 1997).

45. SCHEDULE TO THE CONSTITUTION (1963), § 69, pt. I, item 25 (Nigeria).

46. AJOMO, *supra* note 44.

47. THE LAWS OF THE FEDERATION OF NIGERIA AND LAGOS: IN FORCE 1 JUNE 1958 (1959) Cap 120, No. 17 of 1914 (Nigeria).

48. Petroleum Act of 1969, ch. 350 (1990) (Nigeria).

The entire ownership and control of all petroleum in, under, or upon any land which this section applies shall be vested in the State [State here means the Nigerian State]. This section applies to all land (including land covered by water) which—

- (a) is in Nigeria; or
- (b) is under the territorial waters of Nigeria; or
- (c) forms part of the Exclusive Economic Zone of Nigeria.<sup>49</sup>

According to Professor Ajomo, the above provision on ownership of mineral resources was remodelled under the 1979 Constitution 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.”<sup>50</sup>

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>51</sup> The current legal regime governing ownership of land, minerals and mineral resources in the country retains and vests ownership in the Government of the Federation. The current, applicable legal regime consists of:

- 1) The Constitution of the Federal Republic of Nigeria 1999 as Amended<sup>52</sup>
- 2) The Land Use Act, 1978 Cap L5, Laws of the Federation of Nigeria 2004<sup>53</sup>

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49. *Id.*

50. AJOMO, *supra* note 44, at 5.

51. *Permanent Sovereignty Over Natural Resources*, GENERAL ASSEMBLY RESOLUTION 1803 (XVII) (Dec. 14, 1962), [http://untreaty.un.org/cod/avl/ha/ga\\_1803/ga\\_1803.html](http://untreaty.un.org/cod/avl/ha/ga_1803/ga_1803.html).

52. Emmanuel Uduaghan, *Solving the Niger Delta Problem; The Law and The People — An Overview of Legislations Impeding on the Socio-Economic Development of the South-South Region: The Land Use Act as Case Study*, (AUG. 7, 2008), <http://governoruduaghan.org/news/244.txt>.

53. *Id.*

- 3) Nigerian Minerals and Mining Act, 2007,<sup>54</sup> and
- 4) The Petroleum Act 1969 Cap P 10, Laws of the Federation of Nigeria 2004.<sup>55</sup>

*A. Constitution of the Federal Republic of Nigeria of 1999, as Amended*

The Constitution of the Federal Republic of Nigeria (CFRN) of 1999, as amended, confers exclusive power on the Nigerian State to own, control and regulate the activities of minerals, mineral oils and by-products. This power is firmly provided for in Section 44(3) of the Constitution and specifically states:

Notwithstanding the foregoing provision of this Section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon territorial waters and the Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.<sup>56</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 1979 Constitution.

*B. The Petroleum Act, 1969*

The Petroleum Act is described in its preamble as:

An Act to provide for the exploration of petroleum from the territorial waters and the continental shelf of Nigeria and to vest the ownership of, and all on-shore and off-shore revenue from petroleum resources

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54. *Id.*

55. *Id.*

56. FESTUS EMIRI & GOWON DEINDUOMO, LAW AND PETROLEUM INDUSTRY IN NIGERIA 147 (2009).

derivable therefrom in the Federal Government and for all other matters incidental thereto.<sup>57</sup>

A combined reading of both the preamble and the provision of section 1(1), which stated that, “the entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the state,” is clear and unequivocal as to whom ownership is vested.<sup>58</sup> Specific description of the extent of coverage was also provided for in section 1(2) as follows:

- a) [all lands, including land covered by water] is in Nigeria; or
- b) is under the territorial waters of Nigeria; or
- c) forms part of the continental shelf; or
- d) forms part of the Exclusive Economic Zone of Nigeria.<sup>59</sup>

*C. The Nigerian Minerals and Mining Act, 2007*

The Nigerian Minerals and Mining Act of 2007 repeals the Minerals and Mining Act of 1999:

The entire property in and control of all mineral resources in, under or upon any land in Nigeria, its contiguous continental shelf and all rivers, streams and watercourses throughout Nigeria, any area covered by its territorial waters or constituency and the Exclusive Economic Zones is and shall be vested in the Government of the Federation for and on behalf of the people of Nigeria.<sup>60</sup>

Consequent upon this provision, the Act in Section 1(2) 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.<sup>61</sup>

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

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57. NIGERIA MINERAL, MINING SECTOR AND BUSINESS GUIDE 82 (1990).

58. *Id.* at 262.

59. *Id.* at 82.

60. *Nigerian Minerals and Mining Act*, THE COMPLETE LAWS OF NIGERIA, Mar. 29, 2007, <http://www.placng.org/lawsofnigeria/node/360>.

61. *Id.*

land set apart for, or used for, or appropriated, or dedicated to any military purpose except with prior approval of the president; land within fifty meters of an oil pipeline license area; land occupied by town, village, market, burial ground or cemetery, ancestral, sacred, or archaeological site; land appropriated for a railway, public building, reservoir, dam, or public road; and land that is subject to the provisions of the National Commission for Museum and Monument Act, Cap. N19, Laws of the Federation of Nigeria, 2004 and the National Parks Service Act, Cap. N65, Laws of the Federation of Nigeria, 2004.

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.<sup>62</sup>

Even though the ownership of mineral resources is entirely vested in the federal government, certain rights and customs of host communities—such as preservation of salt, soda, potash and galena from any land other than land within the area of the mining lease or land designated by the Minister as security land—are still preserved.<sup>63</sup>

#### *D. Land Use Act*

The significance of the land ownership and tenure system in Nigeria and its impact on ownership of natural resources makes any discussion on the ownership of natural resources incomplete without an appreciation of the country's land ownership and tenure system. Prior to the coming into force of the Land Use Act, Nigeria's land ownership and tenure system had undergone historical development in three distinct stages—the pre-colonial, colonial and post-colonial—such that what one obtains in the country before the introduction of the Land Use Act was a dual system of land ownership. 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, according to Professor Ajomo,<sup>64</sup> that private ownership of land evolved through grants, sales and partition.

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62. *Id.*

63. *Nigerian Minerals and Mining Act*, *supra* note 61, at § 97-(1).

64. M. A. Ajomo, *Ownership of Mineral Oils and the Land Use Act*, NIGERIAN CURRENT L. REV. 335, 335 (1982).

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>65</sup> It is noted that the Land Tenure Law replaces Lord Lugard's Land and substantially reaffirms the principles and philosophy underlying the Land and Native Rights Ordinances to the extent that, under the Land Tenure Law, the only interest available to an individual throughout the Northern Region is a right of occupancy.<sup>66</sup> The effect of this enactment is that it operated to divest the natives of ownership of their land and facilitated easy dispossession by the authorities.

It can be submitted that the structure that existed prior to the introduction of the Land Use Act reflects a basic tenet of an ideal federalism. Also, it would appear that the unitary configuration sought to promote uniformity in the country through the Land Use Act and brought an end to the duality in Nigeria's land tenure system. The Land Use Act of 1978 was, therefore, promulgated and became applicable all over the federation as evident in its preamble and Section 1, which vests all lands comprised in the territory of each state in the federation in the Governor of the state, who in turn shall hold it in trust and administer it for the use and common benefit of all Nigerians.<sup>67</sup> The Land Use Act was specifically entrenched in the 1979 Constitution and was equally retained in the 1999 Constitution, as amended, thus making its repeal cumbersome and tedious. The Land Use Act introduced an entirely new dimension into land ownership in the country by abolishing the ownership rights of communities and individuals to land and turning their interests into rights of occupancy only.<sup>68</sup> It is, therefore, clear that land ownership and tenure in Nigeria is a qualified one in which absolute title is vested in the Governor. However, it must be mentioned that, notwithstanding the vesting of title in the Governor's land in the respective state, one cannot exercise rights over lands that belong to the federal government and its agencies.<sup>69</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.

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65. *Id.*

66. *Id.*

67. *Nigerian Minerals and Mining Act*, *supra* note 61, at § 1-(1).

68. *Id.*

69. S. 49, Land Use Act, Cap L5 L.F.N. 2004.

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 (No. 2)* where it was held that “the federal government alone and not the littoral states can lawfully exercise legislative, exclusive and judicial powers over the maritime belt or territorial waters and sovereign rights over the Exclusive Economic Zone subject to universally recognized rights.”<sup>70</sup> 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.<sup>71</sup> 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 economy zone<sup>72</sup> or the continental shelf<sup>73</sup>—is vested in the Federal Government of Nigeria.

#### IV. ARGUMENT FOR AND AGAINST TOTALITARIAN OWNERSHIP

As cautiously observed, that some communities with mineral endowment, regardless of the legal position on ownership of mineral resources lay claim to such mineral resources located within their domain as legitimately belonging to them, became a basis for divergent views on state totalitarian ownership of mineral resources in the country.

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70. *Attorney Gen. of the Fed’n v Attorney Gen. Abia State*, [2002] 4 NSCC 51 (Nigeria).

71. *Id.*

72. The Exclusive Economic Zone Act No 28 (1978) (Nigeria) (The Exclusive Economic Zone is a new 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).

73. See The Petroleum Act, Laws of the Federation of Nigeria (1990) ch.P10, § 15 (Nigeria) (“‘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 metres (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”).

*A. The Case For “State Totalitarian Ownership”*

One of the prominent proponents of state totalitarian ownership, especially as it relates to the oil and gas industry, is Professor Ajomo.<sup>74</sup> Professor Ajomo sought to justify his support of state totalitarian ownership and the vesting of it in the federal government by adducing that ownership and control of petroleum is an important political symbol in most developing countries. Additionally, he asserted that the question of the government or authority to whom revenues should be paid, and the power and resources derivable from it, was an issue in the crises that led to the Nigeria Civil War, therefore, necessitating the federal government to claim that right exclusively.<sup>75</sup> He contended further that, since oil has a vital influence on the life of the people because of the benefit of petroleum to the economy, exclusive federal control permits the promulgation of uniform regulations in the oil industry.<sup>76</sup> Still, on the justification for state totalitarianism, Professor Ajomo noted that the federal government, being a federal subject under the Constitution, is the only authority that can successfully pursue, in collaboration with oil companies, a policy that will not adversely affect Nigeria’s foreign exchange position.<sup>77</sup> In the same vein, he argued that, because of the strategic importance of oil in the twentieth century and its importance to national life, it was only natural for oil to be centrally controlled in the interest of the nation.<sup>78</sup> He premised that the deposits of petroleum on land in Nigeria represent “part of the National heritage” while those deposited in the maritime areas are subject to the sovereignty of the state, under various international conventions thus implying that, no matter where the resources are found, they are to be centrally controlled.<sup>79</sup>

It was also the contention of the learned Professor that only the federal government has capacity to operate in the petroleum industry given the huge capital outlay and the high degree of technical expertise required. Similarly, he asserted that only the federal government has the capacity to compel the multinationals operating in the industry to share the necessary

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74. M.A. Ajomo, *The 1969 Petroleum Decree: A Consolidation Legislation, Resolution in Nigeria’s Oil Industry*, in 1 NIGERIAN ANNUAL OF INT’L LAW 57 (1979).

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.* at 58.

79. *Id.*

technical knowledge with Nigerians.<sup>80</sup> The learned Professor also observed that private ownership of oil will create enormous wealth for a few private individuals, who might not apply such fortunes towards productive ends in consonance with national priorities but rather that such wealth may only intensify the class division in the country.<sup>81</sup> He therefore expressed the view that, contrary to private ownership, Federal Government ownership and control of petroleum resources will enhance national unity.<sup>82</sup>

*B. Argument Against "Totalitarian Ownership"*

Perhaps in what can be considered a critical appraisal of Professor Ajomo's support for state totalitarian ownership, Professor Sagay contended that some arguments could not stand up to a rigorous examination or analysis, based on Nigeria's national experience.<sup>83</sup> Starting from the very first argument, Professor Sagay posited that, instead of promoting unity, the federal government's exclusive ownership and control of our oil resources has caused deep bitterness, resentment, and a sense of majority oppression of the minority producers of oil.<sup>84</sup> He went on to say that the country has witnessed rebellions, revolts and cries brought about by the exclusive ownership and control of mineral resources in the federal government by the oil producing areas.<sup>85</sup> He further argued that, as a result of the state totalitarian ownership and control policy, the people of all the oil producing areas naturally feel "cheated and exploited" by a policy under which the wealth under their land is carted away, leaving them with a polluted and devastated environment.<sup>86</sup>

The danger of private ownership of oil creates enormous wealth for a few people who would then misuse these funds, as submitted by Professor Ajomo. Professor Sagay raised the question of whether central ownership and control have prevented the emergence of a class of enormously wealthy individuals and whether the proceeds of oil has been prudently and

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80. *See id.*

81. *See id.*

82. *See id.*

83. ITSE SAGAY, *Ownership and Control of Nigerian Petroleum Resources: A Legal Angle*, in NIGERIAN PETROLEUM BUSINESS: A HANDBOOK (V. Eromosole ed., Lagos: Advent Commc'ns Ltd. 1997).

84. *Id.*

85. *Id.*

86. *Id.*

patriotically put to the use for the country.<sup>87</sup> Based on the these issues, which cannot be answered positively, it is humbly submitted that the points as canvassed by the learned Professor Ajomo, while not illogical, are not justifiable reasons in the Nigerian experience.

Similarly, Professor Duruigbo, while examining the argument for and against public or private ownership, observed, “In private ownership, oil and gas are essentially treated as any other commodity found on land. The landowner decides what to do with the resource and reaps any attendant benefits, subject to compliance with applicable public regulations on such issues as environmental protection and taxation.”<sup>88</sup> He noted further that commentators, who took a traditional economic perspective, favor private ownership of minerals because private ownership promotes the highest and most efficient use of land. This point is accentuated by the fact that, in the United States, most of the oil discovered and developed to date has been on private land.<sup>89</sup> Notwithstanding this view, Professor Duruigbo was quick to identify and emphasize a significant downside of private ownership, which more or less does not take into account the externalities of resource development, such as environmental degradation and its attendant implication on the society as a whole.<sup>90</sup> Luckily, he posited a solution that, if a government can internalize the externalities through adequate environmental regulation and taxation of profits, society could benefit from the resources found on, and developed from, private land.<sup>91</sup>

Professor Duruigbo further observes, “While people in oil-producing areas did not raise much objection to this arrangement initially, in the past decade or so there has been serious agitations for transfer of title back to the communities on which the oil is located.”<sup>92</sup> This seems to confirm the concern of oil producing areas or communities on the legitimacy of the federal government to lay claim to the resources found within their locality and, to some extent, show the communities’ preference for private ownership as practiced by some states in the United States of America, where both public and private ownership coexist. To this effect, perhaps a comparison of the ownership structure in Nigeria and the State of Texas, in

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87. *Id.*

88. Emeka Duruigbo, *The Global Energy Challenge and Nigeria's Emergence as a Major Gas Power: Promise, Peril or Paradox of Plenty?*, 21 *GEO. INT'L ENVTL. L. REV.* 395, 442 (2009).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

terms of elements of mineral interest and conveyability, may prove useful in appreciating the concept of property rights and, consequently, provide an answer to the legitimacy question.

#### V. NIGERIAN POSITION COMPARED WITH STATE OF TEXAS OIL AND GAS OWNERSHIP STRUCTURE

Ownership of oil and gas resources under Texas law has been described as two distinct sets of rights, or “estates”: the mineral estate and the surface estate.<sup>93</sup> The mineral estate is a separate fee estate and is recognized as a corporeal right, i.e. a possessory estate in land.<sup>94</sup> In arriving at this position as far back as 1915, the Texas Supreme Court stated:

It is no longer doubted that oil and gas within the ground are minerals. They have peculiar attributes not common to other minerals because of their fugitive nature or vagrant habit the disposition to wander or percolate, and the possibility of their escape from beneath one part of the surface of the earth to another. Nevertheless, they are to be classed as minerals [citations omitted]. In place, they lie within the strata of the earth, and necessarily are a part of the realty. Being a part of realty while in place, it would seem to logically follow that, whenever they are conveyed while in that condition or possessing that status, a conveyance of an interest in the realty results. . . . If the oil and gas, the subject of the conveyance, are in fact not beneath or within the land, and are therefore not capable of being reduced to possession, the conveyance is of no effect. But if they have not departed and are beneath it, they are there as a part of the realty; and their conveyance while in place, if the instrument be given any effect, is consequently the conveyance of an interest in the realty.<sup>95</sup>

The effect of the Supreme Court decision is that a landowner not only has possessory estate in the oil and gas but can create a similar estate in the

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93. *Oil and Gas Exploration and Surface Ownership*, RAILROAD COMMISSION TEX., <http://www.rrc.state.tx.us/about/faqs/SurfaceOwnerInfo.pdf> (last visited Mar. 1, 2013).

94. *Texas Oil and Gas Property Rights*, JIM BEARDEN & ASSOCIATES, P.L.L.C., <http://www.beardenlawfirm.com/Texas%20Oil%20and%20Gas.pdf> (last visited Mar. 1, 2013).

95. *Texas Co. v. Daugherty*, 176 S.W. 717, 719–20 (Tex. 1915).

oil and gas in place that is separate from the rest of the land. According to Anderson and others, “When the mineral estate has been ‘severed,’ the remaining aggregate of rights in the land has become generically termed as the ‘surface rights.’”<sup>96</sup> These two estates can be owned by the same person or by different people, as has been the case in many areas of Texas.<sup>97</sup>

The division, or severance, of the mineral estate and surface estate occurs when an owner sells the surface and retains all or part of the minerals (or, less commonly, an owner sells the minerals and retains the surface). If an owner does not expressly retain the minerals when selling the surface, the mineral estate he owns automatically is included in the sale.<sup>98</sup>

With respect to both the surface and mineral estates, the Railroad Commission of Texas has expressed this opinion:

Regardless of whether the mineral estate and surface estate are held by one owner or have been severed, Texas law holds that the mineral estate is dominant. This means that the owner of the mineral estate has the right to freely use the surface estate to the extent reasonably necessary for the exploration, development, and production of the oil and gas under the property. This right to freely use the surface estate for the benefit of the mineral estate may be exercised by a company or individual that has taken a mineral lease from the actual owner of the mineral estate.<sup>99</sup>

The Commission’s opinion tends to align with the elements of mineral interest as outlined by George Snell and others:

1. the right of the mineral owner to explore and develop (this includes the right of ingress and egress);
2. the right to execute an oil and gas lease;
3. the right to receive bonus;
4. the right to receive delay rental; and

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96. OWEN L. ANDERSON ET AL., *HEMINGWAY OIL AND GAS LAW AND TAXATION* 33 (Thomson Reuters, 4th ed. 2004).

97. *Oil and Gas Exploration and Surface Ownership*, *supra* note 94.

98. *Id.*

99. *Id.*

5. the right to receive royalty.<sup>100</sup>

The dominance of the mineral estate and its elements in Texas appears to share some similarities with the operation of the mineral interest in Nigeria. However, before considering the similarities, it is significant to re-emphasize the fact that, in Nigeria, once a mineral resource is discovered on any tract of land, the mineral interest is vested in the government and, consequently, any such tract of land, upon which the mineral resource is discovered, is compulsorily acquired under the Land Use Act by the government for overriding public interest.<sup>101</sup> The implication here is that “when petroleum deposits are discovered on one’s land, the landowner effectively forfeits all interests on the land and is entitled to compensation for cash crops and economic improvements on the land.”<sup>102</sup> This is a remarkable difference between public and private ownership of mineral resources in these two jurisdictions.

Coming back to the operation of the mineral interest in Nigeria and its similarity with the mineral estate in Texas, it is important to note that the general right accorded to the holder of an Oil Prospecting Licence (OPL) and Oil Mining Lease (OML), which is usually granted by the Minister of Petroleum Resources in Nigeria pursuant to the Petroleum Act, which has vested control in all mineral resources in the state (i.e., the Federal Government of Nigeria),<sup>103</sup> is the right of the licensee or leasee “to enter and remain on the licensed land or leased lands and do such things as are authorised by the licence or lease.”<sup>104</sup> The correlative right to this provision is paragraph 36(b), which provides that the holder of an OPL or an OML “shall comply with any enactment relating to town or country planning or regulating the construction, alteration, repair, or demolition of buildings, or providing for similar matters which affects him in carrying out the operations authorised by the licence or lease.”<sup>105</sup> Comparing the rights

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100. George Snell et al., *A Comparative Review of Oil and Gas Law in Texas, North Dakota, Wyoming, Montana, Colorado and Utah*, LANDMAN, Nov./Dec. 2004, at 28, available at <http://jay.law.ou.edu/faculty/Hampton/Mineral%20Title%20Examination/Spring%202012/ComparativeReviewOfOandGLaw.pdf>.

101. Land Use Act (2004) Cap. (5), § 28(2) (Nigeria).

102. Emeka Duruigbo, *The Global Energy Challenge and Nigeria's Emergence as a Major Gas Power: Promise, Peril or Paradox of Plenty*, 21 GEO. INT'L ENVTL. L. REV. 395, 443 (2009).

103. Petroleum Act (2004) Cap. (10), § 1 (Nigeria).

104. *Id.* at First Schedule, paragraph 36(a).

105. *Id.* at First Schedule, paragraph 36(b).

of an OPL or OML holder to enter and remain on the licensed or leased lands and do such things as are authorized by the licence or lease with the fact that the lessee of a mineral estate in Texas has broad rights (i.e. conduct seismic tests, drill wells at locations they select, enter and exit well sites and other facilities, build, maintain, and use roads to access to and from facilities, etc.) to use the surface for the purpose of producing oil and gas. According to the Railroad Commission of Texas, this can be carried out reasonably without getting permission from the surface owner and without restoring the surface or paying for any non-negligent damages it causes, unless the mineral lessee is found to be negligent, unreasonable or excessive.<sup>106</sup> This appears to convey the same rights as the OPL or OML holder. Nevertheless, just as legislation (the Petroleum Act in the case of Nigeria) provides correlative rights as discussed above, in Texas, the right of a surface owner seems to exist essentially in common law, such that if a “lessee’s use of the surface is found to be negligent, unreasonable or excessive, the lessee may be liable to pay damages to the surface owner for the resulting injury.”<sup>107</sup> It is important to note, however, that the general rule of free use of the surface by the mineral lessee may be subject to exceptions and limitations by specific terms in the mineral lease and the deed, which severed the mineral estate.<sup>108</sup>

While there appears to be some similarity in the rights conveyed by the Nigerian government through the issue of OPL or OML and the rights conveyed in a mineral estate by a private landowner, the rights of a surface owner are somewhat blurred and appear divergent. For instance, in Nigeria, the import of the provisions of paragraph 36 of the First Schedule of the Petroleum Act states,

The holder of an oil exploration licence, oil prospecting licence or oil mining lease shall, in addition to any liability for compensation to which he may be subject under any other provisions of this Act, be liable to pay fair and adequate compensation for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased lands<sup>109</sup>

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106. *Oil and Gas Exploration and Surface Ownership*, *supra* note 94.

107. *Id.*

108. *Id.*

109. Petroleum Act (2004) Cap. (10), § 5 (Nigeria).

It is not easily determinable as to whether it recognizes surface right ownership. Alternatively, it may be for the purpose of compensation for cash crops or economic improvements, earlier mentioned as entitlement of a landowner who forfeits all his rights to his land under which petroleum deposits are found, which is a position that seems to be favoured by Nigeria's legislation<sup>110</sup> and case law<sup>111</sup> as opposed to the legally recognized rights of a surface owner in Texas.

When surface estates and mineral estates are severed, certain rights inure to the surface owner in Texas; however, the situation in Nigeria is different. Nigeria does not recognise severance of surface or mineral estates. Presumably, the only recognition of surface ownership is for compensation, which is assessed based on economic improvement to the land. The deprivation of mineral estates in Nigeria breeds contempt towards the government, questions the legitimacy of their rights of resources found on an individual's or community's land, and encourages the agitation for the adoption of a more acceptable ownership model in the country.

## VI. THE CONCEPT OF PROPERTY RIGHTS

The idea of property predates any established formal legal system. No one could lay claim of right over any natural resource without recognition of such a right. The concept of property rights was developed within legal systems to regulate the use of scarce resources and provide justification for giving to some individuals, groups, communities or states exclusive rights to the use and disposition of such resources. To this effect, the conferment of property rights, whether with powers to use, manage, transfer or alienate and take income or rent from its use,<sup>112</sup> benefits those who held such powers economically to the disadvantage of others. Hence, the importance attached to the property holder and his control, management and use. Beyond the issue of repository of property right is the nature of rights conferred. In some cases, the property right conferred—whether on individuals, groups, communities or states—is absolute ownership, while, at

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110. Land Use Act (2004) Cap. (5), §§ 28–29, 58 (Nigeria).

111. See *Upper Benue River Basin Dev. Auth. v. Alka*, [1998] 2 NWLR 328 (Nigeria).

112. ANTHONY SCOTT, *THE EVOLUTION OF RESOURCE PROPERTY RIGHTS* 3 (Oxford Univ. Press 2008).

other times, the right conferred is an interest less than ownership.<sup>113</sup> The basis of situating property rights—whether absolute ownership or an interest in an individual, group, community or state—raises a critical legal question that can, perhaps, be answered by recourse to the jurisprudence of “property rights,” which “[i]n economists’ language, . . . is typically [a] little more than a synonym for ‘ownership’ or perhaps ‘possession.’”<sup>114</sup>

The attribute of property rights seems more or less the same with the wider notion of rights put forward by Hohfeld in his classification of legal relations and different uses to which certain words are employed in legal reasoning.<sup>115</sup> Hohfeld’s schemes of rights are claims, privileges (liberty), powers and immunity, which he considered the lowest common denominators in which legal problems could be stated.<sup>116</sup> Having regards to the inherent set of powers associated with property rights, it would appear that Hohfeld’s scheme of rights can be applied in resolving issues related to property rights. It is, however, important to note that Professor Dias<sup>117</sup> expresses the view that the right to ownership is different and distinct from the components of Hohfeld’s scheme in understanding resource property rights.

As a result of the distinct and different observation on the attribute of ownership, Professor Dias classified ownership into corporeal and incorporeal. By corporeal, he means ownership relates to physical things like chattels and, by incorporeal, he refers to ownership as relating to conceptual things, such as rights.<sup>118</sup> On the difference between an incorporeal and corporeal hereditament, Austin remarked “[a] corporeal hereditament is the thing itself which is the subject of the right, [while] an incorporeal hereditament is not the subject of the right but the right itself.”<sup>119</sup>

Bearing in mind this distinction, it can be said that a property right is a legal process designed to regulate the relation of persons to things in order to provide a secure foundation for the acquisition, enjoyment, and disposal

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113. IMRAN OLUWOLE SMITH, PRACTICAL APPROACH TO LAW OF REAL PROPERTY IN NIGERIA 3 (Ecowatch, 2d ed. 2007).

114. SCOTT, *supra* note 113, at 4.

115. See WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 5–6 (Walter Wheeler Cook ed., 1919).

116. *Id.* at 6.

117. REGINALD W.M. DIAS, JURISPRUDENCE (Butterworth & Co., 4th ed. 1976).

118. *Id.*

119. JOHN AUSTIN ET AL., LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW 362 (Nabu Press 2010) (1885).

of such things or wealth,<sup>120</sup> which natural resources has come to reflect and be associated with. The foundation of natural resources property rights, therefore, can be seen as claims or entitlement to the resource and the appurtenances or improvements thereon, accruing to an individual, group, community or state having a legal relationship with the particular resource. This conception of property rights, which tends to emphasize the right of the owner to do as he pleases with his own property, is founded upon the libertarian philosophy, which Robert Nozick is a strong proponent. Nozick's libertarian philosophy on property hinges on the concept of "justice in acquisition" and "justice in transfer."<sup>121</sup> By "justice in acquisition," he refers to a situation where a certain good (natural resource) comes to be appropriated for the first time by somebody without injuring anybody else's rights, while "justice in transfer" refers to voluntary transfer from somebody who had a just title to the resources.<sup>122</sup>

To adopt and apply Nozick's postulation generically, which considers only the need of a party without those of others, creates injustice as is currently the assertion of the Niger Delta region regarding ownership of oil and gas resources in their region. Although communal ownership rights have been eroded by common law and by statutory provisions in Nigeria, when its functionality is considered in terms of its relative application in time and age, it would require a revisit of the legal regime of land and mineral resources in the country. The need for this review follows the postulation of Savigny about law as the only reflection of people's way of life, which can only be understood by the people's history and evolution.<sup>123</sup> This same view, which may have been apposite when canvassed by Oluyede as the philosophical basis for Nigerian Modern Land Law, remains relevant, stronger and more persuasive to justify the necessity for the Niger Delta and other communities to own and control resources in their territory.<sup>124</sup> Firstly, before colonization and amalgamation of the various ethnic groups that make up the present Nigeria, land ownership and its incidental resources were basically communal and jointly owned by the people. Secondly, the current ownership regime has not responded

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120. GEORGE WHITECROSS PATON, A TEXTBOOK OF JURISPRUDENCE 505 (David P. Derham ed., 3d ed. 1964).

121. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 151 (Basic Books, Inc. 1974).

122. *Id.*

123. FRIEDRICH KARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 135 (Abraham Hayward trans., Legal Classics Library 1986) (1831).

124. PETER OLUYEDE, MODERN NIGERIAN LAND LAW 593 (Evans Bros. Ltd. 1989).

positively to the social and economic development of the country. This, in recent times, has led to a high level of militancy, kidnapping, hostage taking, shutting down of flow stations, the blowing up of oil pipelines, bombing, maiming, killing and clamoring for autonomous control of mineral resources. Perhaps, with some exceptions, the prevailing legal regime on ownership is unpopular with the people.

#### VII. OWNERSHIP AND CONTROL OF NATURAL RESOURCES: THE LEGITIMACY QUESTION

With particular emphasis on the ownership of oil, gas and solid minerals in Nigeria, despite the constitutional and statutory vesting of ownership in the federal government, the ownership debate remains a topical issue with different opinions on who actually owns the mineral resources. It is, in this regard, the Ijaw Youths in their Kaiama Declaration claim that “[a]ll land and natural resources (including mineral resources) within the Ijaw territory belong to Ijaw communities and are the basis of our survival”<sup>125</sup> and, as a result, “[w]e cease to recognise all undemocratic decrees that rob our peoples/communities of the right to ownership and control of our lives and resources, which were enacted without our participation and consent. These include the Land Use Decree and The Petroleum Decree.”<sup>126</sup> Similarly, in the Ogoni Bill of Rights presented to the Federal Government of Nigeria in 1990, it states that “successive Federal administrators have trampled on every minority right enshrined in the Nigerian Constitution to the detriment of the Ogoni and have[,] by administrative structuring and other noxious acts[,] transferred Ogoni wealth exclusively to other parts of the Republic”<sup>127</sup> and, thereby, demanded as part of their political autonomy, “the right to control and use a fair proportion of Ogoni economic resources for Ogoni development.”<sup>128</sup> In the same vein, the Oron Bill of Right declares:

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125. Ijaw Youths of the Niger Delta, *The Kaiama Declaration*, <http://www.dawodu.net/kaiama.htm> (last visited Mar. 2, 2013).

126. *Id.*

127. MOVEMENT FOR THE SURVIVAL OF THE Ogoni PEOPLE (MOSOP), Ogoni Bill of Rights 11 (Saros Int’l 1992), available at [http://www.mosop.org/Ogoni\\_Bill\\_of\\_Rights\\_1990.pdf](http://www.mosop.org/Ogoni_Bill_of_Rights_1990.pdf).

128. *Id.*

[T]he Oron Nation is prepared to exist within the Nigerian system if, and only if, the security of the land and people is assured by appropriate affirmative action by the Nigerian Sovereign State by way of a just, equitable and democratic conduct of the affairs of the federal republic of Nigeria through its constitutional, political administration and social policies nationwide and particularly as they affect the micro-minorities. That the Oron Nation unequivocally reject the 1999 constitution of Nigeria on the following grounds: (a) That it is arbitrary and undemocratic, imposed by a military cabal committed only to sectionalist interests. (b) It woefully fails to address the special interest of the micro-nationalities in the country. (c) It does not respect and observe genuine federal principles upon which any viable pluralistic Nigerian political community must be built. (d) It has grave feudalistic elements meant to undermine the small ethnic nationalities and the management of their resources and development interests.<sup>129</sup>

Based on the above declaration and others, the General and Representative Assembly of the Oron Indigenous Ethnic Linguistic Nationality demanded that “[e]very region should control its resources 100% from which it will allocate funds for running the central government.”<sup>130</sup> From the few ethnic declarations and bill of rights highlighted, it appears that the position of most, if not all, ethnic groups—within whose locality oil and gas and other mineral resources are found—are the same; the groups are against the provisions of the law which vest control of the resources in the federal government and claim ownership superior to the federal government. This perception of the people was further confirmed in a study conducted by the Nigeria Extractive Industries Transparency Initiative (NEITI) on the nature and character of the Nigerian Extractive Industries. According to findings from the study, the communities in the Niger-Delta have never fully accepted the laws, which vest ownership in the federal government. The communities have considered “these laws as unjust laws put in place by the majority ethnic groups to intimidate, oppress and dominate them.”<sup>131</sup> In fact, the perception

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129. THE ORON BILL OF RIGHTS (1999), *available at* <http://www.waado.org/nigerdelta/RightsDeclaration/Oron.html>.

130. *Id.*

131. Otive Igbuzor, *Ownership Structure and Level of Participation in the Oil and Gas Sector in Nigeria*, in 1 AN EVALUATION OF THE NATURE AND CHARACTER OF THE NIGERIAN EXTRACTIVE INDUSTRIES: OIL AND GAS 29, 45 (2010), *available at* <http://www.nigerdeltabudget.org/ILLUSTRATION%20OF%20NATURE%20AND%20CHARACTER%20OF%20OIL%20AND%20GAS.pdf>

of the average person in the Niger Delta is that they own the resources on their land; the strength of this perception was emphasized by Chief James Erhokpore of Erhokpore Community in Orogun, Ughelli North Local Government Area of Delta State when he stated, "This is our point of annoyance. How can we be so endowed by God and we are impoverished by the activities of those benefiting from what belong to us. This is strange and painful."<sup>132</sup> Apart from the ordinary Niger Delta people, opinion leaders and the political class in the area also hold a strong view that oil and gas resources in the region belong to them. Interestingly, this view has also been given a scholarly expression by Sagay:

Even a superficial political analysis of the situation will reveal that the fate of the mineral resources of the Niger-Delta minorities particularly the trend from derivation to Federal Government absolutism, is itself a function of majority control of the Federal Government apparatus. In 1960, there were no petroleum resources of any significance. The main income earning exports were cocoa (Yoruba West), groundnuts, cotton and hides and skin (Hausa/Fulani) and palm oil (Ibo East). Therefore it was convenient for these majority groups usually in control of the Federal Government to emphasise derivation hence its strong showing in the 1960/63 constitutions. However, by 1967 and certainly by 1969, petroleum particularly the mineral oil was becoming the major resources in terms of total income and foreign exchange earnings in the country. It was therefore not difficult for the majority groups in the Federal Government to reverse the basis of revenue allocation with regard to petroleum resources from derivations to Federal Government exclusive ownership. They were in control of the Federal Government and their control of the mineral resources by virtue of that fact effectively means that the resources of the Niger Delta were being transferred to the majority group in control of the Federal Government at any point in time.

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Again, these oppressive measures are not the results of accidents or errors. They are deliberate acts of policy implementation founded in the belief that the owners of the petroleum resources being minorities can be deprived of their resources without any consequence. This is the attitude and mentality that led a senior Federal Permanent Secretary in a memorandum concerning Federal expropriation of the resources of the Niger Delta to make the following Freudian slip, some years ago:

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132. *Id.* at 46.

“Given however the small size and population of oil producing areas, it is not cynical to observe that even if the resentments of the oil producing states continued, they cannot threaten the stability of the country nor affect its continued development.”<sup>133</sup>

It is apparent from the declaration and bill of rights mentioned above that the ownership of the resources, as vested in the federal government, has not been accepted by the people. Thus, the subject of the legitimacy of the legal claim by the federal government has become a critical socio-political and legal issue for consideration. However, on the other side of the spectrum is the view that the non-acceptance of ownership of mineral resources by the Niger Delta people, or their agitation for control of the resources found within their domain, illegitimatises the federal government’s ownership, as provided for by the constitution and other statutory instruments. Most of the proponents of this latter view have premised their argument on the compactness and interdependence of Nigeria’s geological formation,<sup>134</sup> which does not recognise the political and aerial dichotomy of the country into a North and South divide. These scholars have therefore contended that the water, soil and oil resources of the Niger Delta—which remained central to the controversy of resource ownership—are the products of the same geological evolution and there is enormous geological evidence indicating that the Delta basin was actually formed—and is still being formed—by the soil, vegetation and other organic matter sweeping across the country.<sup>135</sup> This proposition is found in the works of Professor Alagoa.<sup>136</sup> Alagoa’s argument that “[t]he Niger Delta has been built up over ten thousand years from sediment brought down by the rivers Niger and Benue” formed the basis for which the proponents of geological evolution submits that the resources should belong to the entire federation since every part of the country has made a geological contribution to sedimentary formation of the Delta.<sup>137</sup> Shehu

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133. ITSEJUWA ESANJUMI SAGAY, *THE EXTRACTION INDUSTRY IN THE NIGER DELTA AND THE ENVIRONMENT* 27–28, 31 (Anpez Ctr. for Env’t & Dev. 2001), available at <http://www.profitsesagay.com/pdf/THE%20EXTRACTION%20INDUSTRY%20IN%20THE%20NIGER%20DELTA%20AND%20THE%20ENVIRONMENT.pdf>.

134. YUSUF BALA USMAN & ALKASUM ABBA, *THE MISREPRESENTATION OF NIGERIA: THE FACTS AND THE FIGURES* 52 (Ctr. for Democratic Dev. Research & Training 2000), available at [http://waado.org/NigerDelta/Essays/BalaUsman/Usman\\_Misrepresentation.html](http://waado.org/NigerDelta/Essays/BalaUsman/Usman_Misrepresentation.html).

135. *Id.* at 54.

136. EBIEGBERI JOE ALAGOA, *A HISTORY OF THE NIGER DELTA* 11 (Ibadan Univ. Press 1972), available at [http://waado.org/NigerDelta/Essays/BalaUsman/Usman\\_Misrepresentation.html](http://waado.org/NigerDelta/Essays/BalaUsman/Usman_Misrepresentation.html).

137. *Id.* at 11.

Zuru, relying on the geological evolution theory, submits that “whoever controls the entire federation surely has the broader representative democratic mandate of the people, the moral authority and a better political high ground than anyone else to make a legitimate claim over the ownership of the resources of the country. . . .”<sup>138</sup>

Assuming that the geological evolution theory of the formation of oil and natural gas in the Niger Delta is uncontroverted and accepted as the basis of ownership, it would amount to stretching ownership claims beyond territorial limits and boundaries to unrealistic claims devoid of reasonableness and sound logic, which should be rejected. To decide otherwise—and going by the allusion that the Delta basin was actually formed and is still being formed by the soil—vegetation and other organic matter sweeping across the country, as well as West and Central Africa, should entitle other countries in West and Central Africa to lay claim to the oil and natural gas resources in the Niger Delta region of Nigeria. There is certainly no doubt that this will make a mockery of territory as an attribute of statehood. It may, nevertheless, be argued that the Niger Delta is not a nation-state, as contemplated under international law. However, under the United Nations General Assembly Resolution of 1962, the Niger Delta people have a right to self determination and permanent sovereignty over their natural wealth and resources; “[t]he term ‘peoples,’ . . . recognizes the importance of the ethnic dimension in determining who is entitled to invoke self-determination.”<sup>139</sup> Consequently, oil self-determination is a right of the Niger delta people. Zuru, however, is of the view that oil self-determination is understandable, but it does not provide a legal basis for epic control of mineral resources by the minorities within the larger federation; yet, he agrees that the issue of ownership is a constitutional crisis.<sup>140</sup> Thus, he is consciously admitting the grievances and questioning of the Niger Delta people, even though he considers the issue as legally settled. In Zuru’s view, whoever controls the federation has the broader representative democratic mandate of the people, the moral authority and a better political high ground to make a legitimate claim over ownership of the resources of the country. It becomes a function of majority control,

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138. SHEHU ABDULLAHI ZURU, NIGERIA’S UPSTREAM OIL AND ENVIRONMENTALISM: GOVERNMENT, THE NIGER DELTA AND MULTINATIONAL OIL INDUSTRY 47–48 (2009).

139. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705, 745 (1988).

140. ZURU, *supra* note 139, at 40.

dominance or, better still, conquest justification as opposed to general principles of fairness, equity and justice.

*A. The Concept of Legitimacy*

Generally, legitimacy derives from the beliefs that citizens hold the normative appropriateness of government structures, officials and processes. Central to the concept of legitimacy is the belief that rules and regulations are entitled to be obeyed by the virtue of who made the decision or how it was made.<sup>141</sup> When there is a belief that the laws are legitimate, deferring to and upholding such laws are more likely. Legitimacy more or less denotes popular acceptance of government officials' rights to govern with all the necessary apparatuses of governance. Legitimacy is used here to mean that quality of a rule largely derives from the perception of those to whom it is addressed and it has come into being in accordance with the rights process. Rights process includes the notion of valid sources but also encompasses socio-anthropological and philosophical insights. This is in line with Max Weber's hypothesis that rules tend to achieve compliance when they comply with secondary rules about how the rules are to be made and interpreted.<sup>142</sup> The legitimacy of a rule is merely the perception of those in the community concerned that the rule or the institution has come into being endowed with legitimacy, which is in accordance with the rights process. So far, there appears to be an emphasis on the rights process, thus making it important to highlight factors that take into account the purpose of determining the rights process. These factors include structure of the rule, its origins, internal consistency, reasonableness, utility in achieving stated ends, its connections to the overall rule system and the extent to which its origins and application comport with the notions and principles of equity, fairness and justice. It is, in this regard, submitted that the outcome of Sir John Macpherson's 1951 Constitution, which marked the first formal introduction of federalism into Nigeria, popularly and legitimately arrived as a result of the process.<sup>143</sup> In fact, the Conference noted, "We have no

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141. Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006).

142. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 32 (Guenther Roth & Claus Wittich eds., 1968).

143. Itse Sagay, *Nigeria: Federalism, the Constitution and Resource Control* (May 28, 2001), available at <http://www.waado.org/nigerdelta/essays/resourcecontrol/sagay.html>. Lecture delivered at the fourth sensitisation programme on resource control.

doubt at all that the process already given constitutional sanction, and fully justified by experience, of devolution of authority from the Centre to the Regions should be carried much further so that a Federal System of Government can be developed.”<sup>144</sup>

Furthermore, “[t]he General Conference was of the view that over-centralisation would be a grave error ‘in this vast country with its widely differing conditions and needs.’”<sup>145</sup> It meant that, when given the opportunity to decide political arrangement, the federal system was the popular choice of Nigerians.<sup>146</sup>

It is, therefore, not surprising that:

The 1960 independence and 1963 republican constitutions of Nigeria epitomized some element of a true federal system. The 1950 National conference had been followed by other consultations in 1953, 1954, 1957 and 1959, in which the practice of federalism was perfected. An important feature of these constitutions was the extensive power granted the regions, making them effectively autonomous entities and a revenue arrangement, which ensured that the Regions had the resources to carry out the immense responsibilities of governance.

Under these constitutions, the true federal system was made up of strong Regions and a Central Government with limited powers. Certain features emphasized the thoroughness of the federal system in this period, these included:

- i. Each Region had its own separate constitution, in addition to the federal constitution.
- ii. Each Region had its own separate Coat of Arms and Motto different from that of the federal government.
- iii. Separate Judicial System for each Region which enabled the Regions to have not only High Courts, but also Regional Courts of Appeal.

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144. *Id.*

145. *Id.*

146. Innocent A. Ojefia, Lecturer, Dept. of Political Science, Delta State Univ., Abraka, Nigeria, A Paper for the 22nd Annual Conference of the Association of Third World Studies, Americus, Georgia, USA: The Nigerian State and the Niger Delta Question (Sept. 7, 2004), available at <http://nigeriaworld.com/articles/2004/sep/071.html>.

- iv. Revenue Allocation system under these constitutions was based on derivation.<sup>147</sup>

The federal constitution of 1960 in Part 2 of chapter 9 allocated the country's revenue to the two levels of government and shared other federally collected revenue between them. Section 140 of the 1963 Constitution made provisions for the sharing of the proceeds of minerals, including mineral oil:

There shall be paid by the federal government to a region, a sum equal to fifty percent of proceeds of any royalty received by the Federation in respect of any minerals extracted in that region and any mining rents derived by the federal government from within any region.<sup>148</sup>

From the pre-military interregnum in Nigeria's political arrangement, legitimacy focused on the connection between specific rules and the general underlying principles. It is, however, important to note that, although this rule and structure of governance was popular and widely accepted as true federalism, it was distorted by the military's incursion, which unfortunately restructured the existing regions into splinter states.

. . . [A] series of decrees issued from 1969, set about the process of centralizing fiscal powers, with exclusive powers to legislate on solid/mineral oil and natural gas, "these decrees, completely undermined and subverted the federal basis of [the Nigeria] association" especially the petroleum Act of 1969 and the Land Use Act of 1978.<sup>149</sup>

This led to the paternalistic form of federalism currently in practice, which is somewhat responsible for the crisis and conflicts in the Niger Delta and other parts of the country.<sup>150</sup>

The agitation is a resistance against political and economic external domination, which, among other things, led to the rejection of the ultimate rule by members and may constitute a revolution. Without legitimacy, people are less inclined to support government programmes that redistribute

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147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

resources.<sup>151</sup> This has been the case in the Niger Delta and, thus, provides a strong and compelling basis for discarding the rule. On the other hand, a major effect of a legitimate process is the increased likelihood of compliance with government rules and regulations.<sup>152</sup> Legitimacy, therefore, would make people more willing to defer to the law and to the decisions of legal authority, as it would occur naturally to them as what they “should or ought to” obtain. It is against this background that the legitimacy concept is applied to ownership of natural resources in the country in order to elicit a sense of obligation and willingness that could support the development and maintenance of rational legal authority. The concern here is to maximize the advantage that exists in the relationship between popular support and the efforts of authority to build good governments, which ensures the security of property rights, the supply of other public goods, and protects the population from violence.<sup>153</sup> This public good and social contract dimension is significant considering that the question of the federal government’s ownership, although historical, did not materialize into a full-scale national challenge until recently because of governmental neglect of its basic economic and development responsibilities. It is, therefore, imperative to emphasize the value-based model of legitimacy, which is posited on the antecedent conditions of government trustworthiness and procedural justice.<sup>154</sup> “Government trustworthiness, [it must be remarked,] has three components: leadership motivations, administrative competence, and government performance.”<sup>155</sup> The people’s perception of these three components influences the level of trust and confidence the people have in the government.<sup>156</sup> To some extent, it also determines their willingness to defer to government authority. The resistance movement in the Niger Delta and the current upsurge of Boko

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151. MARC J. HETHERINGTON, *WHY TRUST MATTERS: DECLINING POLITICAL TRUST AND THE DEMISE OF AMERICAN LIBERALISM* 15 (Princeton Univ. Press 2005).

152. Margaret Levi & Audrey Sacks, *Legitimizing Beliefs: Sources and Indicators* 1 (Afrobarometer, Working Paper No. 74, 2007), available at [mercury.ethz.ch/serviceengine/Files/ISN/.../AfropaperNo74.pdf](http://mercury.ethz.ch/serviceengine/Files/ISN/.../AfropaperNo74.pdf).

153. Margaret Levi, *Why We Need a New Theory of Government*, 4 *PERSP. ON POL.* 1, 6 (2006), available at <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=407666>.

154. Margaret Levi, Audrey Sacks & Tom Tyler, *Conceptualizing Legitimacy, Measuring Legitimizing Beliefs*, 53 *AM. BEHAV. SCIENTIST* 354, 356 (2009), available at <http://abs.sagepub.com/content/53/3/354.abstract>.

155. *Id.*

156. *Id.*

Haram in the country can be intrinsically linked to poor governance, weak institutions, and repressive and oppressive legal framework.

#### VIII. CONCLUSION

Against the conceptual background of legitimacy and the highlights of its benefit, if allowed as the basis for the process of law making and exercise of authority, the incessant sub-national agitation and crisis in the country could be due to the foisting on the country by the military. It is a land-and-mineral-resources regime devoid of a robust and extensive consultation process that takes into account the diversity of the constituent component of the country. Consequently, a legitimate constitutional approach is required to revert to “the practice of true federalism and natural law in which the federating units express their rights to primarily control the natural resources within their borders and make agreed contribution towards the maintenance of common services of the sovereign nation-state to which they belong.”<sup>157</sup> Under the proposed legal framework, each component unit must have the power to harness its resources for its own development purposes. In other words, the federal system must emphasize the self-governing status, identity and peculiarities of each component unit and make adequate provisions to guarantee the economic independence of the states that make the polity. The agitation for resource control is, therefore, rooted in the desire to promote the practice of fiscal federalism, as practiced in other jurisdictions operating the federal system of government. This is the most efficient means of dealing with ethnic diversity in a country like Nigeria, and it is the most effective approach to freeing Nigerians from the hangover of military authoritarianism and misrule.

An example of a jurisdiction that employs such a system is the United States of America. The nature of ownership of mineral resources in the United States, which operates a federal system of government like Nigeria, is one where lands belong to the component states. Each state has the power to make laws and regulate exploitation, operation and production practices of its natural resources. It is also worth noting that private ownership is allowed with regards to land and mineral resources contained

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157. AFR. INST. S. AFR., *THE COMING AFRICAN HOUR: DIALECTS OF OPPORTUNITIES AND CONSTRAINTS* 128 (Luc Sindjoun ed., 2010).

in it. The laws regulating the ownership rights and incidents of mineral oils vary from state to state. However, a common trend in most of the states is the landowner's exclusive right to drill a well upon his land for the purpose of producing oil and gas. The only control of the state on this is to charge taxes, land lease bonuses, rentals, and royalties on such operations. While private property rights are firmly entrenched in the United States system, it is imperative to note that, in 1945, the Federal Government of the United States appropriated for itself the natural resources of the subsoil and bed of the continental shelf beneath the high seas but contiguous to its coast.<sup>158</sup>

Another example of a jurisdiction that operates the federal system of government is Canada. In Canada, according to Andre Plourde,:

[o]wnership rights to natural resources are vested with the Crown in right of the provinces: oil and gas reserves are thus owned by the provinces in which they are located. Basically, the only reserves that are owned by the Crown in right of Canada as a whole are thus those located in areas within the country or its offshore exclusive economic zone, but outside the territory of any of the provinces. However, Canada's Constitution gives the federal Parliament jurisdiction over interprovincial and international trade and commerce. In practice, this has meant that the rules governing the development and production of oil and gas reserves have largely been under the control of provincial governments, but that the processes guiding the sale and disposition of production flows have mostly been matters of federal governance.

As of the time of writing, about 80% of the reserves of natural gas and conventional crude oil located in Canada's three westernmost provinces (British Columbia, Alberta, and Saskatchewan) are still publicly owned; that proportion is even greater in the case of Alberta's oil sands deposits, where the share of the reserves collectively owned by Albertans reaches some 97%. The remainder is held either privately, or by the Crown in right of Canada, as is the case for oil and gas deposits located in First Nations reservations or in national parks.

In the case of the 20% or so of the conventional resource base where the mineral rights were sold by the federal government in the Western territories during the nineteenth century (and are still privately held), the owners of these rights may act as producers or enter into agreement with

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158. Exec. Order No. 9633, 10 Fed. Reg. 12, 305 (Sept. 28, 1945).

production companies to do the extraction on their behalf, subject to negotiated terms.<sup>159</sup>

The position of mineral resource ownership is, however, different in the United Kingdom where the virtue of the Petroleum Act of 1998, which repeals the Petroleum (Production) Act of 1934, vests all petroleum in the crown of Great Britain together with the exclusive right of searching and boring for it.<sup>160</sup> Through Section 1 of the Continental Shelf Act of 1964, the natural resources in the territorial water (except in respect of coal) were vested in the Crown.<sup>161</sup>

Looking at the ownership structure in the United States, Canada and the United Kingdom, it is only the United Kingdom operating under a unitary system of government that vests ownership of mineral resources exclusively in the Crown or the central government. In both the United States of America and Canada, which operates a federal system of government like Nigeria, ownership rights of the autonomous units—whether called states or provinces—are recognized. It is also noted that, within these federal systems, private ownership rights are recognized and protected.

It, therefore, follows that, if federalism is essentially a compromise solution in a multinational state between two types of self-determination, one provided by a national government which guarantees security for all in the nation state, and another of component groups to retain their individual identities, the clamour of the Niger Delta people for ownership and control of the resources found within their territory is a legitimate claim that should be given legal backing by reviewing of all extant laws that vest ownership and control exclusively in the federal government. The contemplated framework should empower the states to own and exercise full control over their resources,<sup>162</sup> while, at the same time, moving private ownership

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159. ANDRE PLOURDE, OIL AND GAS IN THE CANADIAN FEDERATION 2–3 (2010), available at [http://siteresources.worldbank.org/EXTOGMC/Resources/336929-1266445624608/Framework\\_Paper\\_Canada2.pdf](http://siteresources.worldbank.org/EXTOGMC/Resources/336929-1266445624608/Framework_Paper_Canada2.pdf).

160. MICHAEL A. G. BUNTER, THE PROMOTION AND LICENSING OF PETROLEUM PROSPECTIVE ACREAGE 41 (Kluwer Law Int'l 2002).

161. MAURICE SUNKIN, DAVID M. ONG & ROBERT WIGHT, SOURCEBOOK ON ENVIRONMENTAL LAW 734 (Cavendish Publ'g, 2nd ed. 2002).

162. For a fuller discussion on the way out of the Niger Delta Crisis, see the communiqué issued at the end of the conference on the “Crisis in the Oil Producing Communities in Nigeria” organized by the Committee for the Defence of Human Rights (CDHR) in collaboration with the Ford Foundation in Boiling Point, p. 263.

towards privatisation and the freeing up of governments' hold on vital economic and commercial activities.

It is, therefore, submitted that, in instances where the motive of any particular law in a given society could, in itself, negate against justice due to its repressive and oppressive nature, there is an urgent need to reconsider such law; otherwise, crisis can escalate to full-scale conflict where such law is expected to be enforced. Consequently, there is nothing "inevitable" about the absolute conception of property rights which is a creation of law and can be revisited based on the premise that reasonable solutions should depend on circumstances of time, place and human choice, which cannot be more auspicious with the ongoing clamour for resource control.<sup>163</sup>

In the event, however, that the federal government wishes to continue to exercise control over oil and gas, ownership should be qualified into legal ownership status and beneficiary status. The former may vest in the federal government while the latter will vest in the Oil Producing Areas. This suggestion confers a legal title on the federal government and an equitable interest in the oil producing states and communities based principally on the concept of trust, which accommodates shared control and responsibilities.

As the legal owner, the federal government will continue to lay down policies and make laws and regulations governing operations in the industry. It will conclude agreements with international oil companies as well as monitor their activities. While on the other side of the equation, oil producing communities, as equitable owners and beneficiaries, will have a say in the operations of the industry and have their rightful share of the proceeds from the revenue derived from the resource.

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163. J. M. ELEGIDO, *JURISPRUDENCE: A TEXTBOOK FOR NIGERIAN STUDENTS* 200 (Spectrum Law 1994).