



## THE IMPLICATIONS OF THE CONSTITUTIONAL PROVISIONS ON OWNERSHIP OF OIL AND GAS IN NIGERIA

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### **Abstract**

Crude oil and natural gas have, for the past six decades, occupied the central position in Nigeria's economic well-being. The foreign earnings from crude oil sector fuels most other sectors of Nigeria's growth and development. It is against this background of the crucial place of the crude oil sector that this article investigates controversial provisions of the Constitution of Nigeria in relation to 'ownership of minerals including crude oil and natural gas and, the effects of the provisions on land ownership in Nigeria. The article suggests that, the provisions of the constitution on ownership of liquid and solid minerals were borne out of irregular ethnic dichotomy. It further suggests that the contestation over self-determination in the eastern and southern parts of the country is partly due to the perceived injustice stemming from the coercive laws of the country with specific concern of land use and minerals ownership.

*Keywords:* Constitution, Minerals, Ownership, Petroleum, Nigeria.

### **1. Introduction**

The starting point of this article is to first highlight section 44(3) of the Constitution of the Federal Republic of Nigeria (1999, CFRN as amended) which expressly states as follows:

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

Section 44(3) of the CFRN appears to have derived strength from Article 77 of the United Nations Law of the Sea {UNCLOS} 1982 which provides that:

“The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.<sup>2</sup> The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural

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<sup>2</sup> Article 77(1) UNCLOS, 1982

resources, no one may undertake these activities without the express consent of the coastal State.<sup>3</sup> The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.<sup>4</sup> The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.”<sup>5</sup>

Land tenure system in Nigeria has been traditionally and customarily based prior to the enactment of the Land Use Act in 1978 via military decree. Consequently, the ownership of land incorporated the ownership of minerals including oil and gas resources. Nonetheless, there are postulated theories that seeks to explain the concept of ownership of oil and gas. In many countries, scholars tend to adopt a combination of multiple theories in determining what is attainable as regards the ownership of oil and gas (“Petroleum”).

## 2. THEORIES OF OWNERSHIP OF PETROLEUM

### (a) Absolute Ownership Theory

Absolute theory postulates that the owner of a piece of land has right to all the natural resources below the surface of the land. It is founded on the *ad coelum* doctrine and heralds the principle of absolute ownership. The Latin maxim *quid quid plantatur, solo solo cedit* (whatever is affixed to the soil belongs to the soil) also gives support to the absolute ownership theory. Where this theory operates, it means that the land owner alone is entitled to deal with and dispose of the land whenever and however he wants to. He can grant mineral interest, lease or even the outrightly convey the land to another person. Such disposal however should be in line with the regulations of the government and the interest of adjoining land owners as was stated in case involving *Marrs v R.R. Commission*<sup>6</sup>. This theory is recognized and operational in the state of Texas, among other states, in the United States of America.<sup>7</sup>

Consequently, petroleum and indeed all minerals found beneath the earth surface are owned by the owner of the land where they are found and extracted. When they are extracted, they become possessory personal property of the party that captures it. However, the theory also states that the ownership of crude oil can be denied to the landowner when the crude oil migrates and captured by others. Hence, ownership of oil and gas could be lost by reasonable drainage and by the rule of capture. In the United States, this theory is also known as the “ownership in place theory” However, in countries where status have replaced the *ad coelum* doctrine such as the Land Use Act, 1978 of Nigeria, and other similar enacted laws, the

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<sup>3</sup> Article 77(2) UNCLOS, 1982

<sup>4</sup> Article 77(3) UNCLOS, 1982

<sup>5</sup> Article 77(4) UNCLOS, 1982

<sup>6</sup> 177 SW 2d 941(Tex 1944)

<sup>7</sup> Kato Gogo Kingston. *Petroleum Laws of Nigeria: A New Dimension* (First Edition: United Kingdom: Amazon Independent Publication, 2023); ISBN-13: 979-8867821333; Amazon Global ID(ASIN): B0CNQHLJ73

common law doctrines that placed minerals firmly in the hands of the land owners have been diminished. For instance, in *Barnard v. Monongahela Natural Gas Co.*<sup>8</sup> the Defendant drilled for oil on a neighbour's land, but actually obtained oil from an underground well on plaintiff's land. Plaintiff sued.

The Court held that gas in an underground well roam free like a wild animal and must be "captured" and contained in order to be owned hence, the land owner cannot claim to won a thing in migratory path. In *Pierson v. Post*,<sup>9</sup> the defendant was chasing a fox and was about to capture it when Pierson came along and took the fox from him. Post sued, but lost on appeal when the court decided that "occupancy" of the fox required actual possession of the animal through capture. It should be noted that the theory of absolute ownership is still valid in some parts of the United States and Canada. For example, in the province of Alberta, Canada, and in the US State of Texas, the private landowners are permitted to own the oil and gas found on their lands. The perceptive standpoint of this theory is that mineral resources are part of the estate of a land owner who has the right to dispose or use his property in whatever lawful ways necessary.<sup>10</sup>

#### **(b) The Qualified Ownership Theory**

Under the doctrine of capture, oil and gas must be in the possession of a person for it to be claimed as belonging to the holder. Hence, one has to be qualified as owner by way capture. This theory seems to dispel the ownership claim of oil and gas in *in situ*. For anyone to have ownership over them, such a person must prove that the mineral resources have been captured or extracted from its natural state.

One of the leading cases that gave judicial support to the qualified ownership theory is the *Ohio Oil Company v Indiana*<sup>11</sup> wherein the United States Supreme Court held that even though the proprietor of a land had the exclusive right to bore wells on the surface of the land for the purpose of extracting natural oil and gas from it, they do not become his property until he has successfully reduced them to his possession. This statement of rule was reiterated in *Lindsley v Natural Carbonic Gas Company*<sup>12</sup> where Van Devanter mentioned that "each surface owner in an oil and gas area has the exclusive right on his own land to seek the oil and gas in the reservoir beneath, but has no fixed or certain ownership of them until he reduces them to actual possession".

In *Ohio Oil Company v. Indiana U.S.S.C.*,<sup>13</sup> it was held that, the nature of rights under the qualified ownership theory is that the owner of the land has no property right over the oil and gas underlying in his land. However, he has the exclusive right to drill and produce through the surface to reduce the oil and gas to actual possession and thus acquire title to it. Therefore,

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<sup>8</sup> 216 Pa. 362 (1907).

<sup>9</sup> 2 Am. Dec. 264 (N.Y. 1805); *Bernstein v. Skyviews & General Ltd* [1978] 1 QB 479; *Del Monte Mining v. Last Chance* 171 U.S. 55 (1898),

<sup>10</sup> Kato Gogo Kingston. The Dilemma of Minerals Dependent Economy: The case of Foreign Direct Investment and Pollution in Nigeria. (2011) (1) (1) African Journal of Social Sciences, 1

<sup>11</sup> 177 US 190 (1900)

<sup>12</sup> 220 US 61 (1911)

<sup>13</sup> [1900] 44 L. Ed. 729, par. 64

Where the crude oil has migrated to adjacent land, title of the former owner is now gone. However, the crude oil land owner can stop the oil from migrating by preventing the drain or by drilling several wells to store the draining oil. In summary, the theory is of the firm belief that: (a) The party who extracts oil and gas from beneath the land acquires absolute ownership of those extracted substances even though they may be drained from beneath the land of another;<sup>14</sup> (b) The owner thereof may acquire the crude oil without being liable to the owner of the adjacent lands; and, (c) If the oil well is drilled at a slant or horizontally penetrating the property of another, and if the aggrieved party can prove it, the oil or gas produced from the well belongs to the owner of the land under which the well is bottomed. Furthermore, in *Ohio Oil Company v. Indiana U.S.S.C.*<sup>15</sup> the court said:

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

In *South Atlantic Petroleum Limited v. Minister of Petroleum Resources*,<sup>16</sup> the plaintiff was granted an oil bloc OPL 246. A half of the OPL area of 1000 square miles was later converted to an OML 130. The government attempted to auction the other half of OPL 246. The contention of the plaintiff was that it was entitled to hold the unexhausted period of the lease while the defendant contended that the remaining portion was deemed relinquished and thus reversionary right was in the federal government as the grantor. In this action, the plaintiff sought orders of injunctions and declarations. In his judgement delivered on 14/10/06, the learned trial judge, Mustapha J. (as he then was) held, inter alia, that “there is nothing unlawful in the government policy that the residue of OPL 246 is automatically relinquished and reverted to the federal government on the grant of an Oil Mining Lease No. 130 to the applicant”. On appeal, the case was struck out on the ground that the issues raised had become academic. Academically, and in the humble opinion of this writer, a licence and a lease, in the contemplation of the Act are different authorizations guided by different provisions of the Petroleum Act. The moment a licence is converted to a lease, the terms, duration as well as financial obligations change. The duration of oil rights in licences are issues of discretionary powers of the Minister of Petroleum and the discretion of the Minister whether or not to grant an additional OML cannot be challenged in court. Surely, the international law position is that every nation has the sovereign control of its mineral resources. This practice is based on the Latin maxim: *quicquid plantatur solo solo cedit*.<sup>17</sup> This means he who owns land, owns what is in it deep down the earth and he also owns what is on top of the earth space up to the sky

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<sup>14</sup> Kato Gogo Kingston and Z. Adango. The Vacuum in Nigeria's Crude Oil Laws: An Inquiry Into The Decommissioning Of Onshore and Offshore Facilities. (2018) (8) (1) *Cranbrook Law Rev*, 1

<sup>15</sup> [1900] 44 L. Ed. 729, par. 64

<sup>16</sup> (2006) 10 CLRN 122

<sup>17</sup> Kato Gogo Kingston and G. O Akolokwu. Cross-Border Unitisation Of Petroleum Production Sharing Agreements: The Need For Adequate Social Stability Clauses. (2018) (8) (1) *Prime Journal of Advanced Legal Studies* 27

and beyond for example, mountains, forests, rivers, grasses, stones and minerals. It is because of this principle, there have been agitations that the Niger-Delta people of Nigeria should have ownership of mineral oil in their land and is the basis upon which the Niger Delta region of Nigeria gave birth to the issue of resource control which culminated in the case of *A-G Federation v. A-G Abia & 36 ORS.*<sup>18</sup>

### **(c) Non-Ownership Theory**

Non-ownership theory of oil and gas provides that oil and gas are not capable of being owned in the strict sense of the word, due to their migratory or fugacious nature. This theory is likened to the concept of *farae naturae* which says that wild animals are not capable of being owned till they are captured and reduced into possession<sup>19</sup>. Kingston<sup>20</sup> explained that, the non-ownership theory emphasizes that no person owns the crude oil until produced, extracted or captured and controlled. However, the right to produce or extract crude oil is limited to those persons who own or have the rights to drill on the land where the straddle of the crude is embedded.<sup>21</sup>

This theory states that petroleum is not capable of being owned since it is fugacious (has capacity to migrate). In essence, since crude oil is in fluid form and can move from one place to another, it cannot be owned in the strict sense of the word.<sup>22</sup> There is not much support for this theory as modern practice show that petroleum though may move from one place to the other is still subject to ownership by the person or authority that captures it at any particular point in time.<sup>23</sup> Followers of the theory claim that just as no land owner can claim ownership of the sun, wild animals or air across and over his land, he cannot also claim the oil and gas flowing underneath his land.<sup>24</sup>

This theory no longer stands the test of time as recent knowledge has shown that even though oil and gas may move from one place to another, it is capable of being owned by an individual, government or corporate entity. More so, the analogy between wild animals and oil and gas resources has however been declared false in *Elliff v Texon Drilling Co*<sup>25</sup>. The Court stated in

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<sup>18</sup> (2006)1 SCNJ 1.

<sup>19</sup> O.K. Edu, 'Ownership of Oil and Gas in Nigeria: Matters Arising' (2007) (7) (1) Sabinet African Journals, 66

<sup>20</sup> Kato Gogo Kingston. Oil and Gas Laws: A Guide for International Practitioners (Second Edition: Germany: Lambert Academic Publishing, 2018)

<sup>21</sup> Kato Gogo Kingston and Prince N. Nweke. Management, Remediation and Compensation In Cases Of Crude Oil Spills In Nigeria: An Appraisal. (2018) (8) (1) Journal of Mineral Resources Law, 27

<sup>22</sup> Kato Gogo Kingston. Transportation of Crude Oil In Nigeria Inland Waterways: A Call For Legislative Accountability. In Okene O. V. C (ed) Excellence and Creativity Legal Essays In Honour of His Excellency Chief (Barr.) Nyesom Ezenwo Wike, Executive Governor of Rivers State, Chapter 27 pp. 463 - 476 (2019) (Lagos: Princeton Publishing, Nigeria, 2019)

<sup>23</sup> Kato Gogo Kingston. Pollution and Environmental Responsibility In Petroleum Extraction In The Niger Delta Of Nigeria: Modelling The Coase Theorem. (Germany: Lambert Academic Publishing, 2017) ISSN 978-3-330-04808-9

<sup>24</sup> Kato Gogo Kingston and Soboma Odumabo. Evidential Hurdles In The Prosecution Of Crude Oil Thieves In Nigeria: Lessons From MT Anuket Emerald v. F.R.N (2017) LPELR-42326 (CA). (2018)(8) (1) Humberside Journal of Law and Social Sciences 37

<sup>25</sup> 210 SW 2d 558 (Tex 1948)

that case that in the light of modern scientific knowledge, the courts have come to recognize that oil and gas which are found in underground reservoirs, are securely trapped in static condition. They do not move about like animals in the wild but remain still until disturbed by penetrations from the surface. These minerals as it was further established in that case, will only migrate towards any low-pressure area created by penetration and production from a part of the common pool. This was illustrated in *Brown v. Humble Oil & Refining Co.*<sup>26</sup> where it was held that: "Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and this is a property right. And it is limited only by the physical possibility of the adjoining landowner's diminishing the oil and gas under one's land by the exercise of the same right of capture." Similarly, in *Rich v. Donaghey*<sup>27</sup> the court held *inter alia*: "... no absolute right or title to the oil or gas which might permeate the strata underlying the surface of their land, as in the case of coal or other solid minerals fixed in, and forming part of, the soil itself". Furthermore, in *Strother v. Mangham*,<sup>28</sup> the court expressly stated that:

"The doctrine that the owner of the land has no property right in the oil and gas beneath the surface until he has reduced it to possession in no manner denies to such owner the exclusive right to the use of the surface for the purposes of such reduction, or for any other purpose not prohibited by law, but, to the contrary, concedes that right, as inherent in the title to the land, and subject only to the control of the state, in the exercise of its police power; and the right may be sold, as may any other right, and may carry with it the right to the oil and gas that may be found and reduced to possession."

Similar other decisions have been reached in courts in the United States with regards to the argument that oil and gas are not capable of being owned in the strict sense of the word, due to their migratory or fugacious nature. In *Borys v. CPR and Imperial Oil Limited*,<sup>29</sup> the court held as follow: "The substances are fugacious and are not stable within the container although they cannot escape from it. If any of the three substances (petroleum, gas or water) is withdrawn from a portion of the property which does not belong to the appellant but lies within the same container and any oil or gas situated in his property thereby filters from it to the surrounding lands, admittedly he has no remedy. So, also, if any substance is withdrawn from his property, thereby causing any fugacious matter to enter his land, the surrounding owners have no remedy against him. The only safeguard is to be the first to get to work, in which case, those who make the recovery become owners of the material which they withdraw from any well which is situated on their property or from which they have authority to draw."

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<sup>26</sup> (1935) Tex. S.C., 83 S.W. (2d) 935

<sup>27</sup> (1918) Okla. S.C., 3 A.L.R. 352, p. 355,

<sup>28</sup> (1915) 138 La. 437

<sup>29</sup> J.C.P.C. [1953] 7 W.W.R. (NS) p. 550 -551

#### **(d) The Eminent Domain Theory**

Eminent domain is that dominant power of a country which is capable of coercing every other element in the country to be subservient by way of wielding the hammer of leadership or government. So, such an entity being distinguished do have the acquired or acclaimed right to expropriate private property for public use, with payment of compensation. In the UK it is used chiefly of international law, whereas in the US it is used of federal and state governments.

The vesting of ownership rights of minerals was conspicuously addressed in Article 77 (1) of the United Nations Convention on The Law of the Seas (UNCLOS) 1982 which provides that the coastal sovereign state has ownership, control and development of natural resources in the exclusive economic Zone (Which Nigeria became a party of in 1986), the rights are prevented from extending to interfere with the territory and territorial rights of neighbouring States.

Simply put, the theory of eminent domain states that the government or the monarch of a country can compulsorily take private lands for public use with or without compensation. The implication of this theory is that, the government can enact coercive legislation to back its desire to seize any land from private persons for any purpose it may classify as public good. In Nigeria, the examples of coercive statutes that empowers the eminent domain are: Section 1 of the Land Use Act, 1978 which vest all lands in the governor of each state governor. Consequently, Section 28(1) states the “it shall be lawful for the Governor to revoke a right of occupancy for overriding public interest.” Section 44(3) of the 1999 Constitution FRN (as amended) provides that: “... entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic zone of Nigeria shall rest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.” By the same token, section 2(1) of the Exclusive Economic Zone Act 1978 provides that: “.... sovereignty and exclusive rights with respect to the of exploration and exploitation of the natural resources of the seabed, subsoil and superjacent waters of the Exclusive economic Zone shall vest in the Federal Republic of Nigeria and such rights shall be exercised by the Federal Government.....”

The eminent domain theory postulates that the ownership of minerals and other natural resources are vested in the national government or the commanding authority of a country. The theory suggests that, it is only the supreme government of a country that has the rights of ownership to the natural resources. Such supreme authority or ultimate power could be a monarch or political government of the country. The eminent domain also has powers to compulsorily acquire property belonging to private persons for the purpose of harnessing the oil and gas thereon.

### **3. CONCLUSION**

This paper concludes that, apart from the United States of America, most countries including the Islamic nations support state ownership of mineral resources. However, it is not sustainable in the long-run to disposes private land owners of their minerals and sub-surface rights.

### **4. RECOMMENDATION**

Removing government ownership of mineral rights could reduce the degree of resistance by the petroleum host communities in Nigeria. Alternatively, the eminent domain laws should be re-enacted to give maximum share of the fiscal gains of the petroleum benefits to the host communities.

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