

A CRITICAL APPRAISAL OF THE THEORIES OF OWNERSHIP AND CONTROL OF PETROLEUM AND OTHER NATURAL RESOURCES IN NIGERIA*

Abstract

A discussion on the concept of ownership and control of Petroleum and other Natural Resources in Nigeria and the world over is one that has generated a great deal of controversy that seems to linger on endlessly. There have been several attempts at resolving this conflict through various legislative and judicial pronouncements. Several authors have written and made laudable recommendations all in a bid to resolve this problem; yet it appears that this controversy is far from being resolved. Towards this end, several theories have been propounded by revered writers and opinion holders all as attempts to suggest ways of resolving the lingering conflicts. Governments and other stake holders in the oil industry have done all at ensuring the protection of their interests. In Nigeria for example, the littoral states have been at logger head with the Federal Government over who should own oil and other natural resources found in the states and to what extent should the federal government exercise state control. This paper adopting the library based or qualitative research method, is aimed at the critical appraisal of the meaning, types and scope of the various ownership and control theories, the various arguments and counter arguments proffered for and against state and individual ownership, and their appropriateness and applicability to the peculiar Nigerian situation. While it is the reasoned position of this study that State ownership is best for Nigeria, strong argument is made for the concept of 'Inclusiveness', that is direct involvement and participation of the littoral states and oil producing communities in the production and management of petroleum and other natural resources. The work concludes by stating that the application of the recommendations/solutions proffered by it will go a long way to help the Federal Government in resolving the hitherto unending controversy generated over the ownership and control of petroleum and other natural resources in Nigeria thereby ensuring a peaceful, stable and conducive environment suitable for investment, growth and development in the oil rich region, and in Nigeria at large.

Key words: Ownership, Control, Theories, Petroleum, Inclusiveness

1. INTRODUCTION

The heated controversy and agitation surrounding the concept of ownership¹ and control of petroleum² and other resources in Nigeria dates back to the discovery of oil in commercial quantity in Oloibiri in

* **AGADA, JOSEPH N. LLB (Hons), BL, LL.M.** Babcock University, Ilishan-Remo, Ogun State, Nigeria 0803 826 2537, agadaj@babcock.edu.ng

¹ Ownership [here implies] "the legal right that a legal system grants to an individual in order to allow him or her to exercise the maximum degree of formalized control over a scarce resource." This idea can be derived from the civil law concept of dominium, the greatest right in property to "use and dispose of a thing in the most absolute way alluded to in early Roman texts." This concept of dominium is the "ultimate right, that which has no right behind it." See Bryan Clark, "Migratory Things on Land: Property Rights and a Law of Capture", 6.3 Electronic J. Comp. L. 2, Oct. 2002, available at <http://www.Ejcl.Org/63/Art63-3> last visited March 17, 2020, Aladeitan L. "Ownership and Control Of Oil, Gas, and Mineral Resources In Nigeria: Between Legality and Legitimacy" Thurgood Marshall Law Review [Vol. 38:159]

² In Nigeria, petroleum or oil and gas is defined as "...mineral oil (or any related hydrocarbon) or natural gas as it exists in its natural state..." In this work, except as otherwise stated, Petroleum or oil and gas is used as a generic term for oil and gas resources. Petroleum Act 1969, re-enacted in the Laws of the Federation 1990, Cap. 350,

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

The vesting of ownership and control of minerals and mineral resources in the Nigerian state is historical and dates back to the colonial era. This has had a great impact on the country's legal system and conception of property rights. As a British colony, most laws in Nigeria were fashioned after those of Britain. Nigeria, therefore, inherited a colonial legacy in which ownership of mineral resources was vested in the crown of England. This was due to the fact that the country, as a corporate entity, was regarded as the property of Great Britain. Thus, the then- suzerain authority and, naturally, the minerals in Nigeria—whether oil and gas or solid minerals—also belonged to Britain⁵

According to Professor Sagay, “The imperial masters claimed all the minerals in Nigeria for themselves, as was to be expected; Colonial rulers operated in their own interest, not in the interest of the colonized people⁶.

“It is this concept of state ownership of minerals that Nigeria inherited at independence in 1960, which thereafter became entrenched in the 1963 Republican Constitution”⁷ Consequently, “After Nigeria gained independence, the new state adopted and institutionalized this vestige of colonial experience.⁸

It is surprising that even after colonization; Nigeria refused to fully learn from countries like the United States of America and others where the practice is what one may safely refer to as shared ownership and control of petroleum and other natural resources. This has in turn led to the seemingly unending agitations, arguments and counter arguments between the central government, littoral states, and oil producing communities on who should own and control petroleum and other natural resources found in their domain.

The Nigerian State has employed the instrumentality of the law in an attempt to resolve the controversy surrounding the concept of ownership and control of petroleum and other natural resources by the promulgation of the various laws vesting ownership and control of petroleum in the government. The legal documents vesting the power to own control and regulate petroleum and other natural resources in the Central Government include: The Constitution of the Federal Republic of Nigeria (CFRN) 1999, as amended. The Constitution confers exclusive power on the Nigerian State to own, control and

S.14, and further in Cap P10 Laws of the Federation 2004 (hereinafter Petroleum Act), Elsevier, P. The Petroleum Handbook, 6th ed. (The Netherlands: Shell International Petroleum Company Limited, 1983), p.1

³ Later known as Shell-British Petroleum. Pearson, S. R., *Petroleum and the Nigerian Economy*: Stanford University Press, (1970). p55.

⁴ The State referred to here is the Government of Nigeria

⁵ Ajomo M.A., “The Legal Framework of the Petroleum Industry 4” (Lagos Oct.17–18, 2001) (paper presented at the Centre for Petroleum Environment and Development Studies workshop University of Lagos on essentials of oil and gas law).

⁶ Sagay, I. *Ownership and Control of Nigerian Petroleum Resources: A Legal Angle, Nigerian Petroleum Business*”: A Handbook (Victor Eromosele ed.), 1997 P. 178

⁷ Aladeitan L. *Ibid*

⁸ Sagay I. *Ibid* p.44

regulate 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.

Others are the Petroleum Act,⁹ The Nigerian Minerals and Mining Act¹⁰, The Land Use Act¹¹. It is equally noteworthy that, apart from legislation, decision of the Courts has also reinstated fact that ownership and control of mineral resources is vested in the federal government. The Supreme Court of Nigeria in the case of *Attorney General of the Federation v. Attorney General Abia State & Ors*¹² 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.”¹³

The court further held that “the mere fact that oil rigs bear the names of indigenous communities on the coastline adjacent to such offshore areas do not prove ownership of such offshore areas”¹⁴. 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 zone¹⁵ or the continental shelf¹⁶—is vested in the Federal Government of Nigeria.

Notwithstanding the introduction of legislative and case law initiatives, and the introduction of derivative principle by the government, the agitation from some component states and communities ownership and control of petroleum and other natural resources in Nigeria still goes on. It is against this background that this study takes a critical look at the various theories of ownership and control of petroleum and other natural resources in Nigeria.

It is important to state from the outset that globally, there are several theories on the concept of ownership and control of petroleum and other natural resources. In this paper, we intend to examine

⁹ Cap P10 Laws of the Federation of Nigeria (hereafter referred to as LFN).

¹⁰ Cap N117 LFN 2004.

¹¹ Cap L5 L.F.N. 2004.

¹² *Attorney General of the Federation v. Attorney General of Abia State, & Ors.* [2002] 4 NSCC 51

¹³ p 251

¹⁴ p 307

¹⁵ The Exclusive Economic Zone is a new resources regime of the sea created by the Exclusive Economic Zone Act Cap E17 LFN 2004 and which has been conceded to coastal states by international law under the United Nations Convention on Law of the Sea, 1982). Section 1 (1) of the Exclusive Economic Zone Act cited above to be “an area extending from the external limits of the territorial waters of Nigeria up to a distance of two hundred nautical miles from the baselines from which the breadth of the territorial waters of Nigeria is measured.” It was also defined by James E. B. as “a 200 nautical mile zone extending from a coastal State’s baseline in which the coastal State has priority of access to living resources and exclusive right of access to non-living resources” Louisiana Law Review Vol 45. No 6 p 1271.

¹⁶ The interpretation section of the Petroleum Act Cap P10 Laws of the Federation of Nigeria 2004 defined Continental Shelf as “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.”

some of the theories that are necessary for proper understanding of the concept of ownership particularly as it pertains to Nigeria while drawing insight from the United States of America.

According to Lanre Aladeitan¹⁷ “there are varying structures of the theories of ownership and control of natural resources; most of the classifications share similar characteristics.” These theories include Absolute Ownership Theory, Qualified Ownership Theory, Domanial/Sovereign Ownership Theory, Ownership in place Theory, Non-Ownership Theory, and the Ownership of strata Theory. Many learned authors have dwelt extensively on these theories and their views and contentions will assist greatly our understanding of these theories.

2. RELEVANT THEORIES OF OWNERSHIP OF PETROLEUM AND OTHER RESOURCES

2.1. Absolute Ownership Theory

Absolute ownership is the theory that minerals such as oil and gas are fully owned in place before they are extracted and reduced to possession. Under this theory, title to oil and gas may be lost by legitimate drainage, and by the rule of capture. Hence in the *Barnard's* of 1906¹⁸, the court refused to enjoin drilling by an adjacent land-owner alleged to be draining oil from a reservoir under the plaintiff's land, holding that the plaintiff's remedy was “self-help in drilling his own well” In the words of Prof. Omorogbe,¹⁹

The land owner is regarded as having title in severalty to the oil and gas in place beneath his land. He is not co-owner even when the reservoir straddles land, each owned by different persons. However, he loses his title to an adjacent operator if the oil from his land migrates to the adjacent land and is produced from his neighbour's well. There is no cause of action for this divestiture of title by drainage.

Under this theory, what the land owner has or is entitled to, is not oil and gas beneath his land. What he has are rights to sink as many wells and to extract as much oil and gas as he can. Prof. Omorogbe went on to cite examples of states in the United States of America where the absolute ownership theory holds sway. They include Texas, Pennsylvania, Arkansas.²⁰ Suffice it to say that this theory has no place in the legal regime of ownership and control of petroleum and other resources in Nigeria. It is therefore unknown to the Nigerian Legal jurisprudence.

There is also the school of thought that views the Absolute Ownership Theory as the act of vesting ownership and control of petroleum and other resources in the State. One of the students of this school of thought Dafe Akpedeye (SAN)²¹ argues that

This theory states that the owner of a piece of land is regarded also as the owner of the petroleum lying underneath the land. Land in this regard includes everything down to the crux and up to the sky. In Nigeria, the absolute ownership by the states is the order of the day. This is clear from the provisions of Section 1 of the Petroleum Act, which provides

¹⁷ Aladeitan L. “Ownership and Control of Oil, Gas, and Mineral Resources In Nigeria: Between Legality And Legitimacy” Thurgood Marshall Law Review Vol 38:159 p. 160

¹⁸ *Barnard v. Monongahela Natural Gas Co.*, 216 Pa. 362. 65 A. 801 (1906), mentioned in Blinn, Duval Le Leuch and Pertuzzio, and cited by Omorogbe Y. Oil and Gas Law in Nigeria Malthouse Law Book (1st edition 2001) p.32.

¹⁹ Omorogbe Y. 2001, *Oil and Gas Law in Nigeria, Lagos Malthouse Law Books simplified series* p.33

²⁰ *Ibid*

²¹ Akpedeye D. “Oil and Gas Operations: Rights and Obligations.” The Nation Newspaper October 13, 2015 p.35

that the entire property in Petroleum shall vest in the state. Thus mineral oil is absolutely owned, but by the state.

2.2. Qualified Ownership Theory

Under the qualified ownership theory, each owner of land lying over the common reservoir has certain correlative rights (and duties) with respect to the oil and gas below. Each landowner had the duty not to waste the oil and gas and not to produce it in such manner as to damage the formation and reduce the ultimate recovery; each landowner has 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.²²

In the words of Yinka Omorogbe, “This theory obtains in states such as California and Indiana.” She stated further that:

Under this theory, the land owner is said not to have title to the oil and gas *in situ* because of the fact that he can be divested by drainage without consent and without any liability on the part of the person causing the drainage. However, he does have property interest which is more than a right of capture. All the land owners over a common reservoir are designated as collective owners, with equal rights to take oil from the reservoir. The respective land owners do not have title to specific oil and gas underneath their respective lands... What each owner has is an equal right with his co-land-owner to secure his proportionate part of the oil and gas in the common reservoir through wells drilled upon his land. He also has a qualified title interest in the oil and gas as one of the collective owners.²³

2.3. Domanial/Sovereign Ownership

Domanial ownership theory provides for the vesting of ownership of petroleum and other natural resources in the sovereign.²⁴ Sovereign ownership theory on the other hand has been seen as the total state control and permanent sovereignty over petroleum and other natural resources by the government.²⁵

Although some authors like Yinka Omorogbe and others distinguished between the Domanial and Sovereign theory, this paper consider both the same and will therefore discuss them together. The only distinguishing factor here may be the use of the word “permanent.” The position of this work is that whether sovereign or domanial, ownership remains permanent until the enabling laws state otherwise.

This ownership theory appears to be the most dominant theory on the ownership and control of petroleum and other resources. This is the theory that holds sway in Nigeria and practically every country with the major exception of the United States of America.

The purport of this theory is that all mineral deposits in these respective countries are owned and controlled by the Sovereign, State or Central Government. These rights of ownership and control are largely enshrined in the various constitutions of these countries. According to the Black’s Law

²² *Id*

²³ *Id*

²⁴ Omorogbe Y. *Ibid*

²⁵ *Ibid*

Dictionary, the word “Sovereignty in its purest and widest sense means the supreme, absolute, and uncontrollable power by which any independent State is governed.”²⁶

It is important that we take a look at the history of Domanial/Sovereign or absolute ownership theory. According to Yinka Omorogbe,²⁷

The question of ownership over natural resources has received a lot of attention at the international levels in the recent past. The trends reveal a shift away from investor ownership and control, towards state control and permanent sovereignty over natural resources. In the latter part of the 19th century and the early part of the 20th century, the tendency was for companies charged with the exploration and production of natural resources in question, to exercise rights that amounted to sovereignty over the natural resources. As the host countries became more aware, they came to resent this state of affairs...The developing and socialist countries attempted to redress what to them was an inequitable state of affairs, mainly through resolutions of the General Assembly of the United Nations.

The December 21, 1952, resolution No 626 (VII) of the General Assembly provides that: “the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty.” On December 14, 1962, the General Assembly adopted Resolution 1803 (XVII) titled ‘Permanent Sovereignty over Natural Resources’ which provides *inter alia* that:

Nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public unity, security or the national interest. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures and in accordance with international law.²⁸

Several other resolutions were progressively passed towards state or sovereign ownership of natural resources which have all worked to bring this theory to the level of popularity it has attained today. Popular amongst them is the December 12, 1974 General Assembly Resolution No. 3281 (XXIX), entitled “Charter of Economic Rights and Duties of States” which *inter alia* states that “Every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.”

Yinka Omorogbe, observed that these United Nations resolutions reveal a definite trend away from the traditional concepts of investor ownership which emphasize the protection of individual rights-towards host state ownership of natural resources.²⁹

In Nigeria for example, the powers of ownership and control of petroleum and other resources as vested in the Nigerian States are provided for in the 1999 Constitution³⁰ of the Federal Republic of Nigeria. It provides that “the entire property in, and control of all minerals, mineral oils and natural gas in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation.”

²⁶ Black’s Law Dictionary 2nd Edition p 1396

²⁷ *Op cit.* p34

²⁸ *Id.*

²⁹ *Op cit* p. 37.

³⁰ Section 44 (3) of the 1999 Constitution of the Federal Republic of Nigeria as amended.

By virtue of the provisions of Section 1 of the Petroleum Act,³¹ the entire ownership and control of all petroleum in, under or upon any land in Nigeria is vested in the State. This power leaves the state with the option of either exploring resources itself, or granting rights to third parties on whatever condition it may deem fit.

2.4. 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.”³²

The Latin maxim “*cujus est solum, ejus est usque ad coelom 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.³³

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.³⁴ He could, by appropriate instrument, separate the ownership of certain rights, powers, privileges and immunities from the estate in fee simple absolute in the land.

Thus, by 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.³⁵ The land owner may grant to another what is described as a mineral interest,³⁶ a royalty interest,³⁷ or leasehold interest;³⁸

According to Lanre Aladeitan,³⁹ The implication of the ownership in place theory is that the Land owner owned the land and the resources beneath his land absolutely and could confer separate titles to them by reservation, separation, or severance. In this theory, the landowner can sever the surface rights from the mineral rights and grant the latter in perpetuity and in fee simple,⁴⁰ 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

³¹ Cap P10 LFN 2004

³² Patrick H. M. & Kramer, M.B., Williams & Meyers, *Oil and Gas Law* (2012). p 200

³³ *Id.*

³⁴ *Marrs v. R.R. Comm'n.*, 177 S.W.2d 941, 948 (Tex. 1944)

³⁵ Martin & Kramer, *supra* note 5, p. 201

³⁶ 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, available at <http://legaldictionary.thefreedictionary.com/Mineral+Right> last visited April 11, 2017.

³⁷ In *Logan Coal & Timber Ass'n v. Helvering*, 122 F.2d 848, 850 (3d Cir. 1941). Mineral royalty was described as the income received from lessees of mineral land.

³⁸ Aladeitan Lanre *supra* described Leasehold interest as the interest of the lessor or the lessee under a lease Contract.

³⁹ *Ibid*, *Bodcaw Lumber Co. v. Goode*, 254 S.W. 345, 349 (Ark. 1923)

⁴⁰ *Simson v. Langholf*, 293 P.2d 302, 306 (Colo. 1956).

the incidence of ownership will permit.⁴¹ The ownership in place theory enjoys wide recognition and application in many states in the United State of America.⁴²

The argument against this theory, according to Lanre Aladeitan⁴³ is:

The inherent potential absurdities in the theory, especially when the ownership of airspace is viewed as an exclusive private possession, because, in reality, the concept of private property will not transcend the point where the owner of the surface soil cannot make actual or beneficial use of the airspace. Therefore, this is a conceptual flaw with the 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.

This paper subscribe to the above position as the ownership in place theory failed to distinguish between the surface soil and airspace in its assertions, and the limits of both in the exercise of ownership rights. This theory though not entrenched in Nigeria seems to form the basis for the agitation for ownership by the littoral states.

2.5. 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 possession⁴⁴

In jurisdictions where the non-ownership theory has been adopted, “Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form.”⁴⁵ 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 land⁴⁶

The non-ownership theory originates from American jurisprudence and dates back to the late 19th 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.”⁴⁷

⁴¹ *Attorney Gen. v. Pere Marquette Ry.*, 248 N.W. 860 (Mich. 1933).

⁴² 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, p. 201.

⁴³ *Ibid*

⁴⁴ *Op Cit.* p 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.

⁴⁵ *Id.*

⁴⁶ *Id*

⁴⁷ *Ibid.* p. 203.

This theory developed and became entrenched in American jurisprudence based on such authorities as *Westmoreland & Cambria Natural Gas Co. v. Dewitt*,⁴⁸ where oil and gas were described: as “minerals *ferae naturae*. (Like) animals . . . , they have the power and the tendency to escape without the volition of the owner. Their ‘fugitive and wandering existence within the limits of a particular tract was uncertain,’” They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another’s control, the title of the former owner is gone.

Possession of the land, therefore, is not necessarily the possession of the oil and gas. If an adjoining, or even a distant, owner, drills his own land, and [produces gas from another’s land], so that it comes into his well and under his control, it is no longer owned by the owner of the other land, but becomes his.⁴⁹ 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 land⁵⁰

The premise of the non-ownership theory, which was upheld in *State v. Ohio Oil Co.*,⁵¹ 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.⁵²

Of further help in this discussion is the decision in the case of *Kelly v. Ohio Oil Co.* which also upheld the non- ownership theory.⁵³ In that case, it was held that:

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 distinct ownership, separate from realty, and becomes personal property,—the property of the person into whose well it came.⁵⁴

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:

⁴⁸ *Id.*; *Westmoreland & Cambria Nat. Gas Co. v. De Witt*, 18 A. 724, 725 (Pa. 1889).

⁴⁹ Martin & Kramer, *Op Cit* note 5, at p. 203 n.2.

⁵⁰ *Id* P.230.

⁵¹ *State v. Ohio Oil Co.*, 49 N.E. 809, 812 (1898).

⁵² Martin & Kramer, *supra* note 5, at P 203 n.4 (quoting *State v. Ohio Oil Co.*, 49 N.E. at 812).

⁵³ *Kelly v. Ohio Oil Co.*, 49 N.E. 399, 401 (Ohio 1897).

⁵⁴ Martin & Kramer, *Ibid* note 5, at p. 203 n.5 (quoting *Kelly v. Ohio Oil Co.*, 49

. . . it is the settled jurisprudence of [Louisiana] that oil and gas in place are not subject to absolute ownership as specific things apart from the soil of which they form part; and a grant or reservation of such oil and gas carries only the right to extract such minerals from the soil. We may hold, and we do hold, that no matter what the intention of the parties be, the owner of lands cannot convey or reserve the ownership of the oils, gases, and waters therein apart from the land in which they lie... because the owner himself has no absolute property in such oils, gases, and waters, but only the right to draw them through the soil and thereby become the owner of them.⁵⁵

It is on the basis of these ancient authorities and others⁵⁶ that the doctrine of oil and gas being incapable of being owned *in situ*, is entrenched in the American jurisprudence, and fugacious minerals, such as oil and gas, can only be subject to ownership when they are captured. Again, this theory is unknown to the Nigerian Ownership concept.

2.6. 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.”⁵⁷ 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 in addition to it.⁵⁸

3. Brief History of State or Absolute Ownership and Control of Petroleum and other Resources in Nigeria

As pointed out earlier, the vesting of the power and right of ownership and control of petroleum and other mineral resources in the Nigerian state is historical and dates back to the colonial era.⁵⁹ The earliest recorded concessionaire in the Nigerian oil industry was a German bitumen company granted rights to prospect for oil in the British protectorate of Lagos in 1908. A consortium of Shell D’Arcy Petroleum Company and British Petroleum Company (Shell B.P.) acquired a second concession in 1937.⁶⁰

Shell-BP drilled its first well in 1951 at a site close to Ihuo village, some sixteen kilometers northeast of Owerri. In 1953, Shell-BP moved its operations to its Akata site where some 450 barrels of oil were produced. Shell-BP discovered oil in commercial quantity in 1956 at Oloibiri⁶¹ and production began in 1958. Between 1958 and 1960, Shell-BP discovered its Bomu oil field located in the Ogoni land area. In the early 1960s, revenue from oil accounted for less than 10% of Nigeria’s revenue base. By this time, agricultural products such as palm oil, palm kernels, groundnuts, cocoa, rubber and mineral resources such as tin, coal, iron and columbite were the major revenue earners

⁵⁵ *Frost-Johnson Lumber Co. v. Salling's Heirs*, 91 So. 207, 243, 245 (La. 1920).

⁵⁶ *Townsend v. State*, 47 N.E. 19 (Ind. 1897);

⁵⁷ *Id* p. 95

⁵⁸ *Id* p 216

⁵⁹ *Id*

⁶⁰ This pioneering work was disrupted following the outbreak of World War 1. At the end of the war, the Nigerian Bitumen Company was not allowed to resume operations in Nigeria. The strained relationship between Britain and Germany during and after the war may have been responsible for non-resumption of exploratory work by the German firm in Nigeria. Nigeria was then a colony of Britain. Etikerentse G. *Nigerian Petroleum Law* Dredew Publishers (2nd ed. 2004) at p. 5, p.11

⁶¹ Now Bayelsa State.

for the country. More than 70% of the people were employed in agriculture or related fields.⁶² The late 1960s witnessed a drift away from agricultural production, the early 1970s saw Nigeria becoming a major oil producing nation with an average production of 2.3 million barrels per day.⁶³

The impact of oil boom on agriculture is captured thus:

During the early post-World War II era, agricultural products dominated the export trade; Nigeria was one of the world's leading exporters of cocoa, groundnuts and palm oil, and a notable exporter of rubber, cotton, and hides. There has, however, been a rapid decline in the size of the agricultural sector, whose contribution to the gross domestic products (or GDP) fell from around 60 percent in 1960 to about 21 percent in 1977, and eventually to less than 10 percent in 1978. Unlike agriculture, however, oil production employs a relatively small number of workers and accounts for only 1.3 percent of the total modern sector employment in Nigeria. Consequently, the oil industry has almost displaced the agricultural economy, making Nigeria a petroleum-based single commodity reliance economy⁶⁴

This over dependence on oil to the detriment of the agricultural sector led to the conscious and intentional efforts at promulgating laws that vest the entire ownership and control of petroleum in the Crown (or the Nigerian State as the case may be). In the words of Lanre⁶⁵ "it is this ideology that was entrenched in the Republican Constitution of 1963."

It is important to note that the issue of ownership was of no consequence in the Mineral Oils Ordinances of 1914⁶⁶ as amended in 1925, and only began to feature as a legal provision in subsequent legislations. For example, section 3 (1) of the Mineral Oil Act 1946 provides that:

The entire property in and control of all mineral oils, on, under or upon any lands in Nigeria, and all rivers, streams and water courses throughout Nigeria, is and shall be vested in the crown. Save in so far as such rights may in any case have been limited by an express grant made before the commencement of this Act.

The Minerals Act of 1969, which expressly emphasized:

The entire ownership and control of all petroleum in, under, or upon any land which this section applies shall be vested in the State.⁶⁷ 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

According to Professor Ajomo, the above provision on ownership of mineral resources was remodeled under the 1979 Constitution to read, "Mineral oil and natural gas in, under or upon any land in Nigeria

⁶² Ikein, A. *The Impact of Oil on a Developing Country: The case of Nigeria*, New York: Pareger, (1990) p. 1

⁶³ *Id* p 58

⁶⁴ *Id* p 19-20

⁶⁵ *Ibid*

⁶⁶ The Laws of the Federation of Nigeria and Lagos: in Force June 1, (1959) Cap 120, No. 17 of 1914.

⁶⁷ State here means the Nigerian State

or in, under or upon the territorial waters and the Exclusive Economic Zone (EEZ) of Nigeria shall vest in the Government of the Federation.”⁶⁸

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.⁶⁹ 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 1982.⁷⁰ 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.⁷¹ This was the inception of the legal regime that has shaped the ownership of oil in Nigeria.

The result of all these laws was to vest in the Crown/State the absolute right and control over oil resources.⁷² In *South Atlantic Petroleum Ltd v. Minister of Petroleum Resources*⁷³ the court held that petroleum resources in Nigeria are vested in the Federal Government. Interested persons are granted licenses or leases to explore, prospect or mine oil and gas. The exclusive right enjoyed by the Federal Government has been a subject of controversy in Nigeria as the oil producing states⁷⁴ and communities agitate for the ownership and control of what they refer to as their God-given resources.

4. Argument for and against State or Absolute ownership⁷⁵

One of the prominent proponents of absolute⁷⁶ ownership, especially as it relates to the oil and gas industry, is Professor Ajomo.⁷⁷ Professor Ajomo supported his position by arguing that ownership and control of petroleum is an important political symbol in most developing countries, and as such should not be left in the hands of private individuals or community.⁷⁸

He observed that private ownership of oil will create enormous wealth for a few private individuals, who might not apply such fortunes towards productive ends in consonance with national priorities, but rather that such wealth may only intensify the class division in the country.⁷⁹ On the other hand, Professor Sagay, argued that Ajomo’s argument cannot stand up to a rigorous examination or analysis, based on Nigeria’s national experience.⁸⁰ Prof. Sagay asked the question whether central ownership

⁶⁸ Ajomo M. A, “The Legal Framework of The Petroleum Industry” (Lagos Oct.17–18, 2001) (paper presented at the Centre for Petroleum, Environment and Development Studies University of Lagos workshop on essentials of oil and gas law).

⁶⁹ *Ibid*

⁷⁰ 1982 United Nations Convention on the Law of the Sea

⁷¹ Permanent Sovereignty Over Natural Resources, General Assembly Resolution 1803 (XVII) (Dec. 14, 1962), available at http://untreaty.un.org/cod/avl/ha/ga_1803/ga_1803.html. (last visited April 12, 2017)

⁷² *Ibid*

⁷³ (2006) 10 CLRN 122.

⁷⁴ The Niger Delta region

⁷⁵ In this work, the words absolute, state, sovereign or totalitarian ownership of petroleum resources mean the same and are used interchangeably.

⁷⁶ Also referred to as Totalitarian ownership theory by Aladeitan L. *supra*

⁷⁷ Ajomo, M. A. “The 1969 Petroleum Decree: A Consolidation Legislation, Resolution in Nigeria’s Oil industry”, in 1 Nigerian Annual Journal of Int’l Law 57 (1979).

⁷⁸ *Op Cit* p17

⁷⁹ *Id*

⁸⁰ Sagay I. “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) 100.

and control have prevented the emergence of a class of enormously wealthy individuals, and whether the proceed of oil has been prudently and patriotically put to the use for the country⁸¹. With due respect, we submit that the question asked by Professor Sagay emanated from the deep corruption in the country and the lack of respect for due process and not from the failure of Professor Ajomo's proposition.

Professor Ajomo further argued that State ownership of petroleum resources will further enhance the drive for national unity as whatever is gotten from the resources is shared among all the component states of the federation and not left in the lands of individuals who will not have the interest of the populace at heart.⁸² In response to this 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.⁸³

He⁸⁴ went on to say that the country has witnessed rebellions, revolts and cries brought about by the exclusive ownership and control of petroleum and other mineral resources by the federal government.⁸⁵ Professor Sagay submitted further that, as a result of the state totalitarian ownership and control policy, the people of all the oil producing areas naturally felt "cheated and exploited" by a policy under which the wealth on their land is carted away, leaving them with a polluted and devastated environment.⁸⁶ According to Lanre⁸⁷

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

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

Furthermore, Professor Ajomo asserted that the question of the government or authority to whom revenues should be paid, and the power and resources derivable from it, was an issue in the crises that led to the Nigeria civil war, therefore, necessitating the federal government to claim that right exclusively.⁸⁸ 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.⁸⁹ This position we think is apposite as allowing individual ownership of petroleum and other resources will lead to a situation where there are differing laws for the various communities and states blessed with these resources in Nigeria thereby leading to further agitations, confusion, and violence.

⁸¹ *Ibid*

⁸² *Id*

⁸³ *Id*

⁸⁴ Sagay I. *Ibid*

⁸⁵ *Id*

⁸⁶ *Id*

⁸⁷ *Ibid*

⁸⁸ Ajomo M. A. *Op Cit* p 72

⁸⁹ *Id*

Professor Ajomo still justifying his position noted that the federal government is the only authority that can successfully pursue, in collaboration with oil companies, a policy that will not adversely affect Nigeria's foreign exchange position.⁹⁰

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.⁹¹ 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.⁹²

According to Lanre,⁹³ it was also the contention of Professor Ajomo, that only the federal government has capacity to operate in the petroleum industry given the huge capital outlay and the high degree of technical expertise required. Similarly, he asserted that only the federal government has the capacity to compel the multinationals operating in the industry to share the necessary technical knowledge with Nigerians. Other prominent authors have lent credence to the argument against state ownership. One of them is Profesor Duruigbo. In his words,⁹⁴

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

He was however quick to identify and emphasize a significant downside of private ownership, which more or less does not take into account the externalities of resource development, such as environmental degradation and its attendant implication on the society as a whole.⁹⁵ He posited that, "if a government can internalize the externalities through adequate environmental regulation and taxation of profits, society could benefit from the resources found on, and developed from, private land."⁹⁶

According to Mrabure K. O.⁹⁷

State ownership has failed considerably these past years. A control of these resources by the people will lead to a departure from the status quo as it were. A great participatory role and a sense of autonomy will be enjoyed by the people thereby placing more responsibly in their hands to seeing that the years of neglect is addressed positively by the indigenes of the region. Moreso, more wealth will be placed in their hands as it is trite that when wealth goes round amongst a people, acrimony, friction and bitterness reduce considerably. They will also become architects of their destiny thereby playing

⁹⁰ *Id*

⁹¹ *Op Cit* p 58

⁹² *Id*

⁹³ *Op Cit* at p.18

⁹⁴ Duruigbo,E. "The Global Energy Challenge and Nigeria's Emergence as a Major Gas Power: Promise, Peril or Paradox of Plenty?", 21 *Geo. Int'l Evtl. L. Rev.* 395, 442 (2009).

⁹⁵ *Id*

⁹⁶ *Id*

⁹⁷ Mrabure, K. O. "Revisiting Petroleum Resources Ownership Question. A Case for Private Ownership"; a Paper Presented at 49th Annual Nigerian Association of Law Teachers (NALT) Conference available at <http://www.naltng.org/wp-content/uploads/2016/06/25.pdf>. Last accessed May 1, 2017.

greater roles in the socio-economic development of their lives, their communities and the Nigerian State as a whole. Greater happiness and contentment will persist greatly in the region as it will become a hotbed of massive infrastructural growth and the Texas of our dream.

Apart from the two extreme positions examined above, there are also those who believe, and so argue for a middle position or what they called state and individual ownership arrangement. One of such is I. Omuli. According to him⁹⁸

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

This position brings to mind what obtains in Texas State, in United States of America where both forms of ownership and control co-exist. Although the position of Professor Ajomo may be opened to criticisms because of the endemic nature of corruption in Nigeria, coupled with neglect of the Niger Delta region, this paper still agree with his position because the converse may open the Nigerian state to further crisis, disintegration and another civil war. This paper however, makes recommendations on how to tackle corruption, and tackle the problem of neglect of the Niger Delta region by successive governments, and advocated the concept of inclusiveness in the management of Nigeria's resources.

5. Conclusion and Recommendations

This paper has critically considered the meaning and various theories of ownership and control of petroleum and other natural resources in Nigeria and other jurisdictions, a brief history of state or absolute ownership theory in Nigeria and the various arguments for and against state ownership canvassing that state or absolute ownership is best suitable for Nigeria for the time being. This work makes the following recommendations as a way of improving the extant position of things covered by the focus of this work.

1. **Adoption of the principle of Inclusiveness in the management of petroleum and other resources:** The Nigerian government should put in place a multi-stakeholder approach to oil exploration and exploitation involving the trio of government (both federal and states), oil companies and host communities. The multi-stakeholder mechanism should address issues of pollution as it relates to biodiversity conservation and regeneration. This way the host communities will help in the monitoring of oil companies in their communities. This will in turn help reduce the incidence of pollution to the barest minimum. Once the people of the oil rich region are fully and properly involved in the administration of oil and its revenue, the agitation will stop.
2. **Intentional fight against corruption:** Apart from the fact that what the littoral states are getting by way of derivation is quite infinitesimal compared to the discomfort they suffer, one sad thing is that even what is paid to the states does not positively impact the lives of the people because of corruption. Political leaders keep sharing the money between themselves until there would be nothing left for the common masses or for development. The federal and state

⁹⁸ Omuli, I. 'What Effect Does the Ownership of Resources by the Government Have on its People: A Case Study of Nigeria'? <O.Iwere@dundee.ac.uk> last accessed April 1, 2017.

governments should be more intentional and willful in the fight against the prime enemy of the Nigerian state—corruption and stop paying lip services the crusade.

3. **Corporate Social Responsibility:** Oil companies operating in the host communities should take up their social responsibilities in their host communities by developing the area, and also employ the youths instead of using the security personnel to intimidate their host communities. This practice has left the youths thinking that those they invited to come and eat have deprived them from eating themselves.
4. **Willingness to enforce the extant laws on the protection of the environment:** The government and all its agencies concerned with the enforcement of the extant laws for the protection of the environment and its inhabitants from pollution should develop more willingness to enforce these laws as the current unwillingness to enforce these laws has brought untold hardship on the people of the Niger Delta region of Nigeria.
5. Finally this work recommend that though the position in the United States of America where individual and component state ownership is practiced is the most ideal, Nigeria should stay with the absolute state ownership as it is currently being practiced being an emerging or developing country as we believe a time would come in the political and administrative experience of Nigeria that it will be ripe to allow individual ownership with little or no rancor.