ADDRESSING THE ENVIRONMENTAL RIGHTS OF THE NIGER DELTA STATES THROUGH GOVERNMENTS' SOCIAL RESPONSIBILITY*

Abstract

Environmental Rights depict access to the unspoiled natural resources that enable survival including land, shelter, food, water and air. It is any proclamation of a human right to environmental conditions of a specified quality, human rights and the environment. Chapter II of the Constitution of Federal Republic of Nigeria, 1999 in its fundamental objectives and Directive Principle of the State Policy directs the state to protect and improve the environment and safeguard the water, air, and land, forest and wildlife of Nigeria. This is so, notwithstanding its non-justiciable attributes. But the right to ownership and control of natural resources under the said Constitution as Nigerian law is constitutional. Basically, the Constitution of the Federal Republic of Nigeria, 1999 (as amended) in its section 44(3) and item 39 schedule II of the Exclusive Legislative List vests the control and management of the natural resources and hydrocarbon operations on the federal government for the common good and benefit of the citizens. However, these resources are within the physical and environmental areas of the Niger Delta who feel the impacts of their exploration, production and mining and therefore, deserve protection. This paper aims at appraising the above Constitutional provision along with environmental protection laws in Nigeria especially the New Petroleum Act to seeing how the Federal Government has been socially responsible to the Niger Delta States under whose environment the Federal government of Nigeria's 90% of Foreign and gross earnings are obtained. The paper adopts the doctrinal research method using primary and secondary sources of law. The paper recommends the option of social responsibility on the part of the Federal Government. This will compel cooperation from the Niger Delta States.

Keywords: 'Environmental Rights', 'Niger Delta States', 'Social Responsibility', 'Ownership' and 'Control', 'Mineral and Oil resources'

1. Introduction

Environmental rights mean access to the unsoiled natural resources that enable survival, including land, shelter, food, water and air.[1] It is any proclamation of a human right to environmental conditions of a special specified quality, human rights and the environment.[2]Natural resources are raw materials that are extracted from the ground or soil. They are found naturally embedded in the soil and can only be modified by man for his benefit and use. The natural resources include fossil fuels, coal oil, natural gas, gold, copper, iron, diamonds, and minerals.[3]Aladeitan has described natural resources as "a gift of

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[1]Friends of the Earth International available online at http://www.air.org'governance accessed on 28/5/2021

[2]UNCEP-UN, 'Environmental Programme' available online at https://www.foei-un'what-we-do accessed on 28/5/2021

[3]T Okonkwo, 'Ownership and Control of Natural Resources, under the Nigerian Constitution 1999 and Its Implications for Environmental Law and Practice' available online at file://c:/users/user/downloads/ownership-and-control-%-Natural-Resources-Under-1%20(1)pdf accessed 25/5/2021

nature and an endowment of comfort that makes the existence of mankind complete.[4] Since natural resources can be used to create and increase the wealth of a country, its ownership and control has become a subject of legal, political and socio-cultural controversy, for whoever controls them control the environment.

The legal regime of ownership, regulation and control of the energy sector in Nigeria is divided into three parts: the petroleum law and regulation,[5] gas law and law of electricity. The scope of this paper is restricted to petroleum law and regulation and gas law only. The term 'Social Responsibility' is of two terms, 'Social and 'Responsibility.' Social means connected with society and the way it is organized. Responsibility, on the other hand means a duty to deal with or take care of somebody or something, so that you may be blamed if something goes wrong.[6]Social responsibility from the perspective of socioeconomic model means reflecting society's broader expectations for business (for example, safe, and meaningful jobs, clean air and water, charitable donations, safe products), many thinks the time has come to revamp what they believe to be an absolute, classical economic model.[7] Thus, when John Rockefeller was at the Zenith of his power as the founder of Standard Oil Company, he handed out dimes to rows of eager children who lined the street. Rockefeller did this on the advice of a public relations expert who believed the dime campaign would counteract his widespread reputation as a monopolist who had ruthlessly eliminated his competitors in the oil industry. The dime campaign was not a complete success, however, because Standard Oil was broken up under the Sherman Antitrust Act of 1890. Conceivably, Rockefeller believed he was fulfilling some sort of social responsibility by passing out dimes to hungry children. Since Rockefeller's time, the concept of social responsibility has grown and matured to the point where many of today's companies are intimately involved in social programmes that have no direct connection with the bottom line. These programmes include everything from support of the arts and urban renewals to environmental protection. But like all aspects of management, social responsibility needs to be carried out in an effective and efficient manner.[8]

The Nigeria federal government and oil companies in Nigeria should be socially responsible to the Niger Delta States and any other areas where minerals, minerals oils and natural gas are mined, explored and produced; to be mined, explored and produced for the development of Nigeria and for sustainable environmental development. The social responsibility of the Federal Government of Nigeria and oil companies in this regard will reduce the tensions, social uprising, kidnapping and deaths in the Niger Delta States.

2. Arguments for Corporate Social Responsibility by Kreitner

As one might suspect, the debate about the role of business has spawned many specific arguments both for and against corporate social responsibility. A sample of four major arguments on each side reveals the principal issues.

[4]L Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria: Between Legality and Legitimacy' (2013) *Thurgood Marshall Law Review*, Vol 38: 159 at 160

[5]The following regulations are issued pursuant to the Petroleum Act, Crude Oil (Transportation and Shipping) Regulation 1984; Mineral Oils (Safety) Regulations 1963 as amended; Oil and Gas Pipelines Regulations 1965; Petroleum (Drilling and Production) Regulation 1969 as amended; Petroleum (Refining) Regulations 1974; Petroleum Regulation 1967 as amended and Marginal Fields Fiscal Regime Regulations 2005

[6]A S Hornby, *Oxford Advanced Learner's Dictionary of Current Englis*h (Oxford: New 9th ed, Oxford University Press, 2015) pp 1481-1319

[7]R Kreitner, *Management* (India: 7th ed., A.I.T.B. Publishers & Distributors Regd. 1999) 134

[8]*Ibid* at p. 131

Convinced that a business should be more than simply a profit machine, proponents of social responsibility have offered these arguments:

1 *Business is unavoidably involved in social issues.* As social activists like to say, business is either part of the solution or part of the problem. There is no denying that private business shares responsibility for such societal problems as unemployment, inflation, and pollution. Like everyone else, corporate citizens must balance their rights and responsibilities.

2 *Business has the resources to tackle today's complex societal problems.* With its rich stock of technical, financial, and managerial resources, the private business sector can play a decisive role in solving society's more troublesome problems. After all, without society's support, business could not have built its resource base in the first place.

3 *A better society means a better environment for doing business.* Business can enhance its long-run profitability by making an investment in society today. Today's problems can turn into tomorrow's profits.

4. Corporate social action will prevent government intervention. As evidenced by waves of antitrust, equal, employment opportunity, and pollution-control legislation, government will force business to do what it fails to do voluntarily.

3. Theories of Ownership of Petroleum

Petroleum as defined by section 15 of the Petroleum Act 1969 means mineral oil (or any related hydrocarbon) or natural gas as it exists in its natural state in strata and does not include coal or bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation. The issue of ownership of energy resources is long settled in international law. The notion that countries have "Permanent Sovereignty Over Natural Resources" within their domains is traceable to two major resolutions of the United Nations General Assembly- the 1952 and 1962 editions. The 1952 resolution recognizes that "the right of peoples freely to use and exploit their natural resources is inherent in their sovereignty".[9] in the opinion of some developing countries like Nigeria and other countries in Africa? This resolution is nebulous, as its provisions represent an inequitable state of affairs in international law.

The criticism levied against the 1952 resolution led to re-wording of the ideological basis of the principle of' "permanent sovereignty over natural resources" in the 1962 UN resolution. The concept was originally proclaimed in the 1962 resolution, which provides among others that:

> The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interests of their national development and of the well-being of the people of the State concerned.[10]

The resolution further states that nationalization or expropriation shall be based on grounds or reasons of public utility, security or the national interest, and upon payment of appropriate compensation, in accordance with international law.[11]

[9] See Resolution No. 626 (VII) of the United Nations General Assembly December 21, 1952.
[10]See Resolution No.1803 (XVII) of the United Nations General Assembly, December 14,1962
[11]*Ibid*

The right of Nigeria and other countries to exercise sovereignty over their energy resources is conferred, arguably though, by international law and this is also justified in theories. Several theories have been put forward as to whether petroleum is capable of being owned.[12]There are various theories of ownership striving for recognition and acceptance. The most popular of these are the Qualified Ownership Theory and the Absolute Ownership Theory. There are also other theories such as the Non-Ownership theory, the Islamic ownership theory and the Dominial System of ownership as explained below.

Qualified Ownership Theory

This theory is recognized by the State of Pennsylvania. It does not accept that full ownership can be vested in oil and gas *in situ.* It holds the view that petroleum cannot be owned until it is captured and reduced into possession. This theory is derived from the concept *of Ferae Naturae* (Le wild animals). An analogy is often drawn between wild animals and petroleum, since in law, wild animals are not capable of being owned until they are captured and reduced into possession. The law of capture originated during the late 19th century USA oil boom in the 1899 Supreme Court of *Pennsylvania case of Westmorland and Cambria* Natural *Gas Co v De Witt.*[13] In this case, the court, in affirming the existence of a law of capture, ruled that:

> Hydrocarbons, like wild animals but unlike other minerals, have tendency and the power to escape, even against the will of its owner and to continue to be his property only while within the area subject to his control, but when they migrate to other areas or fall under-the control of other persons, that title to the previous owner disappears. Therefore, possession of the land does not necessarily involve possession of the hydrocarbons. If someone drilling on his own land reaches the common deposit and obtains through those wells' hydrocarbons of neighbouring areas, the ownership of that oil and gas passes to whoever produced it.[14]

This argument has been discredited as false in North America where it was first propounded. The reason is that there is no similarity between wild animals and petroleum.[15]It is contended that, under this theory all land owners over a common reservoir are designated as collective owners, with equal rights-to take oil from the reservoir. However, the respective land owner does not have title to the specific petroleum underneath their respective lands. They also do not have title as tenants in common to an undivided share of the oil and gas in the common reservoir which is equivalent to the amount of petroleum under their respective lands. Thus, at best, they have qualified title interest in the petroleum as one of the collective owners.[16]The qualified ownership theory is applied in some of the major oil and gas producing jurisdictions including the States of California, Oklahoma and Louisiana.

Absolute Ownership Theory

The theory of absolute ownership often referred to as 'Texas theory' is given widest recognition in the State of Texas in the United States of America. It states that petroleum (oil and gas) is capable of being owned in a fee simple. The thrust of this theory is that the owner of a piece or parcel of land is taken as the owner of the petroleum lying underneath the land. It is also known as the ownership in place theory.

[12]H R Williams & C J Meyer, *Oil and Gas Law* (New York: Matthew Bender & Co, 1991)
[13](1889)1718A724
[14]*Ibid.*
[15]L Atsegbua,*Oil and Gas Law in Nigeria: Theory and Practice, 2nd* Ed., (New Era Publication, Benin: 2004)
[16]Y Omorogbe, *Oil and Gas law in Nigeria* (Malthouse Press Ltd., 2003), at 32

It is a strict adherence to the maxim *cujusestsolumejuestueque ad coelom et ad inferos,* the fee holder owns oil and gas to the same extent that he owns other, non-fugacious minerals. In this regard, the land is taken to include everything down to the crux and up to the sky.

This theory is however weak and capable of being disputed, as oil and gas are fugacious substances and wanders from place to place beneath the surface of the earth. Oil and gas may be-remotely extract or exploited with modern technologies, away from the place of its direct deposit. The fee simple or absolute ownership is however weak. This notwithstanding the theory has also been adopted in a number of States. The attraction theory lies in the notion that, under this theory, a landowner owns petroleum beneath his lands to the same extent as he owns coal or any other hard mineral, but his ownership is qualified by what is known as the 'rule of capture'. This rule provides that if the petroleum on an owner's lands escapes and goes into the lands of another, his title by implication becomes extinguished.[17]

One of the leading cases on the ownership in place theory, as it is applied in Texas, is *Brown v. Humble Oil & Refining Co,* where the Court stated thus:

> 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.[18]

Practically speaking the effects of the two theories are similar. In both theories the land – owner is not in fact entitled to petroleum beneath his land. What he has are rights to sink as many wells as he desires subject to practices, and to extract as much petroleum as he can produce.[19]

The Non-Ownership Theory

This theory posits that petroleum is not capable of being owned since it is fugacious. The non-ownership theory otherwise referred to as "Non-Qualified 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.

This theory has been applied in a number of cases. For example, it *Donaghey,* the Court acknowledged that "... 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.[20]This is largely because, until the ownership is exercised by owning and controlling the substances, no right could be exercised as to ownership of oil and gas.[21] The position of the court in the

[17]For further insights on the rule of capture, see R E Hardwicke, 'The Rule of Capture and its Implications as Applied to Oil and Gas), (1935), *Tex Law Rev,* at 401

[18]See *Brown v. Humble Oil & Refining Co*. (1935) Tex. S.C. 83 S.W. (2d) 935, at p. 940

[19]Y Omorogbe*supra* note 16

[20]*Rich v. Donaghey (1918) Okla. S.C., 3 A.L.R. 352, p.* 555

[21]The above position was further amplified m the case *of Strotherv. Maugham,* where the court declared that:

above cases is informed by the fact that oil and gas substances are fugacious in nature and are not stable within the container although they cannot escape from it."[22]

The Domanial System

The domanial law system provides for the vesting of ownership rights in the sovereign. This is the most prevalent system of ownership of minerals.[23]Practically every country - with the exception of the United State - retains sovereign rights over all mineral deposits. In several countries, the right is enshrined in their respective Constitutions. In this situation the State has the option of exploring and exploiting its natural resources by itself, or granting right to third parties on whatever condition it may deem suitable and appropriate. This is the model being operated by Nigeria, as illustrated above,

Islamic Ownership Theory

This conception of petroleum commons has its root in Islamic economic theory and political practice since the 1970s. It is based on the notion that petroleum found beneath Islamic territory is the common possession of the worldwide Islamic community *(Ummah)* and consequently it is neither State nor private property. The theory makes a number of assumptions. First, since oil is a sub-soil resource, from an Islamic perspective, it is seen as a gift from Allah and hence a community good. Although Islam economics respects private property, it also recognizes the role of communally shared resources. Islamic economics accepts the standard division of private, state, and common property. Oil falls within the category of common property. Although some common property must be mined (like oil, gold, silver, and iron), but the minerals so discovered or produced remain the common property of all Muslims. The Caliphate or state itself might, under Islamic law, mine the resources or sub-contract their collection, but all revenues gained from their sale should under Islamic law, be kept in the *Bait al-Mal* – the same treasury for which the zakat, or redistributive tithe, are designated.

The second principle of Islamic economics is anchored on redistributive fairness. Despite its respect for private property, Islam also provides for institutions to aid a system of income transfers. The third principle of Islamic economics is based on the prohibition of waste and the concern for conserving scarce resources. Under this principle, oil would no longer be considered a State or corporate commodity to be sold to the highest bidder, and instead would be viewed as a common good whose conservation would be valuable in itself.

4. Legal Framework for Ownership of Mineral Resources in Nigeria

The ownership and control of natural resources in Nigeria pre-dates the Constitution of the Federal Republic of Nigeria 1999 (as amended). Prior to Nigeria's independence; the country and its natural resources were regarded as the property of the Great Britain.[24] The British people laid claim to and

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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.
See *Strother v. Maugham (1915) 133La. 437.*

[22]See *Bays v. CPR Mid Imperial Oil Limited J.C.P.C. [1953] 7 WWR. (NS) p. 550 -551*

[23]Y Omorogbe, *supra note 16.* See also Y Omorogbe, *The Oil and Gas Industry: Exploration and Production Contracts* (Lagos: Florence and Lambard (Nigeria Ltd; 2008) pp. 12-13.

[24]I Sagay, 'Ownership and Control of Nigerian Petroleum Resources; A Legal Angle', (1997) *Nigerian Petroleum Business: A Handbook* (Victor Erostosele, ed.) at p 8.

controlled the natural resources found in Nigeria without "the interest of the colonised people.[25] British colonial administration enacted oil and mining regulations which vested mineral rights in Nigeria on the British government.[26] In 1914. Lord Lugard, enacted the Mineral Oil Ordinance "to secure easy administration over mining and oil rights ... and making it a wholly British concern.[27]

The 1914 Mineral Oil Ordinance provides that:

> No lease or license shall be granted except to a British subject or to a British company registered in Great Britain or in a British colony and having its principal place of business within her majesty's dominion, the chairman and managing director (if any) and the majority of the directors of which are British subjects.[28]

Commenting on this provision, Okonmah has written that this piece of legislation "vested the right to search for, win and work mineral oils exclusively in British subjects or companies controlled by them". Simply put. this statute entrusted on Lord Lugard the power to exclusively grant "sole concessionary rights over mining and oil only to British companies' subjects."

Constitution of the Federal Republic of Nigeria 1999

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

> Notwithstanding the foregoing provisions of this Section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.[29]

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

The implication of the above provision is that no State government or local government has a legal right of ownership of mineral resources found within its territory. Consequently, it cannot make laws governing the exploration, development and production of mineral resources. All such matters are within the Exclusive Legislative List as provided by the Constitution.[30] What the Constitution on

[25]In 1906 and 1907. Legal Guidelines on mining were enacted to govern the operations of the mining and oil companies in Nigeria. In 1914 Lord Lugard enacted the Mineral Oils Ordinance

[26]A O N Raji and T S Abejide, 'The British Mining and Oil Regulations in Colonial Nigeria' 1914 – 1960S: An Assessment', (2014) *Singaporean Journal of Business Economics and Management Studies*, Volume 2, NO. 10 at 63-66

[27] Section 6(1), 1914 Mineral Oils Ordinance, Laws of the Federation of Nigeria and Lagos (In Force 1 June, 1958 (1959))

[28]P O Okonmafo, 'Rights to Clean Environment: The Case for the People of Oil-Producing Communities in the Niger Delta', (1997) *Journal of African Law*, 4 (1) at 43 - 67

[29]Similar provisions are contained in Section 1, Minerals and Mining Act, No. 20, 2007

[30] Second Schedule of the Constitution of the Federal Republic of Nigeria, 1999

the above provision did was to cloth the provision of Section 1 of the Petroleum Act with constitutional flavor with an order that the management of the resources shall be in accordance with the prescription of the National Assembly including the formula for distribution of the proceeds thereof.

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

The Constitution also allowed a derivation fund of not less than 13percent of the revenue accruing to the federal account directly from any natural resource to the State from where it is derived.[31] Following a widespread protest, the Federal Government instituted a case against the States of the federation asking the Supreme Court to interpret what constituted the seaward boundary of a littoral State in Nigeria.[32] The Federal Government maintained that natural resources located within the Continental Shelf of Nigeria are not derivable from any state of the federation. The Constitution, being the grundnorm is supreme, and if any other law is inconsistent with its provisions the Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.

Petroleum Act

The most important petroleum ownership/control legislation in Nigeria is the Petroleum Act, 1969,[33]which explicitly and intricately defines the issues of petroleum resource ownership and control. This Act provides for the exploration of petroleum from Territorial Waters and the Continental Shelf of Nigeria and to vest the ownership of, and all on-shore and off-shore revenue from petroleum resources in the Federal Government.

The preamble to the Act[34] describes it thus:

> An act to provide for the exploration of petroleum from, the territorial waters and the continental shelf of Nigeria and to vest the ownership of, and all on-shore and offshore revenue from petroleum resources derivable therefrom in the Federal Government and for all matters incidental thereto.

The Petroleum Act, 1969 in a manner identical to Section 44(3) of the Constitution of the Federal Republic of Nigeria, 1999 makes it clear in its preamble the dispossession of land rights of every individual who happens to own land sitting upon oil. The Act cleans the slate of any property ownership if there is oil or the possibility of oil, land ownership vest in the Federal Government solely. The government may pay compensation for improvement on land.[35]

Section 1 of the Act states:

> The entire ownership and control of all petroleum in, under or upon any lands to which the section applies in the state. The Section in turn applies

[31] Constitution of the Federal Republic of Nigeria, 1999 (as amended), section 162(2)
[32]*Attorney-General of the Federation v. Attorney-General, Abia State & 35 Others* (2002) 6 NWLR pt 764, 543-903
[33] Laws of Federation of Nigeria Cap P10, 2004
[34]*Ibid*
[35] Land Use Act, CAP L5, Laws of Federation of Nigeria, 2004, section 2(c)

> to all land, including land covered by water which is in Nigeria, land under the territorial waters, or land which forms part of the continental shelf, or which forms part of the Exclusive Economic Zone of Nigeria.[36]

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

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

Section 2(2) of the Act granted concession to a citizen of Nigeria or a company duly incorporated in Nigeria under the Companies and Allied Matters Act.[37]Simply put only an unregistered company cannot be granted concession. This is why most foreign oil industries incorporate Nigerian subsidiaries through which they obtain licences and carry-on operations. (This is legal and within the ambit of the law since the law does not require a company incorporated in Nigeria to be owned by Nigerians alone).

Furthermore, Section 2(1) of the same Act empowered the Minister of Petroleum to grant oil mining lease to search for, win, work, carry away and dispose of petroleum. The effect of this is that ownership of produced oil under a license is well settled and free from controversy. Also, Section 1(2) of the Petroleum Act made the provisions in Section 1 applicable to all lands including lands covered by water that is in Nigeria or is under the territorial waters, of Nigeria or form part of the continental shelf. The logical consequence of the Nigerian government's right to the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters is that the government can condemn private land for any aspect of petroleum development. In other words, while individuals' land surface improvements (in the form of buildings, crops, tombstones, shrines and ancestral cemeteries) remain private, minerals, mineral oils and natural gas in, under or upon the land are viewed by the state as public goods and government's intervention in their exploitation becomes simply a case of public use.

Minerals and Mining Act 2007

The Nigerian Minerals and Mining Act 2007 repealed the Minerals and Mining Act, 1999. Section 1 of the Act provides:

> The entire property in and control of all mineral resources in, under or upon any land in Nigeria, its contiguous continental shelf and all rivers, streams and watercourses throughout Nigeria, any area covered by its territorial waters or constituency and the Exclusive Economic Zone is and shall be vested in the Government of the Federation for and on behalf of the people of Nigeria.[38]

Consequent upon this provision, the Act[39]provided that all lands in which minerals have been found in commercial quantities shall, from the commencement of the Act be acquired by the Government of the Federation in accordance with the provisions of the Land Use Act. However, by virtue of Section 3.

[36] Petroleum Acts, (*Op.cit*), Section 1(2)(a-d)
[37]Cap C20. Laws of the Federation of Nigeria, 2004
[38] Minerals and Mining Act, No. 20, 2007, section 1.
[39]Section 1(2) (*Ibid*)

Some lands are excluded from mineral exploration and exploitation and, as such, no mineral title can be granted in respect of such land. The lands referred to in Section 3 includes land set apart for, or used for, or appropriated, or dedicated to any military purpose except with prior approval of the president; land within fifty meters of an oil pipeline license area; land occupied by town, village, market, burial ground or cemetery, ancestral, sacred, or archaeological site; land appropriated for a railway, public building, reservoir, dam, or public road and land that is subject to the provisions of the National Commission for Museum and Monument Act[40]and the National Parks Services Act.[41]

Perhaps due to the importance attached to mining, Section 22 of the Act provides that the use of land for mining operations shall have a priority over other uses of land and shall be considered for the purposes of access, use and occupation of land for mining operations as constituting an overriding public interest within the meaning of the Land Use Act even though the ownership of mineral resources is entirely vested in the Federal Government.

Furthermore, the Act has vested the entire property in and control of all mineral resources in, under, or upon any 'and in Nigeria, its contiguous continental shelf and ail rivers, streams and water courses throughout Nigeria, any area covered by its territorial waters or constituency and the Exclusive Economic Zone in the Federal Government of Nigeria. This provision essentially mirrors the Constitution of the Federal Republic of Nigeria,1999.[42]The most striking aspect of this Act is the mentioning or inclusion of the Continental Shelf. This was one of the reasons for the heated argument in the case of *Attorney-General of the Federation v. Attorney-General of Abia State & 35ors*.[43] The argument was whether the littoral States could claim offshore of the sea adjacent to boundaries of their States so as to enhance their revenue derivation potentialities. This argument was struck off on the ground that whatever revenue that accrues from drilling offshore belongs to the whole Federation of Nigeria based on Section 162(2) Constitution of the Federal Republic of Nigeria, 1999.[44]

The Section states thus:

> The president, upon the receipt of advice from the Revenue Mobilization Allocation and Fiscal Commission, shall table before the National Assembly proposal for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of states; revenue generation, land mass, terrain as well as population density:

Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen percent of the revenue accruing to the Federation Account directly from any natural resources.

The Federal Government of Nigeria in trying to create an enabling environment for business to thrive developed this legislative framework. The Act contains specific provisions that will enhance private

[40]Cap N19 Laws of the Federation of Nigeria, 2004
[41]Cap N65 Laws of the Federation of Nigeria, 2004
[42]Section 44(3) CFRN, (*Op.cit)*
[43](*Supra*) p. 18
[44]Y Aboki, 'Law and Society: The Land Use Act Catalyst for Food Security. Protector of Health, Provider of Good Environment', *An Inaugural Lecture*, Ahmadu Bello University Press Limited (2008), p. 11.

sector participation in the development of the mining industry in the country. One of the provisions contained therein is the vesting of ownership and control of minerals in the Federal Government. Moreover, The Act gives priority for the use of land for mining over other uses of land and shall be considered for the purposes of access, use and occupation as constituting overriding public interest under the Land Use Act. The provision of the Land Use Act, which regulate matters relating to access to land for mining purposes contemplate that land, has a special status. Hence, the Governor has the right to grant a Right of Occupancy and a corresponding power to revoke the Right of Occupancy for overriding public interest.[45] In practice, however, since the Land Use Act vests ownership of land comprised within the territory of a State in the Governor of the State, the process is not so simple particularly where both tiers of Government work at cross-purposes.

Exclusive Economic Zone Act

The scope of the Act is encapsulated in its preamble which states categorically that the objective of the Act is to declare Nigeria's exclusive sovereign right over the natural resources of the Exclusive Economic Zone which natural resource are minerals (only to be found in the continental shelf) and living 'species found in the superjacent waters. It also claims sovereign and exclusive rights to the natural resource of the superjacent waters i.e.; the sea itself for 200 nautical miles. In other words, the Exclusive Economic Zone Act contains two major aspects, the aspect relating to the sea and its natural resources and the part relating to the Continental Shelf and its mineral resources. Sections1 (1) and 2(1) categorically buttress these points.

Section 1(1) provides thus:

> Subject to the other provisions of this act, there is hereby denominated a zone to be known as the Exclusive Economic Zone of Nigeria (hereinafter referred to as the "Exclusive Zone") which shall be an area extending from the external limits of the territorial waters of Nigeria up to a distance of 200 nautical miles from the baseline from which the breadth, of the territorial waters of Nigeria is measured.[46]

Section 2(1) also states:

> Without prejudice to the Territorial Waters Act, the Petroleum Act or the Sea Fisheries Act, sovereign and exclusive rights with respect to the exploration and exploitation of the natural resources of the sea bed, subsoil and Superjacent waters of the exclusive /one shall vest in the Federal Republic of Nigeria and such rights shall be exercisable by the Federal Government or by such minister or agency as the government may from time to time designate in that behalf either generally or in any special case.[47]

Another very interesting and revealing aspect of the Act is that it recognizes that some parts of the Nigerian Continental Shelf may extend into the continental shelves of other states and consequently clear provisions are made in section 1(2) and (3) of the Act resolving all conflicts in advance. It should be noted that Nigeria first lays claims to 200 nautical miles of continental shelf. It then provides that in areas of the sea where a neighboring State's continental shelf might also extend into Nigeria's

[45] Land Use Act, Cap L5, Laws of the Federation of Nigeria, section 28(1).
[46] Cap E17 Laws of the Federation of Nigeria, 2004
[47] *Ibid*

continental shelf the delimitation (division) of the continental shelves of the other state or states and Nigeria shall be based on a treaty or written agreement.[48]

As the International Court of Justice declared in the *Malta v. Libyan Arab Jamahiriya,*[49] although there can be a Continental Shelf where there is no corresponding Exclusive Economic Zone, there cannot be an Exclusive Economic Zone without a corresponding Continental Shelf. Indeed, not only has Nigeria claimed a continental shelf of 200 nautical miles, it has also empowered oil companies to erect artificial islands and installations and structures, meaning offshore drilling platforms on the continental shelf of Nigeria for up to 200 nautical miles.[50]

Land Use Act

The significance of the land ownership and tenure system in Nigeria and its impact on ownership of natural resources make any discussion on the ownership of natural resources incomplete without an appreciation of the country's land ownership and tenure system. Prior to the coming into force of the Land Use Act, Nigeria's land ownership and tenure system had undergone historical development in three distinct stages which are the pre-colonial, colonial and post-colonial such that what obtained in the country was the dual system of landownership.[51] The pre-Land Use Act structure was such that in the Southern States comprising of the former Western Region, Eastern Region, Mid-western Region and Lagos, the communal-system of land ownership held sway and it was from this system, that private ownership of land evolved through grants, sales and partition.

Whereas in the Northern Region, the system of land ownership was governed and regulated by the Land Tenure Law that was enacted in 1962 by the regional government to replace Lord Lugard's Land and Native Rights Ordinance of 1916.[52] It is noted that the Land Tenure Law replaces Lord Lugard's Ordinance of 1916. It substantially reaffirms the principles and philosophy underlying the Land and Native Rights Ordinances.[53] The effect of this enactment is that it facilitated easy dispossession of lands from the natives by the authorities.

It can be submitted that the structure that existed prior to the introduction of the Land Use Act reflects a basic tenet of an ideal federalism. The Land Use Act, 1978 was, therefore, promulgated and became applicable all over the federation as evident in its preamble and Section 1, which vests all lands comprised in the territory of each State in the Federation on the Governor of the State, who in turn shall hold it in trust and administer it for the use and common benefit of all Nigerians. The Land Use Act was specifically entrenched in the 1979 Constitution[54]and also retained in the Constitution of the Federal Republic of Nigeria. 1999, thus making its repeal cumbersome and tedious.

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

[48]S Itse. 'The On-Shore, Off-Shore Bill: An Addendum', http://www.notes.on.exclusive.economic.zone.act.com, Accessed on the 9/2/2019 at 1.09pm
[49]Continental Shelf Case 1985, http://www.icj-cij.org/docket.com. Accessed on the 9/2/2019 at 2.31pm
[50]S Itse, The On-Shore,*op.cit*
[51]I O Smith, *The Law of Real Property in Nigeria. Law Centre*. (Lagos: Lagos State University, Lagos, 1995), p.5
[52]I*bid*
[53]M A Ajomo, 'Ownership of Mineral Oils and the Land Use Act', *Nigerian Current Law Review*, 1982, p. 335
[54] The Constitution of the Federal Republic of Nigeria, 1979, section 274(5)(d) Constitution.

vesting of title to land in the Governors of the respective states, one cannot exercise rights over lands that belong to the Federal Government and its agencies.[55] This includes lands that contain mineral depositor land used for related purposes. Hence, none of the States that are component units of the federation have any direct control over the exploration and exploitation of minerals. It is equally noted that, apart from legislation, case law has also acceded to the fact that ownership and control of mineral resources is vested in the Federal Government. This was confirmed by the Supreme Court of Nigeria in the case of *Attorney General of the Federation v. Attorney General Abia State& 35 Ors*[56] 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. The court went on to decide that the mere fact that oilrigs bear the names of indigenous communities on the coastline adjacent to such offshore area does not prove ownership of such offshore areas.

There is no doubt from the pronouncement of the Supreme Court that ownership and control of mineral resources whether onshore, offshore, in Nigeria's territorial waters, the Exclusive Economic Zone[57] or the Continental Shelf[58] is vested in the Federal Government of Nigeria.

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

Nigeria is located on the West Coast of Africa in the Gulf of Guinea with an approximate coastline of about 853 kilometers.[59]The country is endowed with enormous oil and gas resources found both onshore on the swampy areas of the Niger Delta region and offshore on her territorial sea and continental shelf. The Federal Government currently owns all natural resources in Nigeria. The National Assembly is empowered by the Constitution to determine the formula for the distribution of funds in the Federation Account.

The issue which was not, however, addressed by the derivation formula[60] was whether the offshore bed of the territorial sea, Exclusive Economic Zone and Continental Shelf belonged either to the littoral States or the Federal Government. This culminated in a legal battle between the Federal Government and the 36 States of the Federation, including the eight Littoral States as to the Southern (or seaward) boundary of each of the Littoral States. The boundary was important because of the extensive petroleum reserves that lay both onshore and offshore of the States coast. At stake were each party's proportionate share of the reserve, which would be based on where the State's legal shoreline was determined to be, and the extent of the State's seaward jurisdiction.

[55] Land Use Act, *op.cit*, section 49

[56]*Supra*, p. 22

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

[58]Continental Shelf means the Seabed and Subsoil of those Submarine Areas adjacent to the Coast of Nigeria the surface of which lies at a depth no greater than 200 meters or, where its natural resources are capable of exploitation, at any depth below the surface of the Sea_3 excluding so much of those areas as lies below the Territorial Waters of Nigeria

[59]E Egede, The Nigerian Territorial Waters Legislation and the 1982 Law of the Sea Convention, (2004) Vol. 19. No. 2, *International Journal of Marine and Coastal Law* p.151

[60]For more information on the Historical Analysis of the Derivation Principle, see K Ebeku, Nigerian Supreme Court and Ownership of Offshore Oil. 27th National Resources Forum, (2003) pp, 291-299 *(Supra*), p.22

In the case of *Attorney-General of the Federation v. Attorney-General of Abia State & 35Ors,*[61]the issue before the Supreme Court was not merely a determination of the seaward limit of littoral stales but more importantly, a determination of the ownership of the sea-bed between the littoral states and the Federal Government. The Federal Government (the Plaintiff) based its case on the constitutional powers of the Federal Government as the only authority in Nigeria empowered to legislate on external matters, its sovereign powers as a Nation State recognized by international law, and on the 1982 United Nations Convention on the Law of the Sea and 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.

The Federal Government asserted that the southern (or seaward) boundary of each of the littoral States is the low-watermark of the land surface of such State or, the seaward limit of inland waters within the State, as the case so requires. In addition, the Federal Government contended that natural resources located beyond the low-water mark and within the Continental Shelf of Nigeria are not derivable from any state of the federation. The defendants including the eight littoral states, which are Akwa Ibom, Bayelsa, Cross River, Delta, Lagos, Ogun. Ondo and Rivers States contended that the territory of the littoral state extended offshore as far as the Continental Shelf and even beyond. The States relied in their defense on Section 1(1) of the Offshore Oil Revenue (Registration of Grants) Act[62] as evidence of the Federal Government's acknowledgement or acceptance that the Continental Shelf forms part of the littoral States to which it is contiguous.[63]

They maintained that natural resources derived from both onshore and offshore are derivable from their respective territory and in respect thereof each is entitled to "not less than 13 percent" allocation as provided in the proviso to Subsection (2) of Section 162 Constitution of the Federal Republic of Nigeria, 1999. This is where the issue was joined. The Supreme Court was then saddled with the first opportunity ever to determine the southern (or seaward) limit of each of the eight littoral States. Willing to disentangle the legal issues involved, but unable to find Nigerian legislation's dealing expressly on the issue, the Supreme Court embarked on a voyage through the instrumentality of the political history of Nigeria and in the end relied heavily on colonial Orders-in-Council,[64] foreign cases[65]and international laws.[66]

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[61]*Supra*, p. 22

[62]Cap 336 Laws of the Federation of Nigeria. 1990 now Cap 04 Laws of the Federation of Nigeria, 2004

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

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

[65]See *R v. Keyn* (1876) 2 EX.D.63; *New South Wales v. Commonwealths ALR* (1975-6) 1; Re: Ownership Offshore Mineral Rights, Vol.65 DLR; 354. 1967

[66]There appears to be no Nigerian legislation dealing expressly with the precise location of the seaward boundary between the littoral States and the Federal Government. When the Federal Government through its counsel, attempted to establish the precise location by inference from the Nigerian Territorial Waters Act, Cap. 428. Laws of the Federation of Nigeria. 1990, as amended by Territorial Waters (Amendment[1]) Act No. 1 of 1998, the purport of this amendment, was to reduce the breadth of Nigeria's territorial sea from 30 nautical miles to 12 nautical miles; the Exclusive Economic Zone Act. Cap. E17, Laws of the Federation of Nigeria 2004 and the Sea Fisheries Act, Cap.404, Laws of the Federation of Nigeria, the inference, were rejected by the Court. On this point. Hon. Justice Uwais, CJN (as he then was) stated that "Chief Williams has tried to show this by inference or implication

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

The Supreme Court ruling is of course right. The Supreme Court has read the properly, stating the law as it is. It must be realized that the responsibility of the Court is juridical and not jurisprudential. The Court is to interpret the meaning of the language of the law as presently couched and not to rewrite or amend them or declare them wrong choices of words. It is not to declare whether the law as it is, at the moment is proper, just and equitable or not but to state what they provide and at best whether they have been validly made[67] by competent legislatures.[68] To expect otherwise from the court is to be sentimental and not judicial. The court has therefore done its work.

5. Conclusion

There is no doubt that Nigeria and international Laws gave the Federal Government of Nigeria some rights over the natural resources of minerals and oil minerals found in the Niger Delta States' environment.

The drilling, operation, mining and production in these environments are not without consequences.

Thus, some neglects by and lack of commensurate compensations by the government and oil companies were identified as one of the reason for some agitation by the people of Niger Delta States over their degraded and declined environment, hence, the need for social responsibility.

6. Recommendations

There is need for some of the Nigerian laws to be amended to make the Nigerian Government and Oil Companies especially the multinational corporations to think about their host communities and for them to be environmental friendly.

They should imbibe social responsibility as a panacea to environmental degradation, decline and crisis in Niger Delta States.

This will also ensure environmental sustainability, co-operation and peace between the federal government and communities of the Niger Delta States on one hand and between the oil producing companies and the communities on the other hand.

under the provisions of the Territorial Waters Act. the Sea Fisheries Act and the Exclusive Economic Zone Act. All of which made reference to the territorial waters of Nigeria. However, with respect, none of the legislations (sic) expressly defines the seaward boundary of the littoral Mates. This in my opinion cannot be inferred from the legislations (sic)." Even the 1999 Constitution does not have an express provision on the seaward limit of littoral states.

[67]See *Attorney-General of Bendel State v. Attorney-General of the Federation &*Ors (1982) 3 NCLR, 1

[68]*Attorney-General of the Federation v. Attorney-General, Abia State* (*Supra*)