

WHAT EFFECT DOES THE OWNERSHIP OF RESOURCES BY THE GOVERNMENT HAVE ON ITS PEOPLE: A CASE STUDY OF NIGERIA?

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ABSTRACT: Most countries have conferred the power /ownership of their resources on their Government, not allowing individuals to lay claim to it. This has been beneficial for international business purposes, especially in the petroleum sector and has ensured stable revenue which is then distributed amongst the individual states in the country; while other states like the USA recognise both state and individual ownership.

Associated with exploration and exploitation activities of most natural resources, is environmental degradation, which puts the environment in a non-usable position. There is therefore a need to reduce the effect of these activities.

With increasing Environmental damage from the international oil companies, which has not been properly addressed by the government in countries like Nigeria, individuals have begun to opt for control of their resources rather than leaving it in the control of the government. This paper aims at analysing the effect of resource ownership by the federal government of a state, using Nigeria as a case study.

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LIST OF ABBREVIATIONS

EEZ	Exclusive Economic Zone
GHG	Green House Gas
ICJ	International Court of Justice
ILO	International Labour Organisation
IOC	International Oil Company
LFN	Law of the Federation of Nigeria
NDDC	Niger Delta Development Commission
NGO	Non Governmental Organisation
OMPADEC	Oil Mineral Production Areas Development Commission
SPDC	Shell Petroleum Development Company
UNCLOS	United Nations Convention on the Law of the Sea

INTRODUCTION

Countries, which are largely dependent on their resources (mineral, and hydrocarbons) have created legislations which devolve ownership of these resources from the hands of citizens in whose lands they are found and place them in the care of the government. The rationale behind this is basically to secure and ensure that these resources are used in a sustainable manner which is beneficial not only to those in whose lands the resources are found, but also their future generation at large.

It can be argued that the doctrine of national ownership, which emphasises the above opinion, 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 (oil), are still able to achieve this unified goal, without conflict of both forms of ownership. Note that since the national ownership deprives individuals of their lands upon which these mineral resources are found, there will be adverse effects/reactions from these individuals.

This paper sets a main question to be answered, that is, “what is the effect of national ownership of resources?” It sets a sub-question to be answered which will help in answering the main question:

Has the national ownership of resources proven to be more effective than other forms of ownership?

This topic is of relevance today as most states which practice the national ownership of resources (using Nigeria as an example) are continuously having the indigenous people agitating for the control of their resource, with some going as far as kidnapping the foreign experts from the IOCs. The paper makes use of both comparative and analytic methodology in arriving at its conclusion. First it compares the various forms of resource ownership, and then analyses each them individually to ascertain their effects.

1. WHAT IS OWNERSHIP OF RESOURCES?

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

UNGA 1803 of 1962 in Article 1 provides that “the right of the peoples and nations to the permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well being of the people of the state concerned”¹. While the Rio declaration which follows in line with the Stockholm conference, provides in Article 2, that “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”². What is important to note is that these conventions did not specify the prohibition of ownership of resources by individuals/citizens; rather they stressed the protection of the individual’s interest. It is therefore left to the national laws of each country to develop its own system of ownership. In the USA, there are 3 main theories on ownership of oil; the absolute ownership theory (Texas Theory), the qualified interest theory (Pennsylvanian theory) and the Oklahoma theory. Countries like Nigeria, however, have only one system which is the National ownership theory, since they do not recognize ownership by citizens or individuals.

1.1. The Absolute Ownership Theory

This theory originates from Texas, which is the largest oil producing state in the USA. The theory is a relic of feudalism and postulates the fee simple ownership of oil and gas

¹ Brief summary of UN Resolution,
<http://www.geocities.com/savepalestinenow/unresolutions/studyguide/sgunresgasum1960.html>.

² Rio Declaration on Environment and Development,
<http://www.unep.org/Documents/multilingual/Default.asp?DocumentID=78&ArticleID=1163>.

of the land under which it is found. The theory is synonymous with the common law doctrine of “Quid Quid Platatur Solo Solo Cedit” which affirms that he, who owns a land, owns that beneath it³. This is the same with the legal maxim “cujus est solum, ejus est usque ad coelum et ad inferos”⁴- the owner of the surface owns everything from the skies to the center of the earth. Under the Absolute ownership theory, the owner of a piece of land owns the oil beneath it.

One of the flaws of this theory is that an individual can not claim ownership on hydro carbon as it has a fugacious and vagrant nature and straddles between different lands or zones. This is why in recent days, states and international oil companies have developed agreements such as the joint development and unitization to put to rest the issue of ownership where such hydrocarbon straddles between zones. Another flaw of the theory is that it did not take into consideration that a reasonable percentage of the world’s petroleum deposit is found in the continental shelves or Exclusive Economic Zones (EEZ) of states. Whoever then owns such deposit as an individual can not lay claim to ownership of these areas other than the states as contained in the 1982 United Nations Convention of the Law of the Sea (UNCLOS)⁵. One can only say the theory is politically convenient, particularly in the administration of petroleum revenue.

1.2. The Qualified Ownership Theory

This theory had its root in Pennsylvanian history. This theory is based on the concept of petroleum as akin to “animal farea natural” which implies that until an animal farea natural (wild animal) is captured and kept in the exclusive custody of the captor; the captor can lay no exclusive claim to it. This is called the rule of capture in the USA.

The interest of the individual is a qualified one and subject to his ability to reduce hydro carbon to captivity. The flaw here is that the vibrant nature of hydrocarbon is equated with wildness.

³ Akpo, M., True Federalism and the Resource Control in Nigeria. Quadro Impressions Ltd, 2002. Page 370.

⁴ Ownership of Oil and Gas, <http://www.fhoa.ca/ownership.htm>.

⁵ Part 5 and 6 of the law of the Sea, on the Exclusive Economic Zone and Continental Shelves.

1.3. The Non-Ownership Theory (Oklahoma Theory)

This theory originated from Oklahoma. The theory contends that petroleum is incapable of ownership either absolutely or in a qualified manner. It is hinged on the flowing nature or state in which the mineral occurs under the surface of the earth. One may say this theory is nihilistic in its approach, as petroleum is known to also be in a physical state and should therefore be owned. It will be too naïve to conclude that petroleum is incapable of ownership because it occurs in a fugacious nature. The reality is that presently, oil is capable of ownership; what is in contention in this paper is if ownership by the government of a nation is more efficient than individual ownership, considering the adverse consequence of the latter.

1.4. The National Ownership Theory

This theory is found in most countries today. It advocates the vesting of complete and total ownership of petroleum resources in the government of the state. It is an effective theory in terms of attracting foreign direct investment for countries. Countries such as Nigeria, South Africa, Bolivia, Venezuela and China utilise the National Ownership Theory.

The South African mineral law⁶ provides that “Mineral resources are the common heritage of all the peoples of South Africa and the State is the custodian thereof for the benefit of all South Africans”. While the Chinese mineral law⁷ provides “Mineral resources shall be owned by the State. The State’s ownership shall be exercised by the State Council...” They all reflect that control of the minerals is solely in the hands of the government.

2: HISTORY OF MINERAL OWNERSHIP IN NIGERIA

The Federal Republic of Nigeria is endowed with abundant mineral resources and hydro carbons, besides such other valuable resources as bitumen, coal, columbite, tin, gold, and

⁶ South Africa mineral law 2003, Section 3 (1); <http://www.lexadin.nl/wlg/legis/nofr/oeur/lxwezaf.htm> (last visited on the 3rd of January 2007).

⁷ 1996 mineral law of china; <http://www.lexadin.nl/wlg/legis/nofr/oeur/lxwechi.htm>

limestone.⁸ Its vast oil fields are concentrated in the Niger Delta region, which comprises Akwa Ibom, Bayelsa, Cross Rivers, Delta, Edo, and Ondo States. Oil was first found in Nigeria in 1956, in a town called Oloibiri⁹, which is located in the present day Bayelsa state. This resource has been vested in the Federal Government of Nigeria through various legislations.

2.1. The 1999 Constitution of The Federal Republic Of Nigeria

The 1999 constitution of the Federal Republic of Nigeria, which replaced the 1997 constitution, in section 44(3); the equivalent of section 40 (3) of the 1997 constitution, provides that “Notwithstanding the foregoing provision of this section, the entire property in the control of all mineral oil and natural gas in, under or upon any land in Nigeria, under or upon the territorial waters and the exclusive economic zones of Nigeria shall be vested in the government of the federation and shall be managed in such manner as may be prescribed by the national assembly”.

The section expressly makes known that the control of oil and natural gas is vested in the government of the Federation, and not the state governments or the individuals. It is no surprise then, that state governments have teamed up in the present Niger Delta to request that control of resources should be ceded to them, even though not in an absolute capacity.

2.2. The 1979 Land use Act

This act did not vest ownership of land on the federal government, but it vested all lands in the urban areas in the territory of a state in the government of that state (except land vested in the federal government or its agencies), to hold in trust for the people and allocate for residential, agricultural, commercial and other purpose (with similar powers conferred in the local governments in respect of lands in non-urban areas)¹⁰. What to note here, is that this provision only vests surface rights on the state government and does not

⁸ Investment opportunities in solid minerals, <http://www.nigeriabusinessinfo.com/minerals.htm> (last visited on the 13th of January 2007).

⁹ Ken Saro-wiwa, a martyr for peace in Nigeria, <http://www.warresisters.org/nva0504-1.htm> (last visited on the 2nd of January 2007).

¹⁰ 1997 Land law, Laws of the Federation of Nigeria (LFN) Cap.202.

recognise those rights below the surface of the earth. Where minerals are found under these lands, the right to the minerals is vested upon the Federal government. The act can be criticised to project alienation of the people from their land, by giving them only surface rights.

2.3. The Petroleum Act of 1972

This is very similar to the UK Petroleum Act of 1934. The act provides for the control of petroleum within, upon or underlying all lands in Nigeria and the subsoil of Nigeria's territorial waters and her continental shelf by the federal government¹¹. The act makes the federal government the sole, absolute and /or exclusive owner of all petroleum extracted in Nigeria as well as its proceeds, although the proceeds exempts a 13% requirement by section 162(2) of the 1999 constitution, which is granted to the producing state from which the minerals are extracted.

2.4. The Exclusive Economic Zone Act/Offshore Act

This covers mineral resources which are found in the Exclusive Economic (Zone) EEZ of Nigeria, which has now been increased by the UNCLOS to extend from 12 nautical miles to 200. The act vests the sovereign and exclusive rights with respect to the exploration of natural resource of the sea bed, the subsoil and the superadjacent waters of the exclusive economic zone on the Federal Republic of Nigeria. The Exclusive Economic Zone is defined under the act as the 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.

3. EFFECT OF RESOURCE OWNERSHIP BY GOVERNMENT ON NIGERIANS

It took a while for the effects of these laws to manifest, as they were initially created to give the federal government the power to attract foreign investment for the benefit of the nation as a whole, but with the constant pollution and inadequate response from government in protecting the environment and ensuring there was not just adequate

¹¹ Petroleum act 1969, cap 350, LFN.

compensation, but effective payment of such compensation for environmental damages, people and states began to clamour for control of resources extracted from their lands.

3.1. The Principle of Derivation

This is a constitutional device set up by the federal government to compensate for the minerals that are being extracted from states in which the minerals are found. It is the recognition of a prior beneficial right that was subsequently expropriated¹². It is a constitutional directive which constitutes a form of reparation for an expropriated interest and can not be waived or derogated from by either the state or federal government. The principle is the basis for revenue allocation under the present and past constitutions and dates back to the pre-independence era.

The essence of revenue allocation is that a certain percent of revenue from 100% to 13% should be sent back to states from which the oil has been extracted. The intention was that host governments should be able to use these funds to reduce the amount of environmental degradation created by the extraction of these mineral. The concept was a noble idea and was effective until there was a drastic decline in the allocations to states from 100% to not less than 13% at present¹³. At this point, states could no longer meet up with their obligations and this became the turning point for their agitation for resource control/ownership.

3.2. The Principle of Self Determination

This principle has been established in international law, although it is not recognized by the Nigeria constitution. The right to self determination is a fundamental principle of human right and it entails the individual and collective right to freely determine and pursue political, economical, social and cultural development and status.¹⁴ This right has also been linked with de-colonisation, especially in areas where there are indigenous people such as Australia and the USA. The International Court of Justice (ICJ) has held

¹² Akpo Mudiaga Odje, supra at note 3

¹³ 100% in the 1960 constitution of Nigeria, while the 1999 constitution prescribes not less than 13%

¹⁴ Self Determination: Principle and the Law, <http://www.tamilnation.org/selfdetermination/> (last visited on the 31st of December 2006).

that this is a right held by the people rather than the government, alone and that it is a norm of jus cogens¹⁵, which is the highest rule of international law and must be obeyed at all times.

The principle is clearly enshrined in the International Labour Organisation (ILO) Convention 169 on the indigenous and tribal people in independent countries¹⁶ and this convention has 2 vital attributes:

- a) The right of individuals to participate in the use, management, and conservation of natural resources derived from their lands.
- b) The consultation of government with the people to establish or ascertain to what degree the interest of the people would be prejudiced.

The above attributes can also be found in the Aarhus Convention¹⁷ on the Access to Environmental information and public participation in Environmental decision-making Convention. It is therefore of no surprise that the people of the Niger Delta, are beginning to call for the implementation of the Principle of Self determination to be enshrined in the constitution¹⁸ as this would give them some form of control over the resources which is being extracted on a daily basis from their land.

3.3. The Issue of Resource Control

The reasons behind the call for resource control by the host states in the Niger-Delta can be summarised into the following 3 issues:

- a) The developmental need of the country are seen by those in the Federal government as overriding the well being of the people and their environment.
- b) Corruption; which indicates that some political elites are benefiting from the sales of natural resources and therefore are determined to ensure that nothing disrupts production and sales.

¹⁵ Ibid.

¹⁶ ILO indigenous people, <http://www.unhchr.ch/html/menu3/b/62.htm> (last visited on the 4th of December 2000).

¹⁷ Aarhus Convention, <http://www.unece.org/env/pp/documents/cep43e.pdf> (last visited on the 7th of January 2000).

¹⁸ Niger Delta Women for Justice, <http://www.ndwj.kabissa.org/Declarations/declarations.html> (last visited on the 27th of December 2006).

- c) The poverty of the rural oil producing communities, which means they have a weak bargaining power.

It is obvious that the call for resource control has been necessitated by the federal government's inability to deal with transnational companies which have degraded such communities in whose lands they operate and have failed to adhere to the international principle of sustainable development,¹⁹ the principle of best practical environmental option and mostly notably have failed in carrying out their corporate social responsibility. The federal government, who receive money from these transnational companies by virtue of its joint venture with these companies, is trying to protect its profit, rather than lose same in expropriated funds for lawsuits. This is unfortunate as even principle 3 of the Rio Declaration states that "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."²⁰ The federal government failed in merging development with environmental needs, so the states and communities took it up.

The states whom are closer to these activities than the federal government, want to have enough funds to compensate for such destruction caused by the transnational companies. The states are not alone in this struggle as NGOs and individual communities where these explorations take place, are now taking the law into their hands, in order to drive their points home and get the government to bring them and the transnationals to the table. Their actions have lead to several clashes and violence.

3.4. Communal Hostilities/ Human Right Violations

Working with the motto "the end justifies the means", the just, yet devastating struggle of the minority tribes in the Niger Delta, spearheaded by the Ijaw peoples²¹ has continually made headlines in both the national and international newspapers.

¹⁹ Report of the United Nations Conference on Environment and Development, June 1992.

²⁰ Supra at note 18.

²¹ One of the major tribes in the Niger Delta region of Nigeria.

It is surprisingly, not new to hear of communities controlling their resources e.g. in the U.S.A, communities in the state of Wyoming reaped full benefits from control of its resource from oil in 2001.²² The province of Quebec in the dominion of Canada was also given control of its resources in order to prevent a breakup of the State. However, the agitation by the Niger-Delta states has gone on for far too long, with the federal government still being resilient or adamant.

Communal hostility in the Niger Delta dates far back to 1996. It is important to note that it was not initially a hostile revolution, as the likes of Major Isaac Adaka Boro and the late Ken saro wiwa²³, used civil means to protest the hazards infringed on them by the likes of Shell Petroleum Development Company (SPDC), Agip and other transnational companies through exploration activities on their lands. Although, these protests were peaceful, they had a disastrous reaction from the federal government. The late Ken Saro Wiwa, who was the leader of the Movement for the Survival of the Ogoni People, and nine others, were sentenced to death by the then General Sanni Abacha regime, while Adaka Boro was arrested. Again, in 1998, the government of President Olusegun Obasanjo used military men to quell a protest in Odi, Bayelsa State killing most of the protestants.

In January 2006, the president of the Movement for the Emancipation of Niger Delta (MEND)²⁴, Moujahid Dokubo-Asari, was arrested for unlawful gathering by the federal government and this lead to the kidnap of 4 foreign oil workers by the movement so as to secure a release of their president.²⁵ This is just one of several kidnappings that happened

²² Mr. Chris n. Ugwu, Decentralizing ownership of resources and assets: an imperative for peace and true federalism in Nigeria, September 2002, http://www.ipn.lexi.net/images/uploaded/-3facc53546f62--chris_ugwu_september2002pdf (last visited on the 14th of January 2007).

²³ Supra at note 9.

²⁴ MEND: The Niger Delta's umbrella militant group, <http://www.cfr.org/publication/12920/> (last visited on the 28th of December 2006).

²⁵ Henry Ekwuruke, Niger Delta militants release hostages' pictures with demand. http://www.africafront.com/news/136/niger_delta_millitants_release_hostages_pictures_with_den. (last visited on the 13th of January 2007).

in the year 2006, with one of them resulting in the death of a Briton²⁶ and severe traumatisation of others. These kidnappings and violent attacks do not seem to be coming to an end and international oil companies are now scared of sending their human resources into these areas, for security reasons.

3.5. Environmental Hazards/Pollution

The federal government whose interest is securing foreign funds entered into a joint venture (Production Sharing Contract) with the international oil companies, leaving the communities to pay the price by having their lands polluted. These exploration activities bring with it adverse effects in form of the destruction of the bio-diversity in most areas of its operations and oil spillage which degrade the farm lands and pollute the rivers of these communities; killing fish and reducing the amount of oxygen that goes into the water.

The flaring of gas by the refineries pollutes the atmosphere by releasing green house gasses (GHG) in to the atmosphere. Communities have come together to ask that companies reduce the amount of pollution being emitted, or leave their communities. This is cited in section 16 of the Ogoni Bill of Rights which was presented to the Federal Government of Nigeria in November 1990.²⁷ This is not strange, as it can be found in principle 7 (common but differentiated responsibility) of the Rio declaration of 1992. They have also insisted that gas flaring should end by 2008. How realistic this is? Only time will tell. What is important to note is that if such resources are not centrally owned and controlled, it will be easier to monitor and create laws which will deal with the situation in an effective manner, since the owners and law makers live in the same environment where the pollution occurs, and will therefore have a first hand experience of the issue.

²⁶ Hostage death raises stakes in Nigeria oil crisis, http://ca.news.yahoo.com/s/reuters/061123/world/international_nigeria_hostages_dc (last visited on the 13th of January 2007).

²⁷ The curse of oil in Ogoni land, http://www.umich.edu/~snre492/cases_03-04/Ogoni/Ogoni_case_study.htm (last visited on the 16th of December 2006).

4. FINDINGS AND CONCLUSION

It is important to note that no government has been able to establish that its nation has triumphed or been able to meet its obligations, simply because all resources in the State are owned by the federal government. They may argue that for administrative purposes, it has been helpful in securing foreign investment, as only one body guided by one set of rules is involved, thereby giving the foreign investor a sense of security. This has been to the detriment of individuals on whose lands these mineral are found, as they are not compensated in any form or kind.

It is only natural that there should be some form of compensation for expropriation of property, even if such expropriation is of a legal nature. Such compensation must be prompt, efficient and adequate. In Nigeria, the federal government should realise that no amount of commissions e.g. the Oil Mineral Production Areas Development Commission (OMPADEC), which has been scrapped, or the Niger Delta Development Commission (NDDC) which is currently experiencing financial set backs will be enough to cater for the problems of the Niger Delta, or give the people the feeling that they are a part of the management of the use of their resources. It is the failure of these committees to deal with environmental pollution and degradation that has lead the youths of the Niger Delta, to take up arms to express their point of view through strings of violent clashes with both the federal government and the international oil companies.

These trends are not unique to Nigeria alone, as countries such as Canada and even the USA, where individual ownership of minerals is recognised, have gone through this phase and settled through the provision of sufficient funds or giving out control to the community as was done in 2001, in Wyoming; in the U.S.A.,²⁸ and the province of Quebec in the Dominion of Canada. The Nigerian Constitution does recognise the need to compensate states from which minerals are extracted; this is why it enshrined the derivation principle amongst the revenue allocation formula in section 160 of the

²⁸ Mr. Chris n. Ugwu, Decentralising ownership of resources and assets: an imperative for peace and true federalism in Nigeria, September 2002, http://www.ipn.lexi.net/images/uploaded/-3face53546f62--chris_ugwu_september2002pdf

constitution. The problem with this formula is that it has continuously declined as the years went by, from 100%²⁹ in the pre-independence era to not less than 13%³⁰ as guaranteed by the 1999 constitution.

In conclusion, there is need for the federal government to increase the revenue allocated to the states/individuals, in whose lands mineral resources are found, as this will enable them take action to reclaim or remediate their environment from the adverse effect of exploration. The revenue should be synonymous with what such states would have spent in restoring its environment, had it been in control of its own resources.

²⁹ The chick commission of 1953

³⁰ Section 162 of the 1999 Constitution of the Federal Republic of Nigeria

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