

# **Appraising The Oil & Gas Laws: A Search For Enduring Legislation For The Niger Delta Region\*\***

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## **Introduction:**

The oil and gas sector in Nigeria is undoubtedly going through serious crisis, due partly to a sharp reaction by the oil producing communities, which suffer grievous hardships resulting from the operations of the laws governing the sector. The various attempts to suppress these people through the gun have failed woefully. The only option clearly available to the key players in the industry (the government and the oil producing/servicing companies) is to adopt fair and equitable laws as a framework for the exploitation of the oil and gas resources in the Niger Delta. We do not have to search too far because as a people, we know what we want.

## **Hisory Of The Nigerian Oil Industry<sup>1</sup>**

The search for crude oil began in Nigeria as far back as 1908, when a German company – the Nigerian Bitumen Corporation explored for oil in the Araromi area between Ijebu Ode in the present Ogun State and Okitipupa in the present Ondo State. This pioneering effort was terminated at the outbreak of hostilities between Britain and Germany in the First World War in 1914. Given the fact the Nigeria was under the territorial control of the United Kingdom, and Germany's loss of the war, the German company's operations were not resumed after the war.

Consequently, the British Colonial administration enacted **the Mineral Oil Ordinance No. 17 of 1914** to regulate the right to search for, win, and work mineral oils. The 1914 Ordinance and its amendment in 1925 conferred powers on the Colonial Administration to grant prospecting rights. Through the instrumentality of this Ordinance, Nigeria was constituted into one concession area (1,924,871 km<sup>2</sup>) and non-British companies were statutorily barred from acquiring mineral oil rights in the area.

The law provided 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 having its principal place of business*

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<sup>1</sup> See generally, G. ETIKERENTSE, “Nigerian Petroleum Law,” Macmillian Publishers Ltd. 1985; M.M.OLISA, “Nigerian Petroleum Law and Practice”, Jonia Ventures Ltd. 1977; R.O. AKINTOLA, “Oil In Nigeria- A Study In Political Economy of Development”, Macmillan Publishers Ltd.

*within Her Majesty's dominion, the Chairman and the Managing Director (if any) and the majority of the other directors of which are British subjects*<sup>2</sup>.

This discriminatory legislation had a very adverse effect on the development of the oil sector as it discouraged competition from outside Britain when it was manifestly clear that British companies lacked the requisite capital and manpower for exploration of the vast reserves in Nigeria.

Oil-prospecting activities are resumed in Nigeria in 1973, when Shell D'Arcy, an Anglo-Dutch consortium and subsidiary of the Royal Dutch Shell group, obtained an oil exploration license covering the entire country. This initial monopoly gave Shell D'Arcy (the forerunner of Shell Petroleum Development Company of Nigeria [SPDD]) the leading position, which the present-day SPDC maintains over the other oil majors in Nigeria. SPDC thus remains the largest of the Exploration and Production (E&P) companies operating in Nigeria today.

The operations of the company were interrupted by the Second World War, but were resumed in 1947 culminating in the spotting of the first exploratory well (Ihuo) in Eastern Nigeria in September, 1951. However, it was not until 1956 that oil was discovered in commercial quantities at Oloibiri near Port Harcourt in the present-day Bayelsa State. The year of 1958 witnessed the first export of Nigerian Crude to Europe, when production clicked 5,000 barrels per day (bpd). The quantity doubled the following year. By the mid-sixties, production had gone past the 500,000 bpd mark and other foreign oil companies had rushed in to secure exploration acreage<sup>3</sup>. The exploration rights, which were formerly granted to Shell alone, were now extended to the newcomers in line with the government's policy of increasing the pace of exploration in the country. There was a steady increase in Nigeria's oil production from 0.90 million b/d in 1970 to 2.9 million b/d in 1972, and it reached a peak of 2.4 million b/d in 1979. This steady increase in oil production fetched Nigeria the status of a major oil producer, and she has grown to become the sixth-largest oil-producing country within OPEC.

The earlier-mentioned increase in the number of active oil companies in Nigeria necessitated a change in Nigeria's existing Petroleum (Oil and Gas) Laws. The frail structure of the Mineral Oils Ordinance of 1914 with its amendments could not sustain the modern pressure and trends in the industry. Therefore an attempt to produce a detailed and comprehensive law for the grant of rights to search for and win oil in Nigeria and the conditions connected therewith was made in the promulgation of the **Petroleum Act 1969 and the Petroleum (Drilling and Production) Regulation 1969**.

Government's awareness of the importance of oil in the national economy culminated not only in the enactment of laws but also in direct involvement in oil exploration and exploitation. Government's interest in petroleum was further awakened when it gradually replaced agricultural products as the

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<sup>2</sup> Section 6 (1) (a)

<sup>3</sup> This was made possible by the repeal in 1925 of the said restrictive and prohibitive Sections 6 (1) (a) of the Mineral oil Ordinance.

main export commodity. In order to strengthen and establish government control in the industry, the Nigerian **National Oil Corporation (NNOC) was established in 1971 by Act No. 18**. This metamorphosed into **Nigerian National Petroleum Corporation (NNPC) established by Act No. 33 of 1977**.

## **Niger DELTA OIL AND COLONIALISM**

Time with its unfolding scenarios has proved the British colonial administration and subsequent Nigerian national government wrong to have imagined that native societies would in due course become assimilated with the white population and be better for it. Clearly this scenario never developed, as most of native communities retained their way of life. They, however, suffered from cultural disintegration, disease and poverty.

The discovery of Petroleum in commercial quantities at Olobiri in 1956, further reinforced the Niger Delta's position as a region of international importance (a no go *area [exclusive preserve] for the British colonial administration*), and ushered in an aggressive disregard, indeed contempt, for customary practices and indigenous institutions. One observed a gradual erosion of culture in the various communities in the Niger Delta. These communities, hitherto peaceful, friendly and hospitable, are almost always involved in one conflict or the other, due to oil and gas operations, or the location of oil and gas facilities and consequential benefits; fostered by the "divide-and-rule" strategy of the oil and gas producing companies. The conflict between the Kalabari People (Soku) and the Oluasiri people (Nembe), triggered by the decision to name the SPDC gas project, "Soku Gas Plant", is an example. In 1992, this conflict enlarged and spread to the neighboring towns of Sangama, Kula, Opukiri, and other fishing ports. The Eleme, Ogu and Okrika Communal conflict in October 1999, over the benefits accruing from being the base of the Port Harcourt Refining Company (a subsidiary of NNPC) at Alesa Eleme, among other things, and the gruesome murders that took place are still very fresh in memory. It is pertinent to note that:

- Oil exploration as an extractive industry has peculiar impacts on the indigenous populations in the areas where prospecting and drilling activities are carried out. In contrast to the labor-intensive mining activities, very limited local labor is required for drilling operation.
- The crude oil business –industry was clearly removed from the category of indigenous industries. Indigenes could undertake wood business, palm oil trading, fishing and hunting, but not petroleum.
- Furthermore, the nature of the terrain and the need to maximize profit subject the oil mining areas to devastating environmental abuse and consequential degradation. It is no overstatement to maintain that the Nigerian oil industry has inflicted unprecedented agony on the indigenous communities by completely disrupting the waterways, by destroying soil, water, air, and animal and plant life, and indeed cutting off the fundamental means of livelihood of the communities.

- The Niger Delta is the richest region in terms of hydrocarbon deposits but the communities could not avail themselves of this advantage bestowed by nature. The said Mineral Oils Ordinance No.17 of 1914 was the effective colonial legal weapon.
- Clearly the customary powers of the Chiefs and Obas to regulate the use of natural resources, as they did with water, forest, and farmlands, was stifled.
- The 1914 Ordinance as amended in 1925, conferred powers on the Colonial Administration to grant prospecting rights.
- These prospecting rights were never granted to the customary people as they were statutorily barred from acquiring rights in the resources found in their own land<sup>4</sup>.
- In order to further clarify whatever doubts and misconceptions that may have existed as to property rights in crude oil and other hydro-carbons the colonial administration passed the **Minerals Ordinance of 25<sup>th</sup> February, 1946** which stipulated that: -  
*“The entire property in and control of all minerals, and mineral oil in, under or upon any lands in Nigeria, and of all rivers, streams and water courses throughout Nigeria is and shall be vested in the Crown<sup>5</sup>.”*

Thus, the communities that owned the river and the fish, periwinkles, crab, and oysters therein did not own the oil therein. Rightly did **D/R. Nnamdi Azikiwe**, the first President of Nigeria, observed in 1933 that:

*“Amidst ... conflicting ambitions of Europe for territorial expansion in Africa is the human factor – the fate of indigenous black Africans who dwell on this continent. They constitute an extraneous element so far as European imperialism is concerned. Their raw materials mean more to Europe than their existence to enjoy the fullest of life as do the Europeans, on their own continent respectively. Their manpower seems only valuable for the machinery of European imperialism”<sup>6</sup>*

The legacy of this colonial law is the **Petroleum Act of 1969,<sup>7</sup> and Section 44 (3) of the Constitution of the Federal Republic of Nigeria 1999**, resting on the sure foundation of Sections 158 and 40 (3) of the 1969 and 1979 Constitutions of Nigeria respectively.

The British Administration was concerned only with resource allocation. There was no concern for the preservation of the environment while oil exploration and exploitation thrived. The operating companies wantonly and indiscriminately explored the Niger Delta region. The resultant effect was the displacement of the basic tradition and character of the region. On the contrary, the impact of the oil industry on the economic, and consequently, social history of West Texas notwithstanding, the basic tradition and character of the region remained agricultural. The oil industry did not replace

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<sup>4</sup> See footnote 2 above

<sup>5</sup> Section 3 (1)

<sup>6</sup> N. AZIKIWE, “Renascent Africa” (New York, Negro Universities Press, 1969), 7.

<sup>7</sup> Chapter (CAP) 350, 1990 Laws of the Federation of Nigeria (LFN).

or displace agriculture in West Texas communities.<sup>8</sup> Multinational corporations were thus regarded as being neo-colonialistic. Rightly did **Kwame Nkuruma**, the past President of Ghana, observe in 1965 that:

*“Africa is a paradox which illustrates and highlights neo-colonialism. Her earth is rich, yet the products that come from above and below her soil continue to enrich not Africans predominantly but groups and individuals who operate to Africa’s impoverishment... . If Africa’s multiple resources were used in her own development, they could place her among the modernized continents of the world. But her resources have been, and still are, being used for the greater development of overseas interests”.*<sup>9</sup>

Kwame Nkuruma’s remark of thirty-four years ago is still very much applicable to the present situation. The statement represents the predicament of the Niger Delta much more than any other region in Africa. It is no overstatement to assert that if the crude oil and other hydrocarbon deposits in the Niger Delta were managed for the region’s development, it should definitely have been amongst the best ten developed cities in the world today. In a study of the social impact of oil and gas developments on the small rural community of Caldwell in central Texas, T. J. Copp found that:

*“The local community businesses were more prosperous and larger, the number of workers in the community and county had at least doubled, community institutions were stronger, more services were available, community leadership was stable and the level of community satisfaction was high... . That the new oil and gas money had broadened and deepened the distribution of wealth and power in the community”*<sup>10</sup>

## **Issues In Oil And Gas Laws:**

This section appraises briefly the various oil and gas’ development and exploitation laws.

### **Ownership**<sup>11</sup>

- (a) Common law:** - Established principles of English common law provide that the owner of the soil owned all the minerals below the surface of his land and he may work or lease them

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<sup>8</sup> R. R. MOORE, “The Impact of Oil Industry in West Texas”, Doctoral dissertation, Texas Technological College, 1965. Moore noted that, “...before the depression three areas of West Texas were invigorated by oil discovery... . The benefits of oil discovery were not limited to the land owner with oil on his property or the company which drilled the oil wells. But also, the land leased in every county provided a yearly added income to rangers and farmers alike”. For an enhanced understanding of the impact of oil in extractive economies around the world, see A. A. Iken, “The Impact of Oil on a Developing Country: The Case of Nigeria”, Praeger, New York, 1990.

<sup>9</sup> K. NKURUMA, “Neo-colonialism: The Last Stage of Imperialism”, London: Thomas Nelson & Sons Ltd. 1965.

<sup>10</sup> J. H. Coop, “Social Impacts of Oil and Gas Developments”, Center for Energy and Mineral Resources, 1984.

<sup>11</sup> F. O. AYODELE-AKAAKAR, “Oil and Gas- The Issue of Ownership and the Nigerian Situation”, FJRSB (FIDA Journal) Vol. 2, 199, pp. 61.

to another to work. This concept of ownership presumably includes all substances beneath the soil other than the “royal” minerals- gold and silver, which were traditionally owned by the sovereign. Therefore, where the residue of a long term is enlarged into fee simple, the fee simple would include the fee simple in all mines and minerals which have not been severed in right or in fact, or have not been severed or reserved by an Inclosure Act or award. It was however not the case that a person shown to be the owner of mines was presumably the owner of the surface. A statement by the predecessor in the title of a person who claims minerals, that the overlying surface was in other hands was admissible in evidence against such a claimant. Notably property right in the surface and in the underlying mines could be in different hands. It was quite common to sell or demise a piece of land, excepting mines, or to sell or demise a piece of land excepting the surface, and the instrument of severance would be created.<sup>12</sup> This land surface owner’s ownership of underlying minerals was however subject to the right of a State to reserve for herself mineral resources or to statutorily expropriate them. This right, which the State could exercise over mineral resources under the English system, was thought to be inadequate if such resources were to be utilized for the common good. The State then intervened by providing that: -

*“The property in petroleum existing in its natural condition in strata in Great Britain is hereby vested in His Majesty, and His Majesty shall have exclusive right of searching and boring for and getting such petroleum”.*<sup>13</sup>

*“The Board of trade on behalf of His Majesty, shall have power to grant such persons as they think fit licenses to search and bore and get petroleum.”*<sup>14</sup>

**(b) Nigerian Situation:-** The pattern of central government ownership and control of mineral oils, to the detriment, and at the expense of private persons or individual political components of the nation is very evident right from the first pieces of legislation in the regard. The colonial administration stipulated that: -

*“The entire property in and control of all minerals, and mineral oils in, under or upon and land in Nigeria, and of all rivers, streams and water courses throughout Nigeria is and shall be vested in the Crown.”*<sup>15</sup>

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<sup>12</sup> R. F. MacSwinney, “The law of Mines, Quarries and Minerals” (1884).

<sup>13</sup> Section I(1) of the Petroleum (Production) Act, 1934. Section I (2) provided that “the expression ‘petroleum’ includes any mineral oil or relative hydrocarbon and natural gas existing in its natural condition in strata, but does not include coal or bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation”.

<sup>14</sup> Ibid, Section 2 (1).

<sup>15</sup> Section 3 (1) of the Minerals Ordinance of 1946. In 1934, the National Government in the United Kingdom, on the basis that the search for petroleum had been hindered for uncertainties as to property rights, enacted the said Petroleum (Production) Act (PPA) of 1934. This was the first Legislative piece to

After independence, Nigeria enacted a Republican Constitution in 1963 in which it adopted and institutionalized the legacy of colonial rule. Section 158 therein vested in the President of the Federation all property hitherto held by the Crown. In 1969, the Federal Government provided in the Petroleum Act- the principal law governing oil and gas that:

*“The entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State.”<sup>16</sup>*

**The Exclusive Economic Zone Act of 1978** is in the same direction.<sup>17</sup> It provides that:

*“... ..sovereign and exclusive rights with respect to the exploration and exploitation of the natural resources of the sea bed, sub-oil and superjacent waters of the Exclusive Zone shall vest in the Federal Republic of Nigeria and such rights shall be exercised by the Federal Government... ..”<sup>18</sup>*

This Federal Government ownership was retained in the **1979 and 1999 Constitutions** of the Federal Republic of Nigeria in similar words thus:-

*“... .. , the entire property in and control of all minerals, mineral oils and natural gas, under or upon any land I 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 manages in such manner as may be prescribed by the National Assembly.”<sup>19</sup>*

It is thus clear that ownership of minerals and mineral oils by the Federal Government is absolute. Individuals, on or under whose parcels of land minerals are found, are accordingly denied assertion of any right to such minerals. The same consequence is brought to bear on the oil-producing communities, the Local Government areas and States.

It should be noted however that Federal Government's assumption of ownership was not a drastic event, as it only reached its full scale with the promulgation of the **Offshore Oil**

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address property rights. See notes 13 & 14 above. Prior to the PPA, Government was empowered by law, only to enter on land to search for and get petroleum, and prevent others from doing so. [See the Regulations made in 1917 under the Defence of the Realms Act of 1914.] Sequel to 1917, **the Petroleum** for petroleum should be carried out only by persons acting on behalf of the Government or holding a license issued by the Minister of Munitions. It should be noted that before these legislative steps were taken common law governed ownership of petroleum as minerals belonged to the surface owner and he may work them or lease them to another person to work.

<sup>16</sup> Section 1(I). It should be noted that the Petroleum Act has undergone series of amendments, the latest of which was in 1998 by the Petroleum Amendment Decree No. 22 of 1998.

<sup>17</sup> CAP 116 1990 LFN. This Act delimits the Exclusive Economic Zone of Nigeria to 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 breathe of the territorial waters of Nigeria is measured.

<sup>18</sup> Section 2 (1). It should be noted that the said sovereign and exclusive exploitation of the living resources in the Exclusive Zone is subject to the provisions of any treaty to which Nigeria is a party.

<sup>19</sup> Sections 40 (3) and 44 (3) respectively.

**Revenue Decree No. 9 of 1971.** By this legislation, the rights of the Regions (States) in the minerals in their continental shelves were abrogated and title to the territorial waters, continental shelf as well as royalties, rents and other revenues derived from petroleum operations in the States became vested in the Federal Government. Hitherto, all minerals, both solid and oil, found in the continental shelf of a region, belonged exclusively to the source region.

A salient feature of this structure of exclusive and centralised ownership of oil and gas in Nigeria is the mode of control exercised over the industry. Only the Minister of Petroleum Resources by virtue of Sections 2 (10, 3 and 4 of the Petroleum Act, or the Presidency by virtue of the present Federal Government policy, may grant or revoke a license or lease.<sup>20</sup>

- The Petroleum Act vests enormous powers in the Minister, such that there is no known petroleum operation activity that may be embarked upon without a license granted by the Minister, (now by the Presidency). Be it the construction and operation of oil and gas pipelines, refineries, importation, marketing, storage or distribution of petroleum products. He is exclusively empowered to fix the prices at which petroleum products are sold.<sup>21</sup>
- Indeed, until the **Petroleum (Amendment) Decree No. 22 1998** came into force, the Minister was the sole judge as to the existence of a state of emergency to necessitate the exercise of the right of pre-emption, (a form of power of requisition) of all petroleum and petroleum products obtained, marketed or otherwise dealt with under any license or lease.<sup>22</sup>
- The Minister also has power to make regulations prescribing anything required to be prescribed for the purposes of the Act.<sup>23</sup>
- All these powers are in addition to the general power of supervision over all operations carried out or embarked upon under licenses and leases.<sup>24</sup>
- He also arrests.<sup>25</sup>
- He may order the suspension of operations under a license or lease granted under the Act, until arrangements have been made which in his opinion are necessary to prevent danger to life or property. He may also revoke any license, or lease under certain circumstances. It is sad to note that this provision has not been involved to exercise the

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<sup>20</sup> The office of the Minister for Petroleum Resources is not retained in the present administration. The Presidency with a Special Advisor to the President on Petroleum Matters now oversees the industry.

<sup>21</sup> Section 6. Petroleum Act.

<sup>22</sup> Section 7, Petroleum Act. By virtue of the said amendment, the Minister is no longer the sole judge to determine and declare a state of emergency. The Minister is now to advise the President to declare a state of national emergency depending on the existence of certain situations. It should be noted however, that the Petroleum Act has not been amended to reflect the change from the office of the Minister to the Presidency.

<sup>23</sup> Section 9 specifically empowers the Minister to make Regulations to provide generally for matters, relating to license and leases, and operations carried out thereunder including safe working, the conservation of petroleum resources, etc.

<sup>24</sup> Section 8.

<sup>25</sup> Ibid, (d).

said power in favor of numerous oil- and gas-producing communities that have suffered grave danger to life and property as a result of oil and gas development activities. Operator's upstream activities have continued unrestrained even in the face of major oil spills/fatal accidents and consequential degradation of the environment with loss of life in some cases. Interruptions of such unabated hazardous activities by aggrieved communities, where natural resources suffer gradual extinction given the unsustainable method of development adopted in these areas, only spark off a chain of reactions on the part of the government (a major party to the highly lucrative, albeit hazardous, business) which dispatch military troops to such areas to further suppress and aggravate the injuries of these people. **What a price to pay for development.** Government's action is propelled by the acute loss of petrol-dollars resulting from each day of interruption to petroleum operations.

- The Minister may also revoke any license or lease under certain circumstances.

The Nigerian situation is a clear case of putting the control of the nation's lifeline industry into the hands of just one man or institution, now known as the Presidency. The present framework does not accommodate any iota of control or semblance of participation in management by the natives of oil-and gas-producing areas not *even a Commissioner of Petroleum Resources at State level who could exercise the power granted in **Section 8(1)(f)** of the Petroleum Act to order the suspension of operations so as to prevent danger to life or property, or even a National Petroleum Investment management Services (NAPIMS) situated at the respective oil and gas producing States, if not at the respective Local Government headquarters.*<sup>26</sup>

For the avoidance of doubt, the economic objectives of the Federal Republic of Nigeria are stated to include the right to manage and operate the major sectors of the economy. The phrase "major sectors of the economy" refers to economic activities managed and operated exclusively by the Federal Government whether directly or through the agencies of a statutory or other corporation or company.<sup>27</sup> The oil and gas sector is undoubtedly a major sector of the Nigerian economy. The emerging scenario, however, is the demand for resource control by the respective dauntless oil- and gas-producing States and an unmistakable resistance by the Federal Government, orchestrated by the unflinching support from other segments and/or personalities in the society.

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<sup>26</sup> NAPIMS is a subsidiary of the Nigerian Petroleum Corporation. It is responsible for overseeing and managing on behalf of the Federal Government, the petroleum investments in Nigeria. It is based in the Federal Capital.

Many arguments have been put forward in justification of the Federal Government expropriation of all minerals on, in or under the totality of Nigeria's territories, both land and marine, at the expense of other entities within the state:

- Ownership and control of petroleum has been an important political symbol in most developing countries.
- The question of which government or authority to whom oil revenues should be paid, and the power and resources derived from oil, was an issue in the crisis that led to the Nigerian civil war, prompting the Federal Government to claim that right exclusively.
- Oil has a virtual influence on the life of the people because of the benefits of petroleum on the economy. Thus exclusive federal control permits the promulgation of uniform regulations in the oil industry.
- Foreign exchange being a subject matter on the Exclusive Legislative List in the Constitution, 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.
- Given the strategic importance of oil and its importance in national life, it is natural that it should be centrally controlled in the interest of the whole nation.
- Deposits of petroleum on land in Nigeria represent "part of the national heritage" and those deposited in the maritime areas are subject to the sovereignty of the State, under various international conventions.
- Given the huge capital outlay and the high degree of technical expertise required in the petroleum industry, only the Federal Government has the capacity to operate in it.
- Similarly, only the Federal Government has the capacity to device a framework for technology transfer and compel compliance thereto by the multinational operator.
- Private ownership of oil will create enormous wealth for a few private individuals who may apply such fortunes towards productive ends in consonance with national priorities. Rather, such wealth may only intensify the class division.
- Federal Government ownership and control of petroleum resources will enhance national unity.<sup>28</sup>

The turbulent national experiences Nigeria recorded in the late nineties and the various crises buffeting the national oil and gas industry in the millennium destroy whatever potency these seemingly attractive arguments may have had. Starting from the very last argument,

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<sup>27</sup> See Sections 16 (1) (c) and (4) of the 1999 Constitution of the Federal Republic of Nigeria.

<sup>28</sup> See generally, Sagay Itse, 'Ownership and Control of Nigerian Petroleum Resources: A legal Angle', published in "Nigerian Petroleum Business A handbook", Ed., Eromosele, V. E.; Advent Communications Limited 1997; PP. 176-186.

instead of promoting unity, the Federal Government' exclusive ownership and control of oil resources, has caused deep bitterness, resentment and a sense of majority oppression of the minority producers of oil. The fact is that the people of all oil-producing areas feel "cheated and exploited" by a policy under which the wealth under their lands is carted away, leaving them with nothing but a polluted and devastated environment.

Commenting critically on these arguments, Sagau Itse remarked thus:

***“Regarding the danger of private ownership of oil creating enormous wealth for a few people who would then misuse these funds, the question may be asked: Has central ownership and control prevented the emergence of a class of enormously wealthy individuals in Nigeria? Have the proceeds of oil been prudently and patriotically put to use? Regarding the country’s extra sales of crude oil during the Gulf War alone, the Okigbo Panel noted that some US\$ 12.4 billion is yet to be properly accounted for.”***<sup>29</sup>

**(c) America:** The owner of land overlying oil and gas deposits is the owner of such deposits. This is predicated on the common law principle that owner of land owns whatever is on the land and its subsoil. This is the situation in Texas, Washington, and Pennsylvania. Obviously the ownership structure is purely private. The right of such an owner to drill a well or wells on his land to recover oil and gas is subject to the State and Federal regulatory provisions of governing the industry. The landowner may, by an appropriate contractual agreement, create diverse interests like mineral, royalty or leasehold estates distinct and separate from the basic estate land.

One needs to state for clarity that there exists a dual ownership system in the United States. The landowner owns mineral rights of onshore areas while the State and the Federal Government owns minerals in/on public lands including offshore areas.<sup>30</sup>

**(d) Canada:** Both levels of government (Federal and Provinces) exercise control over different stages of the oil sector. Lands, mines, minerals and royalties are reserved to the provinces. A province has complete title to the petroleum resources *in situ* on the property within its territory. A freehold interest conveyed by the province (lessor) transfers complete title to the property (oil). Another approach is to grant the oil producer an exclusive license - for example a license that grants an exclusive right to drill a well and to extract petroleum

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<sup>29</sup> Ibid, page 180.

<sup>30</sup> See generally - F. O. AYODELE-AKAAKAR, *supra*, for the various concepts of oil and gas ownership in America.

but does not include a conveyance of title to that petroleum. This is adopted where the Province wishes to retain complete title to its petroleum resources.

Undoubtedly the Province owns 80% of Alberta's petroleum resources *in situ*. The Province grants leases and collects royalties. It has the exclusive power to regulate the production process at least until the time of extraction. Federal Policy on the other hand, has been principally focused on the consumption and trade aspects of the oil industry.

It is interesting to note that when Alberta and Saskatchewan were admitted into the Confederation, Crown "lands, mines, minerals and royalties incident thereto," remained vested in the government of Canada. It was only after a long political struggle that the natural resources of the Prairie Provinces were transferred to them. Having acquired control over natural resources, the Prairie Provinces asserted their position aggressively.

Alberta in recent years has left no stone unturned in asserting sovereignty within its borders. This move was prompted by various political and economic considerations and has produced a comprehensive legislative scheme, which extends provincial control to virtually every portion of the petroleum industry. In its entirety, this scheme encompassed the right to grant oil leases, to regulate production from those leaseholds, to market and price oil once extracted and to take sizeable royalties from producers. An example is a requirement that the Crown's lessee should deliver "lessee's share" of production to the Alberta Petroleum Marketing Commission. This compulsion to deliver is a clear case of regulation in the post-extraction stage of production when the Crown's powers are actually extinguished.

**(e) The People's Demand:** From the foregoing, it is clear that the ownership and control structure of oil and gas in Nigeria is far from being just and fair. It is putting the matter mildly, that the Federal Government's exclusive ownership and control of the nation's hydrocarbon resources has caused deep bitterness, resentment and a sense of majority oppression of the minority producers of oil. This policy, rather than promote unity, has caused rebellion, revolts, restiveness, crises and intensified pressures by the minority oil-producing communities to be free from this avoidable harsh consequence of remaining as part of the Federation. One recalls the 12-day rebellion in 1966 and a declaration of the independence of the Niger Delta People's Republic (led by Isaac Boro); The "Ogoni Nation Today and Tomorrow" by Ken Saro-Wiwa (first published in 1968); the Ogoni Bill of Rights calling "for the political and control of Ogoni affairs by Ogoni people, control and the use of Ogoni economic resources for Ogoni development;" the forced discontinuation of

production activities in the Ogoni areas for some few years till date; and the Kiama Declaration released amid the Yuletide in 1998. Undoubtedly the oil producing communities feel cheated and exploited given the unfolding features of this system of ownership and control – a scenario described as indigenous colonialization.

**The recognition and protection of the proprietary of native societies with respect to certain solid mineral further heighten the deep feeling of deprivation and injustice among the people of the region. The adoption of national ownership of all minerals in, under or upon any land, contiguous continental shelf, and of all rivers, streams and water courses throughout Nigeria notwithstanding, the law recognises and retains the title of the community to certain minerals if it has been the custom of the members of the community to win such minerals before the law came into force. On that premise any citizen of Nigeria who belongs to a community that has customarily won such minerals, can win and exploit them.<sup>31</sup> Furthermore, where a mining lease has been granted over any land from which such community had customarily win minerals, the lessee shall, during the continuance of the lease, pay to the members of that community compensation as may be prescribed by the Minister.<sup>32</sup>**

(i) **Africa Charter On Human And Peoples' Rights (CAP 10) 1990 LFN<sup>33</sup>:**

The provisions of this law are particularly relevant in appraising the case of the oil- and gas-producing communities. Section 1 of the said Act specifically provides that the provisions of the Charter shall, “*have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.*”

**Article 21** states specifically with reference to natural resources that:

1. *All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.*
2. *In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation...*

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<sup>31</sup> See Section 1 (1) and 7 (1) of the Minerals and Mining Decree No. 34 of 1999 respectively.

<sup>32</sup> Ibid, Section 7 (3).

<sup>33</sup> This Charter (an international treaty), which was made in Banjul on the 19<sup>th</sup> day of January, 1981, was by Parliament adopted into Nigerian municipal law, with effect from the 17<sup>th</sup> day of March 1983. The treaty was enacted into law and incorporated into Nigerian legal system by the African Charter on Human and People's Rights (Ratification and Enforcement) Act CAP 10 LFN, which sets out as a Schedule thereto, the full text of the African Charter on Human and Peoples' Rights.

3. *The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principle of international law.*"

(ii) **Indigenous and Tribal People's Convention, 1989**

It is pertinent to note that the Indigenous and Tribal People's Convention, 1989, prescribes a recognition and protection of the rights of people to the natural resources from their land. The Convention provides that, "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. The rights include the right of these peoples to participate in the use, management and conservation of these resources." "In cases in which the State (*the national government*) retains ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interest would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The people concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as result of such activities."<sup>34</sup>

It is time Nigeria adopted the spirit of this international instrument. The principles in this Convention should be reflected in the domestic law governing oil and gas development and exploitation in Nigeria particularly when the Federal Government, articulating its fundamental objectives and directive principles of state policy declared that –

*"Sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority;"*

and that:

*"...the security and welfare of the people shall be the primary purpose of government; and the participation by the people in their government shall be ensured... .."*<sup>35</sup>

Furthermore, the Constitution provides that the State (national government) shall:

*"harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self reliant economy;"*

*"control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity;"* and ensure *"that the material resources of the community are harnessed and distributed as best as possible to serve the common good."*<sup>36</sup>

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<sup>34</sup> Article 15. Note: words in bracket not original.

<sup>35</sup> Sections 14 (2) (a), and 14 (2) (b) & (c) respectively of the 1999 Constitution.

<sup>36</sup> Ibid, Section 16 (1) (a) & (b); and Section 16 (2) (b) respectively.

It is important to note that the undertaking to the effect **‘that the material resources of the Nation are harnessed and distributed equitably and judiciously to serve the common good of all the people’**, which was proposed in Section 17(2)(b) 1995 Draft Constitution, is omitted in the present Constitution.

Be that as it may, the Federal Government unequivocally undertook to ensure that, in furtherance of the State social order, which is founded on ideas of freedom, equality and justice, **‘exploitation of human or natural resources in any whatsoever for reasons, other than the good of the community, shall be prevented;’**<sup>37</sup>

The question that would be asked here is as to the enforceability of the foregoing guarantees/undertaking by the State. Enforceability of the Fundamental Objectives and Directive Principles of State Policy is addressed at this juncture.

While it is true that Section 6(6)(c) of the Nigerian Constitution has consistently provided that:

*“ The judicial powers vested in accordance with the foregoing provisions of this section... shall not except a otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of States Policy set out in Chapter II of this constitution;”*

It is no longer fashionable in modern political and constitutional practice to allow such matters as social and economic objectives of a nation to be formulated, pursued and solely determined by political discretion, which can be whimsical and capricious (as oil and gas policies have proved to be in Nigeria). Judicial intervention must be called in where economic or social policies are carried out in such a way as to prejudice particular interests in the society, or where such policies actually or potentially infringe the fundamental rights of citizens. Cowen, treating “ The Foundation of Freedom,” stated that:

*“No knowledgeable person has ever suggested that constitutional safeguards provide in themselves complete and indefensible security. But they do make the way of the transgressor, of the tyrant more difficult. They are, so to speak the outer bulwarks of defence.”*<sup>38</sup>

In the same vein, Dicey, an eminent jurist stated that the –

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<sup>37</sup> Ibid, Section 17(2)(d).

<sup>38</sup> COWEN, “The foundation of Freedom” (1900) P.119

*“Sanction which constrains the boldest political adventurer to obey the fundamental principles of the constitution is the fact that their breach is remedied by the force of the law, administered by a competent court of the land.”<sup>39</sup>*

A discernible pattern is the reluctance on the part of the Court to enforce Directive Principles of States Policy because of the non-justiciable clause in Section 6(6)(c). However, the trend is to enforce these Directive Principles whenever there is a conflict between them and Fundamental Human Rights. The decision of the Indian Supreme Court in the case of **State of Madras v. Champakan Drairajin** is very instructive and it is hereby recommended to the Nigerian Judiciary. The Supreme Court held that:

*“The Directive Principles of State Policy which by Art. 37 are expressly made unenforceable by a court cannot override the provisions found in Part III, which, notwithstanding other provisions, are expressly made enforceable by appropriate writs, orders and directions under Art. 32. The Chapter on Fundamental Rights is sacrosanct and cannot be abridged by any legislative or executive act or order, except to the extent provided in the appropriate articles in Part III. The Directive Principles have to conform to and run subsidiary to the Chapter on Fundamental Rights.”<sup>40</sup>*

From the foregoing, there is an urgent need for a review of the system of ownership with respect to mineral oil resources. The various oil-producing communities, local governments and states are unrelenting statutory provisions. ??? The issue of national interest in oil can be addressed and expressed easily. National policies can be established and followed without expropriation of the right of the producing area. The Federal Government could very much regulate the operations of this major sector of the economy while at the same time ensuring the recognition and security of the rights and interests of the producing community.

One concedes the fact that to insist on private/community or State level ownership of oil and gas may appear to be an unacceptably drastic structural modification, given the political climate in the county. It is however not unrealistic, and it should be negotiated for. However a mid-way approach is to negotiate a redefinition of the status of both the Federal Government and that of the State. In this direction Sagay Itse recommends that the Federal Government retain the status of the legal owner while the State is viewed as a beneficial

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<sup>39</sup> DICEY, A.V. “ An Introduction to the Study of the Law of the Constitution,” London, 445-446.

owner. Thus the Federal Government becomes the trustee with an equitable obligation to deal with the oil and gas over which he has control (the trust property) for the benefit of the oil mineral producing communities (the beneficiaries or cestuisque trust) of whom the trustee may be one. As a trustee of oil and gas within the territories of Nigeria, the Federal Government will have the legal title to all the trust property, having power to lay down policies, make laws and regulations governing the industry's operations. The Federal Government will still continue to conclude contractual arrangement with the multinational oil companies. As beneficial owners the oil-producing communities will have a say in the operation of the industry, that is, the right to participate in the use, management and conservation of the oil and gas resources.

The States as the equitable owners and beneficiaries should receive a reasonable proportion of the proceeds of the oil taken from their land - 50% (Fifty per cent) of the royalty charged in respect of any mineral extracted in that region, while the Local Government of production takes the other 50%. Furthermore, 50% of the mining rents-if not all- charged and received by the Federal Government should go to State and Local Government in the same ratio. Indeed the provisions of **Section 140 (6) of the 1963 constitution** of the Federation which for the purposes of payment of rents, royalties and others proceeds from minerals provides that:

**“ the continental shelf of a Region (State) shall be deemed to be part of the Region”** should be revisited. This should invariably lead to a repeal of the Petroleum Act.

#### *Land*

It is to say the least, the height of oppression to:

- Dispossess the oil-producing communities of their land- (through the confiscatory laws- like the Land Use Act);
- Compulsorily acquire every natural resource yield from this land (and waters);
- Deny the people the benefit of participating in the use and management of these resources and a fair share of the revenue yield.

There can be no better way to wipe out a race of people. **Time is ripe to repeal the LAND USE ACT.** Prosperity for Niger Delta and Nigeria is assured, if Nigerians embrace the fact that the land producing oil belongs to the communities who have been in that part of Nigeria for centuries. Land (property) rights are an essential part of social and economic rights, which must be recognized. It is the inalienable right of the community to own the land in totality including all resources below and

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<sup>40</sup> (1951) AIR SC 226. Article 37 of the Indian Constitution is in similar terms same with the provisions Section 6(6)(c) in the Nigerian Constitution; While Part III deals with Fundamental Human Rights like Chapter VI in the Nigerian Constitution.

above it. This is not an outrageous demand neither will it be a novel or unpatriotic one. Many of the world's remaining indigenous people-estimated at over 250 million living in more than seventy countries – take a view of nature that differs strikingly from conventional attitudes. The attitudes of three groups of indigenous people: the Quichua- speaking Amerindians in the rainforests of eastern Ecuador, the Maasai and Sambura nomadic pastoralists of Kenya, and the indigenous swidden (slash-and-burn) farmers in the upland areas of the Philippines as reported in a 1992 study is quite illustrative. The study concluded that many indigenous people view land not as a commodity to be bought and sold in impersonal markets but as a substance endowed with sacred meaning, embedded in social relations, and fundamental to the understanding of the groups' existence and identity.

The tribal Filipinos see land as a symbol of their historical identity: an ancestral heritage to be defended and preserved for all future generations. According to the Episcopal Commission on Tribal Filipinos, they believe that wherever they are born, there also die and be buried, and their own graves are proof of their rightful ownership of the land. It symbolizes their tribal identity because it stands for their unity, and if the land is lost, the tribe, too, shall be lost.

Ownership of land is seen as vested upon the community as a whole. The right to ownership is acquired through ancestral occupation and active production. To them, it is not right for anybody to sell the land because it does not belong to only one generation, but should be preserved for all future generations.

It is pertinent to note the provisions of the said **Indigenous and Tribal Peoples convention** to the effect that:

*“The rights of ownership and possession of the peoples concerned over the lands, which they traditionally occupy, shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.”*

*“Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.”*

*“Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned”<sup>#2</sup>*

## **Proceeds From Oil And Gas Exploitation**

The revenue-sharing formula has remained very unsatisfactory and a constant cause of conflict in Nigeria. Table 1 below shows the Federal – State share of petroleum proceeds from 1960 – 1999.

TABLE 1

YEAR	PRODUCING STATE	FEDERAL GOVERNMENT	OTHER STATES
60-67	50	20	30
1967-69	50	50	-
1969-71	45	55	-
1971-75	45 minus off-shore proceeds	55 minus off-shore proceeds	-
1975-79	20 minus off-shore proceeds	80 minus off-shore proceeds	-
1979-81	ZERO	100	-
1982-92	1 and half minus off-shore proceeds	98 and half minus off-shore proceeds	-
1992 May99	3 minus off-shore proceeds	97 plus off-shore proceeds	-
May 1999	13 minus off-shore proceeds	87 plus off-shore proceeds	-

Prof.(Chief) Dagogo M.F. Fubara, 2000. “ Memorandum to presidential Technical Committee on the Review of the 1999 Constitution.”

It should be noted that the pre-independence Sir Henry Willink’s Commission of 1957/58 stated that:

*“We were impressed by the arguments indicating that the needs of those who lives in the creeks and swamps of the Niger Delta are very different from those of the interior. WE agree that it is not easy for a Government or Legislature operating from far inland to concern itself or even fully understand the problems of a territory where communication are so difficult, building so expensive and education so scanty...”*

Royalties deserve specific mention:

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<sup>42</sup> Article 14.

- (i) **Royalties:** It is pertinent to note that royalty is a share of production, a recognized reservation by an owner, as a consideration for granting the lease. Royalties represent an interesting and unique portion of revenues accruable to a resource-producing State. It is not a tax, which in contrast, is a compulsory contribution imposed by the sovereign for public purpose or objects. Royalty is normally stated as a certain percentage of the production or production value and the government often has the option to take the royalty in cash or in kind. Where royalty is taken in cash, the amount will be determined by the value of the crude oil and gas.

A royalty has the advantage as a source of revenue that it is a “floor,” payable regardless of the profitability of the production. Also important is the fact that a royalty is payable from the start of production, whereas income taxes (petroleum profit tax) are dependent upon the existence of net profit.

Furthermore, administratively, royalties are easier to monitor and control because they do not necessitate any auditing of the costs of the operating company.

It is very pertinent to note that amongst the numerous sources of revenue from this oil and gas business, namely:

- Fees and rents in respect of licenses and leases;
- 85% Petroleum Profit Tax on gas based projects;
- fees charged on permits and licenses on downstream activities;
- the current 35% income tax rate on gas based projects;
- the proceeds from gas flaring penalties (the Central Bank records showed that the Federal Government realised N58.64 billion from gas penalties in the first quarter of 1998);
- 5% at on most supplies of goods and services to oil companies, and
- a 2% education tax levied on the profits of oil companies by the Education Trust Fund Decree; and
- a host of other levies and charges which oil companies pay to various agencies of the Federal Government, such as levies imposed by the Nigerian Ports Authority (NPA) and the Nigerian Maritime Authority (NMA);

**Royalties on Crude oil is by far the highest.** Currently, 20% is charged for onshore production; 18.5 for up to 100 metres water depth; 16.5% for 101 to 200 metres water depth; 12.55% for water depth from 201 to 800 metres; 8% for water depth from 501 to 800 metres and 4% for water depth from 1000 metres.<sup>43</sup> Royalties charged in respect of the Deep Offshore Production Contracts are

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<sup>43</sup> Paragraph 1(a) of the Petroleum (Drilling and Production) (Amendment) Regulations 1995.

12.55% in areas from 201 to 500 metres water depth; 8% from 501 to 800 metres depth; 4% from 801 to 1000 metres depth and 10% on Production Sharing Contracts in the Inland Basin.<sup>44</sup>

Based on the system of ownership operative in Nigeria, all revenues accruable from petroleum exploitation go into the Federal Government Account. The revenue allocation formula remains till date an unequivocally unacceptable arrangement, which is a constant source of friction between the Federal, State and Local Governments. A true reflection of adoption of derivation as a parameter for revenue allocation, is to concede royalties to the various communities that produce oil and gas, while the other forms of revenue are subjected to an equitable sharing formula.

Be that as it may, there should an upward review of the Revenue Allocation Formula. It is in the best interest of resource-producing states that the formula should be on derivation basis. The 1999 Constitution provides that the President shall table before the National Assembly proposals for revenue allocation from the federation account and in determining the sharing formula for Public Revenue,

*“ the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density: Provided that the principles of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account from any natural resources.....<sup>45</sup>*

Considering the level of revenue accruable to the State from oil and gas business, the present 13 % payable to the oil and gas producing States is rather paltry. The constitution states this as the minimum to be paid. All revenues from oil and gas operations in Nigeria go into the Federation Account as public revenue. These include Signature Bonus, Royalties, Mining Rents, Crude Sales, Discovery Bonus, Production Bonus to mention a few. Aret Adams, speaking on “ Federation Account and Utilization”, rightly notes that:

*“ The Federation Account, as a concept is a frontier phenomenon, requiring very clear and unambiguous definition...”*

### **Compensation For Damages For Petroleum Operations:**

There is no definition of what constitutes fair and adequate compensation. This leaves the way open for a floodgate of disputes and litigation on this crucial matter. The rate used by the operating companies, which is a scale of rates drawn up by the Oil Producers Trade Section (the OPTS) is not a product of negotiation with the people affected by these hazardous operation or their chosen representatives. Be that as it may, the rates are very low and as such do not reflect the increasing inflation rate in the country.

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<sup>44</sup> (Deep offshore and Inland Basin Production Sharing Contracts Decree No.9, 1999 as amended by Decree No. 26, 1999).

### *Compensation for gas flare:*

The Federal Government's decision and continued insistence on taking this compensatory sum of money so to say, is tantamount to an unjustifiable benefit from the fruit of illegality.

**Query:** What is this levied sum meant to cater for? Is it just another source of income; or, a quantified sum of the damage inflicted on the environment thereby, or a punitive sum for doing an act which the law defines as a crime? Is this penalty prohibitive in nature so as to deter continued flaring of gas? It is sad to note that the community in which the gas is flared is not the recipient of the sums of money charged for every SCM of gas flared.

It is pertinent to appreciate that fact that the penalty for flaring (this is the price fixed on damage to the environment as a result of flaring gas) should be dictated by the cost of remediation. The Environmental impact of gas flare is yet to be fully appreciated. It is one hazard that should not be endorsed in spoken terms let alone authorised. Be that as it may, as long as gas flaring lasts the revenue accruable from the penalties charged thereon should be ploughed into the environment that has been destroyed, for necessary remediation. Indeed the Federal Government should render to the communities of flare stack, returns of revenue derived from gas flaring.

### *Pipeline Operations*

The Government as well as the oil- and gas-producing companies (in joint venture with the Federal Government), operate oil and gas pipelines across the Niger Delta. These pipelines have in recent years turned out to be instruments of destruction, responsible for killing thousands of people in the region. **The Pipelines have suffered extensive corrosion and do not in any way conform to the environmental standards stipulated in the Pipelines Regulations of 1995.** Leakages of petroleum products from those "deathtraps" have been swiftly attributed to sabotage on the part of the community through which such pipelines pass. Sabotage is a crime, the penalty for which could be as stiff as the death penalty as prescribed in the **Petroleum Production and Distribution (Anti Sabotage) Act, and The Special Tribunal (Miscellaneous) offences Act.** The victims of pollution from oil and gas pipelines are therefore not entitled to compensation for whatever damage they suffer, however extensive it may be, where the pollution is allegedly caused by sabotage.<sup>46</sup>

**The Oil Pipelines Act** is full of inequities working adversely against the communities and individuals whose land or interest in land may be adversely affected as a result of pipeline operations. The entire procedure for the grant of oil pipelines permits and licenses does not offer adequate protection to individuals and / or communities that may be adversely affected. The issue of notices to such persons / communities, payment of adequate compensation for acquisition and or injurious affection, are weighty matters that have engendered serious conflicts between oil and gas pipeline operators and such individuals/ communities. The Oil Pipelines Act is due for review so as to reflect what is generally accepted by society as being just and equitable.

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<sup>45</sup> Section 162 (2). Underlining not original.

<sup>46</sup> See Section 11 (5) (c) of the Oil Pipelines Act of 1965 CAP 338 1990 LFN.

*Associated Gas Re-Injection Act*<sup>47</sup>

Proceeds from gas flare penalties have proved to be a source of substantial income, and this seems to be of more interest to the Federal Government than the pressing demand by the people to stop gas flaring given its proven hazardous effects on human health. It suffices to state that the amount levied as a penalty for flaring should be related to the damage caused thereby. This law and the **ASSOCIATED GAS RE-INJECTION (CONTINUED FLARING OF GAS) REGULATIONS**, made thereunder, is apparently unmindful of the hazardous effects of gas flaring and as such did not set out to accomplish a full stop of gas flaring exercise.

*The Petroleum (Drilling And Production) Regulation:*

It is obvious that if oil companies are to engage in exploration and prospecting for, and mining of, oil, they must have access to the land beneath which the oil lies. For this reason, clear provisions have been made in various petroleum-related laws and regulations for the appropriation by oil companies, of such land, whether owned by individuals, families or communities.

By regulation 15 (1), of the Petroleum (Drilling and Production) Regulation, 1969, the rights and powers conferred on grantees of petroleum licences and leases (oil companies) include (i) cutting down and clearing timber and undergrowth, (ii) making roads, (iii) appropriating water found in the relevant area, construction and maintenance of buildings, installations, drilling platforms, power plants, flow lines, labours, jetties, derricks, facilities for shipping and air craft etc. Such rights are however only to be exercised subject to all applicable laws and the approval in writing of the Director of Petroleum Resources and "appropriate government agencies and such conditions as they may impose".

The oil operators are precluded from entering upon and occupying any area held to be sacred. Where doubt exists as to whether an area is held sacred or not, the decision of the state authority is final. Also, operators may enter, occupying and exercise any rights in the following places, only on the permission of the Minister.

- (i) areas set aside for public purposes;
- (ii) any part occupied for the purposes of the Federal or a State government;
- (iii) any part situated within a township, village, market, burial ground or cemetery;
- (iv) any part within fifty yards of any building, installation, reservoir, dam, public road, train way;
- (v) any part under private cultivation;
- (vi) any part consisting of private land.

It is important to note that the types of land listed from (i) to (vi) above are available for the use and occupation of a company, provided it first obtains the permission in writing of the Minister of Petroleum Affairs. It is most unlikely that such approval will be withheld, after the same Minister has granted the applicant an exploration or prospecting licence, or a mining lease. These restricting provisions are therefore merely paper restrictions.

Of particular interest to the issue being addressed in this paper is regulation 17 (c) which empowers an oil company to enter upon and occupy private land (in this case, land belonging to individuals, families and communities) provided they fulfill the following conditions:

- (i) notice in writing to the Minister (a) Specifying the name or other sufficient designation, of the land, (b) the size of the land, and (c) the purpose for which it is required and
- (ii) payment or tender of payment, to persons in lawful occupation of the land or to the owners of the land, of fair and adequate compensation.

There is no definition of what constitutes fair and adequate compensation thus leaving the way open for a floodgate of disputes and litigation on this crucial matter. Worse still, where there is a dispute regarding who is entitled to compensation and what amount of compensation (fair and adequate) is payable, the oil company is compelled to deposit with the state authority “any such sum as shall appear to that authority to be reasonable satisfaction in full or in part of whatever compensation the licensee or lessee may be found liable to pay.” Thus where there is disagreement about the person to whom payment should be made and the appropriate amount payable, the state authority becomes the arbiter. This is clearly an arrangement that inflicts enormous injustice on aggrieved persons or communities. ???

## **Recommendations**

In addition to the various recommendations indicated above, the tax alternative is highly recommended to the resource producing States. They should exercise their legislative powers to tax the various activities in the oil industry. Excluded are petroleum profits, and such exemptions from tenement rates indicated in the NNPC Act.

Conceptually, a tax is a perfect societal response to an environmental problem. To economists, environmental harm is a subset of external costs- costs that are imposed on society by an activity but are not paid by the participants in that activity. Hence, participants behave as if these external social costs do not exist, rather than minimizing them as they would comparable private or internal costs. The conceptual beauty of a tax is its ability to convert external social costs into internal private costs, thereby forcing businesses to consider environmental costs in their decision- making. Businesses engage in an activity only if, and to the extent that the total private benefits of the activity exceed its total private costs.

Functionally, a tax is equally attractive. It can be relatively simple and easy to enforce; yet its effects on decision-making are subtle and complex. A tax bans nothing and permits nothing. It imposes a monetary surrogate for environmental harm on businesses that are in a position to choose whether and to what extent to engage in environmentally harmful activity. The State of Louisiana in the United States adopted this strategy to save Louisiana's Coastal Wetland. Governor David Treen, in recognition of the environmental harm taking place in Louisiana's Coastal Wetland, engendered the passage of the Coastal Wetlands Environmental Levy (CWEL). CWEL imposed a tax on the use of

facilities for natural gas and oil transportation through Louisiana Coastal Wetlands. The purpose of the tax was to ameliorate the impact of the environmental harm to the Louisiana Coastal Area caused by activities associated with the transportation and development of oil and natural gas. From a policy and constitutional law perspective, CWEL is the paradigm of an environmental tax, and it was a step in the right direction. This is commendable to the oil- and gas-producing states in the Niger Delta region of Nigeria.

Secondly, the fact that States do have rights is certainly beyond question. The right to a clean environment and subsistence are non-negotiable. The life of the agrarian and fishing communities in the Niger Delta is inextricably tied to land and their rivers. To pollute these natural resources is "murder".

It is paramount to note that subsistence does not begin and end with hunting and fishing, but involves social and cultural tradition, health and nutrition, and the simple economic of providing for food, clothing, and shelter. The significance of subsistence is not in food fathering alone, but with the intertwining of food gathering and the socio-cultural identification of a traditional and unique life style. These lifestyles give natives a sense of pride, identity, distinction and unity. Subsistence culture fosters values such as self-reliance, independence, co-operation and family and community responsibility. There is also a unique satisfaction that coincides with the knowledge that the work one does is not a meaningless activity, but one essential to survival.

Rather than experience enhanced subsistence as a reasonable expected consequence/benefit of petroleum development, these communities within the respective States have become prey to armored tanks, plundered and afflicted up to extinction. The brutal repression of the Ogonis, the massive eradication of the Ijaws along the coast of Bayelsa State under the firepower of the Federal Government Warships were the heights of man's inhumanity to man.

States should be compensated for the pollution and other environmental hazards they suffer as a result of oil and gas activities. States could file action against pollution oil and gas companies and receive damages like the government of Alaska did. Alaska got \$900 million for the damage caused by the 11 million gallons of oil discharged into Prince William Sound when Exxon Valdes ran aground on March 24, 1989. This was without prejudice to claims for compensation made by individuals and native co-operatives. Alaska armed with high bargaining strength through its negotiators, received settlement monies from Exxon rather than wait for a long risky trial.

Producing States should opt for negotiation on the entire policy and regulatory framework within which the oil and gas industry operates instead of long tedious litigation. However, any negotiation entered into by States with polluters should not be myopic or parochial to assume that the quantification of damages would revolve around the harm to resources. It should not overlook the reality that the oil spill; harm people. Failure to consider the importance of nature resources to the subsistence of natives would lead to such resources being under-valued.

The deprived inhabitants of the oil-producing areas must be given a stake in the industry for the exploitation to be beneficial to all concerned. This inevitably would require understanding, patience and statesmanship. Participation by oil producing States deserves urgent attention. The situation, however, calls for negotiation and not confrontation.

*Required Reforms:*

The recommendations made hereunder are in addition to the recommendations made above:

- In view of the recommended repeal of the Petroleum Act, the law that shall govern the oil and gas industry must recognize and affirm the community ownership of resources.
- Accordingly, the provisions of the Deep Offshore and Inland Basin Production Sharing Contracts Decree No. 9, 1999 as amended by Decree No. 26, should be reviewed to reflect the interest of the various parties that are involved in oil and gas production (Federal, State and Local Governments, producing companies and the communities).
- It is further recommended that in the interim, until the said laws are repealed the oil and gas royalties should be paid to the resource-producing communities.
- Gas flaring should be completely prohibited. The various operating companies should be made to adopt and implement the technology in force in the other jurisdictions where they operate without flaring gas. The Gas Re-injection Act and subsidiary regulations made thereunder should be repealed accordingly.
- Henceforth, submission of a viable scheme for gas utilization must be a condition precedent to the grant or renewal of licenses or leases to any oil- and gas- producing company seeking to continue or commence operation in the region.
- In the interim, the gas flare penalties should henceforth be paid to the respective communities where the “criminal but State-condoned’ act is perpetrated. This is the only equitable treatment one could reasonably expect to have while gas flaring persists.
- **A law on Assessment and Compensation for Natural Resources Damage should be enacted.**

## **Conclusion**

It is no pessimism to comment that it is too late now to judge past failures or to provide the natives of the oil- and gas- producing areas with full compensation for what has taken place. A sense of grievance and injustice will remain for generations and nothing but time can erase it particularly when one considers the fact that some of these resources are nonrenewable resources. It is nonetheless remarkable that governments have come to terms with the fact that native societies must be preserved and supported. We now know the power of the community dwellers in Nigeria. This is clearly attested to by the fact that no oil has been produced in Ogoni land for the past few years as a result of the tension and unrest. Aside from moral considerations, which alone are weighty reasons to redress aggrieved natives and yield their call, there is obviously a very

pragmatic reason why the government and the oil- and gas-producing/servicing companies should come to terms with the native people. We need, more than ever, these natural resources, which can be developed in those areas being claimed by the natives. From a practical point of view it becomes very necessary to settle these claims so that these resources can be developed in an orderly manner for the benefit of all Nigerians and in an atmosphere of social peace.

The deprived inhabitants of the oil- and gas-producing areas must be given a stake in industry for the exploitation to be beneficial to all concerned. This inevitably would require understanding, patience and statesmanship.