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The Doctrine of Discovery and Rule of Capture: Re-Examining the Ownership and Management of Oil Rights of Nigeria's Indigenous Peoples*

Doktryna „odkrycia" i zasada „zawłaszczenia". Ponowne badanie prawa własności i zarządzania prawami wydobycia ropy naftowej rdzennych ludów Nigerii

ABSTRACT

The aim of the article is to examine the theories that underpin the ownership and management of oil rights in Nigeria and the need for a new ownership model. The economy of Nigeria is majorly supported by revenues from natural resources, especially crude oil. With the downturn in the country's economy, the Nigerian Federal Government recently embarked on a series of crude oil discoveries to increase revenue despite the unresolved violations of human rights of the indigenous peoples and environmental abuses committed during oil exploration in the Niger Delta region of the country. The Nigerian government finds justification for this uncontrolled exploration of natural resources in the doctrine of discovery and the rule of capture. The author argues that basing the right of the Nigerian Federal Government to explore natural resources on the two doctrines has negative implications on the rights of indigenous peoples in Nigeria and environmental protection, and is a continuation of the philosophies behind colonialism. Therefore, the article examines the doctrine of discovery, the rule of capture, the colonial philosophies of property rights, and the legal regime regarding ownership of natural resources in Nigeria. It suggests a hybrid ownership model where ownership is shared between indigenous groups and the government.

Keywords: doctrine of discovery; rule of capture; indigenous peoples in Nigeria; environmental protection; crude oil; colonialism

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INTRODUCTION

After about eight months of oil exploration in northern Nigeria, the Nigerian National Petroleum Corporation (NNPC) announced on 10 October 2019 that it had discovered crude oil in the region. According to the initial reports, the discovery consists of gas, condensate, and light sweet oil of the American Petroleum Institute gravity ranging from 38 to 41, discovered in layered siliciclastic Cretaceous reservoirs of Yolde, Bima Sandstone, and Pre-Bima formations.[1] Again, in February 2020, the government announced that about one billion barrels of crude oil were also discovered in the north.[2] There are doubts whether any crude oil was discovered or whether it was all a gimmick by the Federal Government of Nigeria to include the northern part of the country as an oil-producing region for the purposes of the recently passed Petroleum Industry Act of Nigeria (PIA; 2021).[3] But beyond the politics surrounding this discovery, there are human rights, environmental, and property ownership issues to be considered.

The doctrine of discovery was a tool used by European colonizers to justify the occupation of vacant land, the so-called *terra nullius*, in the name of their sovereign.[4] The colonialism of the Americas, and to an extent Africa, coincided with the advent of some property rights principles as propounded by John Locke. This theory gave legitimacy to the discovery and grabbing of lands belonging to the indigenous peoples. Again, the rule of capture, which allows a landowner to use substances that escaped from his neighbor's lands, has been used to justify the Nigerian government's ownership of all the natural resources in the country. These principles influenced some of the legal instruments on natural resource ownership in the country and are colonial philosophies.

Nigeria was a British colony until 1960.[5] At this point, crude oil had already been discovered in a large amount. Shell Oil Company discovered oil in Bomu in Ogoniland in 1957, which launched a phase that significantly impacted the Ogoni people and Nigeria as a whole.[6] This became the second oil discovery in the Niger Delta region of Nigeria after an earlier oil discovery in Oloibiri, in present-day

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[1] M. Eboh, *NNPC Discovers Crude Oil, Gas in Northern Nigeria*, 11.10.2019, https://www.vanguardngr.com/2019/10/breaking-nnpc-discovers-crude-oil-gas-in-northern-nigeria (access: 29.8.2023).

[2] C. Nwagbara, *FG Discovers Crude Oil in North, Says There's More*, 13.2.2020, https://nairametrics.com/2020/02/13/fg-discovers-crude-oil-in-north-says-theres-more (access: 29.8.2023).

[3] See K. Jeremiah, *Secrecy, Doubts Trail One Billion Barrels Oil Discovery in North*, 21.11.2021, https://guardian.ng/news/secrecy-doubts-trail-one-billion-barrels-oil-discovery-in-north (access: 29.8.2023).

[4] Indigenous Corporate Training, *Indigenous Title and the Doctrine of Discovery*, 26.1.2020, https://www.ictinc.ca/blog/indigenous-title-and-the-doctrine-of-discovery (access: 29.8.2023).

[5] C.J. Korieh, *Nigeria and World War II: Colonialism, Empire, and Global Conflict*, Cambridge 2020, p. 237.

[6] S. Nubari, *The Impact of Oil Exploration on Ogoniland*, 6.3.2017, https://medium.com/@Saatah/the-impact-of-oil-exploration-on-ogoniland-2d5cbe8d90ea (access: 29.8.2023).

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Bayelsa state.[7] The discovery, which was heralded as good news, was later to become the greatest nightmare of the Ogoni community.[8] This discovery of oil and the right to claim ownership of crude oil by the British government was informed by the doctrine of discovery and the rule of capture. While the former was a tool for the forceful takeover of landed property belonging to former colonies, the latter was used to justify the British colonial government's ownership of all crude oil deposits within the territory of indigenous peoples in Nigeria. Again, at the independence of Nigeria in 1960, the British government handed over to the newly formed Nigerian government the rights and authority to make laws to an extent[9] and transferred to the Nigerian government some assets and liabilities it acquired during colonialism.

The newly formed Nigerian government continued discovering crude oil and taking over lands that contained natural resources.[10] This is despite reports of human rights and environmental violations during oil exploration. For instance, some of the widely celebrated environmental and human rights abuse cases tried in courts of foreign countries emanated from the Niger Delta region of Nigeria,[11] indicating that there are no accountability measures in Nigeria or that the government is unwilling to provide remedies to victims. So, this article examines the doctrine of discovery and the rule of capture and investigates how the Nigerian government, through its legal system, is continuing the colonial ideologies that have negatively impacted human rights and the environment. The author recommends the development of a hybrid system where indigenous peoples would be allowed to own the oil and natural gas deposits within their territories based on the customary principles of *quicquid plantatur solo, solo cedit* and *cuius est solum, eius est usque ad coelum et ad inferos* while the government owns and manage natural gas deposits on other lands with a strict tax regime on indigenous-owned oil and gas resources. This re-

[7] *Ibidem*.

[8] K. Saro-Wiwa, *Nigeria in Crisis: Nigeria, Oil and the Ogoni*, "Review of African Political Economy" 1995, vol. 22(64), pp. 244–245.

[9] Chapter 55 (1) (2) (a) of the Nigeria Independence Act, 1960.

[10] A. Ogbuigwe, *Refining in Nigeria: History, Challenges and Prospects*, "Applied Petrochemical Research" 2018, vol. 8, pp. 181–192.

[11] Some cases were instituted in the US, like *Wiwa et al. v Royal Dutch Petroleum Co.*, 392 F.3d 812 (2004) and *Kiobel v Royal Dutch Petroleum Co.*, 569 US 108 (2013). In the UK, cases like *Okpabi and others v Royal Dutch Shell Plc and another*, [2021] UKSC 3, *Bodo Community & Ors v SPDC*, [2014] EWHC 2170 (TCC). In 2021, a Dutch Court of Appeal gave a ruling regarding oil pollution in Nigeria in *Four Nigerian Farmers and Stichting Milieudefensie v Royal Dutch Shell Plc and another*, [2021] ECLI:NL:GHDHA:2021:132 (Oruma), ECLI:NL:GHDHA:2021:133 (Goi), and ECLI:NL:GHDHA:2021:134 (Ikot Ada Udo). There is a French case where the Supreme Court gave an interlocutory ruling in March 2022. See Business and Human Rights Centre, *Sherpa and Friends of the Earth France v Perenco SA, 9.3.2022*, 10.3.2022, https://www.business-humanrights.org/en/latest-news/french-high-court-rules-in-favor-of-ngos-in-perenco-environmental-case-for-alleged-harm-in-the-democratic-republic-of-congo (access: 13.8.2023).

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quires a shift towards more equitable and inclusive models of resource governance, which prioritize the participation and agency of indigenous communities and seek to promote sustainable development outcomes.

The research methodology is mainly analytical and descriptive. The descriptive methodology is used to explain the doctrine of discovery and rule of capture, while the analytical method is used to question the applicability of these concepts regarding ownership of land and natural resources beneath the land. The essence of using the analytical and descriptive methods is to understand these doctrines, how they were used historically, and how they influenced the current laws and policies regarding the ownership and management of natural resources in Nigeria. As a consequence, the historical research method is used to understand how the doctrine of discovery and the rule of capture were developed. The historical method of research involves studying past events, ideas, and phenomena to gain an understanding of their significance, evolution, and impact on the present.[12] Doctrinally, the legal instruments in Nigeria that divest ownership of oil and natural gas from the indigenous peoples and private individuals are examined.

RESEARCH AND RESULTS

1. The doctrine of discovery

The doctrine of discovery is not just a reminder of colonialism;[13] it has become part of most post-colonial governments' land and natural resources ownership. It was the framework used by Spain, Portugal, and England for the colonization of several territories, including North America[14] and Africa.[15] A doctrine that started as part of some European monarchs and the Church's desire for expansion and more control was accepted as part of international law[16] and used to justify the forceful seizure of indigenous lands under the pretense of discovering new lands.[17] Two

[12] L.K. Jurgens, *Understanding Research Methodology: Social History and the Reformation Period in Europe*, "Religions" 2021, vol. 12(6).

[13] J. Reid, *The Doctrine of Discovery: The International Law of Colonialism*, "The Canadian Journal of Native Studies" 2019, vol. 30(2), p. 335, 337.

[14] Indigenous Corporate Training, *op. cit*.

[15] M. Charles, R. Soong-Chan, *Unsettling Truths: The Ongoing, Dehumanising Legacy of the Doctrine of Discovery*, Illinois 2019, p. 16.

[16] R. Dunbar-Ortiz, *The United States Is Founded upon the Model of European Conquest: Dispose of the Disposable People*, 16.10.2014, https://truthout.org/articles/the-united-states-is-founded-upon-the-model-of-european-conquest-dispose-of-the-disposable-people (access: 29.8.2023).

[17] R.N. Clinton, *Treaties with Native Nations: Iconic Historical Relics or Modern Necessity?*, [in:] *Nation to Nation: Treaties between the United States and American Indian Nations*, ed. S.S. Harjo, Washington 2014, p. 15.

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instances where this doctrine was authorized, one by King Henry VII, an English monarch, and another by Pope Nicholas V, are instructive. The doctrine of discovery is said to have originated in a papal bull issued by Pope Nicholas V in 1445 that permitted King Alfonso V of Portugal to invade West Africa, thus

> to invade, search out, *capture*, vanquish, and subdue all Saracens and pagans whatsoever, (…) and the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods whatsoever held and possessed by them (…) and to apply and appropriate to himself and his successors the kingdoms, dukedoms, counties, principalities, dominions, possessions, and goods, and to convert them to his and their use and profit.[18]

In almost the same tone, in 1496, King Henry VII issued Letters Patent to an explorer, John Cabot and his sons to discover new lands and take ownership of them. He permitted them to

> set up our aforesaid banners and ensigns in any town, city, castle, island or mainland whatsoever, newly found by them… [To] occupy and possess whatsoever such towns, castles, cities and islands by them thus discovered that they may be able to conquer, occupy and possess, as our vassals and governors lieutenants and deputies therein, acquiring for us the dominion, title and jurisdiction of the same towns, castles, cities, islands and mainlands so *discovered*.[19]

This idea of declaring an already inhabited land as *terra nullius* was argued by the US Secretary of State, Thomas Jefferson, in 1792 as part of international law norms that should also apply to the US.[20] It was given a judicial flavour in *Johnson v M'Intosh*,[21] where the US Supreme Court justified the doctrine by citing the papal bull and other such powers given by European monarchs to colonizers. Before the country's independence from British rule, Nigeria had a series of searches for oil deposits. Shell/D'Arcy finally discovered oil at the Oloibiri community in 1956,[22] which launched a phase that significantly impacted Nigeria as a whole.[23]

After the independence of Nigeria in 1960, the new government inherited assets and ideologies from the British government. The new Nigerian government also embarked on discovering lands and resources belonging to the indigenous communities. It even went ahead to make laws to empower them to do so. Unlike the colonial government that was after new colonies and the expansion of their territories and dominions, the post-colonial Nigerian government is inter-

[18] Cited in M. Charles, R. Soong-Chan, *op. cit.*, p. 21.
[19] Cited in Indigenous Corporate Training, *op. cit*.
[20] R. Dunbar-Ortiz, *op. cit*.
[21] *Johnson v M'Intosh*, 21 US (7 Wheat.) 543 (1823).
[22] P. Steyn, *Oil Exploration in Colonial Nigeria, c. 1903–58*, "Journal of Imperial and Commonwealth History" 2009, vol. 37(2), p. 249, 266.
[23] S. Nubari, *op. cit*.

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ested in discovering oil and gas resources within the country. These laws and their justification by another author will be revisited later after analyzing the rule of capture.

2. The rule of capture

Robert E. Hardwicke, in 1935, gave a popular explanation of what this rule entails:

> The owner of a tract of land who drills wells thereon acquires title to the oil and gas which are produced from such wells though it be proved or admitted that some of the oil and gas drained to the wells from adjoining lands.[24]

The rule is often concerning oil and gas law. In simpler terms, it supposes that Mr. XYZ drills wells on his land to produce oil and gas and becomes the owner of the oil and gas, notwithstanding that some of the products flow from under neighboring land belonging to Mrs. UVW. Mr. XYZ is not liable to Mrs. UVW for any loss she might suffer. The rule of capture is a doctrine of common law[25] that dates to early law concerning groundwater and *ferae naturae*. It evolved as a no-liability rule in circumstances where the subject of the dispute was an unconfined, percolating, or wild thing whose behavior was not fully understood and whose behavior was not readily amenable to ordinary property law concepts.[26] The justification for the rule is that oil and gas, like wild animals, are fugitives and wander about. They belong to the landowner, but once they escape or wander into another's land, the landowner cannot lay ownership claims. In this instance, possession of land is not necessarily possession of the gas beneath the land.[27]

As noted earlier, the rule of capture is a product of common law, and at that, the House of Lords was reluctant to recognize corporeal possessory interests in "fugacious, or wild and migratory" substances like mineral oil because they were subject to a loss by drainage.[28] In the US, oil and gas ownership is guided by two theories: (1) ownership-in-place theory, which supposes that subject to the rule of capture, a landowner owns a corporeal possessory interest comparable to a fee simple in the substances beneath his land, but this ownership is a determinable

[24] R.E. Hardwicke, *Rule of Capture and Its Implications as Applied to Oil and Gas*, "Texas Law Review" 1935, vol. 13(4), p. 391, 403.

[25] *Acton v Blundell*, 12 Mees. & W. 324, 354, 152 Eng. Rep. 1223, 1235 (Ex. Ch. 1843).

[26] C.A. Low, *The Rule of Capture: Its Current Status and Some Issues to Consider*, "Alberta Law Review" 2009, vol. 46(3), p. 799, 800.

[27] B.M. Kramer, O.L. Anderson, *The Rule of Capture – an Oil and Gas Perspective*, "Environmental Law" 2005, vol. 35, p. 899, 906.

[28] A.K. Usman, *Nigerian Oil and Gas Industry Laws: Policies and Institutions*, Lagos 2017, p. 199; *Westmoreland Natural Gas Company v DeWitt*, 130 Pa 235, 18 Atl 724, 5 LRA 731 (1889).

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fee;[29] and (2) exclusive-right-to-take theory that allows the landlord, not the right of ownership of the substances in their land, but the right to retain the exclusive right to capture the substances.[30] This right to capture indicates that "oil belongs to the party who extract[s] it from his land";[31] since oil is migratory and can move from one oil well to the other, a party who first captures it is deemed the owner and legally protected.[32]

Because this rule allows a person to drill as many oil wells as possible to capture the oil in his neighbor's land, it is referred to as "the law of piracy", "the law of the jungle",[33] and "evil".[34] Some flaws in this rule have been identified, including "over drilling and the dissipation of the reservoir's natural energy".[35] Apart from the possibility of leading to resource misallocation and gross economic waste, its application is attributed as a significant contributor to environmental pollution.[36]

3. The reception and applicability of the rule of capture in Nigeria

Nigeria is a result of a colonial creation by the British. Because of this, the legal regime in Nigeria is a combination of many sources, including the common law, the doctrines of equity, and statutes of general application that were in force in England on 1 January 1900 as part of the Received English Law.[37] In other words, all common law principles and other laws applicable in England on 1 January 1900 form part of applicable laws in Nigeria, subject, of course, to "the limits of the local jurisdiction and local circumstances shall permit and subject to any Federal law".[38]

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[29] B.M. Kramer, O.L. Anderson, *op. cit.*, p. 906; *Michel T Halbouty and Ors v Railroad Commission of Texas and Ors*, 357 S W 2d 364 (Tex 1962).

[30] A.K. Usman, *op. cit.*, p. 199; E. Kuntz, E. Smith, J. Lowe, O. Anderson, D. Pierce, C. Kulander, *Kuntz Law of Oil and Gas: A Treatise on the Law of Oil and Gas*, vol. 1, Nantucket 2019, chapter 7.

[31] J.L. Smith, *The Common Pool, Bargaining, and the Rule of Capture*, "Economic Inquiry" 1987, vol. 25(4), pp. 631–644; M.C. Blumm, L. Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, "Environmental Law" 2005, vol. 35, pp. 673–674.

[32] A.K. Usman, *op. cit.*, p. 202.

[33] R.E. Hardwicke, *op. cit.*, p. 392.

[34] B.M. Kramer, O.L. Anderson, *op. cit.*, p. 900.

[35] *Ibidem*, p. 902.

[36] T.K. Righetti, *The Incidental Environmental Agency*, "Law Archive of Wyoming Scholarship" 2019, vol. 35, p. 1, 7; J.S. Johnston, *The Rule of Capture and the Economic Dynamics of Natural Resource Use and Survival under Open Access Management Regimes*, "Environmental Law" 2005, vol. 35(4), pp. 855–898.

[37] See Section 32 (1) of the Interpretation Act (Cap I-23 Laws of the Federation of Nigeria, 2004); W.O. Anyim, *Research under Nigerian Legal System: Understanding the Sources of Law for Effective Research Activities in Law Libraries*, "Library Philosophy and Practice" 2019, vol. 2383, p. 1, 6.

[38] Section 32 (2) of the Interpretation Act.

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The rule of capture was, therefore, received in Nigeria as part of colonial legal principles. Some of the Received English Laws already existed under customary law rules in Nigeria with a certain degree of similarities. For instance, there existed and still exist under customary law in various nations in Nigeria concepts like common law rules, such as the customary tenancy, pledge,[39] the primogeniture rule of inheritance[40] whereby land descends to the oldest son,[41] *quicquid plantatur solo, solo cedit*,[42] and so on. The *quicquid plantatur solo, solo cedit* means that anything attached to land is part of the land. Although it appears to be contentious as to whether it is a rule of customary law, the consensus is that it is a rule of customary law and was not new to the various customs in Nigeria prior to colonialism.[43] T.O. Elias believes this principle has always been part of Nigerian property law because it is "reasonable, convenient, and universal".[44] As a corollary to this maxim, there also exists the *cuius est solum, eius est usque ad coelum et ad inferos* maxim that literally means that "whoever owns the soil, it is theirs all the way to Heaven and all the way to Hell"[45] and relates to the extent of the ownership enjoyed by the fee simple owner.[46] As will be seen in the subsequent section, these rules are no longer absolute in Nigeria because there are now statutory exceptions, especially where the land contains mineral resources.

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[39] E. Chianu, *Right to Improvements on Land in Nigeria*, "Journal of the Indian Law Institute" 1990, vol. 32(2), pp. 218, 229–232.

[40] See the case of *Prince Felix I Ogiugo v Prince Anthony E Orhue Ogiugo*, (1999) JELR 41278 (SC). See also A.C. Diala, *Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa*, "African Human Rights Law Journal" 2014, vol. 14(2), pp. 633–654; E.O. Ugiagbe, K. Agbontaen-Eghafona, T.B. Omorogiuwa, *An Evaluation of the Principles of Primogeniture and Inheritance Laws among the Benin People of Nigeria*, "Journal of Family History" 2007, vol. 32(1), pp. 90–101.

[41] K. Maunatlala, C. Maimela, *The Implementation of Customary Law of Succession and Common Law of Succession Respectively: With a Specific Focus on the Eradication of the Rule of Male Primogeniture*, "De Jure Law Journal" 2020, vol. 53(1), pp. 36–37; R.B. Morris, *Primogeniture and Entailed Estates in America*, "Columbia Law Review"1927, vol. 27(1), pp. 24–51.

[42] P. Luther, *Fixtures and Chattels: A Question of More or Less…*, "Oxford Journal of Legal Studies" 2004, vol. 24(4), p. 597, 598; H. Esmaeili, *Property Law and Trusts (waqf) in Iran*, [in:] *Research Handbook on Islamic Law and Society*, ed. N. Hosen, Cheltenham 2018, p. 188.

[43] E. Chianu, *op. cit.*; A.M. Olong, *Land Law in Nigeria*, Lagos 2011, pp. 14–16. See some court decisions on this – *Okoiko and Anor v Esedalue and anor*, (1974) 3 S C 15; *Ezeani v Njidike*, (1964) ALL NLR 402.

[44] T.O. Elias, *Nigerian Land Law and Custom*, Oxfordshire 1962, p. 214.

[45] A.K. Usman, *op. cit.*, p. 199; H.P. Faga, R.A. Ngwoke, *The Niger Delta Agitation for Resource Control: Making Sense of Common Law Private Property Ownership Principles in the Management and Control of Oil Resources in Nigeria*, "Studia Iuridica Lublinensia" 2021, vol. 30(5), pp. 223–252; S.J. Hepburn, *Ownership Models for Geological Sequestration: A Comparison of the Emergent Regulatory Models in Australia and the United States*, "Environmental Law Reporter" 2014, vol. 44(4), p. 10310, 10313; *Jackson Municipal Airport Authority v Evans*, 191 So 2d 126, 128 (Miss 1966).

[46] R. Malcolm, *Concentrate Questions and Answers Land Law: Law Q&A Revision and Study Guide*, Oxford 2020, p. 7.

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The land tenure system in Nigeria is principally based on customary land tenure rights,[47] at least until the Land Use Act[48] and other legislations that embody the colonial ideas of the rule of capture and discovery were enacted. What constitutes land under customary law has been controversial, but the preponderance of opinion tilts towards a land meaning only the soil surface.[49] This was so because many communities, prior to the discovery of oil, did not envisage the possibility of land containing treasures beneath the earth's surface. The above system built on the *quicquid plantatur solo, solo cedit*, and *cuius est solum, eius est usque ad coelum et ad inferos* was enjoyed by different communities before the discovery of oil in Nigeria by the British government and the subsequent legal framework put in place by the Nigerian government.

3.1. Usman's justification of the rule of capture in Nigeria

Professor Adamu Kyuka Usman attempted, although contradictorily, to justify the Nigerian government's takeover of all the natural resources found in Nigeria based on the rule of capture and discovery. According to him, "it was the Nigerian state under colonial rule that searched and *discovered* oil in the Niger Delta" and subsequently "captured" the oil.[50] Because of this, he argues that as against the indigenes who own the lands where the oil was found, the Nigerian government is legitimately entitled to ownership as the indigenous people did not ever think of the existence of the oil and gas nor ever search or capture them.[51] Even though he acknowledges "the common law principle of *quid* (sic) *quid plantatur solo, solo cedit*" as a reasonable ground for the indigenous communities to claim ownership of the mineral resources, he nonetheless dismisses it as having been "overtaken and superseded by the rule of capture".[52] He argued again that the rule of capture is more general and universal "both from the point of where it is recognized and enforced as a rule of law and the property it covers".[53] For Usman, the rule of capture is universally recognized and enforced as a rule of law on all types of property, from land to air and sea, and by contrast *quicquid plantatur solo solo cedit* is an

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[47] C. Wigwe, I.F. George, *Customary Land and Real Estate Ownership in Nigeria: An Appraisal*, "Port Harcourt Law Journal" 2018, vol. 7(1); E.P. Oshio, *Indigenous Land Tenure and Nationalisation of Land in Nigeria*, "Journal of Land Use and Environmental Law" 1990, vol. 5(2), p. 685, 686; I.B. Oluwatayo, T. Omowunmi, A.O. Ojo, *Land Acquisition and Use in Nigeria: Implications for Sustainable Food and Livelihood Security*, [in:] *Land Use – Assessing the Past, Envisioning the Future*, ed. L.C. Loures, London 2019, p. 93.

[48] Land Use Act (Cap L5 Laws of the Federation of Nigeria, 2004), hereinafter: LUA.

[49] A.M. Olong, *op. cit.*, p. 14.

[50] A.K. Usman, *op. cit.*, p. 202.

[51] *Ibidem*.

[52] *Ibidem*.

[53] *Ibidem*, p. 203.

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English common law rule that applies only to land.[54] He further argued that the rule of capture is the basis for applying *quicquid plantatur solo cedit* because for the latter to apply, the land must first be captured.[55]

3.2. Errors in Usman's argument

Usman's argument is a deliberate refusal to apply the principle of capture properly or a failure to understand the true meaning of the rule. This article argues this based on the following four counterpoints:

1. The rule of capture, as thought by Hardwicke and as supported by an array of authorities, is that *an owner* of *a plot of land* acquires title to the oil and gas found in wells drilled on his land, although there is evidence that the oil and gas migrated from his neighbor's land.[56] However, in the case of Nigeria, landowners are not entitled to own oil production and cannot lay claim over any mineral deposit in their lands, not by the operation of this rule but by statutory provisions. So even when a landowner discovers oil in an area that is unlikely to have oil, statutory provisions mandate him to give up ownership of the land.
2. The traditional concept of the rule is that another person can lawfully take any fugacious substance from his neighbor's land without fear of being liable for damages.[57] In other words, any landowner is entitled to "go and do likewise"[58] by drilling his land and owning any captured fugacious substances, unlike in Nigeria, where a landowner is not allowed to drill their lands. If Usman's argument should be taken as the truth, then communities in possession of communal lands should be able to go into the exploration of minerals to capture any mineral resources in their lands.
3. The rule of capture does not give the first person to drill a well the right of ownership of all other uncaptured mineral resources that might be in other lands. Usman argues that since the Nigerian government discovered and captured the first oil and natural gas resources in one community in the Niger

[54] *Ibidem*.

[55] *Ibidem*

[56] R.E. Hardwicke, *op. cit.*, p. 393; B.M. Kramer, O.L. Anderson, *op. cit.*, p. 901; T. Daintith, *The Rule of Capture: The Least Worst Property Rule for Oil and Gas*, [in:] *Property and the Law in Energy and Natural Resources*, eds. A. McHarg, B. Barton, A. Bradbrook, L. Godden, Oxford 2010, p. 140; M.C. Blumm, L. Ritchie, *op. cit.*, p. 673. See these cases: *Acton v Blundell*, 14 152 Eng. Rep. 1223 (1840), applied to the owner of groundwater; *Wood County Petroleum Co v West Virginia Transportation Co.*, 28 W Va 210 (1886), where the Court held that a lessee of land was in occupation of the land and so was entitled to ownership of the oil captured; *Kelley v Ohio Oil Co.*, 49 NE 399 (Ohio 1897).

[57] *Brown v Spilman*, 155 US 665 (1895); A.R. Romero, *Property Law for Dummies*, New Jersey 2013, p. 47.

[58] *Brown v Spilman*, 155 US 665 (1895).

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Delta region of the country, all other uncaptured oil and natural gas resources automatically belong to the government according to the rule of capture. In fact, this is not the proper application of the rule. According to Hardwicke, when the rule of capture is applied in the face of normal operating conditions, the owner of a well gains title to the oil and gas produced, even if some of it drains from adjoining lands.[59] In other words, the first person to dig a well cannot rightly stop another landowner from doing the same.

4. To justify oil ownership in Nigeria on the rule of capture and to insist on only state-ownership theory to the exclusion of the long-held customary principles of *quicquid plantatur solo solo cedit* and *cuius est solum, eius est usque ad coelum et ad inferos* like Usman did has been traced as the source of the restiveness in the Niger Delta region of the country. It serves only the benefit of a few who do not care about "the deleterious effect the exploitation of crude oil has"[60] on the environment and the human and economic rights of the indigenous peoples. This paper aligns with H.P. Faga and R.A. Ngwoke's view that Nigeria should adopt a hybrid system of ownership where both the state and individual landlords should exercise ownership depending on whether the land is owned by the state or individually owned.[61]

A better argument for why the Nigerian government owns the oil and other natural gas resources would have been that the Nigerian government operates a state-ownership model of oil and other minerals[62] and not that by the mere searching and discovery of oil, the Nigerian government is entitled to ownership by the rule of capture of all oil deposits, even the ones yet to be explored. In the state-ownership model, a state acquires title to oil and gas regardless of who owns the land it is located.[63] The state-ownership model exists because of the instrumentality of positive laws enacted by the state in question that vest ownership of all oil and gas in a country on the state to the exclusion of the landowners. Later in his analysis, Usman also acknowledges that this model guides Nigeria's ownership of oil and gas resources.[64] In other words, while existing positive laws confer ownership of

[59] R.E. Hardwicke, *op. cit.*, p. 418.

[60] H.P. Faga, R.A. Ngwoke, *op. cit.*, p. 240.

[61] *Ibidem*, p. 246.

[62] T. Okonkwo, *Ownership and Control of Natural Resources under the Nigerian Constitution 1999 and Its Implications for Environmental Law and Practice*, "International Law Research" 2017, vol. 6(1), pp. 162–184. The argument that state ownership of oil slows down the development of shale in the UK, unlike in the US where it is private ownership, is presented in P. Meri-Katriina, *State Ownership of Petroleum Resources: An Obstacle to Shale Gas Development in the UK?*, "Journal of World Energy Law and Business" 2017, vol. 10(4), pp. 358–366; B. Leonard, D. Parker, *Private vs. Government Ownership of Natural Resources: Evidence from the Bakken*, August 2018, https://csgs.kcl.ac.uk/app/uploads/2019/01/Parker-paper.pdf (access: 29.8.2023).

[63] H.P. Faga, R.A. Ngwoke, *op. cit.*, p. 240.

[64] A.K. Usman, *op. cit.*, p. 203.

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all oil deposits on the Federal Government of Nigeria, the rule of capture has been wrongly applied in the Nigerian context.

4. Locke's right to property, doctrine of discovery, and rule of capture

Researchers have shown that most of the natural resources in the world are located within the territories of indigenous peoples, and so indigenous peoples lay customary rights claim over more than half of the world's natural resources.[65] What has agitated some scholars and governmental policies toward this claim is whether indigenous peoples can exercise property rights over these natural resources or whether states should divest indigenous peoples of ownership. In other words, while they claim customary rights over these resources, they are dispossessed of the rights and are only allowed around 10% of these resources.[66]

This dispossession of customary rights over natural resources could be traced to John Locke's theory of original appropriation, otherwise called the Lockean theory of property. In his Second Treatise, Locke reiterated the creation story in the Bible by saying that after creation, God gave all nature to mankind in common and that since then, all races and peoples have an equal right to gather and appropriate natural resources for their use.[67] Once this has been done, what was gathered or appropriated belonged to the person who made efforts to gather it, even though nature remained commonly owned.[68] Owners of the acquired property had the right to dispose of them according to their desires except to let them spoil unused. Extending this theory to land ownership means that all lands were owned in common originally, but anyone could claim property ownership to a piece of land once they have labored to make the land more productive.[69] Locke postulated that justice gives every man a title to the product of his honest industry.[70] He propounded this theory in 1689 when Europe was still exploring and discovering the world. Justification

[65] L. Notess, P. Veit, I. Monterroso, E.S. Andiko, A.M. Larson, A. Gindroz, J. Quaedvlieg, A. Williams, *The Scramble for Land Rights: Reducing Inequity between Communities and Companies*, 11.7.2018, https://www.wri.org/research/scramble-land-rights (access: 29.8.2023), p. 5; K.K. Sangha, *Global Importance of Indigenous and Local Communities' Managed Lands: Building a Case for Stewardship Schemes*, "Sustainability" 2020, vol. 12(19), pp. 2–3; S.D. Bachmann, I.P. Ugwu, *Hardin's 'Tragedy of the Commons': Indigenous Peoples' Rights and Environmental Protection. Moving Towards an Emerging Norm of Indigenous Rights Protection?*, "Oil and Gas, Natural Resources, and Energy Journal" 2021, vol. 6(4).

[66] K.K. Sangha, *op. cit.*, p. 3.

[67] J.D. Bishop, *Locke's Theory of Original Appropriation and the Right of Settlement in Iroquois Territory*, "Canadian Journal of Philosophy" 1997, vol. 27(3), p. 311, 314.

[68] *Ibidem*.

[69] *Ibidem*.

[70] F. Przetacznik, *Individual Human Rights in John Locke's Two Treatises of Government*, "Netherlands International Law Review" 1978, vol. 25(2), p. 195, 202.

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for the takeover of indigenous peoples' lands was needed, and many have accused Locke of providing such justification through his theory.[71]

The doctrine of discovery and the rule of capture find philosophical backing in Locke's property rights. In fact, the two concepts are property rights theories. In the context of Locke's theory, lands discovered by colonizers belonged to the colonizers because they spent labor and time in the discovery and subsequently made the lands more productive. For the indigenous peoples, Locke's theory justifies the dispossession of their lands through discovery,[72] and his theory played an enormous role in the European colonial further expansion.[73] Again, Locke's theory applies to the rule of capture because drilling a well is a form of expending labor and resources to get a more productive result – oil and natural gas. In this regard, Locke is recognized as "the architect of the capture rule for American purposes".[74] Locke's property right, the doctrine of discovery, and the rule of capture could therefore be said to be like the three leaves of a shamrock or tripartite concepts that give meaning to one another. Some of the laws embodying some of these philosophies will be analyzed in the section below.

5. Legal instruments on oil and natural gas ownership in Nigeria

Nigeria operates state ownership of oil and natural gas. In other words, the government owns the oil and gas reserves found within its borders and has the authority to exploit these resources, either directly or through state-owned companies, to the exclusion of any individual or indigenous peoples. There are many legal instruments that make this possible in Nigeria, as examined below.

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[71] A. Kolers, *The Lockean Efficiency Argument and Aboriginal Land Rights*, "Australasian Journal of Philosophy" 2000, vol. 78(3), p. 391, 392; J.D. Bishop, *op. cit.*, p. 317; W. Uzgalis, *John Locke, Racism, Slavery, and Indian Lands*, [in:] *The Oxford Handbook of Philosophy and Race*, ed. N. Zack, Oxford 2017, pp. 22–30, even though the author disagrees that John Locke was trying to justify racism; J. Tully, *Rediscovering America: The Two Treatises and Aboriginal Rights*, [in:] *An Approach to Political Philosophy: Locke in Contexts*, ed. Q. Skinner, Cambridge 1993, pp. 137–176; B. Arneil, *Trade, Plantations, and Property: John Locke and the Economic Defense of Colonialism*, "Journal of the History of Ideas" 1994, vol. 55(4), pp. 591–609; eadem, *The Wild Indian's Venison: Locke's Theory of Property and English Colonialism in America*, "Political Studies"1996, vol. 44(1), pp. 60–74.

[72] M.L. Caldbick, *Locke's Doctrine of Property and the Dispossession of the Passamaquoddy*, https://www.wabanaki.com/wabanaki_new/documents/Caldbick_Thesis.pdf (access: 29.8.2023).

[73] J. Tully, *op. cit.*, p. 176.

[74] L. VanderVelde, *The Role of Captives and the Rule of Capture*, "Environmental Law" 2005, vol. 35(4), p. 649, 656.

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5.1. The Constitution of the Federal Republic of Nigeria

The 1999 Constitution of the Federal Republic of Nigeria[75] is the *Grundnorm*[76] upon which every other law derives its validity,[77] although some constitutional lawyers have criticized the procedure adopted in its promulgation by the military government for not having evolved from the "consensus of all Nigerians",[78] for being "illegitimate",[79] and not entirely a secular constitution.[80] Issues relating to mines, minerals, natural gas, rivers, etc., are all under the exclusive legislative list of the CFRN.[81] This means that only the National Assembly has the exclusive authority to make laws on them competently, excluding the possibility of states or even the local governments having a say in these matters.[82] While recognizing the right to own moveable property and interests derivable from immovable property,[83] the CFRN expressly vests ownership and management of property in mineral, oil, gas, or the land they are found on the Federal Government.[84] In the case of *Attorney General of the Federation v Attorney General of Abia State*[85] the Nigerian Supreme Court held that it is only the NNPC,[86]

[75] Constitution of the Federal Republic of Nigeria (Cap C23 Laws of the Federation of Nigeria, 2004), hereinafter: the CFRN.

[76] See H. Kelsen, *General Theory of Law and State*, Cambridge 1945; T.C. Hopton, *Grundnorm and Constitution: The Legitimacy of Politics*, "McGill Law Journal" 1978, vol. 24(1), pp. 72–91 (for the explanation of *Grundnorm*).

[77] Section 1 (1) to (3) CFRN; A. Ojo, *The Search for a Grundnorm in Nigeria – the Lakanmi Case*, "The International and Comparative Law Quarterly" 1971, vol. 20(1), pp. 117–136, where the author argues that the 1963 Constitution, which preceded both the 1979 and the 1999 Constitutions, was the *Grundnorm* as of 1971.

[78] A.A. Idowu, *The 1999 Constitution and the Problems of Federalism in Nigeria*, "The Constitution" 2002, vol. 3(1), p. 44.

[79] T.I. Ogowewo, *Why the Judicial Annulment of the Constitution of 1999 Is Imperative for the Survival of Nigeria's Democracy*, "Journal of Africa Law" 2000, vol. 44(2), p. 135, 146.

[80] Although the CFRN provides in its Section 10 that Nigeria shall be a secular state, this is not entirely the case as I.T. Sampson describes the country as a "moderately secular or soft secular state". See I.T. Sampson, *Religion and the Nigerian State: Situating the de facto and de jure Frontiers of State – Religion Relations and its Implications for National Security*, "Oxford Journal of Law and Religion" 2014, vol. 3(2), p. 311, 332.

[81] Section 44 (3) and Section 251 (1) (g) and (n) CFRN (item 39, part 1, second schedule).

[82] J.O. Arowosegbe, R.J. Akomolafe, *The Foreign Relations Powers of the Nigerian National Assembly*, "Sage Open" 2016, https://journals.sagepub.com/doi/pdf/10.1177/2158244016658503 (access: 21.8.2023), p. 3.

[83] Section 44 (1) CFRN.

[84] Section 44 (3) CFRN.

[85] *Attorney General of the Federation v Attorney General of Abia State and Others (No. 2)*, [2002] 6 NWLR (Part 764) 542.

[86] The NNPC was established pursuant to Section 1 of the Nigerian National Petroleum Corporation Act (Cap N123 Laws of the Federation of Nigeria, 2004). In 2021, the NNPC was replaced by the Nigerian National Petroleum Company Limited, established by virtue of Section 53 (1) of the 2021 PIA.

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an agent of the Federal Government, that has the mandate to manage the exploration and production of oil and gas in Nigeria. By these provisions, although indigenous peoples' right to own property is guaranteed, however, they are not allowed ownership of minerals found in their lands. Similarly, individual or indigenous ownership is not allowed even when new oil deposits are discovered in land previously enjoyed by them as landowners; they will have to relinquish ownership of the land and become entitled only to compensation.[87]

5.2. The Minerals and Mining Act

The 2007 Minerals and Mining Act,[88] which repealed the 1999 Minerals and Mining Act, contains almost the same provisions as the CFRN regarding the expropriation and nationalization of mineral resources in Nigeria. Section 1 vests ownership of all mineral resources found in Nigeria and her contiguous continental shelf on the Federal Government. It also provides that the government of the federation shall take over all land in which oil is discovered.[89] By implication, the MMA allows the government to take over all lands containing oil and prohibits any person from searching and exploring oil in Nigeria except as has been authorized.[90] The only exception is where it has been established that the land is held to be sacred or contains a thing that is a subject of veneration.[91] An interesting provision of the MMA is that a landowner shall be given a notice in the prescribed form of the intention to mine his land,[92] and once this mining has commenced, a landowner only retains the right to cultivate the surface of the land or to use it for grazing, provided the grazing and cultivation do not interfere with the mining operations.[93] The landowners are left with *reasonable* compensation,[94] and what amounts to reasonable compensation is not defined in the MMA, except that it shall be as determined by the Mining Cadastre Office and a licensed valuer.[95] Carrying out illegal mining is an offense[96] punishable with a fine of twenty million naira (₦20,000,000) and imprisonment of not less than five years.[97]

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[87] Section 28 LUA.

[88] The Minerals and Mining Act (no. 20, 2007; hereinafter: MMA) passed into law on 16 March 2007.

[89] Section 1 (1) MMA.

[90] Section 2 (1) MMA.

[91] Section 98 MMA.

[92] Section 100 MMA.

[93] Section 101 (3) MMA.

[94] Section 107 MMA.

[95] Section 108 MMA.

[96] Section 131 MMA.

[97] Section 133 MMA.

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5.3. Petroleum Act

The Petroleum Act of Nigeria[98] serves as the principal legal framework that governs the exploration, production, and usage of petroleum in the country. The Act also has provisions that vest the entire ownership of mineral resources on the Federal Government to the exclusion of state governments, local governments, or even the communities that are in occupation of the lands. The vesting section is *in pari materia* with those of the MMA and the CFRN.[99] Punishment for mining and owning a refinery in Nigeria without a license is a fine not exceeding two thousand naira (₦2,000).[100] It is easily understandable why this punishment is so small because the Act is old, has been enacted in 1969[101] and has not gone through any significant amendments since then. The Act is the foundation of the Nigerian oil industry regulatory system,[102] but it is essential to point out that the continued existence of the Petroleum Act is temporal, as the new 2021 PIA provides that the Petroleum Act shall continue to be operative until the termination or expiration of all oil prospecting licenses and mining leases issued under it.[103]

5.4. The Land Use Act

The Land Use Act, which came into effect in 1978, is highly controversial,[104] not just because of the inelegancy in its drafting[105] but also because of the radical changes it introduced into the Nigerian landholding system[106] and the fact that it was incorporated into the CFRN during the constitutional making process.[107] The implication

[98] Cap P10 Laws of the Federation of Nigeria, 2004.

[99] Section 1 of the 2004 Petroleum Act.

[100] Section 13 (2) of the 2004 Petroleum Act.

[101] Petroleum Act (1969).

[102] Y. Omorogbe, *Oil and Gas Law in Nigeria*, Lagos 2001, p. 17.

[103] Section 311 (9) (c) of the 2021 PIA.

[104] Y. Omorogbe, *The Legal Framework for Public Participation in Decision-making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless*, [in:] *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*, eds. D.N. Zillman, A.R. Lucas, G. Pring, Oxford 2002, p. 564.

[105] O.J. Ogunniyi, O.J. Akpu, *The Land Use Act of 1978: Proscription of Discrimination against Fellow Nigerians*, "Social Science Journal" 2019, vol. 3, p. 242, 244; I.O. Smith, *Sidelining Orthodoxy in Quest for Reality: Towards an Efficient Legal Regime of Land Tenure in Nigeria*, Lagos 2008, p. 29.

[106] R.N. Nwabueze, *Equitable Bases of the Nigerian Land Use Act*, "Journal of African Law" 2010, vol. 54(1), p. 119.

[107] Section 315 (5) CFRN provides that "nothing in this Constitution shall invalidate the following enactments, that is to say – (…) the Land Use Act and the provisions of those enactments shall continue to apply and have full effect in accordance with their tenor and to the like extent as any other provisions forming part of this Constitution and shall not be altered or repealed except in accordance with the provisions of Section 9 (2) of this Constitution".

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of this incorporation into the CFRN is that its amendment will be cumbersome and almost impossible,[108] in line with the rigid amendment procedure of the constitution.[109] Section 1 LUA vests ownership of all lands in a state on the state governor for the benefit of all Nigerians. An exception to this vesting is where the Federal Government holds land,[110] like where oil or any other mineral has been discovered on land.[111] The implication of Section 1 on the community-based rights of ownership that existed in Nigeria, according to L.K. Agbosu is that "it divests irrevocably such artificial legal persons of the customary law of their allodial ownership rights",[112] thereby abolishing the indigenous community concept of land ownership in Nigeria.[113]

After annihilating this right, it replaced it with a mere right of occupancy, which may be customary or statutory.[114] The enjoyment of this right is very restricted as the governor's consent must be sought and obtained before it can be alienated by way of assignment, mortgage, sublease, transfer of possession, or any other means howsoever.[115] Failure to obtain such consent makes the transaction invalid[116] or, at best, inchoate until the consent is obtained.[117] This right is further restricted by the power of the governor to revoke this right for "overriding public interest"[118] by issuing a mere notice.[119] This overriding public interest may arise where, among other reasons, the land is required "for mining purposes or oil pipelines or for any purpose connected therewith".[120] There is a provision for compensation where a right of occupancy has been revoked for mining purposes; reasonable compensation shall be paid to the land occupier as determined by the Mining Cadastre Office and a licensed valuer under the MMA.[121] The indirect implication of these provisions is that indigenous communities with abundant mineral oil are at risk of

[108] C. Nwapi, *Land Grab, Property Rights and Gender Equality in Pluralistic Legal Orders: A Nigerian Perspective*, "African Journal of Legal Studies" 2016, vol. 9(2), p. 124, 142; S.I. Nwatu, E.O. Nwosu, *Applicability of the Consent Requirement of the Nigerian Land Use Act to the Asset Management Corporation of Nigeria Act*, "Journal of African Law" 2016, vol. 60(2), p. 173, 182.

[109] See Section 9 (2) CFRN.

[110] Section 49 LUA.

[111] See Section 44 (3) CFRN; Section 1 MMA; Section 1 of the 2004 Petroleum Act.

[112] L.K. Agbosu, *The Land Use Act and the State of Nigerian Land Law*, "Journal of African Law" 1988, vol. 32(1), pp. 1–43.

[113] *Ibidem*, p. 5.

[114] G. Ezejiofor, *The Consent Requirement of the Nigerian Land Use Act*, "Journal of African Law" 1998, vol. 42(1), p. 101.

[115] Sections 21 and 22 LUA.

[116] *Savannah Bank of Nigeria Limited v Ajilo*, (1989)1 NWLR (Pt 97)305; *Union Bank of Nigeria and Anor v Ayodara and Sons (Nigeria) Ltd.*, (2007)13 NWLR Pt 1052 Pg 567.

[117] *Awojugbagbe Light Industries Ltd v PN Chinukwe and NIDB Ltd.*, (1995) NWLR (Pt. 390)379.

[118] Section 28 (1) LUA.

[119] Section 28 (4) LUA.

[120] Section 28 (2) (c) LUA.

[121] Section 108 MMA.

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continuous revocation of their right of occupancy whenever any part of their land is required for mining or for laying oil pipelines.[122]

5.5. Petroleum Industry Act

In 2021, the President of Nigeria signed the 2021 Petroleum Industry Act, ending a twenty-year effort to reform Nigeria's oil and gas sector to create a more conducive environment for the sector's growth while also addressing genuine grievances of communities most impacted by extractive industries.[123] It repeals so many laws regulating ownership, exploration, and regulation of oil production in Nigeria. According to N.C. Ole and E.B. Herbert, the PIA can be considered a revolutionary law as it consolidates at least 15 existing petroleum regulations into a single, comprehensive regulatory framework, effectively repealing them.[124] The old Petroleum Act will only continue to exist until the expiration or termination of the oil licenses and mining leases granted under it.[125] Section 1 PIA vests ownership of petroleum on the Federal Government by providing that "the property and ownership of petroleum within Nigeria and its territorial waters, continental shelf and exclusive economic zone is vested in the Government of the Federation of Nigeria". It establishes some bodies like the Nigerian National Petroleum Company Limited to replace the Nigerian National Petroleum Company[126] and the Nigerian Upstream Regulatory Commission[127] for, among other functions, to grant petroleum licenses. It creates three types of licenses:

1. Petroleum exploration license granted to qualified applicants to carry out petroleum exploration operations on a non-exclusive basis.
2. Petroleum prospecting license, which may be granted to qualified applicants:
   i. to drill exploration and appraisal wells and do corresponding test production on an exclusive basis, and
   ii. Carry out petroleum exploration operations on a non-exclusive basis.
3. Petroleum mining lease, which may be granted to qualified applicants.[128]

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[122] On how state governors have always narrowly interpreted "overriding public interest" to include the flimsiest of reasons, see E.C. Okonkwo, *A Closer Look at the Management, Revocation and Compensation Principles under the Nigerian Land Use Act*, "Journal of Sustainable Development Law and Policy" 2013, vol. 1(1), pp. 21–36.

[123] K. Nwuke, *Nigeria's Petroleum Industry Act: Addressing old Problems, Creating New Ones*, 24.11.2021, https://www.brookings.edu/blog/africa-in-focus/2021/11/24/nigerias-petroleum-industry-act-addressing-old-problems-creating-new-ones (access: 29.8.2023).

[124] N.C. Ole, E.B. Herbert, *The Nigerian Offshore Oil Risk Governance Regime: Does the Petroleum Industry Act 2021 Address the Existing Gaps?*, "Studia Iuridica Lublinensia" 2022, vol. 31(3), p. 154.

[125] Section 311 (9) PIA.

[126] Section 53 PIA.

[127] Section 4 PIA.

[128] Section 70 PIA.

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Holders of interest in petroleum prospecting licenses and or petroleum mining leases are called settlors whose operations are located in or appurtenant to any communities.[129] As part of compensation for lands expropriated, the settlors are required to make an annual contribution of an amount equal to 3% of their actual annual operating expenditure for each fiscal year to the host communities development trust fund.[130] This trust fund goes towards the development plan of the host communities, which includes, among other things, financing and executing projects for the benefit and sustainability development of the community, supporting healthcare development, and embarking on initiatives towards environmental protection.[131] The PIA, just like other laws before it, still vests ownership of oil and gas resources on the Federal Government and, by implication, perpetuates the possibility of indigenous peoples losing all their traditional lands to oil exploration.

DISCUSSION AND CONCLUSIONS

The ownership system of oil and natural gas resources in Nigeria is not economically viable and leads to abuses of the rights of indigenous peoples and the environment. The various justifications for this ownership system are rooted in colonialism, and it begs the question of whether the Nigerian government is the new colonial government. This article also disagreed with Usman's justification of the ownership system based on the rule of capture, for if the proper rule of capture should be applied, it means that indigenous peoples should be allowed to drill wells to capture oils beneath their lands but this is not the case as some legal instruments establish the state-ownership model of oil and gas in Nigeria. Indiscriminate displacement and takeover of lands belonging to the indigenous peoples in the guise of discovering oil in Nigeria is an indirect attempt at extinguishing indigenous peoples in Nigeria because most of their lands contain oil deposits.

A better approach to adopt by the government is to develop a hybrid system where indigenous peoples would be allowed to own the oil and natural gas deposits within their territories based on the customary principles of *quicquid plantatur solo solo cedit* and *cuius est solum, eius est usque ad coelum et ad inferos*. As a form of revenue for the government, there should be a well-developed tax regime on profits accrued from oil products from oil and natural gas resources privately owned by the indigenous peoples. Again, in this hybrid system, the government should only own oil beneath government-owned lands. This requires a shift towards more equitable

[129] Section 318 PIA.
[130] Section 240 (2) PIA.
[131] Section 239 (3) PIA.

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and inclusive models of resource governance, which prioritize the participation and agency of indigenous communities and seek to promote sustainable development outcomes. Therefore, the Nigerian government, in partnership with the private sector and civil society, should work towards reforming existing laws and policies to recognize and uphold the rights of indigenous peoples and to ensure that their voices are not just heard in decisions affecting their lands and resources but that they participate in the ownership and management of these resources.

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ABSTRAKT

Celem artykułu jest zbadanie teorii stanowiących podstawę własności i praw do wydobycia ropy naftowej w Nigerii oraz potrzeby opracowania nowego modelu własności. Gospodarka Nigerii opiera się głównie na przychodach z zasobów naturalnych, zwłaszcza ropy naftowej. Wraz z osłabieniem gospodarki kraju rząd federalny rozpoczął poszukiwania ropy naftowej celem zwiększenia przychodów, pomimo nierozstrzygniętych naruszeń praw człowieka ludności tubylczej i nadużyć wobec środowiska naturalnego popełnionych podczas poszukiwań ropy naftowej w regionie delty Nigru.

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Rząd Nigerii uzasadnia tę niekontrolowaną eksplorację zasobów naturalnych w doktrynie odkrycia (*doctrine of discovery*) i zasadzie zawłaszczenia (*rule of capture*). Autor wskazuje, że oparcie prawa nigeryjskiego rządu federalnego do poszukiwań zasobów naturalnych na tych podstawach negatywnie oddziałuje na prawa rdzennej ludności Nigerii i na ochronę środowiska oraz stanowi kontynuację filozofii kolonializmu. W związku z tym w artykule poddano analizie doktrynę odkrycia, zasadę zawłaszczenia, kolonialną filozofię praw własności oraz reżim prawny dotyczący własności zasobów naturalnych w Nigerii. Sugeruje to hybrydowy model własności, w którym własność jest dzielona pomiędzy grupy tubylcze i rząd.

Słowa kluczowe: doktryna odkrycia; zasada zawłaszczenia; rdzenne ludy Nigerii; ochrona środowiska; ropa naftowa; kolonializm

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