# A LEGAL ANALYSIS OF THE GOVERNANCE AND MANAGEMENT OF NATURAL RESOURCES IN AFRICA: THE CASES OF NIGERIA AND SOUTH AFRICA

**by**

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## DECLARATION

I, **Peter Emeka Nwafor**, student number 33788812, for the degree, Doctor of Laws (LLD), declare that *A Legal Analysis of the Governance and Management of Natural Resources in Africa: The Cases of Nigeria and South Africa* is my original work.

I declare that the above work and all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the thesis to originality-checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

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Signature

PETER EMEKA NWAFOR November 2023

## ABSTRACT

The UN Resolution 1803 of 1962 on Permanent Sovereignty over Natural Resources (PSNR) was a catalyst for rethinking the ownership and governance of natural resources. In terms of the Resolution, the state is at the centre of the ownership and governance of natural resources, as prescribed by international law and the relevant municipal laws, to create and sustain socio-economic development for its people. Africa is endowed with vast natural resources, yet Africa remains the most socio-economically deprived continent in the world. A key reason for this deprivation is the poor management and control of natural resources. Using the comparative legal method, this study explores the management and control of national resources in Africa, with reference to the most endowed and leading economies in Africa: Nigeria and South Africa. The study finds a fracture in the relationship between natural resource endowment in Africa and the optimal socio-economic development of the people in the two countries, contrary to the PSNR principles. This disconnect stems from the legacy of colonial legislation and administration, which is evident and dominant in the post-colonial governmental attitude of self-seeking through elite nationalism. Furthermore, this study shows a huge divide between the state's and the people's shared rights in the international law provisions on natural resources. The state has usurped the inherent shared rights to the ownership and governance of natural resources. This triggers asymmetries in the ownership and governance balance, which impede the socio-economic development benefits expected of natural resource ownership. The study proposes reforms in African countries' domestic natural resource legislation to infuse the PSNR principles. The study suggests a supranational framework for controlling and managing natural resources in Africa – the African Natural Resources Regulatory Panel (ANRRP) – which is inspired by the EU's natural resource control and management framework.



***Keywords***: natural resources, ownership, governance, South Africa, Nigeria, socio-economic development, supranational, state

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## LIST OF ACRONYMS

| | |
|---|---|
| ACHPR | African Charter on Human and Peoples' Rights |
| ACJ&HR | African Court on Human and Peoples' Rights |
| ACP | African Caribbean and Pacific Countries |
| AGRI SA | Agric South Africa |
| ANC | African National Congress |
| ANCYL | African National Congress Youth League |
| AMV | African Mining Vision |
| ANRP | African Natural Resources Panel |
| APRM | African Peer Review Mechanism |
| ASGI-SA | Accelerated and Shared Growth Initiative for South Africa |
| AU | African Union |
| AUDA | African Union Development Agency |
| BEE | Black Economic Empowerment |
| CA | Constitutive Act |
| CERDS | Charter of Economic Rights and Duties |
| COSATU | Congress of South African Trade Unions |
| CSO | Civil Society Organisation |
| CSR | Corporate Social Responsibility |
| DMR | Department of Mineral Resources |
| ECSC | European Coal and Steel Community |

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|---|---|
| ECOSOCC | Economic Social and Cultural Council |
| ENP | European Neighbourhood Policy |
| EU | European Union |
| FDI | Foreign Direct Investment |
| GDP | Gross Domestic Product |
| GEAR | Growth Employment and Redistribution |
| MNCs | Multi-National Corporations |
| MPRDA | Mineral and Petroleum Resources Development Act |
| NCNC | National Council of Nigeria and the Cameroons |
| NEPAD | New Partnership for Africa Development |
| NIEO | New International Economic Order |
| NNPC | Nigeria National Petroleum Corporation |
| NNPCL | Nigeria National Petroleum Limited |
| OAU | Organisation of African Unity |
| OEL | Oil Exploration Licence |
| OML | Oil Mining Licence |
| OPL | Oil Prospecting Licence |
| OPEC | Organisation of Petroleum Exporting Countries |
| PAC | Pan African Congress |
| PAJA | Promotion of Administration of Justice Act |
| ICJ | International Court of Justice |

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|---|---|
| IPILRA | Interim Protection of Informal Land Rights Act |
| LNG | Liquified Natural Gas |
| PAP | Pan-African Parliament |
| PIB | Petroleum Industry Bill |
| PSC | Peace and Security Council |
| PSC | Production Sharing Contract |
| PSNR | Permanent Sovereignty over Natural Resources |
| RDP | Reconstruction and Development Programme |
| SACP | South African Communist Party |
| SARS | South African Revenue Service |
| SERAP | Socio-Economic Rights and Accountability Project |
| SDG | Sustainable Development Goal |
| SPDC | Shell Petroleum Development Company |
| TEM | Transworld Energy and Mineral Resources |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of European Union |
| UDF | United Democratic Front |
| UN | United Nations |
| UNCTAD | United Nations Conference on Trade and Development |
| UNGA | United Nations General Assembly |

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# CHAPTER 1: INTRODUCTION TO THE STUDY

## 1.1 Introduction

Africa is endowed with a wealth of renewable and non-renewable natural resources.[1] Natural resources are arguably the primary driver of the economies of many African states. Hence, they have the potential to create livelihood opportunities and become a significant source of sustenance for a considerable section of Africa's population.[2] Advancing natural resource wealth is regarded as one of the ways to eliminate poverty in Africa, if this process is properly managed.[3] However, Africa's natural resources have achieved relatively little due to countries' weak governance, control and management approach.[4] Some scholars have cited the 'resource curse' as the reason for this minimal achievement; they argue that nations that are overly reliant on their natural resources wealth tend to exhibit slow growth, reduced accountability, the absence of an effective social structure, and a propensity to conflict, as opposed to nations with few or no natural resources.[5] A major problem in Africa is the ownership and governance of natural resources, which are based on states' reinforcement of centralised authority over natural resources as they seek to consolidate political authority for the control of natural resources for patronage.[6]

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1 Donald Kaberuka, *Natural Resources for Sustainable Development in Africa* African Development Report (Oxford University Press 2007) at 96. Supplement to the African Development Report, 'Oil and Gas in Africa' <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Oil%20and%20Gas%20in%20Africa.pdf> accessed 13 August 2023. See also Padraig Carmody, *The New Scramble for Africa* (Polity Press 2011). It is contended that 'African development is defined by the "paradox of plenty": that is, that it is a very resource-rich continent, but economically poor. Africa is thought to contain 42 per cent of the world's bauxite, 38 per cent of its uranium, 42 per cent of its gold, 73 per cent of its platinum, 88 percent of its diamond and around 10 per cent of its oil.'

2 ibid. See also Chris Alden and Cristina Alves 'China and Africa's Natural Resources: The Challenges and Implications for Development and Governance' South African Institute of International Affairs (SAIIA) Occasional Paper No 41 (2009) at 6 <https://www.africaportal.org/publications/china-and-africas-natural-resources-the-challenges-and-mplications-for-development-and-governance/> accessed 17 September 2022.

3 ibid. See also William Hogan, Federico Sturzenegger and Laurence Tai, 'Contracts and Investment in Natural Resources' in William Hogan and Federico Sturzenegger (eds), *The Natural Resources Trap: Private Investment Without Public Commitment* (MIT Press 2010) at 1.

4 Hogan et al (n 3) at 1.

5 The natural resource curse is discussed and analysed in detail in chapters 4 and 5 of this study.

6 James Murombedzi, *World Social Report* (2016) <https://en.unesco.org/inclusivepolicylab/sites/default/files/analytics/document/2019/4/wssr_2016_chap_09.pdf> accessed 9 June 2023.

The purpose of this study is to ascertain how the international law right of people and states to permanent sovereignty over natural resources (PSNR)[7] and the corresponding provision therefor in Articles 21 and 22 of the African Charter on Human and Peoples' Rights (ACHPR)[8] can be infused into the management of natural resources in Africa.[9] This study focuses on Nigeria and South Africa, two leading economies in Africa that both have many natural resources. The study compares the countries' natural resource extraction and exploitation timelines, practices, governance and control.

## 1.2 Problem statement

The ownership and control of natural resources have continued to generate challenges in Africa.[10] These include the direct and indirect exclusion of people from the governance and control of natural resources, leading to exclusive and autocratic control by state powers. This encourages corruption and patronage by state administrators.[11] Several municipal and international law instruments regulate the governance of natural resources. UN Resolution 1803 of 1962, the customary international law provision on PSNR, and Article 21 of the ACHPR are relevant to this study. They provide that states and international organisations must respect the sovereign rights of people and nations over their natural resource wealth and that people have the right to exploit their natural resource wealth without any deprivation of such rights. Consequently, developing states, particularly African states, have managed the state control of natural resources with reference to UN Resolution 1803 and the ACHPR to accelerate socio-economic development and the distribution of wealth.

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7 UN Resolution 1803 of 1962 on Permanent Sovereignty over Natural Resources.

8 African Charter on Human and Peoples' Rights (ACHPR) <https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf> accessed 29 November 2022.

9 Where UN Resolution 1803 of 1963 on PSNR is mentioned in this thesis, it also implies and/or connotes the provisions of Articles 21 and 22 of the ACHPR.

10 Annie Chikwanha, 'The Many Shades of Resource Nationalism' <https://saiia.org.za/research/the-many-shades-of-resource-nationalism/> accessed 17 September 2022.

11 Ibid.

Different views on natural resource ownership and control have mainly been based on customary international law perspectives.[12] A dominant view on natural resource ownership and control is that natural wealth and resources located in the territorial jurisdiction of a sovereign state belong to the community.[13] However, during the decolonisation process, this principle introduced a legal arrangement that differed from the original thinking in the newly independent states. This allowed for the unfair, inequitable and detrimental exploitation of natural resources belonging to the people.[14] The ownership and control of natural resources are critical aspects of the right to self-determination and an essential and inherent element of state sovereignty.[15] But people also have the prerogative to decide how to develop, use and conserve their natural resources. States also have an inalienable right to exercise authority over their natural resources.[16] The relationship between a state, its people and its natural resource ownership and control should be considered disjunctively.[17] Scholars suggest that the state is always in a position to act for people's socio-economic development, which could explain its sovereign control over natural resources.[18]

Furthermore, conflict triggered by issues of ownership and control of natural resources is common in countries around the world, particularly countries in Africa.[19] This is a result of the failure to transform key natural resource ownership and control mechanisms to create equity and better living standards for everyone.[20] This is called the 'resource curse'.[21] Sometimes, the problem is attributed to the 'leadership curse'

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12 UN General Assembly Resolution 626 of 1952 <https://digitallibrary.un.org/record/211441?ln=en> accessed 5 September 2022.

13 Subrata Chowdhury 'Permanent Sovereignty over Natural Resources' in Kamal Hossain and Subrata Chowdhury (eds), *Permanent Sovereignty over Natural Resources in International Law: Principle and Practice* (Frances Pinter Publishers 1984) at 1.

14 Ibid.

15 Bulajic Milan, *Principles of International Development Law* (Martinus Nijhoff Publishers 1993) at 284.

16 Ibid.

17 George Elian, *The Principle of Sovereignty Over Natural Resources* (Martinus Nijhoff Publishers 1979) at 12.

18 Ibid.

19 Augustine Ikelegbe, 'The Economy of Conflict in the Oil Rich Niger Delta Region of Nigeria' (2005) 14 Nordic Journal of African Studies 208 at 209: 'Several conflicts in resource rich states are characterized by violent scramble to control natural resources. This is what has led to the characterisation of several wars, such as those in Angola, Sudan, Zaire (DRC), Liberia and Sierra Leone as resource wars, rebellion and insurgencies.'

20 Emeka Duruigbo, 'Permanent Sovereignty and Peoples Ownership of Natural Resources in International Law' (2006) 38 George Washington International Law Review 33 at 33.

21 Kaberuka (n 1) at 111.

of oppressive and dishonest leaders.[22] Hence, the international legal concept of PSNR regarding the ownership and control of natural resources appears to have been partly motivated by the social and economic biases associated with these resources.[23] The ownership and control of natural resources in terms of the PSNR resolution resulted from the principle of economic self-determination, an aspect of human rights that eventually became intertwined with colonialism.[24]

## 1.3 Rationale for the study

### *1.3.1 Purpose*

The primary purpose of this study is to ascertain how people's and states' international law rights to PSNR, as well as the corresponding provision therefor in Articles 21 and 22 of the ACHPR have been realised in the natural resource legal frameworks in Africa. The study examines two leading African economies: Nigeria and South Africa. The study undertakes a comparative investigation of the governance and control of the dominant natural resources in each country: oil in Nigeria and gold and diamonds in South Africa.[25]

### *1.3.2 Specific objectives*

The specific objectives of the study are:

a) to investigate natural resource ownership and control in Nigeria and South Africa;

b) to establish how the realisation of the PSNR and ACHPR rights of states and people has progressed in Africa;

c) to compare and contrast the legal regimes for the ownership and control of natural resources in two leading African economies, Nigeria and South Africa; and

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22 Duruigbo (n 20) at 34.

23 ibid. See UN General Assembly Resolution 626 of 1952 <http://www.worldlii.org/int/other/UNGA/1952/160.pdf> accessed 5 September 2022. The concept of PSNR can be traced to UN Resolution 626 (VII) of 1952 in relation to the movement for the economic development and political independence of developing countries.

24 Clark Lorne, 'International Law and Natural Resources' (1977) 4 Syracuse Journal of International Law and Commerce 377 at 378.

25 See also section 1.6.4.

d) to establish if the existing forms of natural resource ownership and control mechanisms regarding these rights have led to any socio-economic advancement as intended by international law.

### 1.4 Assumptions

This study proceeds from the central assumption that natural resources are integral to achieving socio-economic development in Africa. Natural resources are also seen as essential national wealth globally, although they are neither solely necessary nor sufficient for economic growth.[26] A country's natural resources are pivotal to its socio-economic development if they are efficiently harnessed and managed. However, natural resources may also be a significant catalyst for conflict, poverty and severe underdevelopment. As Collier et al note: 'The discovery and extraction of natural resources has the potential to finance rapid, sustained and broad-based development. However, harnessing this potential is difficult: the opportunity is often missed and sometimes turns into a nightmare of corruption and violence.'[27]

Scholars have recently noted the possible correlation between natural resource exploitation and socio-economic and political problems. It has been suggested that the exploitation of natural resources is more detrimental than beneficial.[28] However, differences exist when it is argued that natural resources could be used inefficiently or that the flawed exploitation and use of natural resources may become a source of socio-economic and political difficulties. If natural resource exploitation harms economic development, the correct approach would be not to exploit natural resources. Even donor agencies would cease to finance and promote natural resource exploitation.[29] Ascher submits that 'natural resources … also have positive pathways

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[26] Thorvaldur Gylfason and Gylfi Zoega, 'Natural Resources and Economic Growth: The Role of Investment' (2006) 29 World Economy 1091–1115 <http://www.bcentral.cl/estudios/documentos-trabajo/pdf/dtbc142.pdf> accessed 29 November 2022.

[27] Paul Collier and Anthony Venables, 'Key Decisions for Resource Management Principles and Practice' in Paul Collier and Anthony Venables (eds), *Plundered Nations? Success and Failures in Natural Resource Extraction* (Palgrave Macmillan 2011) at 1.

[28] William Ascher, 'The Resource Curse' in Elizabeth Bastida, Thomas Walde and Janeth Warden-Fernandez (eds), *International and Comparative Mineral Law and Policy* (Kluwer International 2005) at 578.

[29] ibid.

to economic growth and democratic stability. Wealth from resource exploitation can be used to finance human resource development and essential infrastructure.'[30]

It is imperative to understand that UN General Assembly Resolution 1962 places a great premium on using natural resources for development. This means that national development and the well-being of people are always paramount. The UN Resolution also places different issues related to the effective exploitation of natural resources in a subdued position. This implies, as supported by Ascher's position, that what matters most are natural resources, and then their effective management and control.

### 1.5 Research question

The study seeks to investigate the following specific questions:

a) To what extent has the principle of PSNR been infused into and realised in the legislative frameworks for the governance and management of natural resources in Africa?

b) To what extent have states misused the principle of PSNR for their own political gains instead of for socio-economic development?

### 1.6 Research methodology

Research methodology is the systematic theoretical analysis of the methods applied in a study. It is a method of solving a research problem using logically adopted steps.[31] This study generally uses the following logical steps to investigate the research questions and the research problem.

[30] ibid.

[31] Mishra Shanti and Alok Mishra, *Handbook of Research Methodology: A Compendium for Scholars and Research* (Educreation Publishing 2011) at 1.

### *1.6.1 Research paradigm*

According to Terreblanche and Durreheim,[32] the research process has three major dimensions: ontology,[33] epistemology[34] and methodology.[35] Thus, a research paradigm captures this all-inclusive system of associated practice and thinking that defines the nature of the study. The ontological and epistemological aspects relate to what is commonly referred to as an individual's worldview, which significantly influences the perceived relative importance of the aspects of reality. This worldview, according to Kivunja and Kuyini, 'is the perspective, or thinking, or school or set of shared belief, that informs the meaning of or interpretation of research data'.[36]

The different paradigms include positivism, constructivism, pragmatism, post-colonialism, nationalism and African nationalism.[37] These different ways of seeing the world have outcomes and/or effects in the various academic areas, yet none of these outcomes or views is considered superior. They may be appropriate for some purposes and insufficient or overly complex for other purposes.[38] This study uses a mixture of paradigms – positivism, post-colonialism and nationalism – because they are deemed complementary for this study.

### *1.6.2 Research design*

The research design is the master plan of a research project. It demonstrates how the study was logically and coherently conducted through a thorough investigation. Therefore, it connects the conceptual research problems to the relevant practical research. The nature of the research problem and questions, as indicated above,

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[32] Martin Terreblanche and Kevin Durreheim, *Research in Practice: Applied Methods for the Social Sciences* (UCT 1999).

[33] Ontology is the philosophical study of the nature of existence or reality of being, or becoming, as well as the basic categories of things that exist and their relations.

[34] Epistemology in research describes how we come to know something, or how we know the truth or reality.

[35] Methodology refers to the practical, systemic and theoretical approach to collecting and evaluating data through the research process.

[36] Charles Kivunja and Ahmed Kuyini, 'Understanding and Applying Research Paradigms in Educational Contexts' (2017) 6(5) International Journal of Higher Education at 26.

[37] Sunethra Perera, 'Research Paradigm, Workshop on Research Methodology' (2018) <http://www.natlib.lk/pdf/Lec_02.pdf> accessed 13 June 2023.

[38] James Scotland, 'Exploring the Philosophical Underpinning of Research: Relating Ontology and Epistemology to the Methodology and Methods of the Scientific, Interpretive, and Critical Research Paradigms' (2012) at 9 <https://files.eric.ed.gov/fulltext/EJ1080001.pdf> accessed 13 June 2023.

requires qualitative research that is descriptive, exploratory and contextual in approach. The current international law instruments and municipal legislation regulating the ownership and control of natural resources in Africa, with specific reference to Nigeria and South Africa, are explored, described, analysed, compared and reported in their proper context.

### *1.6.3 Research method*

The main methods used in this study are case study analysis and comparative legal research,[39] because this is the dominant approach to concept formation and research design that is formal.[40] The comparative element seeks to understand the law and practice in Nigeria and South Africa. However, it has a substantial limitation compared to the functional method of comparative legal research.[41] The functional method is used in different circumstances and serves different goals which entail understanding the law, comparison, deciphering similarities, building systems, determining better law, unifying laws and critically assessing laws.[42] The functional method points to the importance of the research aim and the research question which leads to the choice of an appropriate comparative method.[43] The idea behind the functional method is to find solutions to practical problems of conflicts of interests and rights in societies with diverse legal systems.[44] To provide a proper historical context, the study also adopts a historical approach to understanding the exploitation of natural resources during the pre- and post-colonial periods in Africa, especially in Nigeria and South Africa. However, this historical approach is limited to a historical overview rather than an in-depth legal-historical approach.[45] This stimulates thinking on legal research and

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39 James Gordley, 'Comprehensive Legal Research: Its Function in the Development of Harmonized Law' (1995) 43(4) The American Journal of Comparative Law at 555. He makes the point that the law of a single country cannot be studied independently of the law of others.

40 Francesca Bignanmi 'Formal Versus Functional Method in Comparative Constitutional Law' (2016) 53(2) Osgood Hall Law Journal at 445. In the comparative legal research method that uses the functional approach, the law is often determined by reference to a social problem that is regarded as similar across different jurisdictions.

41 ibid.

42 Mark van Hoecke 'Methodology of Comparative Legal Research' (2015) Law and Method 1 at 9.

43 ibid.

44 ibid.

45 See Manuel Saavedra, 'Diversity as Paradox: Legal History and the Blind Spots of Law' (2020) Max Planck Institute for Legal History and Legal Theory Research Paper Series at 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3554952#> accessed 19 June 2023.

creates new understanding and significant knowledge. Given the controversy about the ownership and governance of natural resources in Africa, it is necessary to engage in a case study and a comparative study, and to use the historical approach to determine the socio-economic impact of the applicable international law instruments and municipal legislation.

### *1.6.4 Justification for the choice of Nigeria and South Africa as case studies*

Nigeria and South Africa tend to exemplify the problem in different complex situations. Nigeria is regarded as one of the largest natural resource-based economies in Africa because of its huge oil deposits, and the exploration and export of crude oil, but many of its citizens live in abysmal socio-economic conditions.[46] South Africa has vast deposits of gold and diamonds, coupled with the efficient extraction of these natural resources, and presents a picture of wealth and economic prosperity.[47] However, it is one of the most unequal countries in the world, and black Africans in particular live in poverty.[48] This study undertakes a comparative investigation of the governance and control of these natural resources to investigate the research questions outlined above.[49]

The main purpose of comparison is to identify the similarities and differences between information gathered from the case studies for investigation and findings,[50] and then to use the exercise to obtain an understanding of the information acquired for credible outcomes.[51] Oil, gold and diamonds are the most economically dominant natural

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46 See Nigeria's Poverty Index, 9 October 2018. The report states that Nigeria's poverty index currently is at 53.7%, <https://www.thisdaylive.com/index.php/2018/10/09/nigerias-poverty-index-stands-at-53-7-says-undp/> accessed 20 February 2019. See also John Agwara, 'Resource Curse in Nigeria: Perception and Challenges' (2006) 7 Central European University Center for Policy Studies at 5 <http://pdc.ceu.hu/archive/00003007/01/john.onyeukwu.pdf> accessed 27 July 2023.

47 See Ansley Elbra, 'The Forgotten Resource Curse: South Africa's Experience with Mineral Extraction' (2013) 38 Resource Policy 549 at 551.

48 ibid.

49 See also the research question in section 1.5 above.

50 Edward Eberle, 'The Methodology of Comparative Law' (2011) 16 Roger William Law Review 51 at 52. See also Geofrey Samuel, 'Comparative Law and its Methodology' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* 2 ed (Taylor and Francis, Routledge 2018) at 123: 'What comparative legal studies is bringing to law research, then is possibly more than just a different perspective. It is a domain study that is establishing and advancing legal epistemology as a new direction in the area of legal theory.'

51 ibid.

resources in the two countries.[52] Laws regulating the exploration of these natural resources will therefore be investigated to determine their effectiveness in driving the socio-economic development of citizens. The evaluation of their effectiveness is based on linking their outcome and/or impacts to the significant international law objective of ensuring that their exploitation benefits the people who have a sovereign right to the natural resources.

Nigeria and South Africa were also selected for the study because of their distinct and unique legal systems. The Nigerian legal system is firmly grounded in British common law whereas South Africa has a unique mixed legal system. Even though Nigeria retained the British common-law regime, South Africa over time crafted an exclusive and unprecedented legal framework for its natural resource exploitation. The choice of Nigeria and South Africa therefore allows for the comparison of different frameworks that emerged from a civil law system, a common-law country and a mixed Roman-Dutch law country.

### 1.7 Significance of the study

The significance of this study lies in the fact that natural resource ownership and governance in Africa are associated with the socio-economic development of people. Thus, the study not only assists in understanding natural resource ownership and governance in Africa but also demonstrates the need for ensuring that natural resources have a socio-economic impact. This study also shows why Africa should recognise the importance of natural resources for socio-economic development.

### 1.8 Delimitation of the study

The delimitation of the study refers to limitations to a study deliberately set by the researcher. These limitations are set as the boundaries or limits of the work so that the study's aims and objectives are manageable.[53] This study does not embark on an exhaustive or comprehensive analysis or examination of natural resources in Africa.

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[52] See Kaberuka (n 1) at 64,69 and Supplement to African Development Report, 'Oil and Gas in Africa' at 46. <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Oil%20and%20Gas%20in%20Africa.pdf> accessed 13 August 2023.

[53] D Theofanidis and A Fountouki 'Limitations and Delimitations in the Research Process' (2018) 7 Perioperative Nursing Quarterly 155–163.

The study is primarily concerned with analysing natural resources and the socio-economic development of the people of Nigeria and South Africa. This research study examines the ownership and governance of oil in Nigeria and gold and diamonds in South Africa in the African context.

## 1.9 Outline of study and organisation of chapters

*CHAPTER 1: INTRODUCTION TO STUDY*

This chapter sets out the background to the study, the research problem, the study's objectives, the assumption underlying the study, the scope of the study, and the research question. It also describes the research methodology, which dovetails into the research paradigm, research design and research method, the significance of study, the delimitation of study and the outline of the study.

*CHAPTER 2: LITERATURE REVIEW: CONCEPTUAL AND THEORETICAL CONSIDERATIONS*

Chapter 2 describes the literature review which includes literature observation and the essential theoretical foundations central to this work. It introduces and provides a general idea and link between natural resources, states and people. Chapter 2 highlights the founding thoughts behind sovereignty and control and how sovereignty emanated from nationalism and then transcended to nationalisation, progressing to a natural resource control mechanism. The chapter further reveals the socio-economic development perspective of natural resource control. This is a significant chapter that sets a firm foundation for the discussion in the subsequent chapters.

*CHAPTER 3: INTERNATIONAL AND REGIONAL FRAMEWORK FOR THE PRINCIPLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES*

Chapter 3 undertakes a socio-economic discussion of the impact of international law on natural resource ownership and control in the context of PSNR and the ACHPR. The chapter assesses the unique socio-economic approach of the European Coal and Steel Community (ECSC) to natural resource ownership, governance and control. The chapter critically appraises the AU's potential to replicate the ECSC benchmark on

natural resource ownership and control by way of collective sovereignty through the elements of supranationalism within the AU normative instrument.

*CHAPTER 4: OWNERSHIP AND CONTROL OF NATURAL RESOURCES IN NIGERIA*

Chapter 4 provides an overview of and explores the existing practice of natural resource development, ownership and control in Nigeria. The chapter discusses the applicable ownership and control mechanisms before and after independence in Nigeria. It critically assesses and analyses the exploitation, ownership and control of natural resources with reference to Nigeria's prevailing international law practices and obligations. It draws on the various aspects that have different impacts on the provisions of international law on the socio-economic development of people.

*CHAPTER 5: OWNERSHIP AND CONTROL OF NATURAL RESOURCES IN SOUTH AFRICA*

Chapter 5 discusses natural resource development in South Africa. It analyses the existing natural resource development in South Africa and evaluates the ownership and control mechanisms from the apartheid period to the democratic era in South Africa. It analyses the exploitation, ownership and control of natural resources with reference to South Africa's international law obligations.

*CHAPTER 6: CONCLUSION AND RECOMMENDATIONS*

Chapter 6 makes some concluding remarks, provides a synopsis, and draws some lessons from the preceding chapters about the factors that impede the socio-economic advancement of peoples through natural resources. It considers the international law rights to natural resources and the intricacies of its fair and equitable control mechanism. This chapter makes a proposal about an effective natural resource governance mechanism. It recommends an 'African Natural Resources Panel' (ANRP) framework to guide natural resource governance and control in Africa.

# CHAPTER 2:

# LITERATURE REVIEW: CONCEPTUAL AND THEORETICAL CONSIDERATIONS

## 2.1 Introduction

This chapter aims to examine the key theoretical foundations central to this study. It surveys critical patterns in the literature related to the study. The chapter introduces and provides a general idea and link between natural resources, states and people. The chapter therefore focuses on the definitional analysis of some key concepts used in this study. They are natural resources, states and people, nationalism, nationalisation and socio-economic development. It also examines their relationship and interdependence. This chapter provides the theoretical and conceptual framework for the ownership and control of natural resources for socio-economic development. It examines the debate on the existence of the people's and the state's socio-economic rights to natural resources from the perspective of permanent sovereignty over natural resources (PSNR) and the African Charter on Human and Peoples' Rights (ACHPR). It provides a sound theoretical basis and the context for the subsequent chapters.

The chapter comprises three sections Section 2.3 problematises the notion of natural resources. It examines the state and people in relation to natural resource management and socio-economic development. It further provides the contextual perspective of the state and people to align them with PSNR's and the ACHPR's intentions regarding socio-economic development. Section 2.4 examines the notions of nationalism and nationalisation and their role in the ownership and control of natural resources. It investigates the basis of nationalism as a sovereign element of the state and the people. It demonstrates that this phenomenon has strongly transformed into a political, economic and social situation that can potentially promote states' and people's socio-economic conditions.

Section 2.5 further explores the different socio-economic development aspects of natural resources. It highlights the socio-economic development considerations where the PSNR and ACHPR positions overlap. It evaluates the two existing components of socio-economic development in developing states: model 1 and model 2. The chapter contends that the second model is applicable because its rules are not coercive and it

is flexible based on what seems to be a relational engagement between the state and the people regarding the ownership and control of natural resources.

### 2.2 Theoretical framework

The study uses systems theory[54] and a devised conceptual framework to navigate the investigation of natural resource ownership and control in line with the rights vested by PSNR, the ACHPR and municipal law. Systems theory is also deployed to advance the question of whether the PSNR and ACHPR right to natural resources has stimulated greater socio-economic development of the people through the state. Alternatively, what are the impediments and strategies to ensure greater socio-economic development through natural resource exploitation? Even though this study relies on systems theory as postulated by Mele et al, it also engages with the work of other scholars which has been received, developed and interpreted within the guidelines of systems theory. With regard to the ownership and control of natural resources, the study draws on the work of various other scholars,[55] which are fully discussed in the following chapter as building blocks in illustrating questions of natural resource ownership that link the state, people and socio-economic development.

The study draws on systems theory and the conceptual framework to identify the key role of natural resources in enhancing socio-economic development. Natural resources are also seen as important national wealth globally, although they are neither solely necessary nor sufficient for economic growth.[56] However, by virtue of its multidisciplinary and multilayer approach to analysis, systems theory is better placed

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[54] Cristina Mele, Jacqueline Pels and Francesco Polese, 'A Brief Review of Systems Theories and their Managerial Application' at 127 <https://pubsonline.informs.org/doi/10.1287/serv.2.1_2.126> accessed 15 September 2022. Systems theory borders on a theoretical perspective that investigates a phenomenon considered as a whole and not as simply the sum of its basic parts. The focus is on the interaction and on the relationship between the parts in order to understand an entity's organisation, function and outcomes. The key distinct characteristic of systems theory is that it developed simultaneously within disciplines so that scholars working from the systems theory perspective built on the knowledge and concepts developed within other disciplines.

[55] Michael Heilperin, *Studies in Economic Nationalism* (Publication De L'Institut Universitaire De Etudes Internationales 1960) <https://cdn.mises.org/Studies%20in%20Economic%20Nationalism_2.pdf> accessed 17 September 2022; Konstantin Katzarov, *The Theory of Nationalisation* (Martinus Nijhoff 1964) at 1. See Chowdhury (n 13); Jeswald Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries' (1990) 24 International Lawyer 655.

[56] Gylfason (n 26) at 1091.

to support the assumption that a country's natural resources are pivotal to the socio-economic development of the people if efficiently harnessed, governed and controlled. However, natural resources are also a major catalyst for conflict, poverty and severe underdevelopment. According to Collier et al: '[t]he discovery and extraction of natural resources has the potential to finance rapid, sustained and broad-based development. However, harnessing this potential is difficult: the opportunity is often missed, and sometimes turns into a nightmare of corruption and violence.'[57]

The study also uses systems theory to understand natural resources in the classical and neoclassical models. The chapter explores the concepts and status of the state and people as beneficiaries of natural resources from PSNR and ACHPR perspectives. The chapter draws on the theories of state recognition to highlight the usefulness of natural resources in terms of rights and duties. The chapter investigates the different versions of state theories of recognition, which are the declaratory and constitutive theories as described by scholars[58] and are discussed in the following chapter. However, this study contends that exploitative state recognition must be destroyed. The chapter also explores the idea of people with the right to self-determination in relation to the PSNR and ACHPR socio-economic dividends. The chapter questions the characteristics that a group must have to be confirmed as people possessing the right to self-determination. These requirements are predicated on race, religion, ethnicity, culture, territory and separateness. Some scholars[59] also

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[57] Collier (n 27). See also Richard Dwumfour and Matthew Ntow-Gyamfi 'Natural Resources, Financial Development and Institutional Quality in Africa: Is there a Resource Curse' (2018) 59 Resource Policy 411 at 412: 'Countries that are blessed with natural resources like oil, gas and minerals among others can leverage these resources to attract private capital flows into the country … thereby having the potential of causing financial sector development.'

[58] Hersch Lauterpracht 'Recognition of States in International Law' (1944) 53(3) Yale Journal of International Law at 385; Gerard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Martinus Nijhoff 2004) at 19–22.

[59] Richard Kiwanuka 'The Meaning of "People" in the African Charter on Human and Peoples' Rights' (1988) 82 The American Journal of International Law 80 at 80; Ian Simmons, *The Ecology of Natural Resources* (Halsted Press 1974) at 3; Yoran Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 International Law and Comparative Law Quarterly 102 at 104; Ian Brownlie, 'The Rights of Peoples in Modern International Law' (1985) 9 Bulletin of the Australian Society of Legal Philosophy 104 at 107; Aureliu Cristescu, 'The Right to Self-Development, Historical and Current Development on the Basis of United Nations Instrument' at 40 para 279 <https://www.cetim.ch/legacy/en/documents/cristescu-rap-ang.pdf> accessed 17 September 2022; Mohammed Bedjaoui, 'The Right to Development and the *Jus Cogens'* (1986) 2 Lesotho Law Journal 93 at 96.

follow the systems theoretical evaluation of the idea and thus offer a slightly different view of the idea. However, this study argues that people in relation to the state are a collective of different groups and therefore share a collective right with the state. The key to this right is the right to self-determination, which protects the people against any form of socio-economic oppression.

This study further draws on systems theory and a conceptual framework to explain the basis of domestic and internal regulation and the control of natural resources.[60] It delves into the opposing cognates of nationalism, mercantilism and liberalism, as backed up by Smith in *Wealth of Nations* in 1776 on free trade and economic internationalism (liberalism), which was in direct opposition to the economic nationalism and mercantilism of Hayes[61] and Heilperin.[62] Nationalisation stems from the concept of nationalism. However, nationalisation indicates transferring resources and/or assets to the sovereign state and/or people.[63] The study also considers the African nationalism (bourgeois nationalism) of Frantz Fanon,[64] which contends that post-colonial nationalism manifests in options where neocolonialism arises due to domination by the nationalist middle class, resulting in the extension of the existing social order. Similarly, Mahmood Mamdani[65] suggests that African nationalism has brought about a reconsideration of African nationalism as a state ideology, which presents the state as the only legitimate agent to express the general interests of the people, thus delegitimising all other democratic struggles. He argues that nationalism is constantly emerging in different forms. However, the key questions under

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60 Adam Smith *Wealth of Nations* (1776) <https://www.earlymoderntexts.com/assets/pdfs/smith1776_1.pdf> accessed 17 September 2022. He advocated free trade and economic internationalism (liberalism) which was a direct opposite to economic nationalism and mercantilism as advocated by Michael Heilperin, Katzarov Konstantin and others (see n 55).

61 Carlton Hayes, *The Historical Evolution of Modern Nationalism* (The Macmillan Company 1931) at 1–12.

62 Heilperin (n 55).

63 Katzarov (n 55). See also Michael Adejugbe 'The Myths and Realities of Nigeria's Business Indigenization' (1984) 15 Development and Change 577 at 588: 'Many countries, including Ghana, Kenya, Senegal and Tanzania, realizing that their political independence was devoid of any economic independence, upon policies that it was hoped would strengthen their respective economies.'

64 Frantz Fanon, *The Wretched of the Earth* (Penguin Classics 2001).

65 Mamdani Mahmood, 'State and Civil Society: Reconceptualizing the Birth of State Nationalism and the Defeat of Popular Movements' (1990) 15 African Development 46 at 49.

consideration are its autonomy, development and amalgamation for socio-economic development. This subject is discussed further in chapter 3.

## 2.3 Natural resources, states and people

### *2.3.1 Natural resources*

Natural resources in international law became the subject of systematic study and regulation after 1945.[66] While the concept of natural resources and the political affairs of states have been intimately linked throughout the history of human civilisation, it effectively manifested in a modern state only in the 1960s.[67] It took over two decades to develop the general international law principle that directed natural resource ownership and control through the PSNR in the UN General Assembly. In 1952, Chile was instrumental in its introduction through the UN Commission on Human Rights.[68] However, the principle of PSNR developed in stages. The first stage commenced in 1952, which led to the adoption of Resolution 1803 in 1962. The second stage that reaffirmed the principle espoused in Resolution 1803 occurred between 1962 and 1973.[69]

Natural resources have elicited interest from various disciplines, and have therefore become the object of several scientific investigations. The exact definition of natural resources is elusive because of the various perspectives from which they are studied or investigated. Schrijver submitted that the natural scientist emphasises living and

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[66] Nico Schrijver *Sovereignty over Natural Resources* (Cambridge University Press 1997) at 13. Natural resources became a subject of study following concerns about the glaring scarcity and optimum use of natural resources at the end of the Second World War in 1945 by the Allied Powers. The immediate post-war period saw the beginning of the initiatives for the sustainable use of natural resources for sustainable development. However, in the 1960s, agitation for independence by colonised states' people who are entitled to the use and disposal of their natural resources increased, because PSNR was rooted in the promotion of the socio-economic development of the people through people's right to self-determination.

[67] Andrea Diut, 'Natural Resources' in Bertrand Badie, Dirk Berg-Schlosser and Leonardo Morlino (eds), *International Encyclopaedia of Political Science* (2011) at 1665 <https://ia803103.us.archive.org/13/items/internationalencyclopediaofpoliticalscience/International%20Encyclopedia%20of%20Political%20Science.pdf> accessed 23 June 2023.

[68] Wil Verwey and Nico Schrijver, 'The Taking of Foreign Property under International Law: A New Legal Perspective?' (1984) 15 Netherlands Yearbook of International Law 3 at 31. See also Elian (n 17) at 95.

[69] Patrick Ngambi, 'Permanent Sovereignty over Natural Resources and the Sanctity of Contract, From the Angle of Lucrum Cessans' (2015) 12(2) Loyola University Chicago International Law Review 153 at 155.

non-living resources.[70] The economist looks at natural resources from the point of view of scarcity or abundance, exploitation and distribution. Geologists consider natural resources as minerals occurring in the earth's crust. The environmentalist stresses the sustainable use of resources, while the lawyer is concerned with issues of ownership and usufruct.[71] It is thus clear that natural resources have many advantages.

In broad terms, Simmons argues that natural resources represent a deliberate relationship shaped by human desires, capabilities and considerations of the immediate environment.[72] Similarly, Badedau et al consider natural resources to be factors of production that generally support development or growth.[73] Blanco et al view natural resources as extending to all facets of the environment that are not artificial, and that give value to humanity.[74] Alao acknowledges these positions, but opines that since the study of natural resource management has become important, a working definition for each given circumstance or study is needed.[75] Alao defines natural resources as 'all non-artificial products situated on or beneath the soil, which can be extracted, harvested, or used, and whose extraction, harvest, or usage generates income or serves other functional purposes in benefitting mankind'.[76]

This is the definition preferred in this study; however, the study is restricted in scope to oil, gold and diamonds. Each definition given in the study must be connected to the functional purpose of benefiting humanity. Land is excluded from the discussion of natural resources due to the delimitation of the study.

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70 Schrijver (n 66) at 13.

71 ibid at 14.

72 Ian Simmons, *The Ecology of Natural Resources* (Halsted Press 1974) at 3.

73 Matthias Badedau and Andreas Mehler (eds), *Resource Politics in Sub-Saharan Africa* ( Giga Hamburg 2005) at 9.

74 Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Edward Elgar Publishing 2011) at 65.

75 Abiodun Alao, *Natural Resources and Conflict in Africa: The Tragedy of Endowment* (University of Rochester Press 2007) at 16.

76 ibid. See also Pascal Sanginga, Washington Ochola and Isaac Bekalo, 'Natural Resource Management and Development Nexus in Africa' in Washington Ochola, Pascal Sanginga and Isaac Bekalo (eds), *Managing Natural Resources for Development in Africa: A Resource Book* (University of Nairobi Press 2010) at 12: 'It is widely recognized that natural resources contribute significantly to development in different ways: as an economic activity and source of growth; as a livelihood by providing jobs for people …'

Attempts have been made to classify natural resources into two major categories. Ress classifies natural resources into renewable or flow resources and non-renewable or stock resources.[77] Renewable or flow resources renew themselves within a short period. These renewals usually take human effort or have some natural causes.[78] Non-renewable or stock resources are in permanent supply, and are formed over a long period. Therefore, they are often thought to be nearing the peak of their accessibility. Non-renewable natural resources include solid minerals and oil.[79] This study concentrates on solid minerals such as gold, diamonds and oil, which are all non-renewable resources.

Differences exist concerning the division of natural resources. Scholars have shown that there is no watertight division; sometimes the lines are crossed in terms of Ress's classification.[80] Lecomber acknowledges that fossil fuels that are regarded as non-renewable could be renewed at an insignificant rate. Likewise, certain minerals that have been classified as non-renewable can also be recycled.[81] Alao reclassifies the current mineral resources cluster as pertinent to and closely associated with natural resources governance.[82] Natural resources are categorised into two groups: existence-dependent and comfort-dependent. Existence-dependent natural resources are fundamental to human survival, while comfort-dependent natural resources are only directed towards achieving human comfort.[83] It is posited that existence-dependent natural resources align with natural resources such as water and land, and comfort-dependent natural resources align with of oil and solid minerals. However, it is acknowledged that this categorisation could have its limitations, just like the other classifications of natural resources.[84] Dividing natural resources into groups to determine their various material forms and uses may be useful. Nevertheless, it is important to emphasise natural resources as a critical element driving much-needed socio-economic development.

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77 Judith Rees, *Natural Resources: Allocation, Economics and Policy* (Methuen 1994) at 14.

78 ibid at 15.

79 ibid at 14. See also John Walther, *Earth's Natural Resources* (Jones and Bartlett Learning 2014) at 1, 2.

80 Alao (n 75) at 16.

81 Richard Lecomber, *The Economics of Natural Resources* (Macmillan Press 1979) at 3.

82 Alao (n 75) at 16.

83 ibid.

84 ibid at 17.

Generally, natural resources played a significant role in developing classical and neoclassical economic systems. Classical economics emanated in the eighteenth and nineteenth centuries in the wake of the Industrial Revolution and improved agricultural output in Europe and North America.[85] Scholars such as Smith, Malthus and Stuart Mills were prominent during this period. A general feature of their scholarly writings was based on their impression of natural resources as the major determining factor of national wealth and growth.[86] Smith argues in an inquiry into the nature and causes of the wealth of nations that individuals generally unintentionally support national wealth through their attempts to use capital to sustain domestic business.[87] Malthus, on the other hand, argues that natural resources could become insufficient to sustain the population. Mills contends that land value will increase as the existing material circumstances advance.[88] The starting point amongst classical and neoclassical scholars revolves around how value is construed. The classical scholars viewed resource value as increasing from labour power, while the neoclassical scholars saw it as being established through the exchange of labour.[89]

According to Kay, neoclassical economic systems are based on four elements. Scarcity is a universal economic problem emanating from natural resources, and a normal characteristic in every configuration of society.[90] Social harmony is the guiding principle in relation to the scarcity of natural resources. Thus, Kay's position acknowledges intermittent differences that may arise in practice so that three factors of production – land, labour and capital – are clearly identified as part of its driving force.[91]

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[85] Karl Farmer and Birgit Bednar Fredl, *Intertemporal Resource Economics: An Introduction to Overlapping Generations Approach* (Springer 2010) at 6, 7, 9. See also Wayne Nafziger, *Economic Development* (Cambridge University Press 2012) at 120, 122, 144. Classical economics is focused on economic growth and freedom which advocates *laissez faire* ideas and free competition. Neo-classical economics, on the other hand, is focused on supply and demand as the primary forces of production, the consumption of goods and services.

[86] Alao (n 75) at 17.

[87] ibid.

[88] ibid.

[89] ibid.

[90] Geoffrey Kay, *Development and Underdevelopment: A Marxist Analysis* (Macmillan Press 1975) at 4.

[91] ibid at 5. Neoclassical economists such as Leon Walras drew attention to the nature and effectiveness of resource allocation. Alfred Marshall played a significant role in the provision of a framework to advance the growth of economies.

Liodakis submits that Marxist economics is another important economic model to consider. Marxist economics borders more on the environmental and natural resource implications for the evolving world because labour is at the centre of the people–nature relationship enforced by nature.[92] The functional position of natural resources is highlighted; it has been noted that it is in humanity's best interest to prioritise the exploitation of the immediate surroundings and environment.[93] In this context, the idea of natural resources presupposes that humanity always evaluates the environment's value to achieve a certain expected end.[94] Rees supports this position by contending that before any component is considered a natural resource, two essential skills must be acquired: knowledge and technical expertise allowing for the extraction and use of the natural resource. Afterwards, the question of demand for natural resources arises.[95]

Consequently, it follows that humanity's capability generates natural resources, and not necessarily their physical existence.[96] Zimmermann submits that the environment could not be considered a natural resource until it was deemed capable of satisfying humanity's needs.[97] Natural resources are apparently expressions of thought and are subjective. Alao gives a cultural dimension to the issue of natural resource determination, apart from the approach to its determination through human needs and technical skills. According to Alao:

> This dimension of resource politics is often ignored in most efforts to conceptualise the subject, but its importance to the natural resource equation centers largely on how culture determines what is 'important' and 'useful'. What is taken as an important natural resource in certain societies may, under a different cultural setting, be of no economic significance. This cultural context of what determines natural resources has been a crucial factor in explaining why conflicts emerge over natural resources ...[98]

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92 George Liodakis, 'The People-Nature Relations and the Historical Significance of the Labour Theory of Value' (2001) 25 Capital and Class 113 at 113. Marxist economics focuses on the role of labour in the development of the economy. Marxist economics is critical of the classical approach to wages and productivity as developed by Adam Smith.

93 Rees (n 77) at 12.

94 ibid.

95 ibid.

96 ibid.

97 Erich Zimmermann, *World's Resources and Industries* (Harper and Brothers 1933) at 3.

98 Alao (n 75) at 18.

Describing natural resources in cultural terms to determine their usefulness is quite pragmatic. However, the global character and perception of natural resources in the world economic commodity stratum may have surpassed cultural requirements. Therefore, it is difficult to evaluate the use and importance of certain non-renewable resources (solid minerals and oil) strictly in cultural terms, bearing in mind their universal nature. Natural resources are not limited to a specific field of law. They involve a combination of different areas of law, including international law, common law, customary law, constitutional law, property law, the law of contract, administrative law and environmental law. Therefore, natural resources attract a blend of legal principles developed by adapting developed and existing general principles of international law, property law, contract law, constitutional law and administrative law, and applying these principles to this study. This study examines natural resources from the international law position and the municipal law position.

The UN Resolution on PSNR is the basis of this investigation.[99] The resolution declares that 'the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development'.[100] The international law character of this principle was justified in the ICJ's *East Timor* case, which shed light on its legality.[101] Judges Skubiszewski and Weeramantry accepted the PSNR principle as part of international law.[102] Asante also submitted that '[it] is now a well-settled principle of international law, emanating from the *jus cogens* principle of self-determination. The concept has been vigorously asserted by developing countries as *a sine qua non* of national independence and economic self-sufficiency'.[103] Accordingly, it can be asserted that PSNR has

[99] ibid. See UN Resolution 626 of 1952 <https://digitallibrary.un.org/record/211441?ln=en> accessed 7 July 2023. The concept of PSNR is traced to UN Resolution 626 (VII) of 1952 in relation to the movement for the economic development and political independence of developing countries.

[100] Resolution 1803 (XVII) UN GAOR Supp No 17 UN Doc (A/5217) <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/resources.pdf> accessed 7 July 2023. See also Andrew Onejeme, 'The Law of Natural Resources Development: Agreements Between Developing Countries and Foreign Investors' (1978) 5 Syracuse Journal of International Law and Commerce 1 at 3.

[101] *East Timor case* (*Portugal v Australia*) at 77 <https://www.un.org/law/icjsum/timor.htm> accessed 7 July 2023.

[102] ibid at 80.

[103] Samuel Asante, 'International Law and Foreign Investment: A Reappraisal' (1988) 37 The International and Comparative Law Quarterly 588 at 594.

transitioned from a political principle to an international law principle. The ACHPR and other municipal laws have also adopted this international law principle.[104]

### *2.3.2 The state*

The state is the key player in the global community, and is the pillar upon which the international legal system is built.[105] Over time, entities that constitute states are accepted into the comity of nations through a process that incorporates them as full subjects of international law. Of course, this recognition is influenced by political considerations; therefore, positive criteria for statehood have been accepted to identify states.[106] Lowe argues that:

> [t]he concept of the state is rooted in the concept of control of territory. The purpose and role of every state is to control activities within its borders so far as possible or more accurately to ensure that activities within its borders are not regulated by any other state. That idea is expressed in international law through the concept of sovereignty.[107]

The state has four integral elements: sovereignty, a permanent population, a well-defined territory, and a government that constitutes the state.[108] State sovereignty

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[104] See Resolution 1803 (XVII) (n 90). See also Article 2 of the Charter of Economic Rights and Duties of States GA Resolution 3281 (XXIX) 12 December 1974: 'Every State has and shall freely exercise fully permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.' <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2778/download> accessed 7 July 2023; Article 4(e) of the Declaration on the Establishment of a New Economic Order GA Res. 3201 1 May 1974: 'Full permanent sovereignty of every State over its natural resources and all its economic activities' <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2775/download> accessed 7 July 2023; Banjul Charter on Human and Peoples' Rights (African Charter) 1985 <https://au.int/en/treaties/african-charter-human-and-peoples-rights> accessed July 2023.

[105] John Dugard, *International Law: A South African Perspective* (Juta 2005) at 81.

[106] ibid.

[107] Vaughan Lowe, *International Law* (Oxford University Press 2007) at 138.

[108] Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law Challenges: Key Issues and Perspectives* (Edward Elgar Publishing 2011) at 9. See also Montevideo Convention, which provides the traditional criteria for statehood: 'The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states. See also Gerard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Martinus Nijhoff Publishers 2004) at 19–22. He acknowledged the 'classical criteria' and posited that '[r]ecognition of statehood and the subsequent attainment of full international legal personality rest on the prior fulfilment of certain criteria. The difficulty is that state practice does not

entrenches in the state fundamental authority to oversee the overall well-being of its citizens.[109] More importantly, state sovereignty over natural resources mandates the state to adopt responsible legal policies that drive positive socio-economic integration and sustainable development.[110] The sovereignty of a state encompasses the power to impose authority over a relevant population, the free use of territory under its jurisdiction (internal sovereignty), and the exclusion of every other state from intrusion into the state's territory (external sovereignty).[111]

Nonetheless, the state's recognition determines effectiveness as the subject of international law.[112] Thus, recognition ultimately characterises the emergence of statehood.[113] This indirectly enables the state to accept all the rights and duties associated with international law to such an extent that they bind the state.[114] Recognition may be done individually or collectively by states. Dugard argues in this regard that individual recognition entails an already accepted state recognising an entity claiming to be a state, since it has met all the realistic requirements of statehood. Collective recognition takes place when a group of states recognises the claimant state as such.[115] In general terms, recognition is seen as a discretionary right of every individual state.[116] At the same time, it is evident that the international community

show a uniform and consistent pattern as far as the application of these criteria is concerned.' He further elevates the requirement of government above all the other criteria: 'The link with international legal personality and state responsibility is obvious. The international community requires an identifiable and responsible agent to deal with. Government is also required for the state to act on the international plain. It enables the state to claim its rights and enter into obligations vis-à-vis other states.'

[109] ibid.

[110] ibid.

[111] ibid. See also James Crawford, *The Creation of States in International Law* (Oxford University Press 2006) at 9. A further exposition on the distinction between internal and external sovereignty is captured there.

[112] Dugard (n 105) at 89.

[113] ibid. See Brad Roth, *Governmental Illegitimacy in International Law* (Oxford University Press 2000) at 129. Roth distinguishes the objects of recognition, and argues that '[t]he main object of recognition in the international system are states … and government. The state in the traditional international law usage refers not merely to a political community…, a unit to whose collective decisions those falling within its bounds are subject, but more specifically to a community that has actually achieved self-governance …The government refers to the apparatus that maintains a monopoly on the legitimate use of force within the bounds of the state, and that speaks in the state's name in international affairs.'

[114] Kreijen (n 108) at 13.

[115] Dugard (n 105) at 89.

[116] Kreijen (n 108) at 14.

comprises states. Consequently, any changes in the existing composition of the international community will affect the ongoing relations between members.[117] It then follows that each constituent state has the competence to decide on the binding effect of the status of new and existing members.[118]

Two theories of recognition have emerged, and two principal schools of thought dominate the debate on recognition: the declaratory and constitutive schools.[119] The declaratory theory argues that a state exists, and the legality of its conception or being is theoretical. Thus, the law must consider the new situation irrespective of its illegality.[120] This implies that a unit becomes a state once the factual requirements of statehood are met. The constitutive theory, on the other hand, contends that rights and duties that emanate from statehood develop from recognition by other states. Essentially, an entity claiming to be a state is regarded as a state once recognised by other states.[121]

Debates between the two schools of thought have generated many complex positions in international law.[122] Exploring the various positions is not within the scope of this study. However, to avoid getting embroiled in the huge controversy created so far by both doctrines, it is important to acknowledge the incontrovertible facts articulated by these doctrines.

The constitutive theory posits that any population thrives on recognition to achieve its full international potential. This includes its legal relationship with all other states.[123] It

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[117] ibid.

[118] ibid.

[119] Crawford (n 111) at 4.

[120] ibid.

[121] ibid.

[122] Hersch Lauterpracht, 'Recognition of States in International Law' (1944) 53 Yale Journal of International Law 385 at 386: 'the problem of recognition of states has been identified with the controversy between the rival doctrines of declaratory and the constitutive character of recognition. The opposition of these two doctrines has for a long-time dominated discussion on the subject.' See also Fred Morrison, 'Recognition in International Law: A Functional Reappraisal' (1967) 34 The University of Chicago Law Review 857 at 857: 'The ambiguous nature of the doctrine of recognition in international law has contributed to significant academic dispute … The "constitutive theory" views recognition as the voluntary act of the recognising state; the "declaratory theory" accepts recognition as automatic.' He further states at 605 that '[t]he problem of recognition of state … has neither in theory nor in practice been solved satisfactorily. Hardly any other question is more controversial, or leads in practice of states to such paradoxical situations.'

[123] Morrison (n 122) at 860.

is essential to note that, without recognition, an entity is prevented from carrying out and practising its extensive rights and obligations as expected under international law.[124] This supports the positive flow of statehood. Clearly, this position embodies the global principle which articulates the interconnectedness of the international community. On the other hand, the declaratory theory shows its strength by highlighting that states and entities that have obtained the critical characteristics of statehood must comply with the basic obligations of international law.[125] According to Kreijen, 'it seems that the question of recognition cannot be answered in terms of whether it is either declaratory or constitutive. The emerging picture rather suggests that recognition is of a composite nature, i.e., that it possesses both declaratory and constitutive.'[126]

Some scholars have adhered to this position by combining the best features of both theories with issues of recognition.[127] Lauterpracht proceeds from a constitutive starting point, which imposes a duty on each pre-existing state to allow recognition to new states, if they have satisfied certain objective criteria, thus bringing in declaratory elements.[128] Robert Sloane, in another contemporary assessment, opines that:

> the 'predominant view of recognition among international law scholars, officials and courts today is the declaratory view', … Many scholars also fault constitutivism as unduly political; it relegates recognition to the 'unfettered political will of existing states-pure realpolitik. Moreover, as a legal matter, the constitutive model begs a host of difficult theoretical questions.'[129]

Human rights issues became a predominant concern of international law after the Second World War.[130] How a state treated its citizens and a state's arbitrary control of the inherent natural resources flowing from the entity were never considered in relation to its admission to the community of nations.[131] Since the Charter of the United Nations

[124] ibid.
[125] Crawford (n 111) at 22.
[126] Kreijen (n 108) at 17.
[127] Morrison (n 122) at 863.
[128] ibid.
[129] Robert Sloane, 'The Changing Face of Recognition in International Law: A Case Study of Tibet' (2002) 16 Emory International Law Review 107 at 117.
[130] Dugard (n 111) at 87.
[131] ibid.

was adopted in 1945, numerous states with inadequate human rights credibility have been admitted as United Nations member states. Furthermore, there was little or no indication that recognising states with shocking human rights records was about to end.[132]

Nonetheless, states have recently been arguing that respect for human rights should be a precondition for state recognition.[133] The breakup of the old Soviet Union created an opportunity for such preconditions regarding human rights in response to the recognition of some parts of the former Soviet Union by the European Union (EU).[134] The EU required that entities agitating for statehood had to show clearly defined evidence and a capacity to protect human rights.[135] Parallel assurance was sought from countries such as Slovenia, Croatia and Bosnia-Herzegovina as a qualification for their recognition as states.[136] The African Union (AU) does not have a clear-cut human rights position on state recognition. The preamble of the AU Charter sets out the promotion of unity and solidarity of African states as its major concern.[137] Thus, it seeks 'to eradicate all forms of colonialism from Africa, to co-ordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa'.[138] This implies that emphasis is placed on the disintegration of states and secession. Essentially, this position was intended to ensure that the colonial powers no longer encroached on state sovereignty. The preamble of the AU Charter safeguards and consolidates an African state's hard-won independence and territorial integrity.[139] Consequently, even if human rights preconditions are laid down, state recognition is not easily supported. However, the recent recognition of South Sudan suggests that human rights considerations are becoming more prominent in the process, but not necessarily as a precondition in Africa.[140]

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[132] ibid.

[133] Kreijen (n 108) at 24.

[134] ibid.

[135] Dugard (n 111) at 87.

[136] ibid.

[137] See Banjul Charter <https://au.int/en/treaties/african-charter-human-and-peoples-rights> accessed July 2023.

[138] ibid. See the Preamble.

[139] Christian Knox, 'The Secession of South Sudan: A Case Study in African Sovereignty and International Recognition' at 16 <http://digitalcommons.csbsju.edu/cgi/viewcontent.cgi?article=1001&context=polsci_students> accessed 6 July 2023.

[140] ibid.

The agitation described above initially arose from discussions on effective government conditions and later evolved into a new proviso for statehood.[141] However, the connection between effective government and respect for human rights seems to have merged, and support is found in the emerging democratic customs in international law.[142] The expectation that state recognition should thrive and be guided by human rights has apparently not been met.[143] The EU could not create or implement its own guidelines on the matter. Thus, available state practice indicates that the existing situation is that human rights have not developed into a prerequisite for statehood.[144] International law has allowed certain prerequisites to be applied in recognising new states to protect human rights. However, such conditions may not have become the accepted criteria for statehood.

Undoubtedly, human rights-related principles are becoming more relevant in the creation of states, but they are not always adhered to by existing states.[145] It is common knowledge that fundamental human rights are constantly infringed worldwide.[146] These infringements have never seemed to undo statehood. Dugard asserts that 'if the systematic denial of basic human rights, including the right to participate in government by means of free elections, is to become a bar to statehood, it would mean that many states would cease to qualify as states and face withdrawal of recognition'.[147]

This assertion suggests that state recognition is unpredictable. It may mean that states are not necessarily legally responsible for recognising entities that comply with the precepts of statehood. In this instance, political and socio-economic conditions mainly determine the decision on recognition or non-recognition.[148] The state is a significant

[141] Dugard (n 111) at 87.
[142] ibid.
[143] ibid. See also Kreijen (n 108) at 24.
[144] ibid.
[145] Kreijen (n 108) at 24.
[146] ibid.
[147] Dugard (n 111) at 88.
[148] Nigeria was created as a country in 1914 under British colonial rule. This was done without the express consent of the constituent bodies, and therefore the country had an unstable foundation. The political and economic benefits for the colonial power were instrumental to the amalgamation. Post-colonial Nigeria, although recognised as a state in the international community, is bedevilled with countless issues of governance. These issues emanated from the British and other Western powers' policy pre- and post-independence to protect their interests in natural resources and other

player in the international community, which sustains the international legal system. However, the state does not operate in a vacuum, but exists within the confines of other elements that propel its recognition, empowerment and what the state anticipates accomplishing, as noted above. It is essential to understand the intricate nature of statehood in relation to the ownership and governance of natural resources as outlined in the context of PSNR and the ACHPR.

Consequently, it is suggested that human rights in regard to natural resource governance forms the cornerstone of statehood. This considers the impact of human rights abuses through the suppression and arbitrary control of natural resources by the state. This suggests a state violation of the equal rights of the people to PSNR and the corresponding provisions in Articles 21 and 22 of the ACHPR. Such a state violation breaches international law and, to a large extent, municipal law.

### *2.3.3 People*

The concept of 'people' appears tautological, as its definition is intertwined with the privileges of self-determination, rather than being distinct.[149] A group can be confirmed

economic interests in Nigeria. Human rights abuses and corruption became rampant as a result of meddling in domestic politics and economics to entrench control. Eventually, there was a profound breakdown in governance leading to coups and counter-coups. The massive annihilation of the Igbos ensued, which led to the breakaway of the Eastern region of Nigeria and the declaration of the state of Biafra. The question of state recognition and non-recognition posed a challenge in this regard. See David Ijalaye, 'Was "Biafra" at any Time a State in International Law' (1971) 65 American Journal of International Law 551 at 555. The state of Biafra received political recognition from five existing states because of the human rights atrocities committed against Biafra before the end of the civil war in 1970. Its non-recognition by certain states may also relate to economic positions, especially taking into consideration the British and other Western interests in Nigeria. South Africa was recognised by certain existing states despite its apartheid policy. This highlights the fact that human rights abuses are overruled by political and economic considerations in state recognition or non-recognition, especially among existing states in the international community. Colonialism was stimulated by economic interests. Natural resource exploiters in South Africa are predominantly European and American corporate entities. They shoulder huge financial responsibility in their home country's economy . Consequently, it would not have served the country's interests not to recognise the state of South Africa (whether as a new state or an existing state) despite its human rights violations.

[149] Brad Roth, *Government Illegitimacy in International Law* (Oxford University Press 2000) at 201. See also Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Martinus Nijhoff Publishers 1995) at 11, 13, 14. Roth gives a breakdown of the history and political philosophy that underpins the concept of self-determination. He posits that '[t]he origin of the principle of self-determination can be traced back to the American Declaration of Independence (1776) and the French Revolution (1789), which marked the demise of the notion that individuals and peoples, as subjects of the Kings, were objects to be transferred, alienated, ceded, or protected in accordance

as a 'people' as soon as it can prove possession of the right of self-determination. Irrespective of race, religion, ethnicity, culture, territorial separateness, and any previous conquest which applies to the inquiry, a people remains a political community.[150] Of course, recognition is necessary as a precondition to prevent unwarranted secession.[151] Self-determination both subverts and strengthens sovereignty in international law. It penetrates the veil of the sovereign state, thus unlocking inquiries into political provisions formerly seen as internal affairs. Likewise, self-determination is the shared right of a unit, resulting in sovereignty as its outcome.[152] Roth suggests that 'self-determination … entails a people's right to maintain its cohesion by whatever means it … sees fit, and to resist all efforts … to subvert its unity and independence'.[153]

Kiwanuka looks at the concept of people from the point of view of the provisions of the ACHPR.[154] He suggests that people and their ensuing rights are the personification of a person's African thoughts and values in a society. A person is regarded as an integral community member animated by the strength of commonality rather than a remote and intangible individual.[155] This position therefore contrasts slightly with the Western world's position that individuals are engaged in a steady effort with society to redeem rights.[156] The Algerian Declaration inspired another version of the concept of people.[157] It holds that people can be separated from their state; therefore, certain

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with the interests of the monarch'. Self-determination became an international discourse due to the effects of the First World War and the Bolshevik Revolution. Former Soviet leader Lenin gave the concept a socialist political philosophy characteristic. He insisted that the right to self-determination be made a general standard for the liberation of peoples. As Cassese expresses Lenin's position: 'self-determination, which granted ethnic or national groups the right to decide their destiny freely, all ethnic groups … were to have the right to choose whether to secede from the power to which they were attached or, alternatively, to demand autonomy while remaining part of a larger structure'. Former US President Woodrow Wilson portrayed self-determination in the light of Western democratic theory: 'self-determination was the logical corollary of popular sovereignty; it was synonymous with the principle that governments must be based on "the consent of the governed"'.

[150] Roth (n 149) at 201.

[151] ibid.

[152] ibid at 202.

[153] ibid at 203.

[154] Richard Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights' (1988) 82 The American Journal of International Law 80 at 80.

[155] ibid at 82.

[156] ibid.

[157] Antonio Cassese (ed), *U.N. Law-Fundamental Rights: Two Topics in International Law* (Sijthoff & Noodhof, Alphen aan den Rijn 1979); R Falk 'The Algerian Declaration of the Rights of People and the Struggle for Human Rights' (Holmes & Meier Publishers Inc 1981) at 225.

political and socio-economic freedom levels are reserved for people *qua* people. This reserved freedom or sovereignty, as the case may be, ultimately becomes significant in view of differences concerning the interests of the people and the interests of the state.[158] Falk submits in this regard that '[g]iven the combination of domestic and international factors, it becomes clear that government cannot be entrusted with the role of serving as the guardian of fundamental human rights. In this regard, the whole tradition of international law is to some extent regressive in the current era'.[159]

Both standpoints are important, but the Western world is no longer alone in the struggle for the redemption of individual rights. The term 'people' has not been clearly defined in certain instruments where it has been used. However, the exposition of people has elicited various viewpoints. Dinstein offers an objective and subjective dimension to people in spite of the position that a community identifies itself as a people due to common interests.[160] The objective element involves the existence of an ethnic group that is linked by a common history or genealogy. The subjective element is such people's belief and state of mind in identifying themselves as members of the ethnic group.[161] Brownlie further develops Dinstein's position by stressing the question of identity, suggesting that even though there may be some doubt about the definition of a 'people' for self-determination, the concept is centred on a reasonable certainty that the community has the right to have such distinct character reflected in its government institutions.[162]

Cristescu develops a somewhat restricted definition of 'people' in the United Nations report.[163] However, it is submitted that the United Nations was cautious about providing a one-size-fits-all definition. Constructing a definition that would fit all possible situations would be impractical.[164] Based on the prevalent circumstances, a

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[158] ibid.

[159] ibid at 229, 230.

[160] Yoram Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 International Law and Comparative Law Quarterly 102 at 104.

[161] ibid.

[162] Ian Brownlie, 'The Rights of Peoples in Modern International Law' (1985) 9 Bulletin of the Australian Society of Legal Philosophy 104 at 107 and 108.

[163] Aureliu Cristescu, *The Right to Self-Development: Historical and Current Development on the Basis of United Nations Instruments* at 40 para 279 <https://www.cetim.ch/legacy/en/documents/cristescu-rap-ang.pdf> accessed 17 September 2022.

[164] ibid.

people denotes a social class with its own clear identity and characteristics and a relationship with a territory, even when the group has been wrongly expelled from the territory and replaced with a different population. Therefore, a people should not be confused with ethnic, religious or linguistic minorities whose existence and rights are recognised as such in Article 27 of the International Covenant on Civil and Political Rights.[165]

The scholars mentioned above have all highlighted the attributes of peoplehood: common interest, the group's identity, uniqueness and a territorial link. It follows that a 'people' perhaps signifies a group of individuals within a definite geographical entity as well as every other person within that same space. People and state seem almost equal with regard to economic self-determination. Articles 1 and 7 of UN Resolution 1803 on PSNR and Articles 21 and 22 of the ACHPR vest the right to the exploitation and disposal of natural resources in the people and the state. Clearly, the concerns that should be addressed through the right of self-determination by applying a socio-economic approach are determined by internal and external structures. This validates the vesting of rights in both the people and the state.

Essentially, in matters of development, the state becomes such an intermediary. Of course, the rights to development primarily belong to the people and the state. Bedjaoui looks at the predicament of development in respect of people as a challenge to the world community. He contends that the UN Charter made development an international issue.[166] He further submits that underdevelopment is an operational phenomenon that is connected to the system of international economic relations and the certain international division of labour. Therefore, underdevelopment is the direct result of this international organisation. The implication is that even the best government with great wealth and natural resources rarely succeeds, because international organisations tend to drain the country of its wealth and natural resources.[167]

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[165] ibid at 41.

[166] Mohammed Bedjaoui, 'The Right to Development and the *Jus Cogens'* (1986) 2 Lesotho Law Journal 93 at 96.

[167] ibid at 98.

These circumstances make connecting people with the state imperative, particularly when rights and development issues arise. It is highly unlikely that people or an entity which is less than a state could efficiently challenge their rights to socio-economic development on the international stage.[168] Bedjaoui further submits that the uncertain condition of developing African states permits the selection of a primordial approach, allowing for merging state institutions to combat underdevelopment. Therefore, the individual pursuit of the right to development in relation to that of the state can only weaken the state. It needs to be supported if the state is to neutralise the negative effects of international influence that frustrate its collective development.[169]

Nevertheless, the ownership and control of vital avenues of development in various African countries, and particularly in respect of the exploration and exploitation of natural resources, lie statutorily with states.[170] Other states entrust their natural resources to people rather than the state or government. This pragmatic approach indicates that there is little or no difference between the aforesaid arrangements. The state controls natural resources for the people through the government of the day.[171]

It may be counterproductive and unviable to consent to people vying for development rights on the international economic stage. Nonetheless, linking the state with the people could clearly indicate that the state recognises the interests of the people. Apparently, the reverse is true in many African countries. In light of the corporate standing of the state, the people are the collective of the different groups in the community. Consequently, they share a collective right with the state. The fundamental right is the right to self-determination, which protects the people against repression and any negative exploration and exploitation of their natural resources.

[168] Kiwanuka (n 154) at 96.
[169] Bedjaoui (n 166) at 99.
[170] Kiwanuka (n 154) at 96.
[171] ibid.

## 2.4 Nationalism, nationalisation and natural resource control

### *2.4.1 Nationalism*

Nationalism is an age-old concept whose origin can be traced back to the Hebrews[172] and the Greeks.[173] It also manifested in the Roman Empire and medieval Europe.[174] It was more visible in the emergence of modern states, in the sixteenth and seventeenth centuries.[175] Over time, the state progressively enjoyed the commitment previously given to a city, church or ruler. Modern nationalism eventually became prominent with the beheading of King Louis XVII during the French Revolution in 1789.[176] Nationalism allows absolute allegiance to the state by all classes of people. Nationalism is largely a result of the French Revolution, which is predicated on the principle of sovereignty of the people.[177]

The notion of modern nationalism is the effect of a scheme developed by the French revolutionaries. Greenfield et al opine that nationalism is the basis of the modern world and a thought system where loyalty and collective solidarity are located within the people.[178] Similarly, Snyder suggests that nationalism, a powerful emotion, has dominated the political convictions and actions of peoples from the era of the French

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[172] See David Aberbach, 'Nationalism and the Hebrew Bible' (2005) 11(2) Nations and Nationalism 223 at 223, 224: 'the Hebrew Bible has authored and nourished national identity and religious-cultural nationalism; in the belief in the closeness of the nation and its necessarily moral foundations; its unity across divisions of class, geographic dislocation and cultural assimilation; fierce criticism of and grievance against its enemies, internal as well as external … The power of the Hebrew Bible was in inverse proportion to the political and military weakness of the people … spanning a period of at least 600 years'.

[173] See Barbro Bankson, Christian Coulon et al, 'Greece: A Study in Nationalism' at 89 <http://archive.helvidius.org/1998/1998_Raptis.pdf> accessed 27 January 2022.

[174] Louis Snyder (ed), *The Dynamics of Nationalism* (D. Van Nostrand Company Inc 1964) at 29: 'Throughout recorded history to the eighteenth century, tribal nationalism was submerged in metropolitanism … or in localism … The peoples of the ancient world were loyal to their city – Athens, Sparta, or Corinth. Rome ruled a huge empire, but the patriotic impulse came from Eternal City. Some elements of nationalism existed in the medieval period among peoples … but this sort of group cohesion was more closely related to primitive localism than to modern nationalism.'

[175] Muhammad Alam, 'Contemporary Ideas and Theories of Nationalism' (1980) 41(3) The Indian Journal of Political Science 367 at 368.

[176] ibid.

[177] Michael Keating, 'Nationalism' in Bertrand Badie, Dirk Berg-Schlosser and Leonardo Morlino (eds), *International Encyclopedia of Political Science* (Sage 2011) at 5.

[178] Liah Greenfield and Katrina Demulling, 'Nation-State' in Helmut Anheier and Mark Juergensmeyer (eds), *Encyclopedia of Global Studies* (Sage 2012) at 3.

Revolution. Nationalism is, therefore, a historical occurrence that emerged as a response to certain political, social and economic conditions.[179]

This single act has inspired people from diverse countries worldwide for over two hundred years. Nationalism has manifested in various forms in different parts of the world.[180] Each strand of nationalism preserves the original meaning of the state, where people are defined in terms of sovereignty and homogeneity. At the same time, nationalism also shapes the concepts in line with each specific historical circumstance.[181] The intricacies and variations of this manifestation have created difficulties in understanding the concept. Therefore, it is generally agreed that nationalism as a concept is quite complex to describe.[182] Hayes, one of the many scholars on nationalism, developed a standard treatise on nationalism, which he categorises into humanitarian nationalism, Jacobean nationalism, traditional nationalism, liberal nationalism, integral nationalism and economic nationalism.[183]

Humanitarian nationalism had three main supporters. Bolingbroke promotes an aristocratic kind of nationalism based on humanitarianism.[184] Rousseau was a French philosopher who campaigned for democratic nationalism, which was quite

[179] Snyder (n 174) at 29.

[180] ibid at 4.

[181] ibid. See Snyder (n 174) at 1, 2. However there are differences in respect of an accepted definition of nationalism. This is evident in the complex and vague nature of it. Nationalism differs in context due to the historical and special social structure of any given state. Thus, scholars of nationalism approach it from different points of view. Han Kohn sees nationalism as being '[f]irst and foremost a state of mind, an act of consciousness … the individual's identification of himself with the "we-group" to which he gives supreme loyalty.' Carlton Hayes considers it as 'a fusion of patriotism with a consciousness of nationality'. Louis Snyder defines nationalism as 'a condition of mind, feeling, or sentiment of a group of people living in a well-defined geographical area, speaking a common language, possessing a literature in which the aspirations of the nation have been expressed, being attached to common traditions'. See also Anthony Smith, *Nationalism: Theory, Ideology, History* (Polity Press 2010) at 9. A further confirmation of the divergence and overlapping nature of the Ideology of nationalism was made: 'ideology of nationalism has been defined in many ways, but most of the definitions overlap and reveal common themes. The main theme, of course, is an ideology that places the nation at the centre of its concern and seeks to promote its well-being.'

[182] See Keating (n 177) at 3, who suggests that there is a huge definitional problem of nationalism, thus it is impossible to arrive at a general theory that will apply to every context of nationalism. As a result, much of the literature examines nationalism from various perspectives, sometimes attempting to generalise from specific situations, yielding mixed results.

[183] Carlton Hayes, *The Historical Evolution of Modern Nationalism* (The Macmillan Company 1931) at 1–12.

[184] ibid at 17.

humanitarian.[185] Von Herder, a German philosopher and also a humanitarian spirit, perceives nationalism as a cultural rather than a political experience.[186] Despite these differences, humanitarian nationalists were endowed with the character of enlightenment. Thus, they were firmly humanitarian, and subscribed to the position that nationality should always allow for essentially unimpeded development.[187]

Jacobean nationalism was founded on humanitarian, democratic nationalism, which was developed by Rousseau in light of the domestic uprising and foreign influence during the French Revolution.[188] It had four distinct features: suspicion and intolerance of domestic dissent, the use of militarism and undue force to achieve ends, religious fanaticism and the influence of missionaries.[189] In the nineteenth century Jacobean nationalism inspired states that attempted to gain independence from foreign control and governmental socio-economic repression. The distrust and intolerance of Jacobean nationalism eventually set the pattern of twentieth-century nationalism. This manifested in Russian communism, Italian fascism and German national socialism.[190]

Traditional nationalism was inspired by aristocratic humanitarian nationalism, as Bolingbroke posited. It emphasised history and tradition at the expense of reason and revolution.[191] It also emerged as an ideology opposing the principles of the French Revolution.[192] Traditional nationalism was instrumental in awakening nationalistic resilience in Germany, Holland, Russia and Spain. Some of the earlier apostles of this nationalism, such as Burke, advocated allegiance to family, locality and region.[193]

Liberal nationalism began in the period between Jacobean nationalism and traditional nationalism. It started in England in the eighteenth century in an evolutionary rather than a reactionary way. Bentham was the earliest proponent of this nationalism.[194] Its

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[185] ibid at 27.
[186] ibid at 29. See also 32: 'Herder was a bitter foe of imperialism. He denounced as criminal the effort of any nation to subject or interfere in any way with the natural development of another, and for a government to abridge the culture of a people'.
[187] ibid at 33.
[188] ibid at 51.
[189] ibid at 53, 54.
[190] Alam (n 175) at 370.
[191] Hayes (n 183) at 87.
[192] ibid.
[193] ibid at 111.
[194] ibid at 120.

core principle was utmost regard for economic liberty of all kinds by the state.[195] This strand of nationalism denounced war but anticipated a peace process that would usher in a world organisation that would support disarmament and a world court.[196] The state's absolute sovereignty was emphasised, but its effect was subdued by promoting individual liberties in the state's political, economic and religious actions.[197] Liberal nationalism involved a sovereign constitutional government to end authoritarianism, aristocracy and clerical authority and emphasised an era of exercising personal liberty.[198] Liberal nationalism eventually inspired the principles behind communism, fascism and socialism.[199]

Integral nationalism involves a special undertaking to establish national policies, a total consciousness to maintain state integrity, and the gradual rise in state power.[200] A state is deemed to have been defeated when its military strength is depleted; it thus made the state an end in itself rather than a means to serve humanity. This implies that the overall interests of the individual, together with personal liberties, are less important than state interests.[201] Thus, it was a manifestation of a policy of state self-centredness. Integral nationalism was well-known in the first half of the twentieth century and was practised in the pre-Second World War tyranny in Hungary, Poland and Hitler's Germany.[202] It was equally observable in Russia as economic and social transformation manifested in protest against militarism, imperialism and nationalism.[203] However, it eventually became the special integrated nationalism of the former USSR.[204] Economic nationalism was stimulated by the growth of integral nationalism, which became evident in the ensuing struggle for markets, natural resources and grounds for capital investment. Economic nationalism thus stemmed from this consideration.[205] It developed into a propensity to view the state as an economic and political entity. Consequently, modern states created domestic

[195] ibid at 125.
[196] ibid at 131.
[197] ibid at 135.
[198] ibid at 162.
[199] Alam (n 175) at 371.
[200] Hayes (n 183 ) at 164.
[201] ibid at 165. See also 223.
[202] ibid at 166.
[203] ibid.
[204] ibid at 167.
[205] ibid at 282.

regulations that were not necessarily uniform to bolster economic self-reliance. Economic nationalism and imperialism developed into history's key driving forces in contemporary times.[206]

Of course, nationalism was a significant aspect of decolonisation; it essentially propelled the first phase of African nationalistic ideology.[207] Consequently, there was a philosophical enthusiasm for nationalism, in opposition to the colonialists. Fanon envisages this development after decolonisation, otherwise known as bourgeois nationalism. He is of the view that post-colonial nationalism manifests in two ways.[208] Neocolonialism emerges if the nationalist middle class dominates the state and capitalist social relationships are extended. Also, the nationalist operation may become an avenue for a socialist order that supports the transformation of existing social arrangements.[209] Fanon considers the state subject to anti-imperialist resistance and thus committed to fulfilling its nationalist restoration project. While he acknowledges the significance of nationalism in shaping national identity and consciousness, he argues that it is crucial to go beyond this to foster a broader social consciousness during times of freedom. Therefore, decolonisation may seem like a change from one type of domination to another.[210]

A corresponding distinction is highlighted in Mamdani's work on the state and civil society. African nationalism was seen to have evolved from the anti-imperialist struggle rather than the state ideology prevalent after independence.[211] However, the reconsideration of nationalism as a state ideology was exemplified by two positions. Firstly, the state became the only legitimate agent that expressed the people's overall interests. Thus, every other democratic struggle was delegitimated. Secondly, every

[206] ibid at 283.

[207] Kersting Norbert, 'New Nationalism and Xenophobia in Africa – A New Inclination?' (2009) 44(1) Africa Spectrum 7 at 9.

[208] See Fanon (n 64) at 247.

[209] ibid.

[210] ibid at 248.

[211] Mahmood Mamdani, 'State and Civil Society: Reconceptualizing the Birth of State Nationalism and the Defeat of Popular Movement' (1990) 15(3/4) African Development 47 at 49. See also Krista Johnson, 'Whither Nationalism? Are We Entering an Era of Post-nationalist Politics in Southern Africa?' (2005) 58 Transformation: Critical Perspectives on Southern Africa 1 at 8.

internal effort was displaced by externally controlled force in the form of technocrats, which were imposed by the state to search for solutions.[212]

Nationalism in Africa appears to embody a post-colony substantially depressed by distorted and superficial views of natural resource nationalism. Johnson opines that nationalism stimulated an insatiable thirst for embourgeoisement in African elites in the post-colonial state.[213] This happens because of the growing demand for investment and resource accumulation. On the other hand, poor people use nationalism to demand collective justice and the equal redistribution of resources as an indigenous right.[214] According to Ekeh, early African nationalism was rooted in elite nationalism, which was directly aligned with African bourgeois ideologies of legitimation.[215] This concept emerged because of educated Africans' struggle for recognition and inclusion as part of the colonial formation in governance. Thus, the colonialists' extension of certain expected privileges to African elites created an aspect of elite nationalism.[216] Ekeh suggests that:

> African bourgeois ideologies were formed to achieve two interrelated goals. First, they were intended to serve as weapons to be used by the African bourgeois class for replacing the colonial rulers; second, they were intended to serve as mechanism for legitimating their hold on their people.[217]

The 1960s and 1970s bear testimony to the above. These periods were distinct in the sense that there was obvious optimism that Africa could control Africa's natural resources.[218] However, African politicians (the African bourgeois) who were concerned with establishing their legitimacy promoted corrupt politics, using public resources and assets for their personal enrichment.[219] The 1962 UN Declaration on PSNR and the ACHPR complicated the scenario. They were intended to assist with the socio-

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[212] ibid.

[213] Johnson (n 211) at 7.

[214] S Ndlovu-Gatsheni 'Africa for Africans or Africa for "Natives" Only? "New Nationalism" and Nativism in Zimbabwe and South Africa' (2009) 1 Africa Spectrum 61 at 62, 63.

[215] Peter Ekeh, 'Colonialism and the Two Publics in Africa: A Theoretical Statement' (1975) 17 Comparative Studies in Society and History 91 at 93.

[216] ibid at 96.

[217] ibid at 100.

[218] Rush Bush, 'Scrambling to the Bottom? Mining, Resources and Underdevelopment' (2008) 35(117) Review of African Political Economy 361 at 363.

[219] ibid.

economic development of the people.[220] The contention was that natural resources are an integral part of the states concerned, both *de jure* and *de facto*. Therefore, the free disposition of such natural resources must also be a constituent part of the right of self-determination.[221] Consequently, as contended by Ekeh, the African elites seized the opportunity to entrench their nationalism. However, as suggested by Hayes, the concept of economic nationalism ostensibly became the centrepoint of African nationalism.

### *2.4.2 Nationalisation and natural resources*

Essentially, nationalisation emerges from nationalistic principles, and thus has social, political and economic characteristics.[222] However, it has equally developed into a legal tradition. However, great emphasis is still placed on nationalisation's social, economic and political characteristics, even in its legal analysis.[223] Nationalisation means the transfer of natural resources to the people. This manifests in the eventual exploitation of such resources in favour of the overall interests of the people.[224] Nevertheless, it is not a new phenomenon. States' taking of resources for the people's general use and development can be traced back to the empires of Babylon, Athens and Rome, up to the Middle Ages and in the era of colonialism.[225]

Nationalisation has gone beyond the state assuming purely economic functions. Nationalisation includes the desire to achieve international harmony and social justice and to surmount diversity and social conflicts.[226] However, it is interesting to note that the objectives of nationalisation may still be far from being attained in Africa. It is clear that nationalisation was ostensibly inspired by the ideals of peace and social equality, which seem to have been achieved in the past years, particularly outside Africa. Thus, UN Resolution 1803 on PSNR and the ACHPR[227] further encapsulate the world's

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[220] Yoichi Itagaki, 'Economic Nationalism and the Problem of Natural Resources' (1973) 11(3) The Developing Economics 219 at 221.

[221] ibid.

[222] Katzarov (n 55) at 1.

[223] ibid.

[224] ibid.

[225] ibid at 2.

[226] ibid.

[227] The term 'spoliation' is used in place of nationalisation or expropriation in Article 21(2) of the ACHPR, which states: 'In case of spoliation, the dispossessed people shall have the right to lawful recovery of its property as well as to an adequate compensation.'

desire for peace and social and economic justice.[228] Prior to this, UN Resolution 1515 of 1960 recommended that the sovereign right of every state to dispose of its wealth and resources must be respected.[229] Nationalisation finally culminated in an international law principle in Article 4 of Resolution 1803, which states that '[n]ationalisation, expropriation or requisition shall be based on the grounds of reasons and public utility, security or the national interest which are recognised as overriding purely individual or private interests'.[230] This is an indication that nationalisation was intended to tackle the social and economic consequences of disparities in natural resource wealth.

However, nationalisation and/or expropriation have definitional difficulties. Scholars have suggested that expropriation is an ancient concept. Expropriation was the original legal term used when the state took individual property.[231] It also indicates an act that is rational only if requirements such as public purpose and adequate compensation are met.[232] On the other hand, nationalisation is a more recent concept. It became common in the twentieth century, unlike expropriation. In the main, it indicates large-scale appropriation for social and economic transformation for the overall good of the people.[233] Rood submits that 'the terms have different connotations and even dissimilar legal consequences … these differences are often blurred in the United Nations resolutions, national legislation, court decisions, and legal writings'.[234]

Scholars have different views of this conundrum. Some scholars believe that, compared to expropriation, nationalisation emanates from the adjustment of an economic or social agreement, which usually occurs in the aftermath of a political change.[235] On the other hand, expropriation entails an officially authorised system by which the state infringes on private property rights to place specific property at the

[228] <http://www.worldlii.org/int/other/UNGARsn/1962/59.pdf> at 15. Accessed 6 July 2023.
[229] <http://www.worldlii.org/int/other/UNGARsn/1960/49.pdf> at 9. Accessed 6 July 2023.
[230] Article 4 of UN Resolution 1803.
[231] Domenic Re Edward, 'The Nationalisation of Foreign-Owned Property' (1951) 36 Minnesota Law Review 323 at 323.
[232] Leslie Rood, 'Nationalisation and Indigenisation in Africa' (1976) 11 The Journal of Modern African Studies 427 at 429.
[233] ibid.
[234] ibid at 430.
[235] Samy Friedman, *Expropriation in International Law* (Greenwood Press 1953) at 55. See Isi Foighel, *Nationalisation: A Study in the Protection of Alien Property in International Law* (Praeger 1982) at 16.

disposal of the state or the people.[236] Katzarov seeks to explain the concepts of nationalisation and expropriation.[237] Nationalisation entails a general economic undertaking, obtained as a going concern. Expropriation is mainly intended for control purposes by the state; it restricts and disposes of private property for socio-economic needs. Expropriation takes ownership of the means of production from individuals and then transfers it to the people.[238] Wortley adopts a more incorporated approach. He asserts that nationalisation equally implies expropriation '[i]n pursuance of some national political programme intended to create out of existing enterprise or to strengthen a nationally controlled industry'.[239] This study does not discuss nationalisation as related to international investment law and the legality and illegality of the process, as this is not within the scope of the study.

However, it is apparent that nationalisation is established and entrenched as a customary international law principle. Consequently, the municipal laws of most African countries align with this ownership and control model and have adopted it in their municipal constitutions. However, the manner and mode of nationalisation remain the subjects of an ongoing debate.

## 2.5 Socio-economic development perspectives of natural resource control

Development has evolved over time and is no longer mere economic growth measured only by gross national product per capita. Development addresses the core question of the equitable distribution of economic growth for the socio-economic needs and

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[236] Friedman ibid at 220. See also Martin Domke, 'Foreign Nationalisations: Some Aspects of Contemporary International Law' (1961) 55 American Journal of International Law 585 at 587. According to him, the term 'expropriation' is sometimes used in instances where the word 'nationalisation' as a measure of general change in the state's economic and social life would be more appropriate. The distinction may indeed have little practical effect in terms of international legal relations. See also Greta Gainer 'Nationalisation: The Dichotomy between Western and Third World Perspectives in International Law' (1983) 26 Howard Law Journal 1547 at 1551. Nationalisation and expropriation are described by the term 'taking' which is an action by a foreign state with the aim of depriving foreign investors of their property rights and interests. See also Peter Muchlinsky, *Multinational Enterprise and the Law* (Blackwell Publishing 1999) at 501: 'An act of expropriation involves the compulsory taking of property belonging to another upon payment of compensation for its loss. The taker is usually a public authority or a private entity acting on behalf of a public authority. The expropriated property may be acquired by a third party or be taken into public ownership and control, in which case it is said to have been nationalised.'

[237] Katzarov (n 55) at 143.

[238] ibid.

[239] Atkin Wortley, *Expropriation in Public International Law* (Cambridge University Press 1959) at 36.

welfare of the people.[240] This situation in the 1950s and 1960s coincided with the emergence of the PSNR Resolution and the ACHPR in the 1980s. Developing states could not ensure a significant change in people's living conditions, irrespective of their remarkable economic growth.[241] Some scholars suggest that development involves more than economic growth and changes in economic configurations. It is further submitted that development also embraces the socio-economic well-being of the people.[242] Therefore, it should counter poverty, inequality, unemployment and hunger. Scholars agree that, in poor developing states, growth is a requirement for development. But development definitely entails more than growth.[243] Sen suggests that development is broader in this regard. Thus, the freedom to engage in all socio-economic and political activities supports the best human existence.[244] He further asserts that an objective definition of development is difficult, which often leads to differences in the purpose of development.[245]

The UN Resolution on PSNR is clear about its intention to pursue the economic growth of the state and the socio-economic development of people.[246] However, developing states were exposed to colonial control of their trade and investment over a period of time. Consequently, natural resources were exploited using new knowledge, creating rapid economic growth.[247] The traditionally self-reliant societies became entangled in the web of natural resource exploitation, and exposure to the outside world created contemporary weakness and desires.[248] Therefore, people wish to strive for socio-economic development in view of the readily available natural resource wealth. The UN declaration on the right to development of 1986[249] echoes the PSNR position on

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[240] Jeswald Salacuse, 'From Developing Countries to Emerging Markets: A Charging Role for Law in the Third World' (1999) 33(4) International Lawyer 875 at 875.

[241] Adam Szirmai, *The Dynamics of Socio-Economic Development: An Introduction* (Cambridge University Press 2005) at 6.

[242] ibid at 7.

[243] ibid.

[244] Amartya Sen, *Development as Freedom* (Oxford University Press 1999) at 10.

[245] Szirmai (n 241) at 7.

[246] UN Resolution 1803 of 1962 and Articles 21, 22 and 23 of the ACHPR.

[247] Szirmai (n 241) at 10.

[248] ibid.

[249] See <http://www.ohchr.org/Documents/Issues/Development/RTD_booklet_en.pdf> accessed 6 July 2023. Article 1 states: 'The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.' See also Article 22 of the ACHPR.

development. This aligns with the provisions of Article 22 of the ACHPR, emphasising the human rights dimension. Sengupta opines that 'development … must be genuinely participatory, with fair and equitable distribution of benefits that results in the progressive improvement of the well-being of all people, and not just certain economic groups'.[250]

Sengupta notes that participating in development and the equitable allocation of its benefits to people denotes exercisable rights, consistent with human rights provisions.[251] Salacuse agrees with the notion of economic growth attached to development in the 1950s and 1960s. He argues that the depiction and focus of development have changed and advanced over time.[252] The equitable distribution of economic growth resulting from the exploitation of natural resources and the extensive poverty in developing states should form part of the development programme.[253] The policy position of governments and academic discussion in the last few decades have shown two spheres of development: development that manifests as a set of goals and development that is the process of achieving these goals. The goals of development include improved economic output, poverty reduction and the general welfare of the people.[254] The development process includes achieving the state's social and economic goals in respect of the people.[255] Sengupta agrees and further submits that the process should be rights-driven; thus, its outcome is realised based on equity and accountability.[256] Thus, all state policies and actions in this regard must abide by human rights standards through people's involvement in a non-discriminatory way.[257]

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[250] Arjun Sengupta, 'The Human Right to Development' (2004) Oxford Development Studies 179 at 180. See also Bard Andreassen and Stephen Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions* (Intersentia Publishing 2010); Rajeev Malhotra, 'Towards Implementing the Right to Development: A Framework for Indicators and Monitoring Methods' in Bard Andreassen and Stephen Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions* (Intersentia Publishing 2010) at 249, who submits that 'a broad based notion of development in terms of economic, social, cultural, and political advancement, directed at the full realization of all human rights and fundamental freedoms, transformed the right to development from a mere claim for a supportive human right'.

[251] ibid.

[252] Salacuse (n 240) at 875, 876.

[253] ibid.

[254] ibid at 876.

[255] ibid.

[256] ibid.

[257] Andreassen and Marks (n 250) at 23.

Two forms of development have emerged in developing states. The first model took its cue from the prevalent position in the 1960s.[258] As the sole representative of the people, the state was empowered to drive the economic development agenda in terms of customary international law prescripts. The first model set up state mechanisms and public arrangements and regulations.[259] However, the reliance on public law to attain its objectives created limitations of private law, given the development process. States used the law only to contribute towards certain desired socio-economic changes. The state excluded rules that allowed people to engage in socio-economic activities in terms of their individual and collective interests.[260] The first development model introduced new laws and regulatory measures as natural resource control measures. Foreign investment codes and nationalisation legislation emerged to support this unfolding economic and business venture.[261] The mid-1980s saw rising agitation from developing states, their agencies and certain international agencies. It became obvious that the first development model had been unsuccessful and could not sustain the anticipated development.[262]

However, the second development model emerged, which, from every perspective, is the direct opposite of the first development model. Developing states began to pursue decisions on natural resources and other services from the private sector perspective rather than the state perspective.[263] It has been suggested that the economies of developing countries, because of the second development model, have revealed a certain level of openness in trade and investment. This contrasts with the failure of the earlier position, which created closed economies and economic self-reliance that could not support improved socio-economic development.[264] The move from the first development model to the second development model, by implication, advocates that the notion of law as a social engineering mechanism to tame human behaviour is reduced.[265] Consequently, developing countries have become less revolutionary with regard to legislation that controls their natural resources. Law has turned out to be the

[258] ibid.
[259] ibid at 880.
[260] ibid.
[261] ibid at 881.
[262] ibid at 882.
[263] ibid at 883.
[264] ibid at 885.
[265] ibid at 886.

set of rules which guides and controls the conduct of people and investors in their financial dealings.[266] Therefore, it is not feasible to rely on coercion to effect change, as it was in the early periods of development; the law currently uses incentives to influence behaviour.[267]

## 2.6 Conclusion

Natural resources contributed to shaping the development of classical and neo-classical economic theories. They are therefore a building block of and defining factor in national wealth and socio-economic development.

This chapter found that natural resources are a collective asset of the state and the people for the overall good. This conclusion is based on the functional ability of natural resources to contribute to the socio-economic well-being of the people through state machinery. The chapter suggests that the state, a sovereign international law subject, is bequeathed with the authority to oversee and control its natural resources for the people's sole socio-economic development and benefit. The chapter has also demonstrated that nationalism and nationalisation are common elements that can be traced to both the sovereign state and the people, which developed out of the intense desire to ensure the sustainable ownership and control of natural resources. Thus, nationalisation has become a practical and effective tool for the control of natural resources by the state for the development of the people. The chapter also suggests that development primarily embraces the socio-economic well-being of the people and is not limited to economic growth only. The chapter also highlighted and demonstrated that the second development model precluded the state-centric approach adopted in the first development model, which excludes the people and makes natural resource decisions by dealing with corporates.

[266] ibid.
[267] ibid at 887.

## CHAPTER 3:

## THE INTERNATIONAL AND REGIONAL FRAMEWORK FOR THE PRINCIPLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

### 3.1 Introduction

International law is the catalyst for systemic regulatory intervention in natural resource ownership and governance.[268] This intervention was initiated by the interest that the UN General Assembly instruments on PSNR triggered, which dovetailed into the ACHPR and other interventions on natural resource ownership and governance across the board.[269] These innovative PSNR instruments were first captured in UN Resolutions 626 VII and 1803 XVII.[270] They are predicated on economic integration to enhance socio-economic development, support world peace, and guarantee the right to PSNR to the state and the people.[271] PSNR emanated as a human rights concern that was based on the principle of economic self-determination of the state and the people.[272] PSNR inevitably became entangled with the question of colonialism, which was a hot topic then.[273] The issue of PSNR became a debate between developing and capital-exporting states. The differences in their approach to PSNR created a divide between the international legal aspects of natural resource ownership and governance and the socio-economic development of the state and the people, on the one hand, and the relevant domestic and international political effects, on the other.[274] Thus, both connections are considered in this study, particularly in the case studies of Nigeria and

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[268] Richard Bilder, 'International Law and Natural Resource Policies' (1980) 20 (3) Natural Resource Journal 451 at 451.

[269] UN General Assembly Resolutions 626 (VII) and 1803 (XVII) <https://digitallibrary.un.org/record/211441?ln=en> and <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/resources.pdf> accessed 30 November 2022. See also Articles 21 and 22 of the ACHPR <https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf> accessed 30 November 2022. See also United Resolution 61/295 Article 26 of 2007 on the Rights of Indigenous People <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf> accessed 16 July 2023.

[270] ibid.

[271] ibid.

[272] Lorne Clarke, 'International Law and Natural Resources' (1977) 4(2) Syracuse Journal of International Law and Commerce 377 at 378.

[273] ibid.

[274] ibid.

South Africa in chapters 4 and 5. The connections are further illuminated in the discussion of the ECSC and the AU as regional structures in relation to the legal aspects of natural resource ownership and governance and the socio-economic development of the state and the people, and their international and domestic political significance.

This chapter evaluates and discusses the position of international law with regard to natural resource ownership and governance within the ambit of other ancillary international organisations in light of the anticipated socio-economic development of the people. Section 3.2 provides an analysis of the resolutions on PSNR as international law instruments on natural resource ownership and governance to enhance the socio-economic development of the people. This analysis considers the development of the discussion and resolutions on PSNR over the years to capture the needs of the changing world. The chapter does not provide a full discussion of and the history of these resolutions, as this is beyond the scope of this study. However, it engages in an overview of PSNR from the standpoint of the socio-economic development rights of people.

Section 3.3 investigates the European Coal and Steel Community's (ECSC) natural resource ownership and governance systems. It considers the theory of supranationalism as theorised within the context of the EU's ownership and governance of natural resources. Lastly, it explores the current EU framework on natural resources and the current EU structures. Section 3.4 explores the AU's position on natural resource exploitation for socio-economic development. It investigates state practices in natural resource ownership and governance during the Organisation of African Unity (OAU) era and the ACHPR's position on natural resources in relation to PSNR.

## 3.2 The development of PSNR at the international level

PSNR is not a static legal theory.[275] Since the first decade after the Second World War, this principle focused on the ownership and governance of natural resources and the

[275] Chi Manjiao, 'Resource Sovereignty and WTO Dispute Settlement: Some Comments on China – Raw Materials and China – Rare Earths' (2015) 12 Manchester Journal of International Economic Law 2 at 3.

ensuing socio-economic position of the people.[276] It took over two decades to develop this principle in the UN General Assembly. Chile was instrumental in its introduction through the UN Commission on Human Rights in 1952. Subsequently, it has been evident in many UN General Assembly resolutions. The numerous motions have evolved into a declaration of rights that is vested in states and the people.[277] The development of the principle created a mixed understanding among states. However, a shift in understanding emerged from the idea that the concept resulted from political and legal demands for decolonisation and self-determination.[278] Eventually, the concept was transformed into a political claim for the New International Economic Order (NIEO).[279] Historically, the development of PSNR falls into two major periods: its inception in 1952 until the adoption of Resolution 1803 (XVII) of 1962, and Resolution 3281 of 1974.[280]

### *3.2.1 The phase between 1952 and 1962*

UN General Assembly Resolution 535 (VI) of 12 January 1952 recognised the right of underdeveloped countries to exploit their natural resources without restraint for their socio-economic development. Subsequently, the right was reiterated on 21 January 1952 as an inherent right vested in the sovereignty of people.[281] Within six years, in 1958, it was recognised in the UN General Assembly that the right to PSNR is an essential element of the right to self-determination. All the resolutions adopted during this period advocated that people's right to PSNR was inherent.[282] Therefore, the principle clearly supported the political and legal agenda for decolonisation and self-determination. This is attributable to the fact that colonised states, particularly in Africa,

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[276] ibid.

[277] Wil Verwey and Nico Schrijver, 'The Taking of Foreign Property under International Law: A New Legal Perspective?' (1984) 15 Netherlands Yearbook of International Law 3 at 31. See also Elian (n 17) at 95.

[278] Rudolf Dolzer, 'Permanent Sovereignty over Natural Resources and Economic Decolonization' (1986) 7 Human Rights Law Journal 217 at 222.

[279] ibid.

[280] Fritz Visser, 'The Principle of Permanent Sovereignty over Natural Resources and the Nationalisation of Foreign Interests' (1988) 21 Comparative and International Law Journal of Southern Africa 76 at 77.

[281] UN General Assembly Resolution 535 (VI) of 12 January 1952 <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/067/90/IMG/NR006790.pdf?OpenElement> See also <http://legal.un.org/avl/pdf/ha/ga_1803/ga_1803_ph_e.pdf> accessed 9 September 2022.

[282] Ibid .

were agitating for independence. PSNR is therefore a right vested in the people, not in states.[283]

The concept of PSNR became widely recognised in 1962. Consequently, on 14 December 1962, General Assembly Resolution 1803 (XVII) on PSNR was officially adopted.[284] It was overwhelmingly supported by affected groups from both developing and developed states, and received 87 votes in favour and two against from South Africa and France.[285] The latest UN General Assembly Resolution dealing with PSNR comprised eight paragraphs, with paragraph 1 granting and entrenching the right to PSNR to both people and states.[286] The resolution entrenched the right to PSNR to be exercised for national development and the well-being of people of all concerned states.[287] The exploitation, development and disposition of natural resources had to occur according to the accepted rules that the people and states deem desirable. Resolution 1803 (XVII) was accepted for its conventional outlook, creating certainty about international law's applicability to natural resource investment and divestment.[288]

### *3.2.2 The phase after 1962*

Resolution 1803 was restated and reconfirmed in numerous subsequent resolutions, such as Resolution 2158 (XXI) of 25 November 1966, Resolution 2386 (XXIII) of 19 December 1968 and Resolution 2692 (XXV) of 11 December 1970.[289] This period was marked by foreign private investors' activities in the development process. This resulted from the series of nationalisations and expropriations that occurred following decolonisation.[290] This period adopted a far more conservative approach compared to the earlier periods. However, Resolution 1803 (XVII) received its first challenge later

[283] Visser (n 280) at 77. See also Verwey (n 277) at 80.
[284] General Assembly Resolution 1803 (XVII) <http://www.worldlii.org/int/other/UNGARsn/1962/59.pdf> accessed 9 September 2022.
[285] Aditi Garg, 'Permanent Sovereignty over Natural Resources: An Analysis' (2021) 4(1) International Journal of Law, Management and Humanities 624 at 627.
[286] Kamal Hossain and Subrata Chowdury, *Permanent Sovereignty over Natural Resources in International Law: Principle and Practice* (Frances Pinter Publishers 1984) at 1.
[287] Dolzer (n 278) at 219.
[288] ibid.
[289] Visser (n 280) at 78.
[290] ibid.

in this period.[291] Resolution 88 (XII) of 19 October 1972 was adopted by the UN Trade and Development Board at its Conference on Trade and Development (UNCTAD). It reaffirmed the 'sovereign right of all countries freely to dispose of their natural resources for the benefit of the national development'.[292] In addition, it restated that:

> in the application of this principle, such measures of nationalisation as states may adopt in order to recover their natural resources, are the expression of a sovereign power in virtue of which it is for each state to fix the amount of compensation and the procedure for these measures, and any dispute which may arise in that connection, falls within the sole jurisdiction of its courts, without prejudice to what is set forth in the General Assembly's Resolution 1803 (XVII).[293]

Nonetheless, the qualification 'without prejudice' was apparently not part of the original draft. It was only introduced to satisfy the objection raised by certain states due to a conflict about Resolution 1803 (XVII) and the original draft.[294]

Resolution 3171 (XXVIII), passed in December 1973, endorsed and reaffirmed the position of Resolution 88 (XII). However, it excluded any references to the international law position.[295] Thus, certain developed nations perceived it as a radical move from duly accepted international law principles. Consequently, a declaration about the establishment of an NIEO was adopted in the UN General Assembly through Resolution 3201 on 1 May 1974. It formulated a set of 20 principles; the fifth principle granted 'full and permanent sovereignty of every state over its natural resources and economic activities'.[296] This principle therefore comprises the intrinsic right to nationalise and to transfer ownership by the state to establish the absolute permanent sovereignty of its resources.

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[291] ibid.

[292] See UNCTAD Trade and Development Board: Resolutions on Permanent Sovereignty over Natural Resources 19 October 1972 at 1475 <http://heinonline.org/HOL/LandingPage?handle=hein.journals/intlm11&div=206&id=&page=> accessed 9 September 2022.

[293] ibid.

[294] Visser (n 280) at 78.

[295] ibid at 79.

[296] UNGAR 3281 (XXIX) of December 1974 <http://www.un-documents.net/a29r3281.htm> accessed 26 February 2014.

The final development of PSNR was its integration into Article 2 of the Charter of Economic Rights and Duties (CERDS). Furthermore, the principle was transformed into a political mechanism for an NIEO. Absolute economic sovereignty was emphasised to a greater extent, even within the sphere of foreign investment.[297] The second phase of the development of PSNR emphasised the inherent need for developing states to be the subject of this right. Consequently, certain UN resolutions placed the obligation to exercise the right to PSNR on states and for the benefit of their people.[298]

### *3.2.3 The new phase*

People's self-determination rights in a state became an intricate issue. People are perceived to be objects, as opposed to subjects, of international law.[299] However, in the 1970s and 1980s, this discourse about people's rights was confined to states. The CERDS of 1974 and the Seoul Declaration of 1986 of the International Law Association, a non-governmental law organisation comprising lawyers from developed and developing nations, exemplified this approach.[300] Article 2 of CERDS and section 5 of the Seoul Declaration dealing with PSNR principles did not reference 'people'.[301]

Nevertheless, the point at which the indigenous people of a natural resource area of the state who are unduly deprived of their natural resource rights should freely participate in decisions affecting the exploitation of their resources remains a domestic issue.[302] International law becomes relevant when it is clear that a state discriminates

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[297] Dolzer (n 278) at 78. See also Jeremie Gilbert, 'The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right' (2013) 31(2) Netherlands Institute of Human Rights 314 at 320: 'Under the new economic order, the emphasis was on the affirmation State's sovereignty over natural resources and the need to enjoy such sovereignty'; 'the main features of all the … resolutions, declarations … focusing on natural resources, is the assertion that States enjoy an absolute sovereignty over natural resources'.

[298] ibid. See Gilbert (n 297): 'States are clearly the holder of such right, with the only constraint that they should exercise such a right to support the well-being of their own peoples.'

[299] Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997) at 8.

[300] ibid at 9.

[301] ibid. See also Paul Peters, Nico Schrijver and Paul de Waart, 'Responsibility of States in Respect of the Exercise of Permanent Sovereignty over Natural Resources: An Analysis of Some Principles of the Seoul Declaration (1986) by the International Law Association' (1989) 36 Netherlands International Law Review 285 at 286.

[302] Schrijver ibid.

against such people or cannot adequately represent all people regarding race, creed or colour.[303]

The probable legal question today is whether people living in a natural resource state can participate in the discussion about the use and control of natural resources, given the self-determination principle.[304] Of course, self-determination is recognised today as a rule in modern international law and core international law principles, and is more or less a *jus cogens*.[305]

Akpan submits that '[s]elf-determination is not only relevant to people under colonisation, ... it is a universe of human rights precepts which quality renders it applicable to all people … at all times … it is a demand of a people to take their destiny in their own hands in matters that have direct effect on them.'[306] It can thus be determined that self-determination elicits rights to participate, to be consulted, and to inherent autonomy in natural resource control issues.[307] Self-determination creates autonomy for people to decide on matters that directly affect them instead of imposing choices on them.

Colonialism was vehemently rejected due to its breach of the self-determination standards set out in international law, and therefore people were liberated from unjust dominance. Indeed, foreign dominance may have been the main issue, but that does not justify domestic dominance in the same way.[308] Internal and external self-

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[303] Schrijver ibid at 10.

[304] George Akpan, 'Host State Legal and Policy Response to Resource Control Claims by Host Communities: Implications for Investment in the Natural Resource Sector' in Elizabeth Bastida, Thomas Walde and Janeth Warden-Fernandez (eds), *International and Comparative Mineral Law and Policy Trend and Prospects* (Kluwer Law International 2005) at 287.

[305] Akpan ibid. See James Anaya, *Indigenous Peoples in International Law* (Oxford University Press 2004) at 97. See also Stefaan Smis and Dorothee Cambou, 'Permanent Sovereignty over Natural Resources from a Human Rights Perspective: Natural Resources Exploitation and Indigenous Peoples' Rights in the Arctic' (2013) 22(1) Michigan State International Law Review 348 at 357. They provide a further analysis of the relationship between sovereignty, self-determination and human rights in natural resource exploitation.

[306] Akpan ibid. See also Anaya (n 305) at 98, who argues that self-determination provides remedies that kick against suppressive legacies of the 'empire, discrimination, suppression of democratic participation, and cultural suffocation'.

[307] Akpan ibid at 288.

[308] Charles Beitz, *Political Theory of Public International Law* (Stanford University Press 1979) at 92. See also Anaya (n 305) at 103–104, who supports the position and opines that '[i]t is a mistake to equate self-determination with decolonization regime, which has entailed a limited category of subjects, prescription, and procedures … Self-determination precepts comprise a world-order

determination are distinct. The internal right of self-determination allows people to contribute extensively to the state's legal system, to have some control over natural resources, and to participate effectively in the national polity.[309] External self-determination, on the other hand, occurs when an internal notion becomes unworkable and unacceptable to the people. Thus, people tend to decide their international standing in this regard.[310]

The legal dispensation regarding natural resource exploitation in most African states contradicts the effective realisation of the self-determination principle. Akpan opines that laws on natural resource development sometimes reside with an individual state functionary or commission which is allied to the powerful elite in the state.[311] Thus, the overall input and interests of the people affected by natural resource control can be more or less extinguished.

## 3.3 Regional frameworks for the governance of natural resources

### *3.3.1 The European Coal and Steel Community framework*

The emergence of the European Coal and Steel Community (ECSC) triggered European efforts to own and govern natural resources.[312] The ECSC was established based on the harmonised principles of international treaties, outlining a body of rules and obligations that govern the relationships between states, as highlighted in chapter 2. The European multinational institution aimed to merge its coal and steel resources

standard which colonialism was at odds [with] … The substantive content of the principle of self-determination, therefore inheres in the precepts … which apply universally to benefit all human beings individually and collectively.'

[309] Beitz ibid at 93.

[310] Michael Freeman, 'National Self-determination, Peace and Human Rights' (1998) 10(2) Peace Review: A Journal of Social Justice 157 at 157. See also Helen Quane, 'The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) at 260: 'Once an entity is recognised as a people, the traditional position in international law is that they enjoy the full range of options in respect of both internal and external self-determination.'

[311] Akpan (n 304 ) at 290.

[312] Karen Alter and David Steinberg, 'The Theory and Reality of the European Coal and Steel Community' Working Paper No 07-001 2007 at 3 <https://faculty.wcas.northwestern.edu/kal438/KarenJAlter2/ECJsPolitical_Power_files/ECSCTheory&Reality.pdf> accessed 9 September 2022.

into a common market with a view to more inclusive socio-economic development.[313] Article 2 of the ECSC treaty[314] validated the broad purpose of the ECSC as follows:

> The mission of the European Coal and Steel Community is to contribute to economic expansion, the development of employment and the improvement of the standard of living in the participating countries through the institution in harmony with the general economy of the member states, of a common market …[315]

Article 3(d), (e) and (f) emphasised the intended socio-economic purpose articulated by the European countries through the ECSC, stating that:

> Within the framework of their respective powers and responsibilities and the common interest, the institution of the Community shall:
>
> (d) see that conditions are maintained which will encourage enterprises to expand and improve their ability to produce and promote a policy of rational development of natural resources, avoiding inconsiderate exhaustion of such resources;

[313] ibid.

[314] On 18 April 1951, representatives of six European governments comprising France, Germany (West Germany), Belgium, the Netherlands, Luxemburg and Italy signed the ECSC treaty. Subsequently, the treaty was duly ratified by these countries' parliaments. In terms of the treaty provisions, all authority regarding the production and distribution of the coal and steel of member nations of the ECSC was vested in the supranational institutions. These institutions comprised: (1) the High Authority, which served as the executive arm of the ECSC, comprising nine members. It was jointly appointed by the ECSC members for a specific period. (2) The Assembly served as the supervisory body over the activities of the High Authority. It was made up of delegated members from participating countries for the duration of one year. (3) The Council of Ministers, comprising government representatives from the cabinet members of each country. The Council ensured that the coal and steel policies of the ECSC were duly carried out in terms of the general economic policies of the ECSC and vice versa. (4) The Court of Justice dealt with the juridical matters arising between various organs of the participating governments and other enterprises concerned. It was composed of seven members that were jointly appointed by the governments of the participating countries. (5) The Consultative Committee assisted the High Authority in an advisory capacity in terms of decision-making. The Committee consisted of 30 to 50 members chosen by the Council of Ministers. The key object of the formation of the ECSC was the regional governance and control of its natural resources. This would trigger and sustain the much-needed socioeconomic development in Europe.

[315] See Article 2 of the Treaty Constituting the European Coal and Steel Community <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11951K:EN:PDF> accessed 9 September 2022.

(e) promote the improvement of the living and working conditions of the labour force … so as to make possible the equalisation of such conditions in an upward direction;

(f) further the development of international trade and see that equitable limits are observed in prices charged on external markets.[316]

The treaty established a common ownership and governance mechanism for Europe's key natural resources. It prohibited certain practices that could prevent the socio-economic development of people and member states. The main purpose of the ECSC treaty was to secure effective economic benefits that would advance people's and member states' socio-economic development. The treaty's prohibitions centred on the irresponsible exhaustion of natural resources to the detriment of future generations. The treaty further supported the creation of employment and the improvement of living standards in member states. The ownership and control of Europe's natural resources to achieve the desired socio-economic development was innovative in that it became the basis for European unity. It was revolutionary because it was characterised by an ownership and governance system that delegated power from the member states to a supranational body.

The European natural resource governance framework is based on supranationalism as a political and legal theory: it embodies the existence of an organisation that is competent to exercise delegated authority over its member states.[317] It entails the subsistence of an organisation that functions at a higher level than nation states.[318] International relations may be critically state-oriented, but supranationalism aims to develop principles for resolving common and interconnected problems through impartial and specialised institutions.[319] Weiler classifies supranationalism into decisional supranationalism and normative supranationalism. Normative supranationalism required relationships and a hierarchy between European Community policies and legal measures, on the one hand, and the competing policies

[316] Article 3 of the ECSC treaty.

[317] Babatunde Fagbayibo, 'Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview' (2013) 16 Potchefstroom Electronic Law Journal 32 at 33 <http://www.scielo.org.za/pdf/pelj/v16n1/04.pdf> accessed 9 September 2022.

[318] ibid.

[319] See Babatunde Fagbayibo, 'A politico-legal framework for integration in Africa: Exploring the attainability of a supranational African Union' (LLD thesis, University of Pretoria, 2010) at 138.

and legal measures of member states, on the other.[320] This explanation indicates the existence of three pertinent positions: if, in respect of general interests and competence, such policies and laws of the institution have a direct outcome in member states; if the laws of the institution are greater than those of the member states; and if member states are prevented from enacting conflicting laws.[321] These attributes were represented in the institutional apparatus of the European Community. Weiler submits that:

> [It] embodies but it is not limited to the following core elements: decisional autonomy (in particular the rule of the voting majority as opposed to consensus), the binding effect of the laws of international organisations (where member states are precluded from enacting contradictory laws), the institutional autonomy of an organisation from its member states, and the direct binding effect of laws emanating from regional organisations on natural and legal persons in member states.[322]

Prescatore further suggests that there are three preconditions for supranationalism: the acknowledgement of common values and interests; the formation of effective authority; and the autonomy of these authorities.[323] He argues that:

> Even where common interest and common values are recognised, the second element of supranationality, recognition of common authority is lacking. Nothing more, then, has been achieved than what is called international 'cooperation'.[324]

Articles 8 and 9 of the ECSC treaty captured the position indicated by Weiler and Prescatore. This was shown in the role and purpose of the High Authority in the governance of Europe's resources through supranationalism. Article 8 declared that the 'High Authority shall be responsible for assuring the fulfilment of the purpose stated in ... [the] treaty'. Article 9 further emphasised the independent and sacrosanct nature of supranationalism, stating that:

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[320] Joseph Weiler, 'The Community Systems: The Dual Character of Supranationalism' (1981) 1(1) Yearbook of European Law at 271–273.

[321] ibid.

[322] ibid at 276.

[323] Pierre Pescatore, *The Law of Integration*: *Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (AW Sijthoff 1974) at 50, 51.

[324] ibid at 52.

> The members of the High Authority shall exercise their functions in complete independence, in the general interest of the Community. In the fulfillment of their duties, they shall neither solicit nor accept instructions from any government or from any organisation.

It can be determined from the above that achieving significant socio-economic impact through natural resources depends on a protected decision-making body. This body makes binding decisions and takes responsibility with regard to supervising and operationalising such decisions. Supranationalism was manifested in the creation of principles that galvanised the European states to create quality strategic plans for the governance of their natural resources, namely the ECSC treaty.[325] Certain guiding ideals emanated from these principles to assist with the following: establishing and sustaining a controlled common market for resources in Europe, thus reducing political interference;[326] preventing private monopolistic arrangements between the resource-producing communities; and allowing competitive forces to operate freely.[327] This study does not deal with the theories that are derived from the principles indicated above. In 2002, after about 50 years as agreed upon in the treaty, the ECSC came to an end, and all its responsibilities were transferred to the European Union (EU), since

[325] Gerhard Bebr, 'The European Coal and Steel Community: A Political and Legal Innovation' (1953) 63(1) Yale Law Journal 1 at 1. See also Karen Alter, 'The Theory and Reality of the European Coal and Steel Community' (2007) Buffet Centre for International and Comparative Studies Working Paper Series at 4 <https://www.researchgate.net/publication/228187047_The_Theory_and_Reality_of_the_European_Coal_and_Steel_Community> accessed 9 September 2022. She suggests: 'While the Treaty of Paris ended up in intergovernmental bargain, it did establish supranational institutions with real powers … The council of ministers, comprised of ministers from member countries, had to formally assent to policy measures initiated by the High Authority.' See also Berthold Rittberer, 'The European Coal and Steel Community (ECSC) and European Defence Community (EDC) Treaties' at 1 <https://www.researchgate.net/publication/304650621_The_European_Coal_and_Steel_Community_ECSC_and_European_Defence_Community_EDC_Treaties> accessed 28 May 2019. Rittberger submits that '[the ECSC] marks a milestone in international cooperation as it represents the first supranational treaty organisation … National governments decided to delegate domestic decision making authority … to a new supranational organisation … renouncing [a] portion of their national sovereignty.' See also Joseph Weiler, *The Political and Legal Culture of European Integration: An Exploratory Essay* (Oxford University Press 2011) at 687. Weiler contends that '[t]he treaty of Paris with its explicit reference to supranationalism represents a radical and unprecedented exercise in legalization of transnational regime … it involves institution of governance, of transnational administration, of adjudication and enforcement.'

[326] ibid at 4.

[327] ibid.

1992.[328] Apparently, coal and steel had completely lost their strategic importance by this time, due to the emergence of other natural resources, such as cheaper energy sources from different parts of the world, particularly petroleum resources.

### *3.3.2 The EU's current strategy on natural resources*

Presently, competition for natural resources is on the agenda of most countries, including EU countries.[329] This rise in competition has triggered a high-level and great demand for natural resources.[330] The EU has witnessed the adverse effects of this development on natural resources over the past few years.[331] The Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) seem to have given fresh direction to the EU's capability regarding natural resource ownership and control.[332] This is the result of the termination of the ECSC treaty, which has been devolved to the EU.

Article 3 of the TEU lists the aims of the EU.[333] Article 3(5) of the Lisbon Reformed Treaty[334] considers the aims of the EU in relation to the wider world. The aims which are relevant to natural resources are described as follows: 'the sustainable development of the Earth', 'free and fair trade' and 'the protection of human rights as well as socio-economic development rights'. This allows the EU to pursue these aims.

Article 3 of the TEU is further linked to Article 21 of the TEU. In the Lisbon Reformed Treaty, Article 21 is intended to enhance the EU's external actions. Article 21(2)(d), (e) and (f)[335] of the TEU contains a specific reference to the governance of natural resources for the socio-economic advancement of people:

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[328] Benedetta Ubertazzi, 'The End of ECSC' (2004) European Integration Online Papers (EIOP) vol 8 at 1–4 <http://eiop.or.at/eiop/pdf/2004-020.pdf> accessed 9 September 2022.

[329] Chris Koppe, 'Up Towards a Coherent and Inclusive EU Policy on Natural Resources: Treaty Amendment Proposals' in Z Jaap, L Martijn and M Abiola (eds), *Governance of Security Issues of the European Union: Challenges Ahead* (Asser Press 2016) at 308.

[330] ibid.

[331] ibid.

[332] ibid at 312.

[333] ibid.

[334] Lisbon Treaty, Third Edition 2007 at 16 <http://en.euabc.com/upload/books/lisbon-treaty-3edition.pdf> accessed 9 September 2022.

[335] ibid at 29.

21(2) The Union shall define and pursue common policies and actions, and shall work for a high degree of co-operation in all fields of international relations, in order to:

(d) foster the sustainable economic, social and environmental development of developing countries with the primary aim of eradicating poverty;

(e) encourage integration of all countries into the world economy including through the progressive abolition of restrictions on international trade

(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.

The motivation for this section in the Lisbon Reformed Treaty arises from the need, as articulated in the PSNR provisions, to assist in the effective and sustainable management of natural resources. Another significant treaty proviso is Article 8 of the TEU,[336] which bestows competence on the EU to develop a European Neighbourhood Policy (ENP).[337] The ENP will contribute significantly to securing access to natural resources for people in neighbouring countries, for example, through preferential trade agreements.[338]

The EU's current plan to protect natural resources is articulated in the Europe 2020 strategy.[339] The recommendation and adoption of this strategy devolves from the general competence of the European Commission,[340] stated in Article 17 of the TEU, and that of the European Council, stated in Article 15 of the TFEU.[341] The primary aim of the EU's strategy with regard to natural resources is their sustainable use.[342] In order to achieve these aims, the Europe 2020 strategy describes the roles and tasks of EU institutions, national authorities, civil society and other stakeholders. It further states:

[336] ibid at 19.
[337] Koppe (n 329) at 313.
[338] ibid.
[339] See Europe 2020, 'A European Strategy for Smart, Sustainable and Inclusive Growth' at 3 <http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf> accessed 9 September 2022.
[340] Koppe (n 329) at 313.
[341] Lisbon Treaty (n 334) at 22, 24.
[342] Koppe (n 329) at 313.

> All EU policies, instruments and legal acts, as well as financial instruments, should be mobilised to pursue the strategy's objectives. The Commission intends to enhance key policies and instruments such as the single market, the budget and the EU's external economic agenda to focus on delivering Europe 2020s objectives.[343]

The EU's policy attempt to protect natural resources, as expressed in its Europe 2020 strategy, is intertwined with the core operations of its key organs. This does not detract from its unique operational features, which were previously characterised by the pooling of sovereignty to achieve a common development goal.[344] Successive decisions were taken in previous EU summits, culminating in the EU 2020 strategy on the sustainable use of natural resources from a more expansive perspective.[345] It follows that the existing EU policy, regulations and instruments framework on the sustainable use of natural resources undeniably have shortcomings.[346] Questions about the impact of imported natural resources from developed countries and the security of supplies were not extensively covered by the policy and regulatory instruments.[347] The EU Commission's thematic strategy on the sustainable use of natural resources was proposed to the European Parliament and Council for appropriate consideration.[348]

The next section outlines the activities of the AU with regard to natural resource ownership and control in view of the EU operations with reference to the principle of PSNR, its international considerations, and the role of member states in the sustainable use of natural resources.

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[343] See Europe 2020 (n 339) at 18.

[344] See Final Report European Union 6th Environmental Action Programme 'Towards a Thematic Strategy on the Sustainable Use of Natural Resources' at 116–121 <http://ec.europa.eu/environment/archives/natres/pdf/final_report_wg1.pdf> accessed 9 September 2022.

[345] See 1998 Cardiff Summit, 2000 Lisbon Summit and 2001 Goteborg Summit. The conclusion of these summits created the political foundation which enabled the EU to delve into issues concerning the sustainable use of natural resources.

[346] ibid.

[347] ibid.

[348] Nisida Gioski and Michal Sedlaacko, 'Resource Policies in the Context of Sustainable Development: Current Trends and Challenges Ahead' (2011) *ESDN Quarterly Report* at 15 <https://www.sd-network.eu/quarterly%20reports/report%20files/pdf/2011-March-Resource_policies_in_the_context_of_sustainable_development.pdf> accessed 9 September 2022.

### 3.4 The African Union and natural resource ownership and control

Africa continues to struggle with the challenge of harnessing the full potential of its natural resource endowment for sustainable and inclusive socio-economic development.[349] Natural resources are extracted mainly for processing and use outside of Africa. Thus, the sector remains disconnected from the broader economies.[350] The rent from natural resources has provoked fierce contests between ruling elites and their factions in creating, capturing, allocating and distributing such rent, thus producing a network of patronage that competes for the rent, resulting in its inefficient and unproductive use.[351] A major challenge to good governance in Africa regarding natural resources is the influence of the ruling political elites and their domestic actors controlling access to natural resource rent. This deprives many citizens of natural resources and their socio-economic benefits and results in a narrow nationalistic agenda and ethnic and civil strife.[352] An Oxfam Report states that a season of very high commodity prices, known as the commodity supercycle in Africa from 2000 to 2011, benefited only the extractive industries and political elites at the expense of the continent's citizens.[353]

African heads of state adopted the African Mining Vision (AMV) at the AU Summit in 2009.[354] It was intended to tackle the issue of Africa's mineral wealth existing alongside

[349] Vanessa Ushie, 'From Aspiration to Reality Unpacking the African Mining Vision' (2017) Oxfam Briefing Paper at 4 <https://www-cdn.oxfam.org/s3fs-public/bp-africa-mining-vision-090317-en.pdf> accessed 16 July 2023.

[350] ibid.

[351] African Development Bank Group Report (2023) 'African Economic Outlook 2023: Mobilising Private Sector Finance for Climate and Green Growth in Africa' (2023) at 147 <https://www.afdb.org/en/documents/african-economic-outlook-2023> accessed 21 July 2023.

[352] ibid. The African Development Bank Group Report states that 'Africa has lost more than $1 trillion in illicit financial flows over the last 50 years and it will likely still lose about $89 billion annually. The money lost through various leakages is more than the total of foreign direct investment and overseas development in Africa. Mining, oil and gas and minerals remains particularly prone to leakages: of $1.2 trillion accrued from selling oil, gas and minerals, only 22 percent of the proceeds end up in national treasuries.'

[353] ibid. The Oxfam Report states: 'Around 56 percent of illicit financial flows (IFFs) leaving Africa between 2000-2010 came out of the oil, metal ore and precious mineral sectors. The leaks from the International Consortium of Investigative Journalists (ICIJ) or (the Panama Papers) revealed that political elites from 44 out of 54 African countries hid wealth generated from the mineral sector through shell companies established to own or do business with oil, gas and mining operations.'

[354] African Mining Vision (2009) <http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf> accessed 14 March 2022.

poverty. However, it does not appear to have helped the situation.[355] The AMV aims to integrate extractive industries in line with the desired broad-based socio-economic development policies at the local, national and regional levels to ensure that communities benefit from natural resource extraction.[356] Africa's efforts to achieve socio-economic development through its natural resources since the early period of independence in the late 1960s have been below average.[357] Different ideologically driven efforts have been made by states for the ownership and control of their natural resources.[358]

Firstly, states became involved in managing natural resources in line with the need for self-determination and the control of national patrimony.[359] This culminated in states' establishment of state-owned enterprises to exploit their natural resources.[360] The understanding of the government at the time was that the state must be involved in entrepreneurial activities with a view to managing its natural resources for socio-economic development. However, state-owned enterprises were ineffective because of their many complex ambitions, ranging from generating surplus funds to efficient internal management and well-articulated socio-economic development.[361]

Secondly, private corporations involved in exploiting natural resources were nationalised. This was common in states ruled by military governments.[362] The state nationalisation intervention lasted for a while and failed to yield the anticipated socio-economic dividends. The states lacked the ability to activate the natural resources to deliver the desired socio-economic benefits.[363] Third, the regulatory roles played by states in the face of the current dominance of multinational corporations (MNCs) have

[355] ibid.
[356] ibid at 13.
[357] Bebr (n 325 ) at 140. See also Fagbayibo (n 317) at 35.
[358] ibid.
[359] Kobena Hanson, Cristina D'Alessandro and Francis Owusu (eds), *Managing Africa's Natural Resources Capacities for Development* (Palgrave Macmillan 2014); Joseph Ayee, 'The Status of Natural Resource Management in Africa: Capacity Development Challenges and Opportunities' in Kobena Hanson, Cristina D'Alessandro and Francis Owusu (eds), *Managing Africa's Natural Resources Capacities for Development* (Palgrave Macmillan 2014) at 18.
[360] ibid.
[361] ibid.
[362] ibid.
[363] ibid.

been unsatisfactory.[364] This followed the Washington Consensus, which advocated minimal state intervention in the market through privatisation, deregulation and liberalisation in the 1980s.[365]

Scholarly opinions on the role of MNCs in Africa's economy with respect to their natural resource exploitation activities are divided.[366] The issue that has dominated this debate is the balance of power between states and MNCs, which often manifests in the state feeling short-changed in the relationship.[367] Although MNCs' activities in exploring and exploiting Africa's natural resources date back to the colonial and postcolonial periods, the Washington consensus of the 1980s, which brought about economic globalisation, gave them a continental standing.[368] MNCs have resurged in Africa – mainly Chinese, Japanese and Indian state-sponsored companies – and have brought new facets to Africa's natural resource exploration and exploitation.[369]

It is clear that the Pan-African movement influenced African autonomy and independence.[370] However, it achieved a new manifestation when the Organisation of African Unity (OAU) was established in 1963, after many African countries became independent.[371] The OAU's main objectives were to promote unity and cooperation among African states and to end African colonialism.[372] Upon the OAU achieving its objectives in the 1960s and 1970s, Africa was faced with a socio-economic and political dilemma similar to that of Europe.[373] Africa's configuration was founded on the existence of individual states rather than on a continent-wide federation. It was therefore difficult for the OAU to promote or drive continent-wide socio-economic

[364] ibid at 19.

[365] ibid.

[366] Peter Drucker, 'Multinational Corporations and Developing Countries: Myths and Realities' (1974) 53(1) Foreign Affairs 121–134. See also Richard Sklar, *Corporate Power in African States: The Political Impact of Multinational Mining Companies in Zambia* (Berkeley University of California Press 1975); Arne Wiig and Ivar Kolstad, 'Multinational Corporations and Host Country Institutions: A Case Study of Corporate Social Responsibility in Angola' (2010) 19(2) International Business Review 178–190; Bonaventure Ozoigbo and Comfort Chukuezi, 'The Impact of Multinational Corporations on the Nigerian Economy' (2011) 19(3) European Journal of Social Sciences 380–387.

[367] ibid.

[368] ibid.

[369] ibid.

[370] Dejo Olowu, 'Regional Integration, Development, and the Africa Union Agenda: Challenges, Gaps, and Opportunities' (2003) Transnational Law and Contemporary Problems 211 at 216.

[371] ibid at 217.

[372] ibid.

[373] ibid.

development amongst state entities. However, members of the OAU decided to pursue broader political and socio-economic development by establishing the African Union (AU). The AU has features comparable to those of the EU, similar to how the EU evolved from the ECSC, as the most thriving cluster of socio-economic development alliances. This poses the question whether the structure of the AU and that of the EU are comparable with regard to socio-economic development, particularly from the perspective of the ownership and governance of natural resources. Undeniably, the EU presents an enviable model for Africa and the AU.

### *3.4.1 African Charter on Human and Peoples' Rights (ACHPR), a regional instrument on PSNR*

The ACHPR, also known as the Banjul Charter, was adopted by the OAU in 1981 and came into operation in 1986.[374] The ACHPR corroborates and endorses the PSNR principle,[375] and therefore entrenches the people's right as an integral part of the sovereign right to participate freely in the ownership, disposal and use of their natural resources to bring about socio-economic emancipation.[376] The ACHPR adopted the concept of people in the African treaties on human rights. It therefore integrates and elevates the idea of people into international human rights theory.[377]

Similarly, despite variations in the use of the phrase 'permanent sovereignty over natural resources' in the ACHPR, state parties made an unqualified use of language to declare their intention. Article 19 guarantees that all people shall be able to enjoy equal rights. Article 20 further provides for the right to self-determination of the people. Article 21(1) declares that 'all peoples shall freely dispose of their wealth and natural resource'. Article 21(3) declares that the 'disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation … equitable exchange and the principle of international law'. This aligns with the provisions of Resolution 1803 of 1962 on PSNR.

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[374] Garg (n 285) at 630.

[375] Richard Gittleman, 'The African Charter on Human and Peoples Rights: A Legal Analysis' (1982) 22(4) Virginia Journal of International Law 667 at 681.

[376] Manjiao (n 275) at 3.

[377] Garg (n 285) at 630.

Article 22(1) further declares that 'all people shall have the right to their economic, social and cultural development'. The ACHPR's use of the term 'people' is considered in light of political and economic self-determination. Thus, it refers to people living in a sovereign state who are simultaneously entitled to exercise their right to political and economic self-determination and socio-economic development from natural resources.[378] State parties to the ACHPR are given the right to dispose of their natural resources freely and they are therefore under an obligation to eliminate any foreign exploitation. This is intended to balance such rights with the international obligation of state parties.

### *3.4.2 The African Union Constitutive Act and intentional supranationalism*

Article 3(j), (i) and (l) of the AU Constitutive Act (CA) articulates the need for member states to coordinate and harmonise their general policies in terms of socio-economic development cooperation.[379] This is intended to achieve a core purpose of the AU CA – the socio-economic advancement of states. Yet again, in the preamble to the treaty establishing the African Economic Community, it is clearly stated by African heads of state that they are 'conscious of … our duty to develop and utilise the human and natural resources of the continent for the general well-being of our peoples in all fields of human endeavour'.[380]

Article 54(1) and (2)(a) and (e) of the treaty establishing the African Economic Community states that:

> (1) Member states shall coordinate and harmonise their policies and programmes in the field of energy and natural resources
>
> (2) To this end, they shall:

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[378] See Garg (n 285) at 631: 'The Charter has also been interpreted to include the rights of indigenous people. In 2001, the African Commission on Human and Peoples' Rights appealed to the Government of Nigeria to ensure the protection of the Ogoni people and their human rights especially with respect to their land and natural resources. The Commission found violation on the basis of Articles 4, 16 and 25 of the Charter.'

[379] <https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf> accessed 9 September 2023. See also Article II(2)(b) of the OAU Charter <https://au.int/sites/default/files/treaties/7759-file-oau_charter_1963.pdf> accessed 9 September 2022.

[380] Treaty Establishing the African Economic Community <https://au.int/en/treaties/treaty-establishing-african-economic-community> accessed 9 September 2022.

(a) Ensure the effective development of the continent's energy and natural resources;

(e) Articulate a common energy policy, particularly in the field of research, exploitation, production …

Article 56(a) and (d) further directs that:

> In other to promote cooperation in the area of natural resources … member states shall:
>
> (a) Exchange information on the prospection … production and processing of mineral resources …
>
> (d) Coordinate their positions in all international negotiations on raw materials.

The AU CA clearly allows AU member states to harmonise their natural resource policies, and to stimulate sound socio-economic development that is self-sustained and self-reliant. Harmonisation cannot be created in a vacuum; it must happen within a structure as anticipated by the AU.

However, the principle of sovereign and territorial integrity may discourage states from pooling their sovereignty or part of it without an institutional body that has the authority to harmonise collective sovereignty through supranationalism. Therefore, the next step of enquiry is determining whether the AU as a supranational institution can pool sovereignty in the current arrangement. Another question is whether the AU has been designed with the capability for collective sovereignty in view of its institutional structure to support the idea of multilateral socio-economic advancement in terms of natural resources. The existence of supranationalism in any organisational structure demands an enquiry to ascertain whether areas of common interest and competence in such organisation's laws and policies directly affect member states,[381] and to ascertain if the laws of the organisation are superior to the laws of the member state, which also prevents the member states from making any contradictory legislation. The EU position provides affirmative answers to the above question. However, this is not

[381] Babatunde Fagbayibo, 'Looking Back, Thinking Forward: Understanding the Feasibility of Normative Supranationalism in the African Union' (2013) 20(3) South African Journal of International Affairs 411 at 414, 415.

the case with the AU, as it has not attained the same achievements.[382] This indicates that an appropriate legal and policy convergence by the AU states is very likely to make a positive difference.

Article 5 of the AU CA outlines the internal workings of the AU. The key organs of the AU are the Assembly of the Union, the Executive Council, the Pan African Parliament, the Court of Justice, the Commission, the Permanent Representative Committee, the Specialised Technical Committee, the Economic, Social and Cultural Council, and the financial institutions (the African Central Bank, the African Monetary Fund, and the African Investment Bank).[383] Other organisations linked to the AU structure include the Peace and Security Council (PSC), the African Union Development Agency-NEPAD (AUDA-NEPAD),[384] and the Africa Peer Review Mechanism (APRM).

The Assembly of the AU comprises 55 heads of state and government.[385] It is the supreme governing body of the AU and meets once a year in ordinary and extraordinary sessions summoned by a two-thirds majority. Its decisions and resolutions are made by a two-thirds majority. However, decision-making is by a simple majority.[386] The ministers are designated by member states in the Executive Council, usually ministers of foreign affairs. It holds its meetings twice yearly, and extraordinary sessions are held when possible.[387] Decisions on issues of common policies, such as

[382] ibid.

[383] ibid.

[384] A decision was taken at the Eleventh Extra Ordinary Session of the Assembly of the African Union in November 2018 to rename the New Partnership for Africa's Development Planning and Coordinating Agency. The new name is the African Union Development Agency-NEPAD (AUDA-NEPAD). The rationale behind the establishment of AUDA is that it will be a vehicle for the better execution of the AU Agenda 2063. 'Pursuant to the request of the Heads of States, the AUDA-NEPAD Agency developed the Natural Resource Governance Programme articulated around 3 main intervention areas; (1) strengthening the negotiation capacity of African State and monitoring the implementation of CONNEX initiative at the continental level; (2) Improve coordination among stakeholders and actors of the extractive sector in Africa; (3) Capacity building. The mandate of the AUDA-NEPAD is: (i) To coordinate and execute priority regional and continental projects to promote regional integration towards the accelerated realisation of Agenda 2063; (ii) To strengthen capacity of African Union Member States and regional bodies; advance knowledge-based advisory support, undertake the full range of resource mobilisation, and serve as the continent's technical interface with all Africa's development stakeholders and development partners.' <https://www.nepad.org/who-we-are> accessed 9 September 2022.

[385] See the AU CA (n 396).

[386] Article 6 of the AU CA.

[387] Article 10 of the AU CA.

foreign trade, transport, agriculture and communication, are coordinated by this office.[388]

The legislative body of the AU is the Pan-African Parliament (PAP).[389] It exercises only advisory and consultative powers, which are not yet permanent. The PAP comprises 265 members or representatives elected from the legislatures of the 55 AU states.[390]

The Court of Justice merged with the African Court on Human and Peoples' Rights to become the African Court of Justice and Human Rights (ACJ&HR).[391] The latter comprises the General Affairs section with eight judges and the Human Rights section with eight judges.[392] In June 2014, at the AU summit in Malabor, Equatorial Guinea, the Malabor Protocol was adopted to amend the African Court of Justice and Human and Peoples' Rights statute.[393] However, this awaits ratification from states.[394] The statute as amended by the Annex to the Protocol indicates that the Court will have three sections: 'the General Affairs Section, a Human and Peoples' Rights Section and an International Criminal Law Section'.[395]

The General Affairs section will hear all cases brought to it under Article 28 of the Protocol, except for cases allocated to the Human and Peoples' Rights section and the International Criminal Law section.[396] The Human and Peoples' Rights section will hear cases relating to human and peoples' rights as described broadly in Article 28 in view of the interpretation and the application of the African Charter and Protocol. The

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[388] ibid.

[389] Article 17 of the AU CA.

[390] ibid.

[391] Article 18 of the AU CA.

[392] ibid.

[393] Gerhard Werle and Moritz Vormbaum, 'The Search for Alternatives: The "African Criminal Court" Commentary' 28 March 2017 at 1 <https://www.ispionline.it/sites/default/files/pubblicazioni/commentary_werle_wormbaum_28_03.2017.pdf> accessed 9 September 2022.

[394] ibid.

[395] See Article 16 of the Annex to the Malabor Protocol <https://www.refworld.org/pdfid/56a9ddcf4.pdf> accessed 9 September 2022.

[396] Max du Plessis, 'Implication of the AU Decision to Give the African Court Jurisdiction over International Crimes' Institute for Security Studies Paper No. 235 (June 2012) at 5 <https://issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt.pdf> accessed 9 September 2022.

International Criminal Law section is competent to hear cases relating to the crimes as specified in the statute.[397] The scope of the Court's jurisdiction is extensive.

The AU Commission is the executive arm or secretariat of the AU.[398] Its mandate is to implement AU policies.[399] It comprises the Chairperson, Deputy Chairperson and eight other commissioners dealing with various policy areas.[400] The Permanent Representative Committee comprises nominated permanent representatives from member states.[401] It prepares the work of the Executive Council and thus serves as its secretariat.[402] The Specialised Technical Committee prepares the background work on the common policy.[403] This is concerned with rural economy and agriculture, science and technology, energy, education, environment, health, transport, trade and natural resources.[404] The Economic, Social and Cultural Council (ECOSOCC) is an advisory organ comprising civil society organisations on the continent.[405] It aims to ensure the involvement of the people of Africa in the AU process.[406] The AU operates three financial institutions: the African Central Bank, the African Monetary Fund and the African Investment Bank.[407]

[397] ibid.

[398] Article 20 of the AU CA.

[399] ibid.

[400] ibid. Attempts have been made to reform the AU to improve the effectiveness of the organisation. In 2016 AU Chairperson Paul Kagame was charged with implementing reform. He reported on the reform and his report was adopted by heads of states in January 2017. In 2018, in Addis Ababa, in their final attempt to implement reforms, particularly with regard to donor dependence, the AU leaders agreed to reduce the number of commissioners from eight to six, with peace and security merged with political affairs, and trade and industry merged with economic affairs. See ISS/PSC Report 'Option to Restructure the AU to Ensure Greater Peace and Security' <https://issafrica.org/pscreport/psc-insights/options-to-restructure-the-au-to-ensure-greater-peace-and-security> accessed 9 September 2022. See also 'AU Leaders Agree to Reform to Reduce Donor Dependence' <https://www.news24.com/Africa/News/pics-au-leaders-agree-reforms-to-reduce-donor-dependence-20181119> accessed 9 September 2022.

[401] Article 21 of the AU CA.

[402] ibid.

[403] Article 15 of the AU CA.

[404] ibid.

[405] Article 22 of the AU CA.

[406] ibid.

[407] Article 19 of the AU CA.

### *3.4.3 The African Union's validation of supranationalism*

Since the transfer or pooling of sovereignty may have been limited, an analysis of the AU CA suggests that it makes room for collective sovereignty or that such an entity was intended to come into existence. This intention is apparent from the provisions of the preamble of the AU CA. It highlights the clear intention of the AU to decentralise authority in view of the ability of the common institutions to carry out their mandate. This marks a clear departure from the sacrosanct principle of sovereignty and suggests the alternative of adopting the ECSC or EU supranational approach in dealing with the ownership and governance of natural resources in Africa.

The common institutions are listed in Article 5 of the AU CA. These institutions were established to engage with specific issues, including socio-economic development, security, human rights, globalisation, and political and democratic governance at a supranational level.[408] These issues form the key tenets of natural resource ownership and governance standards, as indicated in the EU institutional set-up. Scrutiny of the functions of these institutions reveals an intention to allow a certain level of supranationalism in these institutions. Article 9 of the AU CA demonstrates the power of the Assembly to determine common policies, monitor the common policies and ensure that policies are adhered to by members. Similarly, the Assembly can impose sanctions on member states that do not adhere to these common policies.[409] The Executive Council coordinates and makes decisions on policies with respect to foreign trade, immigration matters, transport and communication, education, health and agriculture.[410] This is similar to the EU regional position on the management of natural resources through the executive, the Assembly and ministers appointed from individual countries.

The African Court of Justice and Human Rights has jurisdiction over matters that relate to the interpretation of the AU CA, disputes that arise between states, and acts and functions of the organs of the AU.[411] The General and Human Rights sections in the

[408] Article 5 of the AU CA.

[409] ibid.

[410] Article 10 of the AU CA.

[411] Article 2 of the Statute of the African Court of Justice and Human Rights <http://www.peaceau.org/uploads/protocol-statute-african-court-justice-and-human-rights-en.pdf> accessed 9 September 2022.

Court will constitute one or more special chambers.[412] Any judgment handed down by either chamber will be recognised as being rendered by the Court. The judgments granted by the Court are final and binding on the parties.[413] The proposal by the AU to establish an African Criminal Court is also useful in view of the crime of illicit exploitation of natural resources. As indicated above, the African Court replicates EU court practice and structure by which juridical matters between participating governments are addressed in the natural resources management context.

The AU's right of intervention depicts supranationalism through its CA, which provides for the sovereignty and territorial integrity of member states.[414] This is stipulated in Article 4(h), as amended in 2003, which provides that the AU has the right to intervene in member states in the case of war crimes, genocide, crimes against humanity and serious threats to legitimate order. Some of the natural resources that African states are endowed with are used in the commission of heinous crimes because of disputes about the ownership and control of these resources.[415] An argument can therefore be made that the AU may intervene in the domestic affairs of member states. However, another core mechanism for normative supranationalism may also have been put in place, like the other normative supranational framework of the AU,[416] following the granting of legislative powers to the PAP.[417] This legislative authority is absent in the PAP. However, the PAP has only consultative and advisory power, which limits the execution of its mandate.[418]

Weiler states that decisional supranationalism:

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[412] ibid at 19.

[413] ibid.

[414] See Babatunde Fagbayibo, 'A Supranational African Union? Gazing into the Crystal Ball' 2008 (3) De Jure at 497 <https://repository.up.ac.za/bitstream/handle/2263/10063/Fagbayibo_Supranational(2008).pdf> accessed 8 May 2019. See also the AU CA (n 397).

[415] See also 'Regional Initiatives against the Illegal Exploitation of Natural Resources' UN Economic Commission for Africa, Sub Regional Office of East Africa. <https://archive.uneca.org/sites/default/files/PublicationFiles/special_report_-icglr.pdf> accessed 9 September 2022. The natural resource conflict in the Great Lake Region epitomises this scenario.

[416] See Fagbayibo (n 419) at 403, 414, 415: 'the normative supranational framework within the AU derives from the provisions in its constitutive act and other related instruments'.

[417] See Article 4(2) of the Protocol to the Treaty Establishing the African Economic Community on Pan-African Parliament 2001 <https://au.int/sites/default/files/treaties/36301-treaty-0022_-_protocol_to_the_treaty_establishing_the_african_economic_community_relating_to_the_panafrican_parliament_e.pdf> accessed 9 September 2022.

[418] ibid.

> [r]elates to the institutional framework and decision-making processes by which Community policies and measures are, in the first place, initiated, debated and formulated, then promulgated and finally executed.[419]

This characterisation outlines the forms of the decision-making process in a supranational institution. The preceding discussion has illustrated that supranationalism from the perspective of natural resource ownership and governance could require the independence of intergovernmental institutions in respect of the decision-making process.[420] A majority-based voting method supports the authority that flows from this autonomy. This majority-based voting system guarantees that member states are bound by the decision, even though they may disagree.[421] The AU possesses minimal or no determinable measure of normative supranationalism,[422] but it has elements of decisional supranationalism. Article 7 of the AU CA provides that the Assembly has the authority to rectify decisions through consensus or by a two-thirds majority of the member states in the AU in the absence of procedural matters that need a simple majority.[423]

The place of supranationalism of international institutions is determined by decisional and normative elements of supranationalism within the existing institutional framework.[424] The lack of normative supranationalism in the AU structure implies that it is an intergovernmental institution. However, it must be emphasised that supranationalism does not mean that it must start from an 'all-or-nothing' position. Any enquiry to ascertain the existence or absence of supranational elements should not be directed at the all-embracing supranational characteristics,[425] but should also

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[419] Weiler (n 320) at 271.

[420] ibid.

[421] ibid.

[422] See Fagbayibo (n 414) at 496: 'In gauging the existence of normative supranationalism within an organisation, the legal inquiry should be based on whether – in respect of specific areas of common interest and competence – the policies and laws of such an organisation have direct effect in member states; the laws of the organisation are superior to the laws of the member states and member states are pre-empted from enacting contradictory legislation. While the answers to these questions is in affirmative in the case of the EU, the AU is yet to attain such feat.'

[423] ibid. See also Article 7 of the AU CA.

[424] Weiler (n 320).

[425] Babatunde Fagbayibo, 'Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview' (2013) 16(1) Potchefstroom Electronic Law Journal at 35/536 <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812013000100004> accessed 23 July 2023.

highlight the inherent mixture or juxtaposition of intergovernmental and supranational elements.[426] It is possible that even when an organisation embraces all the elements of supranationalism, there are still some embedded characteristics of inter-governmentalism.[427] In the case of the EU, it is clear that even though it is designated a supranational organisation, one of its primary decision-making organs, the Council of the EU, comprises national ministers who champion their governments' agenda. The Council decides on foreign policy, home affairs and justice issues.[428] The AU may have the potential to become a supranational institution.[429]

### 3.5 Conclusion

The international law idea of PSNR and the ACHPR hinges on human prosperity and socio-economic development.[430] PSNR is based on the inherent right to political and economic self-determination of the people and their inherent right to use and dispose of their natural resources freely. The profound influence of the idea is undoubtedly seen in the ACHPR, even though the term PSNR was avoided. However, the language used clearly sets out the intention of the ACHPR provisions. The ACHPR therefore ratifies the customary international law principle of the people's inherent right to dispose of their natural resources to ensure socio-economic development. This chapter has demonstrated that the ECSC, which was transformed into the present EU, improved the ownership, governance and use of natural resources to advance the socio-economic development of the people. It was encouraged by states' surrendering their sovereignty through supranationalism. This chapter argues that the different ideological efforts made by states in Africa with regard to the ownership and governance of natural resources have not been satisfactory. Pan-Africanism was crucial in achieving African autonomy and independence.[431] However, the AU embraces a system that pursues broader political and socio-economic advancement. This chapter found that the ECSC / EU experience can serve as a model for Africa and the AU. The provisions of the AU CA allow states to harmonise their natural resource policies to stimulate socio-economic development. The chapter also found

[426] ibid.
[427] ibid.
[428] ibid.
[429] Fagbayibo (n 414).
[430] Gittleman (n 375) at 3.
[431] Olowu (n 370) at 216.

that the AU CA creates room for the pooling of sovereignties, that is, supranationalism, which is a departure from the sacrosanct principle of state sovereignty.[432]

[432] Fagbayibo (n 381) at 411.

# CHAPTER 4:

# THE OWNERSHIP AND GOVERNANCE OF NATURAL RESOURCES IN NIGERIA

## 4.1 Introduction

The natural resource sector in the Nigerian economy is enormous and broad, with oil (petroleum) resources playing a dominant role.[433] This chapter focuses only on oil resources. Nigeria is Africa's leading oil producer, with about 2.2 million barrels being produced every day.[434] There are about 37.2 billion barrels of oil in reserve and Nigeria's oil constitutes 2.13 per cent of global production.[435] Nigeria has the world's tenth largest proven reserves (3.1 per cent of global reserves) and is among the top ten oil producers.[436] Nigeria's oil resources present a paradox: oil has attracted enormous earnings, with little to show regarding the socio-economic development of its people.[437] The ownership and governance of oil resources are vested exclusively in the FGN.[438] Oil resources were pivotal in Nigeria's economic and political landscape from the 1960s to the 1970s.

The political independence of Nigeria in 1960 shows a clear divergence in terms of the political and economic implications.[439] The discovery of oil, a natural resource, in commercial quantity exacerbated the uncertainty bedevilling the political and

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[433] Anthony Akinlo, 'How Important is Oil in Nigeria's Economic Growth?' (2012) 5 Journal of Sustainable Development 165 at 167.

[434] Supplement to African Development Report, 'Oil and Gas in Africa' at 46 <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Oil%20and%20Gas%20in%20Africa.pdf> accessed 13 August 2023. The report states that Nigeria's production steadily rose from 1,084 bpd in the 1970 to 2,256 bpd in 1974.

[435] OPEC, Annual Statistical Bulletin, Nigeria Facts and Figures, 2022. The oil is mainly concentrated in the Niger Delta region of Nigeria and accounts for almost 95 per cent of the country's foreign exchange earnings, about 65 per cent of its budgetary revenues and 80 per cent of its Gross Domestic Product (GDP). <https://enterprise.press/wp-content/uploads/2022/06/ASB_2022.pdf> accessed 15 August 2023.

[436] 'Nigeria's Oil Reserves Now Stand at 37 Billion' *Nigeria Business Day* (Lagos, 25 April 2023) <https://businessday.ng/energy/article/nigerias-oil-reserves-now-stand-at-37billion-nuprc/> accessed 9 August 2023.

[437] African Network for Environment and Economic Justice, *Oil of Poverty in Niger Delta* (June 2021) at 10: 'Nigeria has earned an estimated $350 billion in thirty-five years from oil production and export' <https://www.aneej.org/oil-of-poverty-in-the-niger-delta-report/> accessed 27 July 2023.

[438] ibid.

[439] Toyin Falola and Matthew Heaton, *A History of Nigeria* (University of Texas 2010) at 157.

economic status of the new nation.[440] Petroleum resources would become a serious threat to the growth of Nigeria in years to come. This natural resource, which could potentially lead to socio-economic development, has caused ethnic divisions, state-sponsored corruption and illegal activities since 1960.[441]

Petroleum resources were discovered in Nigeria in 1956 by Shell D'Arcy, a consortium owned by Royal Dutch Shell and British Petroleum.[442] Oil was discovered in today's Bayelsa State in the Niger Delta. Nigeria produces more or less 2.2 million barrels of oil daily, and Royal Dutch Shell is the leading oil corporation.[443] Nigeria's economy is substantially sustained by oil.[444] About 95 per cent of Nigeria's exports are oil and other mining products. Approximately 90 per cent of the federal, state and local government structures are derived from oil revenue.[445]

Nigeria's foundation since colonial rule appears to be primarily based on economic considerations.[446] Like many African states, the Nigerian geo-political entity was shaped by Britain as a colonial master in 1914, without due consultation with the indigenous people. This resulted in a very limited national consciousness.[447] Ethnicity

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[440] ibid.

[441] ibid.

[442] Lisa Stevens, 'The Illusion of the Sustainable Development: How Nigeria's Environmental Laws are Failing the Niger Delta' (2011) 36 Vermont Law Review 387 at 390.

[443] ibid. See Supplement to African Development Report, 'Oil and Gas in Africa' (n 1).

[444] ibid. See Supplement to African Development Report, 'Oil and Gas in Africa' (n 1).

[445] ibid. See Supplement to African Development Report, 'Oil and Gas in Africa' (n 1).

[446] Adigun Agbaje and Adewale Adebanwi, 'The Political Economy of the Problem of Nigerian Statehood' in Richard Olaniyan (ed), *The Amalgamation and its Enemies an Interpretative History of Modern Nigeria* (Obafemi Awolowo University Press 2003) at 59. See also Ebenezer Obadare and Wale Adebanwi 'Introducing Nigeria at Fifty: The Nation in Narration' in Ebenezer Obadare and Wale Adebanwi (eds), *Nigeria at Fifty: The Nation in Narration* (Routledge 2011) at 11: 'The consolidation of colonial violence and metropolitan arbitrariness is sharply emphasized by the amalgamation of the Northern and Southern (British) Protectorates, executed without consultation with the "natives" or "subjects". The (dis)credit for this naming of the country goes to Dame Flora Louisa Shaw, journalist, writer and eventual wife of Nigeria's first colonial Governor-General Lord Fredrick Lugard ... Lugard was the more forcible (violent) side of that hegemonic coin; Shaw was its non-forcible (discursive) side. Incidentally, she was also close to two other men who, along with Lugard, represent the most significant elements of the materialists basis of metropolitan violence exported to Africa by the British: Cecil Rhodes, businessman, mining magnate and founder of the diamonds company, De Beers, and whose racist legacy constitutes part of the challenging inheritance of Southern Africa today; and George Goldie, Rhodes's parallel on the west coast of Africa, who helped to "pacify" many parts of what eventually became Nigeria and ran the Royal Niger Company … eventually encouraged full colonial imposition.'

[447] Falola (n 439) at 158.

and regionalism became the dominant preoccupations of the average Nigerian citizen.[448] These preoccupations manifested in the federal system, which solidified the ethnic and regional divisions in the 1950s, which created chaos from 1960 to 1966 after Nigeria's independence.[449]

Political parties in each region engaged in battles to gain and maintain control of federal and regional assemblies, apparently to control Nigeria's resources.[450] This means that the governance of natural resources and their distribution is dependent on the control of the federal and regional houses of assembly. Consequently, the political party in control of the assemblies had the power to share and distribute resources amongst their ethnic and regional supporters. According to Osadolor:

> This can simply be explained in the sense that the attainment of independence did not arouse any consciousness as part of the ethos of nationhood. Consequently, harmony, co-operation, and unity became remote from social and political life and what became glaring, was inter-ethnic competition and winner-take-all politics in a political environment where opposition was equated with treason.[451]

This position resulted from the British colonial policy, designed to protect British interests in natural resources in colonial and post-colonial Nigeria.[452] The choice of the country's deemed neo-conservative up-and-coming political elite (in the Northern political sphere) to maintain its status quo with the British was imperative.[453] At the

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[448] ibid at 165.

[449] ibid.

[450] ibid.

[451] Benson Osadolor, 'The National Question in Historical Perspective' in Abubakar Momoh and Said Adejumo (eds), *The National Question in Nigeria: Comparative Perspectives* (Ashgate Publishing 2002) at 38.

[452] Adekunle Amuwo, 'Between Elite Protectionism and Popular Resistance: The Political Economy of Nigeria's Fractured State Since Juridical Independence' (2010) 28(4) Journal of Contemporary African Studies 423; Obadare (n 452) at 47. See also Olukunle Ojeleye, *The Politics of Post-war Demobilisation and Reintegration in Nigeria* (Ashgate Publishing 2010) at 32: 'the British kept pressure on the Northern Region to stay within the Nigerian federation, and to protect their vital economic and other interests manipulated the decolonization process to ensure the Northern Region had political power at independence in 1960'.

[453] ibid. See 'North Controls 83 percent of Oil Blocks in the South' *Nigerian Tribune* 7 March 2013. Senator Ita Enang from Akwa-Ibom North-West Constituency stated in the Senate that the Northerners of Nigeria, who have apparently held political leadership more than any other region in Nigeria, owned 83 per cent of Nigeria's oil blocs, marginal fields and oil prospecting licences. So far the government has not provided clarity on the existing position or debunked this assertion.

same time, it silenced all other progressive political groupings, thus ensuring that the conservative parties gained all political power in all spheres of government.[454]

A profound breakdown occurred in the foundations of the country, which led to the military takeover of the political administration of the country and the resultant counter-coups.[455] The massacre of the Igbo people ensued, followed by the secession of the Eastern region and an outbreak of civil war.[456] Before these developments, the Raisman Commission of 1958 was instituted to review the allocation of revenue from natural resources between the federal and regional governments. It was recommended that the 100 per cent allocation accruing to regions from natural resources be reduced to 50 per cent. The other 50 per cent was to be shared – 30 per cent to the federal government and 20 per cent to the distributable pool account to be equally distributed to the regions.[457] The Commission reasoned that the Eastern Region, as of 1958, had started to exploit oil in large commercial quantities.

There is potential for larger-scale oil production, thus creating a massive source of income, which may upset an equitable balance of development in the future.[458] This reasoning created a conundrum, culminating in discontent among the people of the Eastern region. Only a fraction of the revenue from crude oil resources after 1959 accrued to the region, compared to the revenue from agricultural exports accruing to the Northern and Western regions.[459] Ojeleye stated the following in view of the civil war:

> For the East, secession was a good idea because it would entail total control of profits from oil, and a hundred per cent gain following its previous pursuit of a revenue allocation system based on derivation. For the North, control of the centre meant control of the gains from oil, and an assurance of the steady flow of money to the North for development and rapid catching up with its Southern counterparts.[460]

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[454] ibid.

[455] Ojeleye (n 452) at 32.

[456] ibid at 37.

[457] ibid.

[458] ibid at 38.

[459] ibid.

[460] ibid. See W Soyinka, *You Must Set Forth at Dawn* (Ayebia Clarke Publishing 2009) at 109, 110: 'The discovery of oil in huge reserves in the East, largely in the Niger estuary played a role, in the propulsion of the Biafran leaders towards secession, but it would be a distortion of history, an attempt to trivialise the trauma that the Igbo had undergone, to suggest – as some commentators have tried

It is worth noting that the oil industry's early period in Nigeria was distinguished by enormous foreign control. State participation was non-existent or, at most, very peripheral.[461] The state simply collected rent and tax.[462] This may have limited the implementation of the decisions of the Raisman Commission of 1958.

In the 1970s (post-civil war), given the substantially increased oil revenue and economic nationalism,[463] the Nigerian government embarked on the nationalisation or indigenisation of the oil industry. Decree No 51 of 1969 transferred the ownership and control of all petroleum to the federal military government.[464] The government took equity shares in all multinational oil marketing companies and appointed the newly formed state oil corporation, the Nigeria National Petroleum Corporation (NNPC), as its representative.[465] This is discussed further below. The state policy of nationalisation or indigenisation led to the incorporation of the activities of the transnational operations of the oil industry by the NNPC.[466] In spite of this, the state's ownership of oil resources and its majority shareholding and greater profits still created a defective relationship with its partners that was structurally asymmetrical.[467] This was a result of the superior

to do – that it was the lure of oil wealth that drove the Igbo to seek a separate existence. When a people have been subjected to a degree of inhuman violation for which there is no other word but genocide, they have the right to seek an identity apart from their aggressors.' See also C Obi, 'The Petroleum Industry: A Paradox or (Sp)oiler of Development?' in Obadare and Adebnwi (n 463) 65 at 73. Obi states that '[f]rom 1970, federal ownership of oil led to the progressive reduction of derivation as a revenue allocation principle and to its replacement by the Derivative Pool Account (DPA) or Federation Account that emphasized population size and equality of states as principle of revenue allocation. As a result the derivation principle was reduced from 50 percent in 1970, 5, 1.5, and then 3% in the mid-1980s and then increased in 1999 with the return of democratic rule to 13 percent ... Niger Delta gained some measure of measure of self-determination as a result of the state's creation exercise(s), and the national unity project gave some Niger Delta elite some access to lucrative state and federal appointments and patronage, the people felt short-changed by the fact that in spite of their support for the federal side during the war, they remained marginalised from ownership and control of oil produced from their region.' See also notes 20 and 21, recommendation of the Raisman Commission of 1958.

461 Obadare (n 452) at 65–69.

462 ibid.

463 Laura Hosman, 'Dividing the Oils: Dynamic Bargaining as Policy Formation in the Nigerian Petroleum Industry' (2009) Review of Policy Research 609 at 619 <https://core.ac.uk/download/pdf/32434073.pdf> accessed 9 August 2023.

464 ibid.

465 ibid.

466 ibid at 620.

467 ibid.

wealth and oil technology of the multinational partners, which indirectly exerted pressure in terms of resource control and management.[468]

The advent of a democratic dispensation in 1999 did not help matters either, due to the same foundational constraints inherited from the colonial era.[469] The interests of the transnational oil companies and the global oil market remain paramount, so much so that the ruling class prioritises capturing state power.[470] This enormous oil revenue strengthens the exploitative prowess and impunity of the state, which has little regard for democratic values, thus creating a complex struggle for natural resource control.[471]

This chapter analyses and evaluates Nigeria's existing oil resource development as a case study in the ownership and governance of natural resources in Africa. It provides an overview of oil resource development in Nigeria from the political economy perspective. The chapter assesses the applicable ownership and governance mechanisms in pre-independence and post-independence Nigeria. The chapter examines the exploitation of Nigeria's existing municipal law obligations. It further discusses incidental matters arising from natural resource endowment. The issues in this chapter from part of the effort to gauge the effect of natural resource management on the socio-economic development of African people. This case study aims to demonstrate what is required for the collective governance of natural resources, as highlighted in chapter 3 in the discussion of the ECSC / EU and AU supranational provisions.

## 4.2 Natural resource ownership and governance systems in Nigeria before and after independence

### *4.2.1 Pre-independence era*

Nigeria's search for petroleum resources officially began in 1903 through concessions given to Nigeria Properties (Limited) and the Nigeria and West African Development Syndicate (Limited).[472] The Nigeria Bitumen Corporation was founded in 1905 and

[468] ibid.
[469] Obi (n 460) at 73.
[470] ibid.
[471] ibid.
[472] Phia Steyn, 'Oil Exploration in Colonial Nigeria, c. 1903-1958' (2009) 37 The Journal of Imperial and Commonwealth History 249 at 252.

commenced operations in 1906. It perfected the exploration concessions of the two companies.[473] Oil was first struck in November 1908 in the Lekki Lagoon field. However, a lack of necessary equipment, inclement weather conditions and financial difficulties impeded further exploratory work.[474] Nigeria Bitumen ceased operations and was liquidated in 1914. Other companies competed with Nigeria Bitumen in the exploration for oil before 1914; they were less successful and little is known about their operations.[475]

Only the British Colonial Petroleum Corporation continued with the search for oil in the colony. The company emerged from the Nigeria Investment Company, which had been granted an oil exploration licence in Southern Nigeria in 1906 and was incorporated in December 1908 in London.[476] The positive outcome of the drilling for oil prompted the creation of the British Colonial Corporation, tasked with the exploration for oil through the concession of the Nigeria Investment Company.[477] Nevertheless, the development of the control and management mechanisms of the colonial oil industry commenced through Nigeria Bitumen and its chairman,[478] John Simon Bergheim, who suggested that the general regulatory provision was inadequate to regulate the oil industry.[479] He lobbied the colonial office as well as the Southern Nigeria government to develop an explicit oil regulatory structure.[480]

A regulatory instrument replicating the Trinidad oil mining law was developed over time. It was known as the Southern Nigeria Mining Regulation (Oil) Ordinance of 1907.[481] This regulation was in line with the British oil policy of 1904, which established that oil exploration concessions in the British Empire should be granted only to companies registered in Britain or its colonies. This Ordinance placed the exploration for oil in Nigeria exclusively under British control and monopoly.[482] It extended its

[473] ibid at 253.
[474] ibid at 254.
[475] ibid.
[476] ibid at 255.
[477] ibid.
[478] Aoy Raji and TS Abejide, 'The British Mining and Oil Regulation in Colonial Nigeria c. 1914-1960s: An Assessment' (2014) 2 Singaporean Journal of Business Economics and Management Studies at 64.
[479] ibid.
[480] ibid.
[481] Mineral Ordinance 1907/C 80 1290, National Archive Ibadan.
[482] ibid.

control by imposing a requirement that all board members of companies had to be British subjects. The concessions' size, location and boundaries were also regulated and enforced by the colonial government.[483]

However, the 1907 ordinance was unacceptable to the unofficial African Legislative Council members who were representatives of the Native Authorities. They were particularly opposed to s 5 of the Ordinance, which allowed the Governor to enter into a contractual agreement to acquire surface and sub-surface mineral rights over their land.[484] This exempted the colonial government from paying any royalties on oil. Sapara Williams proposed amending s 5 of the Ordinance[485] to allow Native Authorities a fair and reasonable share of the royalties from the mineral oil obtained from their land.[486] The official members and the Governor rejected the proposal because they had majority votes in the legislative council. The same governance and management principles exhibited in the 1907 Ordinance subsisted in the 1914 Mineral Oil Ordinance in the newly amalgamated Nigeria. It also manifested in the ensuing amendments of 1925, 1950 and 1958.[487]

The First World War played a defining role in the expansion of the global oil industry.[488] It prioritised the search for oil in the British Empire due to the huge dependency on American oil. Nevertheless, Britain did little to promote the exploration for oil in the Empire.[489] However, the British Government excluded non-British oil companies from the Empire. D'Arcy, an exploration company, had its first stint in Nigeria around 1918, through a concession licence that the Crown and the colonial government granted after protracted negotiation, which lapsed in 1924.[490] However, D'Arcy revived its

[483] ibid.

[484] Raji (n 478 ) at 65.

[485] ibid. See also Omoniyi Adewoye, 'Sapara Williams: The Lawyer and the Public Servant' (1971) 6 Journal of Historical Society of Nigeria 47 at 48. Mr Williams was the son of a liberated African slave, Alexander Safara Williams, and the grandson of Lejofi Agbogborin of Ilesha, Nigeria. He was born in Freetown, Sierra Leone on 19 July 1855. He was the first qualified Nigerian legal practitioner.

[486] ibid.

[487] ibid.

[488] Benson Okoro, 'A Case for the Participation of the Oil Producing States and Communities in the Ownership and Control of Petroleum Resources in Nigeria' (2021) 3 International Review of Law and Jurisprudence 171 at 172.

[489] ibid.

[490] ibid at 174.

activities in Nigeria in the 1930s.[491] It partnered with Royal Dutch Shell to bypass the controlling clause of the colony's Mineral Oil Ordinance that excluded foreign companies like Dutch-controlled Shell from searching for oil.[492] The joint venture licence was granted in 1937.[493] The operation was, however, halted in 1941 due to the Second World War.[494]

After the Second World War ended, Shell/D'Arcy resumed its operations in 1946 in Eastern Nigeria (the Owerri, Okigwe and Umuahia regions).[495] Since the emerging oil industry was not part of the official colonial government development agenda, Shell/D'Arcy was greatly supported by the Nigerian government.[496] The government openly supported it even in the face of local resistance in certain areas around the late 1940s. However, the support received by Shell/D'Arcy from the colonial government was not wholly based on economic development.[497] The issue of Nigerian decolonisation as well as the conflict between the Nigerian government and the nationalist movement in Eastern Nigeria spearheaded by Nnamdi Azikiwe and the National Council of Nigeria and the Cameroons (NCNC) were also factors.[498]

The end of the Second World War stimulated the Nigerian nationalist movement, as occurred in other parts of Africa.[499] Nnamdi Azikiwe and the NCNC fought against the unjust Mineral Ordinance Act of 1945, reaffirming that mineral rights were vested in the Crown.[500] The nationalist movement regarded this Ordinance as the British

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[491] ibid at 175.

[492] ibid.

[493] ibid.

[494] ibid.

[495] Steyn (n 472) at 262. See also Thomas Paterson, 'Unmasking Ecological Warfare-Shell-BP, Nigeria, and the Movement for Survival of the Ogoni People' (MA thesis, Georgia State University, 2023) at 21, 22. Paterson states that 'within the context of these broader social and political changes, the Shell/D'Arcy Corporation returned to Nigeria in 1946 and focused its operation on Eastern Nigeria in Owerri and Umuahia regions. While the colonial Government was glad to support the joint venture in accomplishing its task of finding viable oil, many locals felt quite different. Under the leadership of Dr. Nnamdi Azikiwe, the National Council for Nigeria and the Cameroons became a major oppositional organisation for nationalists whose goal was self-autonomy.'

[496] ibid.

[497] ibid.

[498] ibid.

[499] ibid

[500] ibid. See also Raji (n 478) at 70: 'The Zikist Movement (NCNC) argued that the public land and mineral ordinances, if amended, would protect the interests of foreign powers while the local shareholders would reap no benefit.'

government's confiscation of Nigeria's land and its natural resources. It was a measure of renewed control by the British government, especially when nationalist leaders thought that such control was ending.[501] The people in Southern Nigeria, through Azikiwe and the NCNC, vehemently opposed the Ordinance. The secretive nature of the exploration for oil was thus brought into the open. Questions were raised about the Ordinance, which did not require Shell/D'Arcy to obtain permission and guaranteed them protection from interference.[502]

A locally incorporated company was formed in 1951, known as the Shell/D'Arcy Petroleum Development Company of Nigeria. The colonial government adopted a limited policy of Nigerianisation in the civil service to prepare Nigeria for independence.[503] Shell/D'Arcy, the leading oil exploration company, was also involved in this arrangement. However, it was more of a smokescreen to allow them to control oil exploration. It trained only a handful of Nigerian staff, and there was no clear policy on the Nigerianisation of its staff.[504] Between 1951 and 1956, inroads were made in terms of exploration and the drilling of oil wells. However, in January 1956, oil was found in commercial quantity and quality, leading to other discoveries around 1958.[505] Nevertheless, the dominance of large oil companies persisted due to their strong economic position.

### *4.2.2 Post-independence era*

The latter part of 1959, leading to the eve of Nigeria's independence in 1960, created a shift in the dominance enjoyed by Shell-BP in Nigeria's oil industry. Other oil companies from America and Europe came on board, as a result of the amendment of the Mineral Oil Ordinance No 17 (1914), the Mineral Oil (Amendment) Ordinance No 1 (1925) and the Mineral Oil (Amendment) Act of 1958.[506] This allowed foreign (non-British) companies to enter the Nigerian petroleum industry. Some of the non-British oil companies who benefited from this Act of 1958 included Socony-Vaccum

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[501] ibid.

[502] ibid at 263.

[503] ibid.

[504] ibid.

[505] ibid.

[506] Kingsley Ekwere, 'Sustainable Development of Oil and Gas in the Niger Delta Legal and Political Issues' (DPhil thesis, University of Hamburg, 2010) at 12 <http://ediss.sub.uni-hamburg.de/volltexte/2010/4642/pdf/edited-2.pdf> accessed 10 September 2022.

(known as Mobil), Tennessee (known as Tenneco), Gulf Oil (known as Chevron), American Overseas (known as Amoseas), Agip and SAFRAP of France (known as ELF).[507] They were all granted licences to explore for oil. According to Frynas, '[a]ll six major foreign oil companies, which dominate the Nigerian oil industry today … were already present in Nigeria by the early 1960s and were all producing by 1971'.[508]

The FGN, after independence in 1960,[509] was vested with the superior powers to make laws and regulate mines and minerals, including oil field surveys and exploration in Nigeria. Subsequently, the Petroleum Act of 1969 came into being and marked a turning point in petroleum exploration legislation in Nigeria.[510] This Act emphasised that the entire ownership and control of all petroleum found in Nigeria was to be vested in the FGN. This changed the prevailing terms and conditions guiding the pre-1969 concessions. It completely repealed the Minerals Ordinance Act of 1914 as amended.[511]

The 1969 Petroleum Act prescribed three main mechanisms for the control of petroleum operations in Nigeria: the oil exploration licence (OEL), the oil prospecting licence (OPL) and the oil mining licence (OML).[512] The Petroleum Act Cap 350 together with its ancillary legislation, the Petroleum (Drilling and Production) Regulations 1969, laid the legal basis for petroleum development in Nigeria.[513] The ownership and control of oil resources in Nigeria are also addressed in the 1979 and 1999 Constitutions. Section 44(3) of the 1999 Constitution provides:

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[507] ibid at 14.

[508] George Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Transaction Publishers 2000) at 9.

[509] See s 25 of the 1960 Independence Constitution of Nigeria, The Schedule, Part 1, Exclusive legislative list. The FGN was exclusively in control of the mines and minerals, including oil fields, oil mining, geological surveys and natural gas. <https://constitution.lawnigeria.com/2018/03/26/1960-constitution-of-nigeria-the-nigerian-constitution-hub/> accessed 9 August 2023.

[510] See s 1(1) and (2) of the Petroleum Act of 1969 <https://resourcegovernance.org/sites/default/files/documents/nigeria-pertoleum-act.pdf> accessed 9 August 2023.

[511] Frynas (n 508 ) at 9.

[512] See s 2(1)(a), (b) and (c) of the Petroleum Act of 1969.

[513] See the Petroleum Act Cap 350 <https://www.chr.up.ac.za/images/researchunits/bhr/files/extractive_industries_database/nigeria/laws/Petroleum%20Act.pdf> and the Petroleum (Drilling and Production) Regulations 1969 <https://www.nuprc.gov.ng/wp-content/uploads/2020/06/Petroleum-Drilling-ProductionAmendments-Regulations-2020.pdf> accessed 9 August 2023.

> Notwithstanding the foregoing provisions in this section, the entire property in control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall be vested in the Government of the Federation.

Nigeria never had enough indigenous capacity and expertise when oil was discovered. It was unable to develop its oil reserves effectively and had no valuable control.[514] The FGN, despite its claim to ownership of and attempts to control oil resources, negotiated oil production terms with MNCs. Therefore, the government only takes a certain proportion of the revenue generated.[515] However, the enthusiasm for independence in the 1960s and the subsequent resolutions of the Organisation of Petroleum Exporting Countries (OPEC) have steadily supported some level of government control of the oil industry in Nigeria.[516]

The Nigerian government engineered the nationalisation of the oil industry in the 1970s by taking an equity stake in the oil industry.[517] Over time, the government increased its participation in most oil companies operating in Nigeria from 35 per cent in 1971 to 55 per cent in 1974 and 60 per cent in 1979.[518] However, modern onshore exploration and oil production activities have developed into joint venture arrangements between foreign companies and the NNPC.[519] The allocation of shares

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514 'The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities' (1999) Human Rights Watch Report at 26 <http://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf> accessed 9 September 2022.

515 ibid.

516 ibid at 27.

517 ibid.

518 ibid.

519 See ss 54, 55, 56, 57, 58 and 59 of the Official Gazette of the Petroleum Industry Act 2021 <http://www.petroleumindustrybill.com/wp-content/uploads/2021/09/Official-Gazette-of-the-Petroleum-Industry-Act-2021.pdf> accessed 6 September 2022. The NNPC was a state-owned and controlled corporation founded in 1977. It was licensed to regulate and commercially operate Nigeria's petroleum industry. However, on 19 July 2022, the Nigerian government transformed the NNPC into the Nigeria National Petroleum Corporation Limited (NNPCL) in terms of the new Petroleum Industry Act (PIA) passed in August 2021. The NNPCL is intended to operate as a fully commercial venture without government funding or control in terms of the Companies and Allied Matters Act of 2020. It is still wholly owned by the state. Thus, in terms of s 59(2) of the PIA, the President appoints the board members despite the NNPCL's mandate of 'no government influence', thus politicising the NNPCL. However, in an attempt to dispel this apparent misnomer the lawmakers added a proviso in s 59(5), stating that the provisions of s 59(2) will only apply where the NNPCL remains wholly owned by the state, after which the composition will be determined by the new shareholders upon the sale of shares to the public. Regrettably, it is not indicated when shares in the NNPCL will be made available to the public.

in joint ventures determines exactly how investments are divided among operating companies, such as the exploration and drilling for oil.[520] The shareholders also own the oil reserves found in the ground. Nevertheless, MNCs manage the day-to-day activities of these joint ventures.[521]

The Nigerian government has recently attempted to boost indigenous involvement in the oil industry.[522] More than 20 local oil exploration firms have been granted oil exploration licences, which allow them to drill for and produce oil.[523] In addition, the government has provided new guidelines for the further development of 'marginal oil fields' which appear to favour local companies, thus threatening to review the licences of joint venture partnerships.[524]

## 4.3 Regulation of natural resource exploitation and control in Nigeria

### *4.3.1 Domestic law regulation*

Domestic legal guidelines on petroleum in Nigeria under the colonial regime began with the Petroleum Ordinance of 1889[525] and then the Southern Nigeria Mining Regulation (Oil) Ordinance of 1907, also called the Mineral Regulation (Oil) Ordinance.[526] The Minerals Oil Ordinance of 1914 was promulgated to regulate the right to search for oil. However, it created uncertainties about whom the petroleum right is vested in, as the existing laws did not make provision for the right. Section 6(1) of the 1914 Ordinance stated:

> No lease or license shall be granted except to a British subject or to a British company or in a British colony and having its principal place of business within her majesty's

[520] ibid.
[521] ibid at 28.
[522] ibid at 30.
[523] ibid.
[524] ibid.
[525] Deloitte, 'Petroleum Industry Act: Nigeria's New Oil and Gas Regulatory Framework' (2021) at 1: 'The Petroleum Ordinance promulgated in 1889 was the first law to provide the legal basis for the granting of oil exploration rights in Nigeria.' <https://www2.deloitte.com/content/dam/Deloitte/ng/Documents/energy-resources/Petroleum%20Industry%20Act_Nigerias%20New%20Oil%20and%20Gas%20Regulatory%20Framework.pdf> accessed 4 August 2023.
[526] Okoro (n 488) at 173: 'The Mineral Regulation (Oil) Ordinance of 1907 vested on the British subjects the monopoly to explore for Nigerian oil resources.'

> dominion, the chairman and managing director (if any) and the majority of the directors of which are British subjects.[527]

This domestic legislation laid the basic framework for developing oil resources.[528] The legal framework allowed only British subjects or companies under the control of British subjects to explore for and exploit oil resources in Nigeria.[529] This domestic law position created a concessionary arrangement, eventually allowing companies with close ties to the British to operate.

The 1916 Mineral Ordinance re-confirmed the British Crown's control of mining and oil rights in Nigeria. Section 3(1) of the 1916 Ordinance stated:

> The entire property in control of the minerals, and mineral oils, in under or upon any land in Nigeria, is and shall be vested in the Crown, save in so far as such rights may in any case have been limited by the express grant made before the commencement of this Ordinance.[530]

Nigerians were obviously excluded from this deal. Shell/D'Arcy Petroleum Development Company became a concessionaire in 1938 and thus had a monopoly to explore for oil in more than 357,000 square miles, which covered the entire mainland of Nigeria.[531] It was able to explore about 15,000 square miles of the original concession area obtained until about 1962. Several changes took place in the oil industry, and the sole concessionary right was reviewed and extended to other companies apart from the British company.[532]

However, in 1946, the Mineral Ordinance was passed by the colonial government. Its principal purpose was to vest all mineral oils in situ in the Crown. Section 3(1) of the Mineral Ordinance of 1946 provided:

> The entire property in and control of all Mineral and Mineral Oils in, and under or upon any lands in Nigeria, and of all rivers, streams and watercourses throughout Nigeria

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[527] Mineral Ordinance Regulation, 1914, National Archives Ibadan War Prof, 1914.
[528] Yinka Omorogbe, 'The Legal Framework for the Production of Petroleum in Nigeria' (1987) 5 Journal of Energy and Natural Resource Law 273 at 273.
[529] ibid.
[530] Mineral Ordinance Regulation, CSO, 422/1916, National Archives Enugu War Prof, CSO, 422/1916.
[531] ibid at 274.
[532] ibid.

> is and shall be vested in the Crown save in so far as such rights may in any case have been limited by any express grant made before the commencement of the Ordinance.[533]

Subsequent constitutional developments led to the transfer of government to Nigerians. The Crown in Britain was replaced by the FGN, which assumed sovereignty over mineral oils and all other natural resources that were vested in the Crown. The promulgation of the Petroleum Decree, known as the Act of 1969, to consolidate legislation on oil from the colonial period, activated the ownership provisions, which substantially re-echoed s 3 of the Act of 1946. Section 1(1) of the Act provided that the entire ownership and control of all petroleum in, under or upon any lands to which this section applies would be vested in the state.[534]

The current Constitution of the Federal Republic of Nigeria of 1999, as amended, gives the Nigerian state the exclusive power to own, control and regulate all mineral resources and their byproducts. Section 44(3) of the Constitution specifically states:

> The entire property in control of all minerals, mineral oils and natural gas in, in under or upon any land in Nigeria or in, under or upon territorial waters and the Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

The above provision includes mines and minerals, including oil fields, oil mining, geological surveys and natural gas. The addition of these issues in the Exclusive Legislative List follows the pattern in the Republican Constitution of 1963,[535] as well as the 1979 Constitution.[536] However, several other regulatory statutes were passed after this preliminary legislation. The Petroleum Act of 1969 and the Petroleum (Drilling and Production) Regulations provided a succinct legal framework that apparently influenced the general regulation of the natural resources industry.[537] The 1969 Act

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[533] Section 3(1) of the Mineral Ordinance 1946 Cap 121 Laws of 1958 Nigeria. This provision in the Mineral Ordinance of 1946 was amended by Act 51 of 1968 where the expression 'mineral oils' was deleted, confirming the section to 'minerals' simpliciter.

[534] Section 1(1) of the Mineral Ordinance 1946 Cap 121 Laws of 1958 Nigeria.

[535] The Schedule, Exclusive Legislative list, s 69(25) of the 1963 Republican Constitution of Nigeria and s 4(36) of the second schedule of the 1979 Constitution.

[536] Lanre Aladeitan, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria: Between Legality and Legitimacy' (2013) 38 Thurgood Marshall Law Review 159 at 170.

[537] Omorogbe (n 528) at 274.

copied the colonial legislation by vesting the entire ownership and control of petroleum resources in the state. The Act further afforded Nigerian citizens and companies that are incorporated in Nigeria certain rights of operation, such as:

(a) a licence to be known as the oil exploration licence to explore for petroleum,

(b) a licence to be known as an oil prospecting licence to prospect for petroleum, and

(c) a lease, to be known as an oil mining lease, to search for, win, work, carry away and dispose of petroleum.[538]

The Act also specified the appropriate duration and maximum areas of each licence or lease within its scope. Thus, the oil mining lease, which is the largest of the rights under the 1969 Act, may be granted only to the holder of an oil prospecting licence who has:

(a) satisfied all the conditions imposed on the licence or otherwise imposed on him by the Decree, and

(b) discovered oil in commercial quantity.[539]

Oil is considered to have been discovered in commercial quantities where the director of petroleum resources has positively confirmed any evidence that the licensee had adduced and declares satisfactorily that the licensee can produce at least 10,000 barrels of crude oil per day from the licensed area.[540] The decree flowing from the Act gives extensive rights and powers over the land to holders of oil licences and mining leases.[541] However, the licences and leases are subject to limitations as enumerated in s 17, which states that the licensee or lessee may not 'enter upon or occupy or exercise any of the rights and powers conferred by his licence or lease over any private land until compensation has been paid to the person who is in legal occupation of the land'.[542]

[538] Section 2 of the Petroleum Decree of 1969.
[539] Section 8 of the Petroleum Decree 1969. See Schedule 1.
[540] Omorogbe (n 528) at 275.
[541] ibid.
[542] Section 17 of the Petroleum Decree of 1969.

The Land Use Act expressly vests ownership of all land in the government of Nigeria. The Constitution also confirms the government's ownership of natural resources in such land. This raises the question of who owns the land and the natural resources or legally possesses them: the people or the government?[543] In *Attorney-General of the Federation v Attorney-General of Abia State and 35 Others*,[544] the Supreme Court of Nigeria affirmed the FGN's exclusive ownership and control of all natural resources in the Nigerian territory. The implication of this legislation and the judicial pronouncements is that no state, local government or individual can lay any legal claim to the ownership and governance of any oil resources found within the geographical boundaries of Nigeria. The Supreme Court's decision resulted in severe fiscal repercussions for oil-producing states and communities, triggering a rare cementing of FGN dominance through legislation. The FGN promulgated the Allocation of Revenue Act 2004 as part of the revenue-sharing mechanism in natural resource ownership and governance to the states. It is now immaterial whether oil resources are located on-shore or off-shore. Ownership is further consolidated in the FGN with limited financial benefits to the oil-producing states and communities.

The ownership and governance of natural resources continues to raise legitimate debates. Despite the constitutional and statutory legislation vesting ownership and governance in the FGN, the contestation about and debates on natural resource ownership and governance persist, with various legal opinions about where the true ownership and control of natural resources reside. The Niger Delta people of Nigeria continue to assert that the land and natural resources in their communities and territory belong to the Ijaw communities and form the basis of their survival.[545]

The FGN concluded various petroleum development contracts with international oil companies, thus excluding the oil-producing states and communities.

[543] Omorogbe (n 528) at 275.

[544] *Attorney General of the Federation v Attorney General of Abia State and Others* (2002) 96 LRCN 559, (2002) 6 NWLR (Part 764), 542–905.

[545] See Ijaw Youths of the Niger Delta, 'The Kaiama Declaration' <https://www.hrw.org/reports/1999/nigeria2/Ngria993-02.htm> accessed 5 August 2023.

#### *4.3.1.1 Joint ventures*

The joint venture arrangement in Nigeria started in April 1971, with the negotiation and signing of the first participation agreement. The Nigerian government then exercised an option available in a 1962 concession agreement with the Agip Oil Company of Nigeria that took up a 35 per cent equity interest in the company.[546] Thereafter, it allowed the government to acquire a 35 per cent participation interest in the concession held by Elf. This was a punitive measure against France for supporting secessionist Biafra in the 1967 to 1971 Nigerian civil war.[547] The acquisition of further equity participation concessions in other major oil corporations – Shell-BP, Mobil and Gulf – eventually took place in 1973.[548] Nigeria effectively converted its original concession arrangement into joint ventures. Akpan states that about 95 per cent of Nigeria's crude oil exploitation occurs under this joint venture arrangement. This arrangement then developed into other contractual forms such as production sharing and service contracts.[549] The influence of OPEC in this regard should not be underestimated. It brought a different dimension to the traditional concession arrangement common in Nigeria's understanding of oil resource exploration.

The government is entitled to 60 per cent equity shares in the concessions of all oil companies operating in Nigeria. However, Shell is an exception, and the government has 80 per cent equity shares due to the nationalisation of all BP interests in 1979. The joint venture arrangement underscores three separate agreements that characterise the relationship between Nigeria and oil-producing countries:[550] the participation agreement, the operating agreement, and the heads of agreement.

The participation agreement specifies all the relevant interests of oil companies and Nigeria in terms of the concessions. The agreements vary in their features and structure because they were negotiated individually, but they are essentially the

[546] Kingsley Edu, 'A Socio-Legal Appraisal of Nigeria's Joint Venture Arrangement in the Petroleum Industry' (2010) 22 Sri Lanka Journal of International Law 1 at 8.
[547] ibid.
[548] Omorogbe (n 528) at 278.
[549] Wilson Akpan, 'Putting Oil First? Some Ethnographic Aspects of Petroleum-related Land Use Controversies in Nigeria' (2005) 9(2) African Sociological Review 134 at 138.
[550] Omorogbe (n 528) at 277.

same.[551] The equity interest acquired through the NNPC by the government is considered a 'participating interest' in:

(i) the oil mining leases;

(ii) immovable and movable assets of the Company in Nigeria, including without limitation, the company's exploration, development, production, transportation, storage, delivery and export operations associated assets such as offices, housing and welfare facilities (collectively called the Assets) and

(iii) the working capital that is pertinent to the oil mining lease operations including materials, stocks (including those in transit), debts of staff, debtors, repayments (referred to as working capital).[552]

The agreements concerning the ensuing participating interest acquired by the government clearly state the amount paid by the government; thus both parties confirm that the payment:

> constitute[s] a binding full and final settlement of all claims which the government and/or NNPC on the one hand and the company on the other hand may have or alleged against each other in respect of any and all matters arising from or relating to the acquisition by the government and for NNPC of the said initial participation interest.[553]

However, the amount that must be paid may be in local or foreign currency. The participation agreement does specify in certain instances that the payment shall be exempt from taxes and other financial impositions or burdens.[554] It also provides that 'Oil Mining Leases and all other agreements and arrangements … between NNPC and the Company shall remain and continue in full force and effect in accordance with their terms, save only as modified by the terms Agreement and Operating Agreement'.[555]

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[551] ibid.

[552] ibid. See the Oil Mining Lease Agreements signed by the Mobil, Gulf and Agip oil conglomerates between 1983 and 1985.

[553] ibid at 278. See also the Oil Mining Lease Agreements.

[554] ibid.

[555] See the Oil Mining Lease Agreements.

The participation agreement operates under the regulation of applicable legislation as provided for in Nigeria.

The operating agreement establishes the legal connection between the owners of the leases or concessions and validates the procedural requirements and rules for the joint development of the area by parties. The operating agreement also covers the property jointly owned by the parties.[556] Omoregbe notes that the term 'joint property', given the Nigerian operating agreements, covers the expenditure incurred for all the activities and services of the oil company, such as salaries, staff housing schemes, pensions and gratuities.[557] Nonetheless, the NNPC has never been involved in the internal management of oil companies, apart from supervising compliance with Nigeria's law.[558] In any case, the foreign operator is usually a designated operator who is responsible for conducting all joint venture operations. The operator is under the operating committee's control, supervision and direction.[559] The operator in Nigeria has always been the oil company; this dates back to the full concession era, that is, before the period of operating agreements.

Heads of agreement are short but essential agreements between the NNPC and joint venture partners that provide general principles that are intended to direct off-take or scheduling and lifting agreements for crude oil.[560] Heads of agreement set out in clear terms the undivided interests in rights that were granted by the applicable oil mining leases in view of the petroleum resources in the contract area. They also stipulate that each interest owner shall share the resources to the extent of its equity participation. Thus, each interest owner can elect, lift and dispose of its oil resource shares separately.[561] However, a make-up right accrues to the interest owner to allow it to settle the balance of its outstanding equity share in the future. The NNPC often does not lift its entire oil quota in terms of this agreement to such an extent that oil is left underground. Consequently, this provision is important to the NNPC.[562]

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[556] Omorogbe (n 528) at 279.
[557] ibid.
[558] ibid.
[559] ibid. The operating committee is made up of nominated representatives of the oil company and the NNPC. Major decisions are made by the unanimous vote of the parties.
[560] ibid.
[561] ibid.
[562] ibid.

#### *4.3.1.2 Production sharing contracts*

The production sharing contract allows foreign oil exploration firms and the government to share the output of oil operations at a predetermined ratio.[563] This is a departure from the old concession arrangement, because the state is theoretically deemed the undeniable owner of the petroleum. Foreign oil conglomerates are engaged in their capacity as contractors for specific tasks for a fee in kind.[564] According to Omorogbe, 'the Nigerian experience with production sharing contracts has been singularly unsuccessful'.[565]

A twenty-year production sharing contract that involved the NNPC and Ashland Petroleum Corporation made Ashland the designated operator in terms of the contract, and title to petroleum was passed to parties at the wellhead.[566] However, Ashland pays for all equipment needed for the oil exploration operation in Nigeria, the ownership of which is transferred to the NNPC on delivery in Nigeria. It becomes part of the operating costs. Similarly, Ashland conducts an industrial training programme that recruits and trains Nigerians for oil exploration jobs.[567] Provision is made for about 2 per cent of the actual operating costs to be included as overheard charges in the total operating costs. In terms of this production sharing contract, operating costs such as rents, royalties and interest costs on finances borrowed to conduct operations are all recoverable from the proceeds of crude oil sales, having attained a maximum of 40 per cent. Then 55 per cent of the outstanding crude oil is apportioned to Ashland, and it becomes relevant for the petroleum profit tax.[568] Each party should pay any further money payable according to their participating interest shares. The remaining crude oil is then shared between Ashland and the NNPC in terms of participating interest of

[563] Taiwo Ogunleye, 'A Legal Analysis of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry' (2015) 5(8) Journal of Energy Technologies and Policy at 2. There is no universal model of production sharing contracts as each country develops its version of the contract to suit its special circumstances. Ogunleye posits that '[a] number of shortcomings were associated with production sharing contract. It was executed when Nigeria had little or no knowledge about the concept of a production sharing contract and the model terms that could benefit the country.'

[564] ibid.

[565] Omorogbe (n 528) at 279.

[566] ibid.

[567] ibid at 280.

[568] ibid.

35/65 until crude oil production exceeds 50,000 barrels per day. The shares then escalate to 30/70 in favour of the NNPC.[569]

The Crude Oil Sales Tribunal set up by the government to probe an alleged loss of N2.8 billion from the NNPC accounts found that production sharing contracts do not promote the economic course of the NNPC, and therefore the NNPC cannot afford to maintain this model of contract.[570] However, Omorogbe believes that since the contract is casually worded, it is subject to various interpretations. Production sharing contracts in other parts of the world, particularly those in Indonesia, are extensively detailed and precise with progressive clauses. They state that a contractor must provide 8.25 per cent of the entire production at a subsidised rate to cover domestic demand.[571] Currently, the major oil operators in Nigeria are Shell, ChevronTexaco, Total, ExxonMobil and Agip. However, new entrants that comprise other independent foreign companies in partnership with indigenous companies who jointly bid for oil blocks are now recognised.[572]

Production sharing contracts are widely accepted and are the ideal contract arrangement in the oil industry. This status is based on certain factors, such as the fact that the Niger Delta is well-known as the major oil basin; therefore, investors find it easier to work in the high-risk shallow and deep offshore basins.[573] This encourages commercial oil finds and stands the investor in good stead to recoup its investment. Moreover, the Nigerian government's intention to reallocate resources currently tied up in joint venture shares to other areas of the economy has made production sharing contracts attractive.[574] The relative flexibility in managing the operations of production

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[569] ibid.

[570] ibid. See also Tribunal of Inquiry into Crude Oil Sales, *Federal Government Press* (1980) full inquiry report. See also Ogunleye (n 619) at 3, who states that 'the production sharing contract was found to be lopsided in favour of Ashland by the Crude Oil Sales Tribunal set up to investigate an alleged loss of 2.8 billion naira from the account of NNPC, with the Midland Bank in London, between 1978 and 1979'.

[571] ibid.

[572] The Deep Offshore and Inland Basin Production Sharing Contracts Act No. 9 Laws of the Federation of Nigeria 1999 currently regulates production sharing contracts. It sets out the general framework for its operations such as applicable royalties, tax regimes and the allocation of costs and profits.

[573] Madaki Ameh, 'The Shift from Joint Operating Agreement to Production Sharing Contracts in the Nigerian Oil Industry: Any Benefits for the Players?' (2006) Energy Law and Policy CEPMLP 1 at 11.

[574] ibid.

sharing contracts, which reduces the financial burden on the government, is an advantage. However, the key disadvantage of production sharing contracts is the non-leveraging of the technical know-how and experience of domestic oil exploration expertise. This affects the accrued socio-economic benefits of oil resource development.[575]

#### *4.3.1.3 Service contracts*

Service contracts were designed to address the shortcomings of production sharing contracts. The NNPC signed several service contracts with Agip, Elf and other companies around 1979.[576] However, it is very unlikely that the Nigerian government wishes to commit to such a contract arrangement. The service contract is different from the production sharing contract in several respects. The length of the service contract is only five years, tied to one service block. The service contractor takes care of all the financial components of oil exploration appraisal and development operations.[577] However, if no commercial discovery of oil is made in the first five years, the contract is terminated, leading to a loss of the money spent on oil exploration.

If oil is discovered in commercial quantity within the first term or the first five years of the contract, all the money spent will be recouped. The service contractor then becomes entitled to compensation for applicable risks and remuneration for all rendered services.[578] Insofar as the service contractor may not have any claim to any crude oil produced, it may receive a refund for all contributions made as an investment and thus obtain remuneration in crude oil.[579] 'Nigerianisation' is emphasised in the service contract. The NNPC draft service contract model imposes an obligation on the service contractor to:

> make use of Nigeria nationals to the maximum extent in all aspects of its operations. Only in cases where specialised technical personnel are required and not available from among Nigerians, may the contractor with … agreement of NNPC hire non-Nigerians whose level of remuneration shall be approved by NNPC provided always

[575] ibid at 10.
[576] Omorogbe (n 528) at 281.
[577] ibid.
[578] ibid.
[579] ibid at 282.

> that the employment of non-Nigerians shall be subject to the condition that the contractor undertakes to train Nigerians in corresponding specialisation to replace such non-Nigerians in the shortest possible time.[580]

Tax compliance by the service contractor is emphasised in the service contract, and therefore it is treated differently. Customs duties as well as other duties related to the service contractor's activities are refundable. Taxes are not refunded.[581] The service contractor pays taxes that are due based on its remuneration under the Company Income Tax Act. However, petroleum profits tax and all applicable royalties due on petroleum in terms of the service contract are paid by the NNPC.[582]

Commentators regard the service contract as more progressive than other forms of oil exploitation contracts in operation. The service contract is viewed as an improvement on the production sharing contract, which has been ineffective with regard to maximum revenue generation for Nigeria.[583] A comparison of the production sharing contract and the service contract reveals that the service contract is better for Nigeria. Its contractual terms are sympathetic to the policy direction of Nigeria as the host country. Unlike the joint venture arrangement and the production sharing contract, its short period motivates service contractors to discover oil as quickly as possible.[584]

#### *4.3.1.4 Direct or indirect state participation*

In view of the different forms explained above, the state has the absolute use of direct state operations, which have hardly been taken advantage of in Nigeria. The state provides all the funds for oil resource exploration and development. The state controls the exploration progress, including the eventual turnover from the crude oil produced, and the state incurs possible risks.[585] However, adapting the model of direct state participation does not mean that the state has all the technological requirements or

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[580] ibid. See the NNPC Draft Service Contract Model <https://nnpcgroup.com/insights/NNPC-Limited-Contract-Transparency> accessed 9 August 2023.

[581] ibid.

[582] ibid.

[583] ibid.

[584] ibid.

[585] Omorogbe (n 528) at 282. See also Natural Resource Governance Institute, 'State Participation in Oil, Gas and Mining' Parliamentary Briefings, 2015, which states that 'many Governments take a direct ownership stake in oil or mineral and gas ventures, either as the sole commercial entity or in partnership with private companies'.

adequate financial assets for such investment. The state usually seeks financial assistance by borrowing from financial institutions and hiring technology to explore for oil resources.[586] However, the state bears the financial risks. The NNPC is ostensibly the government's investment arm in this regard.[587] The NPCC uses the services of contractor companies to explore for of oil resources. The seismic survey crews may sometimes act as contractors to oil companies.[588] The NNPC has successfully drilled oil wells in terms of the concessions it holds, and some of these oil wells remain shut for future crude oil production.[589] The impact of direct state involvement on the exploration for and exploitation of oil resources seems insignificant. Nigeria's developing hybrid control approach, which combines contractual arrangements and direct participation to enhance the control of oil resources, appears ineffective and has not resulted in critical socio-economic development.[590]

The Petroleum Industry Bill (PIB),[591] an initiative of the late President Umar Yaradua's administration, which was passed by President Muhammadu Buhari, sustains the basic principle anticipated by direct state participation.[592] One objective is to 'enhance exploration and exploitation of petroleum resources in Nigeria for the benefit of Nigerian people, … to promote the development of the Nigerian content in the petroleum industry'.[593] The Nigerian Oil and Gas Content Act (Nigerian Content Act) was enacted in 2010 by President Goodluck Jonathan and amplified direct state participation.[594] Ovadia states that it:

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[586] ibid at 283.

[587] ibid.

[588] ibid.

[589] ibid.

[590] ibid.

[591] This was assented to and passed on 14 August 2021 by President Muhammadu Buhari. It has created an array of provisions and innovations that will affect the private sector, the public sector and stakeholders in the oil and gas industry in Nigeria. <https://www.brookings.edu/blog/africa-in-focus/2021/11/24/nigerias-petroleum-industry-act-addressing-old-problems-creating-new-ones/> See also <https://www2.deloitte.com/za/en/nigeria/pages/energy-and-resources/articles/petroleum-industry-bill-passed-by-the-national-assembly.html> accessed 24 January 2022.

[592] Jesse Ovadia, 'The Nigerian "One Percent" and the Management of National Oil Wealth through Nigerian Content' (2013) 77(3) Science and Society 315 at 318.

[593] Samuel Diminas, Richards Obinna and Victoria Ibezim-Ohaeri, 'An Analysis of the Nigerian Petroleum Industry Bill 2012 Vol 1' at 2 <http://www.westpaq.com/wp-content/uploads/2013/05/An-Analysis-of-the-Nigerian-Petroleum-Industry-Bill-2012_WESTPAQ_v1_FINAL.pdf> accessed 24 January 2022.

[594] Ovadia (n 592) at 318.

> represents the latest effort to cultivate social and economic development through promotion of the country's fossil wealth … the Nigerian Content Act was conceived to allow Nigeria to finally succeed in exerting a measure of national control over its oil and gas resources and to increase benefit derive from its oil wealth.[595]

This is intended to endorse maximum local participation in the petroleum industry to enhance the socio-economic development of the people. However, the policy of upholding local content is not a recent development; it dates back to the era of promulgating the Petroleum Act in 1969, but has been overshadowed in the last decades by indigenisation policies.[596] These have been consistently rationalised by factors such as increased government revenue, citizens' socio-economic empowerment, and Nigeria's control of its natural resources. Ovadia further submits that previous policy attempts to achieve a national content strategy were a total failure, partly due to their elite foundation and the erroneous notion of neoliberalism, which posits that Nigerian oil wealth ownership and control will benefit the people.[597]

The Nigerian Content Act, which had previously manifested in the Indigenisation Decree between 1972 and 1979, was aimed at encouraging the involvement of the government and the people in the exploitation of natural resources. Subsequently, the Nigerian government acquired equity participation in all international oil companies involved in oil resource exploration.[598] Atsegbua states in this regard that 'the inability of Nigeria to exercise *de facto* control over its oil industry is the result of the absence of domestic personnel for management positions in the subsidiaries of the international oil companies'.[599]

The increased employment of indigenous people does not manifest in control as they may develop an affinity with foreign stakeholders. The lesson from the indigenisation experience relates to the need for indigenous management of the oil exploration industry. Furthermore, this exercise created a windfall for the government and for

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[595] ibid. See also Joe Okafor and Ernest Aniche, 'A Critical Appraisal of Enforcement of Nigeria Oil and Gas Industry Content Development (NOGICD) Act, 2010' (2014) 31 Journal of Law, Policy and Globalisation 82 at 84.

[596] ibid.

[597] ibid.

[598] ibid at 320.

[599] Lawrence Atsegbua, *Oil and Gas in Nigeria: Theory and Practice* (New Era Publications 2004) at 106.

people who were strategically disposed to the government.[600] Ake suggests in this regard that

> [i]ndigenisation was ostensibly intended to localize control of the economy. But what actually happened was that it gave opportunities for some Nigerians who were already very well off to acquire shares in foreign-owned businesses and to enter into partnership with foreign capital. So in the end what was indigenised was not control of the economy, but rather exploitation.[601]

The legislative role that the government has played thus far to assert control of its natural resources has been outlined above. However, despite these attempts to control the exploration of oil resources culminating in nationalisation, they have made minimal contribution to the socio-economic development of the people.

#### *4.3.1.5 Totalitarian ownership and governance: the Nigeria Mineral and Mining Act 2007*

A raft of legislation governs the Nigerian natural resource industry.[602] The Minerals and Mining Act of 2007, which repealed the Minerals and Mining Act of 1999, is one of these laws. Section 1(1) states:

> The entire property in and control of all mineral resources in, under or upon any land in Nigeria, its contiguous continental shelf and all rivers, streams and watercourses throughout Nigeria, any area covered by its territorial waters or constituency and the Exclusive Economic Zones is and shall be vested in the government of the federation for and on behalf of the people of Nigeria.[603]

Section 1(2) provides that all the land in Nigeria where minerals have been found in commercial measure shall be acquired by the FGN from the commencement of the

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[600] Ovadia (n 592) at 321.

[601] Claude Ake, *Social Science as Imperialism: The Theory of Political Development* (Ibadan University Press 1982) at 188.

[602] These include the Oil Pipeline Act of 1956, the Petroleum Control Act of 1967, the Petroleum Act 51 of 1969, the Exclusive Economic Zone Act of 1978 and the Offshore Oil Revenue (Registration of Grants) Act of 1971.

[603] Minerals and Mining Act 2007 at 5 <http://admin.theiguides.org/Media/Documents/Nigeruian%20Minerals%20and%20Mining%20Act,%202007.pdf> accessed 9 September 2022.

Act, in terms of the provisions of the Land Use Act.[604] Recognising the significance of mining to the state, s 22 of the Act asserts that the use of land for mining development shall be prioritised over other uses of land.[605] This includes access to, and the use and occupation of land for mining development, which clearly override private rights as prescribed by the Land Use Act. Thus, the Land Use Act initiated a fresh dimension of land ownership with regard to natural resources and eliminated people's right to own land by permitting only occupancy rights.

The ownership of land in Nigeria is vested in the government through the governors of each state.[606] However, despite the vesting of ownership in the governors, only the FGN can exercise the right to own land that belongs to the FGN. Therefore, no states or people have any control of the land with regard to the exploration for and exploitation of natural resources.[607] It is clear that the government's ownership and control of land endowed with natural resources may amount to private land being used for natural resource development. The land and all its improvements may remain private property, but the natural resources that are exploited are public goods. Essentially, the right to natural resources belongs overwhelmingly to the state. Also, indigenous people who own the land only share in the surface rights or they receive nothing.[608]

In Nigeria, the laws have led to unhappiness among people whose ancestral lands are endowed with oil resources, mainly because the law has not provided for any clear level of compensation.[609] The Petroleum Act highlights the need for the oil operator to pay the landowner: it provides for the payment of 'such sums as may be a fair and reasonable compensation for any disturbance of the surface rights of such owner or

[604] ibid.

[605] ibid at 13.

[606] ibid. Nigeria's land ownership and tenure system has been through the pre-colonial period, the post-colonial period and the recent introduction of the Land Use Act. It is suggested that the structure that was applicable before the advent of the Land Use Act aligned to the basic tenets of federalism. However, the Land Use Act sought to promote uniformity and vest all land in the hands of the FGN.

[607] Akpan (n 549 ) at 141.

[608] ibid.

[609] ibid. See also Funmi Makinwa, 'Nigeria Petroleum Industry Bill 2012: Conflict Analysis Report' (2012) at 12 <http://integritynigeria.org/wp-content/uploads/2012/09/PIBReportFinal_v3.pdf> accessed 15 March 2022.

occupier and for any damage done to the surface of the land upon which his prospecting or mining is being or has been carried on … or by any agent or servant'.[610]

This provision is very broad and not clear with regard to the level of compensation. There are no set guidelines for compensation for surface right infringements due to oil exploration and exploitation.[611] Despite the conflicts surrounding oil exploration and exploitation in Nigeria, there is no clear evidence of government efforts to address the issue of compensation. Thus, the awareness of surface rights as it affects the people regarding claims and compensation is a very unclear area, solely in the control of the government. This obvious nationalisation of natural resource rights appears to have prevented the state from genuinely dealing with private claims.[612] However, there appears to be collusion between the state and multinational oil companies in dealing with compensation issues. This is evident in compensation-related court cases that involved people whose surface rights have been infringed upon in their communities by transnational oil companies. These cases were mainly decided in favour of the multinational oil conglomerates.[613]

There are different opinions about the question of people's rights and ownership of natural resources, as opposed to the state's ownership of natural resources. The state's ownership of natural resources was supported by the principle enshrined in the Land Use Act manifesting in state totalitarian ownership.[614] Ajomo is a proponent of totalitarian ownership, which confirms the FGN's ownership and control of oil through various legislative enactments.[615] Ajomo states that the control of oil revenue and oil resources that yield such revenue should be the exclusive right of the FGN, as the battle for control of resources was the cause of the civil war in Nigeria. Oil, which is

[610] Section 77 of the Petroleum Act of 1969 <http://www.resourcegovernance.org/training/resource_center/nigeria-1969-petroleum-act> accessed 15 March 2022.

[611] Makinwa (n 609) at 12: 'In the first instance, the GoN has completely disregarded and totally removed all prior land ownership rights prevalent before the nation came into being … the lack of compensation benchmarks and resettlement of communities by the Government of Nigeria have led to the present state of discontent and marginalisation based on the surface rights versus mineral/oil rights issue ….'

[612] Akpan (n 549) at 142.

[613] Frynas (n 507) at 225.

[614] Aladeitan (n 536) at 174.

[615] Michael Ajomo, 'The 1969 Petroleum Decree: A Consolidation Legislation, Resolution in Nigeria's Oil Industry' (1979) 1 Nigeria Annual of International Law at 57.

crucial to the socio-economic life of the people due to its economic benefits, requires exclusive federal control through uniform legislative regulations.[616] He further submits that because oil exploration requires a huge capital outlay and considerable technical expertise, only the government can operate in such a field. The government can therefore coerce MNCs to distribute their knowledge to Nigerians.[617] Ajomo contends that oil exploration and exploitation, if left in the hands of the people, might generate huge wealth for a few private people at the expense of national priorities. Accordingly, the FGN's ownership and control of oil resources will enhance national cohesion.[618]

However, Sagay contends that the FGN's exclusive ownership and control of oil resources has entrenched resentment and the oppression of the minority in Nigerian oil resource development.[619] As supported by legislation, the totalitarian ownership and control policy has created anxiety in oil-producing communities, because the resources in their ancestral communities are being exploited without socio-economic benefits for the people.[620] This exploitation has left them with a contaminated and distressed environment. Sagay contends that the central ownership and control model as it is currently applied has not ended the accrual of wealth to a few individuals.[621]

It is therefore clear that, in terms of the current ownership and control mechanisms, the proceeds of oil resources have not been used for the socio-economic upliftment of Nigeria. Sagay disagrees with Ajomo's arguments, regarding them as unfounded in the Nigerian context.[622] This study finds Sagay's position compelling and in alignment with the PSNR principle. A new report by the Socio-Economic Rights and Accountability Project (SERAP) indicates that:

> communities in the Niger Delta continue to live in depressing and deplorable conditions, despite the fact that the wealth derived from these areas is the main economic mainstay for the country.[623]

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[616] ibid.

[617] ibid.

[618] ibid at 58.

[619] Itsa Sagay, 'Ownership and Control of Nigerian Petroleum Resources: A Legal Angle' in V Eromosole (ed), *Nigerian Petroleum Business: A Handbook* (Advent Commons 1997).

[620] ibid.

[621] ibid.

[622] ibid.

[623] See Socio-Economic Rights and Accountability Project 2022 Report 'We are all Vulnerable, How Lack of Transparency and Accountability is Fueling Human Rights Violations in the Niger Delta'

The report confirms that communities in the Niger Delta are the poorest in the country and declares that 'extensive social economic and environmental degeneration has largely affected the lifestyle and wellbeing of the people of Niger Delta'.[624] The report further demonstrates that corruption contributes to poverty and the consequential suffering of numerous people in the Niger Delta. The people's right to a clean, safe and healthy environment is being constantly violated by the government and oil companies.[625]

## 4.4 Emerging dilemmas in Nigeria's natural resource ownership and governance

Nigeria has struggled for some time with the ownership and governance of its natural resources. The current approach is ineffective and unsustainable.[626] This situation has triggered conflict situations. The Niger Delta region in Nigeria has recently seen sporadic escalations of violence, stemming from the allocation and spending of oil revenue from oil sales.[627] The progressively reduced oil allocation refunds to the oil-producing states of the Niger Delta from 50 per cent in 1970 to 20 per cent between 1975 and 1979 and down to only 3 per cent between 1992 and 1999 significantly contributed to the disorder.[628] The Delta state region was deprived of substantial income, which led to the southern regions resenting the central government.[629] However, under the 1999 constitution, the allocation refund of oil revenue to the Niger Delta region was increased to 13 per cent.[630]

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<https://serap-nigeria.org/download/download-we-are-all-vulnerable-how-lack-of-accountability-is-fuelling-human-right-violation-in-the-niger-delta/> accessed September 2022. See also 'Communities in Niger Delta live in Depressing Conditions – SERAP' <https://www.vanguardngr.com/2022/09/communities-in-n-delta-live-in-depressing-conditions-serap/> accessed 3 March 2022.

[624] ibid.

[625] ibid.

[626] Annegrete Mahler, 'Nigeria: A Prime Example of the Resource Curse? Revisiting the Oil-Violence Link in the Niger Delta' (2010) German Institute of Global and Area Studies Working Paper 120 at 16 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1541940> accessed 27 July 2023.

[627] Ukoha Ukiwo, 'Governance Regimes of Oil in Nigeria: Issues and Challenges' (2018) Centre for Research on Peace and Development (CRPD) Working Paper 69 at 7 <https://soc.kuleuven.be/crpd/files/working-papers/crpd-no-69-ukiwo-full.pdf> accessed 9 August 2023.

[628] ibid at 8.

[629] ibid.

[630] ibid.

Since Nigeria's oil rent per capita is relatively low compared to other oil states, the increased allocation refund may not seem marginal, considering the positively fluctuating oil prices in recent years. Nevertheless, in reality, this revenue did not serve its purpose and never reached most of the people, because huge amounts of the fiscal allocation disappeared from the states' and local governments' treasuries.[631] Personal enrichment by public servants and patrimonialism have been prevalent for decades. However, while there appears to be an insignificant improvement at the central government level, there has not been any improvement at the domestic level.[632]

The 1970s saw increased oil revenue being partly used for industrialisation projects and other socio-economic development.[633] These projects were very capital-intensive and poorly planned, so they had little sustainable effect. They did not support the economy and the needed socio-economic upliftment.[634] A considerable amount of oil revenue was squandered by flawed projects, and some projects were created as conduits to dispense huge amounts of money to a certain privileged public servant. This continuous squandering of state revenue created huge indebtedness due to increased international interest rates and oil prices slumping in the 1980s.[635] Nigeria therefore entered a period of severe economic crisis. Structural adjustment policy reforms in 1986 resulted in a sharp national currency devaluation. This led to an increase in the cost of living, which affected the lower and middle classes, thus eroding whatever socio-economic benefits could be derived from oil revenue.[636]

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631 Mahler (n 626 ) at 16.

632 ibid at 17.

633 ibid. See also Sarah Peck and Sarah Chayes, 'The Oil Curse: A Remedial Role for the Oil Industry' (2015) Carnagie Endowment for International Peace at 3 <https://carnegieendowment.org/files/CP_250_Peck_Chayes_Oil_Curse_Final.pdf> accessed 9 August 2023. They state that '[o]il-producing countries commonly experience some degree of Dutch disease, which is primarily caused by a host country's inefficient management of the massive influx of dollar-valued oil revenues'.

634 ibid. See also John Onyeukwu, 'Resource Curse in Nigeria: Perception and Challenges' Central European University Centre for Policy Studies (CPS) at 6–7, who states that '[t]he contribution of oil to government revenue rose from 0.1 percent 1958 to 26.3 percent in 1970; and since then has been on upward swing … It is quite amazing that the stupendous resources gained from oil have not been reflected in the rate and level of development in Nigeria. Rather, it has become a major source of concern that such resources might, when we look at the economic indices, be classified as having been wasted.'

635 ibid.

636 ibid. See 'Revisiting Structural Adjustment Programme' *Punch* 6 September 2022 <https://punchng.com/revisiting-structural-adjustment-programme-of-1986/> accessed 9 August 2023. The article states that '[u]pon the attainment of independence and aided by the influx of

The gradual decline in the state's socio-economic structure affected the existing public amenities so that they became extremely under-equipped due to a severe shortfall in oil revenue.[637] The prevalence of poverty was obvious before the advent of oil, but the decline in oil revenue, as well as the failed socio-economic structures that resulted from ineffective and unsustainable oil resource management, dramatically worsened poverty. The percentage of people affected by extreme poverty increased from 35 per cent to 70 per cent by the middle of the 1990s.[638] The Niger Delta is the face of failed socio-economic advancement through natural resources in Nigeria. The level of poverty in the region has increased, and has led to an increase in violent conflict. This is the result of oil abundance and its mismanagement.[639] The lack of sustainable management of oil resources has resulted in a situation where even a sharp increase in oil revenue in recent years has not substantially reduced poverty.[640] More than 50 per cent of the population in the Niger Delta lives on less than one dollar per day and 80 per cent lives on less than two dollars per day. This shows the continued prevalence

petrodollars in the 1970's, Nigeria created a bureaucratic economy with government at the center of the economy … All was well until oil prices that financed the imports crashed in 1982 and the inherent weakness of the system was exposed.'

637 ibid.

638 ibid. See 'The Damning Statistic on Poverty in Nigeria' *The Cable* 25 November 2022 <https://www.thecable.ng/the-damning-statistics-on-poverty-in-nigeria#:~:text=The%20National%20Bureau%20of%20Statistics,percent%20of%20the%20nation's%20population> accessed 9 August 2023. The article states that '[t]he National Bureau of Statistics recently disclosed what most of us already knew – 133 million Nigerians are poor. It is instructive to note that in its 2023 Multidimensional Poverty Index Survey released in Abuja, the NBS said the figure represents 63 percent of the nation's population.'

639 ibid at 16. See Kate Higgins, 'Regional Inequality and Niger Delta' Policy Brief No. 5 prepared for the World Development Report, Overseas Development Institute (2009) at 3 <https://cdn.odi.org/media/documents/3383.pdf> accessed 9 August 2023. The policy brief states: 'The oil boom in Nigeria has been driven by oil extracted from the Niger Delta region. Oil wealth, from the Niger Delta region is largely responsible for sustaining the Nigeria federation. Despite fueling much of Nigeria's economic growth, the Niger Delta is somewhat marginalised from Nigeria's national development. Essentially, there is a significant disconnect between the wealth the region generates for the Nigerian federation and transnational oil companies extracting oil from the region's human development progress.'

640 ibid. See Nordic Africa Institute Policy Notes 2009/1 'Causes and Curses of Oil-related Niger Delta (2009)' at 4 <https://www.files.ethz.ch/isn/97598/policy_notes2009-1.pdf> accessed 9 August 2023. The article states: 'With agriculture threatened, no expansion in agro-allied and petrochemical industries and tourism neglected, unemployment and underemployment at 8.8 percent and 26.2 percent respectively are higher in Niger Delta than other regions … The incident of poverty in the region is 35 percent as against the national average which stands at 54 percent, self-assessment ... indicates that the very poor is highest in the Niger Delta'.

of poverty.[641] Oil revenue has not substantially sustained or expanded the region's socio-economic and infrastructural development.

Severe unemployment combined with poor oil resource management has created a serious socio-economic distortion in Nigeria, and particularly in the Niger Delta region.[642] The oil industry has generated very little employment due to its capital-intensive but not labour-intensive nature. Oil is hardly processed in the country; it is immediately exported to other countries.[643] The industry directly and indirectly employs only about 35,000 people in Nigeria.[644] In the Niger Delta, which is the mainstay of oil production in Nigeria, jobs in the agricultural sector have been destroyed without any countermeasures to remedy the situation. Consequently, youth unemployment is extremely high in Nigeria, particularly in the Niger Delta region, where it is higher than any other part of the country.[645]

The NNPC barely engages in oil exploration and exploitation. It acts only in a management capacity, which weakens capability and allows for the Nigerian oil sector to depend on private foreign companies.[646] The Shell Petroleum Development Company (SPDC) dominates oil exploration in Nigeria. Other companies like Exxon Mobil, Chevron, Total (Elf) and Eni/Agip have also been established as big operators in recent years.[647] In comparison, private Nigerian oil operators produce insignificant

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[641] ibid at 18.

[642] ibid. See Oxfam Report, 'Inequality in Nigeria Exploring the Drivers' (Oxfam International May 2017) at 16 <https://www.oxfam.org/en/research/inequality-nigeria-exploring-drivers> accessed 9 August 2023. The report indicates that the misappropriation of resources in Nigeria occurs in the Niger Delta region. Despite the allocation of funds from sources for the development of the region since 1999, the Niger Delta communities continue to live in abject poverty and amid severe environmental damage. This mismanagement of resources has created very high levels of youth unemployment in Nigeria and in the region.

[643] ibid.

[644] ibid.

[645] ibid. See Nordic Africa Institute Policy Notes (n 640) at 4.

[646] ibid at 19. See 'NNPC Lose $1 Billion Annually to Inefficiency, Others' *Business Day* 25 July 2019 <https://businessday.ng/energy/oilandgas/article/nnpc-loses-1billion-annually-to-inefficiency-others-says-bpe/> accessed 9 August 2023. It is reported that the 'NNPC loses between $800 million and $ 1 billion annually to inefficiency, mismanagement, and unnecessary interference from political authorities. There is a weak governance structure and lack of transparency, accountability and commercial oversight and credible management structures in place.'

[647] ibid. See also Amnesty International Report 'Nigeria: Petroleum, Pollution and Poverty in the Niger Delta' (2009) at 11, which states that 'the oil industry in the Niger Delta comprises both the Government of Nigeria and subsidiaries of multinational companies such as Shell, Eni, Chevron,

amounts of oil. The multinationals, especially Shell, undoubtedly have a strong economic influence on oil exploration activities, which does not help to alleviate poverty in Nigeria.[648] The report of the Natural Resource Governance Institute, 'Inside NNPC Oil Sales: A Case for Reforms in Nigeria' states:

> Beginning decades ago, a steady stream of reports and reviews has documented the company's dismal legacy of lost revenues, inefficiency and corruption in eye-watering details. Its problems are well known and widely agreed upon, yet meaningful solutions have not taken root. Despite the lost earnings and the glaring performance failures – and persistent poverty in many segments of Nigerian society – successive heads of states have avoided fundamental reform.[649]

This indicates that NNPC has consistently failed to manage the state's oil resources.

However, foreign oil operators have not been transparent about their activities and the extent to which they impact the socio-economic development of host states.[650] In 2001, Andre Tarrallo, a former executive of French-owned oil giant Elf, testified before a French prosecutor about how Elf had shaved off money on every barrel of African oil from Nigeria, Gabon, Cameroon and others.[651] This money goes into secret bank accounts in Liechtenstein and Switzerland to pay corrupt leaders from these African states. These accounts were set up through Elf, Rivunion and Elf trading subsidiaries.[652]

Similarly, Halliburton, a US company, the world's second-largest oilfield services provider, faced investigation in Nigeria, France and the United States over its business activities in certain African countries.[653] Halliburton's role in Nigeria's liquefied natural

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Total and ExxonMobil and other Nigerian companies. Thus, oil exploration and production is undertaken in what is known as "joint venture".'

[648] ibid.

[649] Aaron Sayne, Alexander Gillies et al 'Inside NNPC Oil Sales: A Case for Reform in Nigeria' Natural Resource Governance Institute (2015) at 13 <http://www.resourcegovernance.org/sites/default/files/documents/nrgi_insidennpcoilsales_completereport.pdf> accessed 27 July 2023.

[650] Jodi Rosenstein, 'Oil, Corruption and Conflict in West Africa: The Failure of Governance and Corporate Social Responsibility' KAIPTC Monograph No 2 (2005) at 40 <https://africaportal.org/wp-content/uploads/2023/05/mono-5_Rosenstein.pdf> accessed 27 July 2023.

[651] ibid.

[652] ibid.

[653] ibid.

gas (LNG) projects, a by-product of crude oil, in the 1990s involving corrupt practices led to a probe about who benefited from a USD 200 million commission paid between 1990 and 2002.[654] Investigations revealed that the TSKJ consortium, led by Halliburton's Kellogg Brown & Root unit, established a subsidiary company, LNG Services, in Portugal. Illegal payments were made to companies and persons linked to the LNG projects.[655] Payouts of around USD 150 million were traced to accounts in private banks in Geneva and Monaco. Halliburton confirmed that its internal probe of this debacle revealed that the TSKJ consortium could have paid bribes to politicians through these networks of foreign bank transfers in exchange for contracts.[656] Halliburton admitted in May 2003 in a US federal court that it paid USD 2.4 million in bribes to a public servant in Nigeria to obtain favourable tax treatment in relation to its oil service contract.[657]

Every indication is that the financial stakes for international oil companies are immense. For example, ExxonMobil earned about USD 32.5 billion in 2014 from the exploration of oil, more than 50 per cent of what it earned in 2004.[658] This shows that oil companies go to great lengths to acquire new fields because they are constantly trying to improve their exploration business, which is far more profitable than refining crude oil.[659] This explains why international oil companies court the attention and influence of public servants in Nigeria and other African states to obtain possibly illegal business favours.[660] This corrupt state of affairs has placed immense strain on the intended use of natural resources for the effective socio-economic advancement of the people.

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654 ibid at 41.

655 ibid.

656 ibid.

657 ibid. See 'Editorial' *The Nation* 21 February 2016: 'Not only that the U.S government imposed a heavy fine, those involved were tried and jailed in that country for the crime committed against Nigeria. … [T]he Nigeria government refused all entreaties by the U.S government to haul in the Nigerians allegedly involved.'

658 ibid.

659 ibid at 42.

660 ibid.

## 4.5 The natural resources and socio-economic development conundrum

Natural resource endowment has the potential to drive positive socio-economic development on the African context. From a global perspective, the demand for scarce natural resources is continuously increasing.[661] Natural resources are abundant in Nigeria and could drive very stable socio-economic growth if properly harnessed. However, the inability to achieve this civic duty has been attributed to the 'resource curse'.[662] The extent and inevitability of the concept has been contentious.[663] Scholars argue that nations that are more dependent on natural resource wealth are inclined to suffer from slow growth, poor accountability and a poor social structure, as well as being prone to conflict, unlike natural resource-poor nations.[664]

### *4.5.1 The natural resource curse: The Nigerian experience*

Nigeria is the largest economy in Africa, mainly due to its crude oil exports. In 2000 oil exports accounted for 98 per cent of Nigeria's earnings. However, the socio-economic conditions of the country's citizens are worsening. The oil wealth generated by oil revenues has not benefited the people. Thus, 53.7 per cent of the citizens live below the poverty line.[665] According to Stiglitz, 'some 30 years ago, Indonesia and Nigeria had comparable per capita incomes, and both were heavily dependent on oil revenues. Today, Indonesia's per capita income is four times that of Nigeria.'[666]

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[661] Terry Heymann (ed), *Natural Riches? Perspective on Responsible Natural Resource Management in Conflict-affected Countries* (World Economic Forum 2013) at 4.

[662] Naazneen Barna, Kai Kaiser K, Tuan Minh Le and Lorena Vinuela, *Rents to Riches? The Political Economy of Natural Resource-Led Development* (World Bank 2012) at 1.

[663] Marcartan Humphreys, Jeffrey Sachs and Joseph Stiglitz (eds), *Escaping the Resource Course* (Columbia University Press 2007) at 1; Rabah Arezki, Tholvadur Gylfason and Amadou Sy (eds), *Beyond the Curse* (International Monetary Fund Publication Services 2012) at 7.

[664] Daniel Kaufman, Aart Kray and Pablo Zoido-Lobaton, *Governance Matters II* <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.200.2726&rep=rep1&type=pdf> accessed 27 July 2023; Jeffrey Sachs and Andrew Warner, 'Natural Resources and Economic Development: The Curse of Natural Resources' (2001) 45 European Economic Review 827 at 828.

[665] See 'Nigeria's Poverty Index Stands at 53.7%' *This Day* 9 October 2018. The newspaper reports that 'Nigeria's poverty index currently stood at 53.7%, according to the United Nations Development Programme (UNDP)' <https://www.thisdaylive.com/index.php/2018/10/09/nigerias-poverty-index-stands-at-53-7-says-undp/> accessed 20 February 2019. See also John Agwara, 'Resource Curse in Nigeria: Perception and Challenges' (2006) 7 Central European University Center for Policy Studies at 5 <http://pdc.ceu.hu/archive/00003007/01/john.onyeukwu.pdf> accessed 27 July 2023.

[666] Joseph Stiglitz, 'Making Natural Resources into a Blessing rather than a Curse' in Svetlana Tsalik and Anya Schriffin (eds), *Covering: A Reporter's Guide to Energy and Development* at 13

Stiglitz's position concisely summarises the effect of the 'resource curse' on Nigeria and most sub-Saharan African countries. In the early 1970s, Nigeria was among the 50 richest countries in the world. Now, in the twenty-first century, it has plunged into the ranks of the 25 poorest countries.[667] A country categorised as the sixth largest crude oil producer ironically hosts the world's highest number of people experiencing extreme poverty.[668] It is incomprehensible that the enormous resource gains from crude oil thus far have not led to improved socio-economic development. Oil resources have become a huge source of distress, which gives the impression of severe economic wastage when considered from an economic index perspective.[669] Collective earnings from crude oil exports from 1965 to 2000 were USD 350 billion. However, considering the fact that there has been a continued rise in the crude oil price in the international market from before and after 2000, it is safe to contend that Nigeria has earned triple the amount earned in 2000.[670] Wenar states:

> From 1970 to 2000 the Nigerian government received very large revenues (around US$300 billion) from oil sales. Yet during this period, the percentage of Nigerians living in extreme poverty … increased from 36 percent to almost 70 percent. Meanwhile inequality skyrocketed, and corruption was everywhere …[671]

Hence, it is safe to suggest that Nigeria's poor socio-economic development is linked to a resource curse.

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<http://www.opensocietyfoundations.org/sites/default/files/osicoveringoil_20050803.pdf> accessed 27 July 2023.

667 Agwara (n 665) at 5.

668 'Every Minute 6 Nigerians Enter Extreme Poverty: Here's Why' *Business Day* 27–29 June 2018. The article reports that '[t]he number of Nigerians living in extreme poverty crossed the 83 million mark in 2018, surpassing India's number of extremely poor at 73 million'. <https://businessday.ng/exclusives/article/every-minute-6-nigerians-enter-extreme-poverty-heres/> accessed 10 September 2022. See also 'Oil Rich Nigeria Outstrips India as Country with Most People in Poverty' *The Guardian* 16 July 2018: 'Nigeria, one of Africa's two wealthiest economies, has overtaken India as home to the world's greatest concentration of extreme poverty' <https://www.theguardian.com/global-development/2018/jul/16/oil-rich-nigeria-outstrips-india-most-people-in-poverty> accessed 10 September 2022.

669 ibid.

670 ibid at 8.

671 Leif Wenar, 'Property Rights and the Natural Resource Curse' (2008) 36(1) Philosophy and Public Affairs at 5.

### *4.5.2 Current manifestations of the natural resource curse*

The contemporary practice of natural resource development in Africa is founded upon and driven by mere exploitation, rather than the core socio-economic upliftment of the people.[672] As shown in the literature, Nigeria's situation exemplifies the predicament facing many African countries. The legislative provisions regulating natural resource development are colonialist-inspired.[673] The state controls natural resources and exclusively decides on matters regarding its governance. This ideological approach, which appears conservative, is somewhat repressive in practical terms and lacks genuine people-oriented values. However, the available evidence suggests that African countries with non-renewable resources have either a perfect growth opportunity or a debilitating challenge.[674] The current regulatory regime applicable to natural resources has not provided for the perfect growth that can translate into socio-economic development.

The African continent has many countries that are rich in natural resources yet experience the resource curse.[675] Kenneth Kaunda, the first president of Zambia, attributed part of the country's socio-economic problems to the resource curse. He stated that '[w]e are in part to blame, but this is the curse of being born with a copper spoon in our mouths'.[676] This confirms that the abundance of copper is negatively impacting Zambia's socio-economic development. Gabon began the exploration for and exploitation of oil in the late 1960s. Despite all the oil wealth that has accrued to the state's treasury for more than 30 years, Gabon has struggled to provide its 1.3 million people with compelling socio-economic improvements.[677] In Angola, oil resources have not translated into credible socio-economic benefits. Increased oil reserves have hardly alleviated the country's level of poverty.[678] The Human Rights

[672] Heymann (n 661) at 10.

[673] ibid. See Cyril Obi and Siri Aas Rustad (eds), *Oil and Insurgency in Niger Delta: Managing the Complex of Petro-violence* (Zed Books 2011) at 37.

[674] See *Natural Resource Charter* 2 ed (Natural Resource Governance Institute 11 June 2014) at 4 <https://resourcegovernance.org/sites/default/files/NRCJ1193_natural_resource_charter_19.6.14.pdf> accessed 9 September 2022.

[675] Emeka Duruigbo, 'The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa' (2005) 26(1) University of Pennsylvania Journal of International Law at 21.

[676] 'The Paradox of Plenty' *The News International* 27 June 2013 <http://www.thenews.com.pk/Todays-News-9-186255-The-paradox-of-plenty> accessed 27 July 2023.

[677] Duruigbo (n 675) at 24.

[678] ibid.

Report on Transparency and Accountability views Angola as a typical example of the problems that plague a resource-abundant state.[679] In Congo (Brazzaville), the government is closely connected to the leading French oil company, and the interests of the people are secondary.[680] This relationship, which puts political interests ahead of the interests of the people, has affected socio-economic development.

There has been civil agitation by indigenous peoples occupying communities where natural resources are located and extracted. For example, the Niger Delta situation in Nigeria has become a protracted one. The socio-economic exclusions experienced by people in respect of the exploitation of oil resources in their ancestral spaces caused serious concerns in the community.[681] Omeje contends that issues underlying the conflict include institutional, ecological and social factors.[682] However, this study will only consider the institutional aspect of the conflict.

This predicament has existed since colonialism, and, to date, successive governments have maintained the status quo. With regard to the historical evolution of oil legislation and policies in Nigeria, it is possible to establish why the state allowed almost unfettered access by multinational oil corporations.[683] The Land Use Act of 1978 was enacted to neutralise every customary obstacle to land acquisition so as to make land easily available for oil activities.[684] The Act distinguishes between compensation for land that is regarded as the property of the state and compensation for investments made by former landowners. While compensation is paid to the state for land, compensation for investment in the land, which is a one-off payment and also evaluated by the state, is paid to the indigenous owner of the land. If it is community land, compensation is paid to the chief on behalf of the community.[685]

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679 Human Rights Watch 'Transparency and Accountability in Angola' (2010) <https://www.hrw.org/report/2010/04/13/transparency-and-accountability-angola> accessed 27 July 2023.

680 Duruigbo (n 675) at 25. The French oil conglomerate was known as Elf Aquitane, but is currently known as Total-FinaELF.

681 Annegret Mahler, 'Nigeria: A Prime Example of the Resource Curse? Revisiting the Oil-Violence Link in the Niger Delta' German Institute of Global and Area Studies Working Paper (2010) at 17–18 <http://repec.giga-hamburg.de/pdf/giga_10_wp120_maehler.pdf> accessed 27 July 2023.

682 Kenneth Omeje, 'Oil Conflict in Nigeria: Contending Issues and Perspective of the Local Niger Delta People' (2005) 10(3) New Political Economy 321 at 323.

683 ibid.

684 Nigeria Land Use Act of 1978.

685 Omeje (n 682) at 324.

The 1978 Act does not give domestic courts jurisdiction on issues of compensation involving the Act. Section 27 of the Act states that 'no court shall have jurisdiction to inquire into any question concerning the amount or adequacy of any compensation paid or to be paid under this Act'. This legislative arrangement is complemented by relevant provisions in Nigeria's 1979, 1989 and 1999 Constitutions.[686] Accordingly, this legislation controls all rights of access to oil-rich land in the state with little or no legal recourse by claimants for compensation for any land they possess. Apart from the state's oil laws and policies that give oil companies a privileged position, the state also obtains rent for oil mining land due to the contemporaneous legislation which consolidates oil and land as state property.[687] The indigenous oil communities are left susceptible to poverty due to the fact that little or no compensation is paid for their economic investments in their alienated land. The state exploits this institutional advantage created by its monopoly on legislation and law enforcement to unduly benefit and preserve the rent interests of the elites holding political power.[688] The state's oil rent-seeking interests undoubtedly run counter to the interests of the Niger Delta communities with regard to land. This has led to local resentment, state suppression and the ensuing oil violence.

### *4.5.3 The nature of the current natural resource arrangement*

The ownership of oil resources in Nigeria vests in the state and is entrenched in the Constitution of the Federal Republic of Nigeria and other related legislative instruments.[689] All lands under the air and beneath the sea with minerals in commercial quantity shall be acquired by the FGN in accordance with the Land Use Act. Therefore, the FGN derives and controls the revenue from oil resources.[690] Apart from the 1960 and 1963 constitutional provisions, changes to the revenue derivation proportion were arbitrarily imposed by military decrees.[691] These were implemented without wide consultation, particularly with the people of the crude oil-producing states of the

[686] ibid.
[687] ibid at 326.
[688] ibid.
[689] Aladeitan (n 536) at 170.
[690] ibid at 172.
[691] Paul Orogun, 'Resource Control, Revenue Allocation and Petroleum Politics in Nigeria: The Niger Delta Question' (2010) 75(5) GeoJournal 459 at 486.

federation.[692] Nigeria is currently divided into six geo-political precincts for administrative expediency: North-West, North-East, North-Central, South-West, South-East, and South-South. All South-South states, including Akwa-Ibom, Bayelsa, Cross-River, Delta, Edo and Rivers, are Niger Delta states. With the exclusion of Abia and Imo of the South-East Zone and Ondo state of the South-West Zone, they constitute the oil-bearing region of Nigeria and are also the minority states in Nigeria. This minority status has been badly affected in terms of revenue allocation in Nigeria ever since oil became the mainstay of Nigeria's economy.[693]

Over the years, 90 per cent of the revenue accruing to the government has been from oil exports.[694] However, political elites at the centre have devised and included other non-resource derivation criteria to fund the country's public sector and socio-economic development.[695] This became a standard used by the government to allocate funds to the previously constituent 12, 19 and currently 36 states in the federation. Geopolitical and strategic positions became prerequisites for determining and disbursing revenue

[692] ibid.

[693] Chuks Egugbo, 'Resource Control and the Politics of Revenue Allocation in Nigeria Federation' (2016) 5(4) International Journal of Arts and Humanities at 187.

[694] Orogun (n 691) at 486. See also Emmanuel Ojo, 'The Politics of Revenue Allocation and Resource Control in Nigeria: Implications for Federal Stability' (2010) 7(1) Federal Governance at 31 <https://www.ssoar.info/ssoar/bitstream/handle/document/34277/ssoar-fedgov-2010-1-ojo-The_politics_of_revenue_allocation.pdf?sequence=1&isAllowed=y&lnkname=ssoar-fedgov-2010-1-ojo-The_politics_of_revenue_allocation.pdf> accessed 9 August 2023. He bemoans the inability of the Nigerian state to commensurately compensate the oil-bearing Niger Delta. The Niger Delta is now one of the most wretched communities in the world. There has been an upsurge in economic nationalism and a huge demand for institutional reforms, including the amendment of the Nigerian Constitution to make oil exploration and exploitation a joint federal–state affair, rather than an exclusively federal affair.

[695] ibid. This is captured as the main economic objective of the 1999 Constitution of Nigeria as amended to secure the maximum welfare, freedom and happiness of every citizen on the basis of societal justice, equality of states and opportunity. Section 162(1) of the Constitution established a 'Federation Account' to which all revenues collected by the FGN are paid. Section 162(2) then enacts the principle of allocation which comprises population density, equality of states, internal revenue generation, land mass and terrain. However, this proviso is subject to an overriding proviso which states in part that 'provided that the principle of derivation shall be constantly reflected in any formula as being not less that thirteen percent of the revenue accruing to the federation account directly from any natural resources as an overriding allocation principle of the Federation Account'. See also Phillip Okolo and Raymond Okiemute, 'Federalism and Resource Control: The Nigerian Experience' (2014) 4(2) Public Policy and Administration Research 99 at 105. They confirm that the revenue allocation is creating intense controversy in Nigeria because federally collected revenue from oil forms about 90 per cent of the government revenue that is used for development initiatives.

from oil sales in the Nigerian polity.[696] The issues considered were population size, land mass, parity and equity of all constituent states, number of local council districts in each state, and the revenue generation ability of each federation state.[697]

Egugbo opines that the key element that triggered the resource control agitation in the Niger Delta was the abandonment or de-emphasis of the derivation principle of revenue-sharing in the Nigerian federation.[698] Economic differences and systematic inequalities are deeply rooted in Nigeria's fiscal federalism mechanisms. This has led to perceived unfair resource control and revenue allocation, and the political marginalisation of ethnic minorities.[699] This demographic standard has had a severe impact on the minority states in the Nigerian federation that are rich in oil resources.[700]

The acrimony about the current fiscal federalism, derivation formula and regional resource control in Nigeria is based on asymmetrical political domination by the majority ethnic group.[701] This domination extends to security matters, judicial matters and fiscal allocation. Ethnicity and tribalism have become defining features of government and politics in modern-day Nigeria.[702] According to Orogun:

> [f]iscal federalism and revenue appropriations formulas in Nigeria, have fostered an entrenched pattern of ethno-hegemonic control of the power of the purse by the demographically more numerous and ethno-regionally more dominant Hausa-Fulani-Northerners at the expenses of the Southern ethnic minority communities located in the oil-rich Niger Delta region …. [P]olitical domination at the central government constitutes the crux of energy-politics, resource control and the discords over derivation principles.[703]

It is clear that ethnic groups' entitlement has created faultlines in Nigeria's implementation of fiscal federalism. This entitlement has created a huge socio-

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[696] ibid. See also Ojo (n 694) at 31, who states that '[t]he principle of derivation in revenue allocation has been consciously and systematically obliterated by successive regimes, resulting in the drastic reduction of the derivation principles from 100 percent in 1953 to 50 percent in 1960, 45 percent in 1970, 20 percent in 1975, 2 percent in 1982 to 13 percent in 1992 till date'.

[697] ibid.

[698] Egugbo (n 693) at 191.

[699] Orogun (n 691) at 486.

[700] ibid.

[701] ibid at 488.

[702] ibid.

[703] ibid at 489.

economic challenge for the government, as well as the multinational oil corporations operating in Nigeria.[704] The incessant demands for resource control by the people due to their poor socio-economic advancement will continue unabated in the absence of an equitable oil derivation mechanism.[705]

Following the advocacy for natural resource control from the South-South geopolitical zone of Nigeria based on constitutionally aligned derivation principles,[706] their Northern counterparts have consistently resisted the agitation, regarding any attempt to allow states to control their resources as a recipe for the disintegration of the Nigerian federation.[707] Dangaladima presents the Northern position in a newspaper article titled 'States Cannot Control Resources'. He dismisses the demand for resource control on the proper derivation principle as unrealistic. He argues that 'the people of oil-bearing states only migrated to settle in their present abode … met the land and everything there and therefore cannot claim the resources to be their own'.[708] In a similar vein, Yakassi describes the unfortunate position of the North regarding the resource control issue. He notes that all the Constitutions that were operational in Nigeria from the colonial era until the present have always placed the control of natural resources on the federal government.[709] He further argues that the central government naturally controls oil mineral deposits worldwide and the Nigerian government should not deviate from this acceptable standard. Yakassi reminds the Niger Delta and the people of the South-South geopolitical zone that when the Biafran Republic was declared in 1967 by Colonel Odumegwu Ojukwu, all the people in Nigeria made a sacrifice to liberate them.

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[704] ibid at 490.

[705] ibid.

[706] Abubakar Hassan and Ogag Ari, 'Fiscal Federalism and Resource Control in Nigeria' (2023) 4(1) Zamafara Journal of Politics and Development 118 at 122, who state that for years there has been agitation, primarily by Southern states – the South-South geopolitical zone – for restructuring to 'true federalism'. The agitation has been ongoing since the Nigerian state was established. The agitation began as a dispute about how many natural resources should go to the collective and/or federal pool. See also 'South-South Demands Restructuring, Resource Control, True Federalism' *Nigerian Business Day* 24 November 2020 <https://businessday.ng/lead-story/article/south-south-demands-restructuring-resource-control-true-federalism/> accessed 9 August 2023.

[707] Okolo and Okiemute (n 695) at 103.

[708] 'Report on States Control of Resources' *Punch* 6 April 2001.

[709] 'Report on South - South Position on Control of Resources' *Guardian* 20 May 2001.

Yakassi explains why every Nigerian deserves to share in the resources derived from the Niger Delta.[710] The 19 Northern state governors made their position clear on this issue of natural resources control in a communiqué issued at the end of one of their consultative meetings in Kaduna, Nigeria, rejecting the 'true federalism' position of the South-South geopolitical zone as articulated by its governors. They maintained that the actualisation of such a position would have grave implications.[711] Presently, even with the ethnic dimensions of Nigeria's fiscal federalism, the fourth schedule of the Nigerian Constitution anticipates that the third tier of government will provide certain socio-economic support directly to the people through the accruals from natural resource exploitation by the state. This arrangement is instituted through the joint account allocation policy of the state and local government areas in the 1979 Constitution of Nigeria.[712] It was part of the recommendation of the local government reform panel established in 1976. However, in 1989, it was discontinued by the former military head of state of Nigeria, Ibrahim Babangida, as a result of anomalies arising from its implementation.[713] Local government has struggled to fulfil its basic obligations with regard to the socio-economic development of the people.[714] This has been attributed largely to s 162 of the Nigerian Constitution, which allows the state governor absolute discretion over the finances that accrue from natural resources to the local government areas.[715] Issues of undue deductions and the mismanagement of local government funds have negatively affected socio-economic development. An argument against allowing local councils to administer their finances has been raised, because the persons who are becoming local government administrators are not trusted to manage the resources of local councils prudently.[716]

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[710] ibid.

[711] 'Rejecting the 'true federalism' position of the South – South Geopolitical Zone *This Day* 15 April 2001.

[712] See the 1979 Constitution of Nigeria <http://www.constitutionnet.org/sites/default/files/nig_const_79.pdf> accessed 23 August 2022.

[713] See Samuel Ogundipe, 'Special Report: How Nigerian Law Contributes to Abject Poverty in Niger Delta Communities Despite Decades of Oil Wealth' *Premium Times* 1 August 2017 <http://www.premiumtimesng.com/news/headlines/238753-special-report-nigerian-law-contributes-abject-poverty-niger-delta-communities-despite-decades-oil-wealth.html> accessed 23 August 2017.

[714] ibid.

[715] Section 162 of the 1999 Nigerian Constitution <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> accessed 23 August 2017.

[716] Ogundipe (n 713 ).

Fiscal responsibility is of fundamental importance if a state like Nigeria is to benefit fully from its oil revenue.[717] A former managing director of the World Bank Group stated that:

> [p]roper management of petroleum revenues depends on a number of factors, including institutional capacity and more importantly, the quality of governance. Where governance is poor, there is little chance that sound policies will be implemented …[718]

This position confirms that socio-economic development will follow on sound governance devoid of underhand practices. Nuhu Ribadu, a former head of Nigeria's anti-corruption agency, put the Nigerian situation into perspective and asserted that '[t]he oil money fuelled the corruption, and the corruption took over our engine of Government. It became a way of life.'[719] Oil industry contracts became embroiled in corruption. These contracts involve oil operations and range from development projects to infrastructure. Associates of military administrators, government officials and traditional rulers became the recipients of such contracts.[720] This gave the middle management of oil companies and contractors an opportunity to appropriate a percentage.[721]

In 1999, the democratic government of the former president of Nigeria, Olusegun Obasanjo, promised to combat corruption, and cancelled the contract for 16 oil exploration blocks awarded irregularly under the previous military regime.[722] About 11 of those oil blocks had been awarded to indigenous companies with strong links to senior military officials. An attempt to renegotiate the irregular oil blocks came under

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[717] Rosenstein (n 650) at 16.

[718] B Mundial, 'Making Petroleum Revenue Work for the Poor: Transparency and Good Governance Dominate Discussion on Petroleum Revenue Management' (2002) Comunicado de Imprensa.

[719] Rosenstein (n 650) at 17. See also Alexander Gillies, 'Reforming Corruption out of Nigerian Oil? Part One: Mapping Corruption Risks in Oil Sector Governance' (2009) Centre of International Studies, University of Cambridge at 2, who argues that '[o]il wealth also fuels the instability, corruption and patronage-driven politics which characterise governance in the country'. <https://www.cmi.no/publications/file/3295-reforming-corruption-out-of-nigerian-oil-part-one.pdf> accessed 9 August 2023.

[720] ibid at 25.

[721] ibid.

[722] ibid. See Sayne (n 649). In order to end such corrupt practices, President Obasanjo allegedly made Nigeria's oil block bid rounds more competitive and transparent. For the first time, the government was able to publicly advertise all available oil blocks and the selection criteria were disclosed.

protest by means of a petition to the House of Senate in March 2000.[723] The process was challenged for being unfair, as it excluded indigenous oil companies from being part of the renegotiation process. The process favoured the MNCs whose oil blocks were located in what are considered the most sought-after oil exploration fields.[724] This event shows how the potential socio-economic benefits of oil resources play second fiddle to the personal interests of public officials. The status quo that existed during the military dictatorship has not changed much.

## 4.6 Conclusion

Nigeria's oil resource development has been used as a case study to measure Africa's socio-economic development through natural resources. This chapter examined natural resource development in Nigeria during the colonial and independence periods in the context of the political economy. The chapter established that the ownership and governance of oil resources in Nigeria were vested in the British Crown through colonial legislation that excluded the indigenous people from being part of the ownership and governance of their natural resources. The chapter also revealed that natural resource acquisition was the main priority of the colonialist incursion, as opposed to the socio-economic well-being of the colonised people.

The assessment of the post-independence legislation regulating the ownership and governance of natural resources identified a colonialist pattern that the FGN adopted. The result is that the people are intentionally excluded, and the applicable international law rights that should be shared by the people and the state are denied to the people. The government has appropriated the right to natural resources that should be shared by the people and the state for its own political ends. The chapter demonstrated the inconsistency in the principle of natural resource derivation, tainted with an ethnic bias. This triggered the Nigeria and Biafra civil war, and it is currently creating a restive situation in Nigeria and the Niger Delta region in particular. This chapter argued that the ownership and governance of natural resources by the people and the state remains a key issue. The constitutional and statutory provisions that vest ownership and governance in the FGN have continued to generate contestation, debate and legal

[723] ibid.
[724] ibid.

opinions about where the true ownership and control of natural resources should reside.

The chapter argued that Nigeria's current practice of natural resource development is founded in and driven by exploitation and is therefore opposed to the core socio-economic advancement of the people. The legislative provisions regulating natural resource development are repressive and lack genuine people-orientated values. The FGN is given excessive ownership and control rights; the people whose communities own the natural resources face the daily devastation of the exploration for and exploitation of natural resources in their communities. The chapter highlighted that the current regulatory regime in Nigeria is devoid of the principle of PSNR in relation to the shared ownership and governance of natural resources. The chapter established that the principle of PSNR has not been explicitly infused within the legislative framework for the governance and management of natural resources in Nigeria. The chapter also showed that the state has directly and/or indirectly consciously abused the extant principle of PSNR, thus depriving the people of socio-economic upliftment.

# CHAPTER 5:

# THE OWNERSHIP AND GOVERNANCE OF NATURAL RESOURCES IN SOUTH AFRICA

## 5.1 Introduction

This chapter focuses on the ownership and governance of mineral resources in South Africa. South Africa is ranked among the top 50 mining countries in the world.[725] The wealth of the mining industry is the mainstay of the South African economy.[726] The industry contributes over R300 billion to the South African gross domestic product (GDP), and is thus the economic arrowhead of many communities in the country.[727] South Africa has steadily maintained its position as one of the world's top gold and diamond producers.[728] In the 1980s, the mining industry, which served as the pillar of the South African economy, was the second-largest contributor to the country's GDP, contributing 22 per cent per year. However, since 2016, the GDP contribution from mining declined to 8 per cent and then to 7 per cent in 2018.[729] Gold and diamond mining are central to economic activity in South Africa and they remain a huge industry by any standard.[730]

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[725] Talifhani Khubana, Chantal Rootman and Elroy Smith, 'Antecedent of Shared Value: Perception within the South African Mining Industry' (2022) 19 Journal of Contemporary Management 132–167 at 133.

[726] Stewart Goodman, Agesan Rajagopaul and Ziyad Cassim, 'Putting the Shine Back into South African Mining: A Path to Competitiveness and Growth' (McKinsey & Company 2019) <https://www.mckinsey.com/~/media/mckinsey/featured%20insights/middle%20east%20and%20africa/putting%20the%20shine%20back%20into%20south%20african%20mining/mck-putting-the-shine-back-into-south-african-mining-a-path-to-competitiveness-and-growth.pdf> accessed 20 September 2023.

[727] ibid.

[728] Kaberuka (n 1) at 64, 69.

[729] Khubana (n 725) at 133.

[730] Desmond Houghton, *The South African Economy* (1976) at 102. See Victor Oluwole, 'African Giants: The 10 Largest Economies on the Continent' *The Business Insider Africa Report* (24 July 2023). South Africa ranks as the third largest economy in Africa and commands a GDP of USD406 billion. It is endowed with a wealth of mineral resources and some well-established industries which attract global attention. See Remigius Nnadozie, 'Access to Basic Services in Post-Apartheid South Africa: What has Changed? Measuring on a Relative Basis' (2013) 16 *The African Statistical Journal* at 82, which states that South Africa is endowed with vast mineral resources and strong state institutions compared to other sub-Saharan African countries. It is considered an upper middle-income country on par with advanced emerging economies like Brazil, Mexico and India.

The mining of natural resources (gold and diamonds) began in earnest between the 1860s and the 1880s.[731] Both blacks and whites formed part of the rush for the new-found natural resources, participating in the diggings.[732] This discovery of mineral resources stimulated the conflict of the 1870s and the 1880s.[733] This eventually culminated in the South African (Anglo-Boer) War known as the 'mineral revolution'.[734] The discovery of mineral resources fundamentally symbolised the mining development in the Witwatersrand.[735] Colonisation established a clear divide between privileged individuals and native South Africans, who were predominantly black. Thus, the exploration for and exploitation of natural resources were confined to a very small group.[736] As a result, from the nineteenth century until recently, the material privilege of white South African colonialists and their descendants was embraced and accepted.[737] Economic considerations essentially encouraged the colonial expedition.[738]

The unification of South Africa resulted in an economic boom in natural resources, which exposed the country to significant capitalist and monopolistic influence.[739] Gold and diamond exploiters with lucrative claims made a lot of money from mining, one example being a diamond trader like Cecil Rhodes.[740] De Beers Consolidated Mines, a company owned by Cecil Rhodes, acquired the diamond mine monopoly.[741] Similarly, a handful of white businesses took over and controlled all the gold mines.[742] The capitalist and monopolistic path was the result of greed and the colonialist

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[731] Douglas Farnie, 'The Mineral Revolution in South Africa' (1956) 24(2) South African Journal of Economics 125–136 at 125. See also Alan Lester, Etienne Nel and Tony Binns, *South Africa Past, Present, and Future: Gold at the End of the Rainbow* (Longman 2000) at 3. See also Nigel Worden, *The Making of Modern South Africa* (Blackwell Publishing 2000) at 7.

[732] Worden (n 731) at 43.

[733] ibid.

[734] ibid.

[735] ibid.

[736] Lester (n 731) at 3.

[737] ibid.

[738] ibid.

[739] Robert Ross, *A Concise History of South Africa* (Cambridge University Press 1999) at 55.

[740] ibid. See Leonard Thompson, *The History of South Africa* (Yale University Press 2000) at 114. In 1889, the British administration empowered a commercial company dominated by Cecil Rhodes – prime minister of the Cape Colony and the most powerful man in the diamond- and gold-mining industries – to annex and administer territories north of the Limpopo.

[741] ibid.

[742] ibid at 65.

disposition that allowed for maximum wealth accumulation, the absolute subjugation of Africans, and the control of South Africa.[743] The policy of apartheid in 1948 introduced a more aggressive dimension to the already racially segregated South Africa.[744] Africans were at the receiving end of economic hardship resulting from the harsh natural resource ownership and governance mechanisms entrenched by whites.[745]

The African National Congress (ANC) became part of the political liberation movement involved in human rights protests in the 1960s.[746] South Africa was engulfed in uprisings, which prompted certain reforms in the 1980s.[747] In 1990, apartheid was abolished, and liberation movements, including the ANC, the Pan African Congress (PAC) and the South African Communist Party (SACP) were unbanned. Negotiations for a new democratic South Africa started in 1990 and were concluded in 1994. Among the initiatives to rebuild an inclusive economy was the Reconstruction and Development Programme (RDP).[748] The RDP was designed to ensure sustainable economic development and address the existing economic injustice.[749] The achievements of the RDP were minimal because it lacked a clear policy direction. However, the RDP appeared to lean more towards a broad-based social and economic development plan.[750] The government could not provide a clear direction on macro-economic policy, and therefore adopted the Growth, Employment and Redistribution

[743] ibid. According to Ross, when Africans sent a delegation to London to petition about the passing of the Union of South Africa Act, which further reduced them to mere spectators in their affairs, '[t]he British government was much more concerned to reconcile the Afrikaners to the imperial connection than to address black grievances. It was more than happy to treat South Africa as a white dominion, run, as were Australia and Canada.'

[744] Thompson (n 740) at 189: 'The term apartheid, however, soon developed from a political slogan into a drastic systematic program of social engineering. The man largely responsible for that development was a Hendrick Frensch Verwoerd.'

[745] ibid at 190. See also Worden (n 731) at 108, 109.

[746] Lester (n 731) at 185.

[747] ibid at 205.

[748] This was the socio-economic framework adopted by the ANC in 1994 <https://www.gov.za/faq/finance-business/where-do-i-get-copy-reconstruction-and-development-programme-rdp> accessed 31 August 2023.

[749] ibid at 248.

[750] ibid.

(GEAR) policy[751] in 1996.[752] The ANC Youth League (ANCYL) proposed the nationalisation of mines in South Africa to address the country's socio-economic inequalities. The ANCYL championed a discussion document entitled 'Towards the Transfer of Mineral Wealth to the Ownership of the People as a Whole: A Perspective on Nationalisation of Mines'[753] to persuade the ruling party to nationalise mines in South Africa. The document was a concrete resolution about the nationalisation of mines, considering the Freedom Charter requirements of people sharing in the country's wealth.

This chapter considers natural resource development in South Africa as part of the study's analysis of the ownership and governance of natural resources in Africa. It assesses gold and diamond mining developments in South Africa from a legal perspective. The chapter starts by exploring natural resource ownership and governance in the colonial, apartheid and constitutional democracy periods. It reflects on and critiques the current legal framework for natural resources, and its impact on the socio-economic development of the people. The chapter further discusses incidental matters arising from the natural resource endowment. The chapter gauges

[751] This was an ANC government policy that focused on rebuilding and restructuring the economy, bearing in mind the injustices and inequities of the past. <https://www.gov.za/sites/default/files/gcis_document/201409/gear0.pdf> accessed 31 August 2023.

[752] ibid at 252.

[753] ANCYL discussion document 'Towards the Transfer of Mineral Wealth to the Ownership of the People as a Whole: A Perspective on Nationalisation of Mines' (2010) at 1 <https://www.politicsweb.co.za/politics/ancyl-plan-for-nationalising-the-mines> accessed 21 August 2022. See <http://www.fin24.com/Economy/ANC-We-dont-oppose-nationalisation-20110805> accessed 21 August 2022. See also <http://old.leadershiponline.co.za/articles/politics/1809-nationalisation> accessed 21 August 2022. '[T]he ANC Study Group on State Intervention in the Minerals Sector finally briefed the party's national executive committee on its long awaited report … Many incorrectly interpreted the report's rejection of nationalisation as the ANC's final word on the subject.' International comparative research was launched based on the 'premise of a resolution adopted at the ANC's 52nd national conference in Polokwane' which the ANCYL seem to have copied in terms of its nationalisation demand. '[T]he report proposes … No outright nationalisation with or without compensation, A 50% tax on the sale of mining rights to prevent speculation; A resource rent of up to 50% must be imposed on "super profit", defined as anything more than 22% return on investment … Government management of the industry through a new "super ministry" of mining created by combining the appropriate elements of the departments of trade and industry, mineral resources, energy, public enterprises, economic development and science and technology'. The former ANCYL leader, Julius Malema championed the discussion document on the nationalisation of mines, but he was expelled from the ANC in 2012. He formed a new political party, the Economic Freedom Fighters (EFF) in 2013. The party's policy position replicates the ANCYL discussion document on natural resources, and advocates the takeover of all strategic sectors of the economy.

the effect of natural resource governance on the socio-economic development of African people. The chapter also seeks to capture the problematic experience of natural resource governance and control and align them with the proposition on the collective governance of natural resources as outlined in chapter 3 in the discussion of the ECSC / EU and AU supranational provisions.

## 5.2 Historical background to natural resource ownership and governance in South Africa

Pre-Union South African mining legislation emerged in the Cape Colony and subsequently in the Boer colonies.[754] Africans were dispossessed of large portions of their productive land. The mining legislation was intended to entrench white economic domination by developing mining activities. The 1813 legislation instigated by Sir John Cradock in the Cape Colony,[755] the Grondwet van de Zuid-Afrikaanse Republiek enacted in the Transvaal in 1858,[756] the Precious Metal Ordinance 3 of 1904 in the Republic of the Orange Free State,[757] and the Natal Mines Act 43 of 1899[758] provided mechanisms for the control of the new-found natural resources on the land seized from Africans.[759]

The 1813 Proclamation transformed the land tenure systems comprising freehold and loan occupation into perpetual quitrent holdings, also known as *erfacht*.[760] However, whether the holder of a quitrent had the right to minerals depended not on the statute but on the nature of the original grant, which vested in the grantee's rights to

[754] Elmarie van der Schyff, 'South African Mineral Law: A Historical Overview of the State's Regulatory Power Regarding the Exploitation of Minerals' at 136 <https://repository.nwu.ac.za/bitstream/handle/10394/16988/New%20contree-2012-64-Van%20der%20Schyf.pdf?sequence=1> accessed 25 September 2023.

[755] See also the Mining Lease Act 12 of 1883, the Minerals Land Leasing Act 9 of 1877, and the Precious Stones and Minerals Mining Act 19 of 1883 <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01695.htm > accessed 30 August 2022.

[756] ibid. See also Ordinance 5 of 1866.

[757] ibid. See also Ordinance 8 of 1904.

[758] ibid. See also Law 16 of 1869.

[759] ibid at 137–145.

[760] Sir John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure, 6 August 1813. According to the Preamble of the Perpetual Quitrent Proclamation, its purpose was to improve the cultivation of land in the Cape Colony by giving security of title to the non-indigenous occupiers of loan places by converting loan places into perpetual quitrent. See also Van der Schyff (n 754) at 136.

minerals.[761] The quitrent holder had no right to minerals at face value.[762] Section 4 of the Proclamation stated: 'Government reserves no other right, but those of mines of precious stones, gold, or silver … other mines of iron, lead, copper, tin, coal slate or limestone are to belong to the proprietor.'[763]

This triggered the development of a new mining dispensation in the Cape Colony, as the reservation of rights to precious stones and minerals was strongly emphasised in the mining legislation applicable to the colony.[764] The Precious Stones and Minerals Mining Act extended the issuance of prospecting licences to private land, where the right to precious stones or minerals had been reserved to the state without the owner's consent.[765] The landowner was compensated for the surface damage by allocating half of the licence fees.[766] In 1858, following the approach in the Cape Colony, the Grondwet van de Zuid-Afrikaanse Republiek[767] was enacted in Transvaal. Section 7 confirmed that all land not yet alienated was state property accessible to the public.[768] Section 29 further confirmed that the owner of land where mineral resources were discovered would be obliged to sell such land to the state for a reasonable fee.[769] It was repealed by s 68 for its expropriation effect.[770] However, similar to the approach in the Cape Colony, base minerals and precious minerals were differentiated in Law 1 of 1877, allowing the state to take full control of the mining of precious stones and metals.[771] This section provided that the mining rights concerning all precious stones and minerals belonged to the state, except for rights previously obtained by private persons. When precious metals and stones were discovered on private land, the state could take over the diggings administration upon the payment of compensation.[772] The Act aimed to reserve the right to mine precious stones and metal for the state and to

[761] See Gilbert Stone, *The Mining Law of the British Empire and of Foreign Countries* vol 3 (HM Stationery Office 1922) at 6.
[762] ibid.
[763] Sir John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure (n 760).
[764] ibid.
[765] Precious Stones and Minerals Mining Act 19 of 1883.
[766] Section 23 of the Precious Stones and Minerals Mining Act 19 of 1883.
[767] Constitution of the South African Republic.
[768] Section 7 of the Constitution of the South African Republic.
[769] Section 29 of the Constitution of the South African Republic.
[770] ibid.
[771] See s 1 of the Base Minerals and Precious Minerals Law 1 of 1877.
[772] ibid.

recognise the state control of the digging activities, including both on private land.[773] The 1904 Precious Metal Ordinance[774] in the Orange Free State, unlike the legislative provisions of the Cape Colony and Transvaal, did not particularly reserve the right to mine and remove precious metals to the state. However, it did restrict the right of people to mine them, which had the same effect of reservation to the state.[775] Base metals and minerals were governed by Ordinance 8 of 1904, which provided for the right of the landowner to prospect.[776] Thus, any prospector could obtain a licence with the landowner's consent. The state's interest was protected by the state royalty. Nonetheless, on Crown land, all precious stones and base minerals were reserved for the Crown in terms of the Crown Land Disposal Ordinance of 1908.[777] Before the enactment of the Natal Mines Act of 1899,[778] landowners' rights were constrained because prospecting on private land without the consent of the owner was allowed. Because of the principle, the right to mine all minerals, bases and precious stones was vested in the state. However, the Natal Mines Act of 1899 changed the situation with regard to coal, limestone and the mining of other specified minerals by granting rights to the landowner.[779]

It is clear from the above that the colonial government exercised ownership and governance of mineral resources using strict regulatory powers. Even though the common-law maxim *cuius est solum* was applicable in South Africa, the rights of private landowners, particularly black Africans, were intensely curtailed. This shows the systematic colonial economic exploitation perpetrated against black Africans who were not involved in the legislative enactments. The post-Union era did not change the *status quo* even though the individual South African colonies united. Section 135 of the South Africa Act of 1909 provided that the existing legislation of the colonies continued to apply until expressly repealed.[780] Section 123 further provided that the

[773] ibid.
[774] See the Precious Metal Ordinance 3 of 1904.
[775] Michael Dale, 'A Historical and Comparative Study on the Concept and Acquisition of Mineral Rights' (PhD thesis, University of South Africa, 1979) at 206.
[776] See the Precious Metal Ordinance 8 of 1904.
[777] See the Crown Land Disposal Ordinance 13 of 1908.
[778] See the Natal Mines Act 43 of 1899.
[779] See s 59 of the Natal Mines Act 43 of 1899.
[780] See s 135 of the South Africa Act of 1909 <https://media.law.wisc.edu/s/c_8/jzhy2/cbsa1.pdf> accessed 22 August 2023.

control and management of the mines in the colonies would be vested in the Governor-General in Council.[781]

The dawn of apartheid in 1948 deepened the segregationist plan with regard to Africans.[782] The Second World War brought economic and social growth to South Africa as industrial and business activities in wartime created a great demand for mineral resources and other industrial materials.[783] Whites and Africans competed for employment, which became a contentious issue. By the end of the war, the industrial sector had become the main productive economic base of South Africa.[784] As a result, a huge number of whites and Africans were living in the cities, and competing for jobs. The tremendous economic growth experienced in wartime placed pressure on the harsh segregationist policies in places of work and the expanding urban environment.[785]

Apartheid was imposed through an intricate series of laws and regulations intended to separate the races and to ensure that blacks would be subservient to white rule.[786] There was absolute control of every aspect of citizens' livelihoods with regard to race. This control resulted in the continued oppression of most South African citizens, particularly Africans. The country's economy was very stable as foreign investors swamped the country and made astounding profits from the exploitation of natural resources.[787] The repression associated with apartheid also meant that blacks were paid very low wages. Businesses operating in South Africa made profits averaging almost 25 per cent compared to rates of 6.5 per cent in Britain and 4.1 per cent in

[781] Ibid. See s 123 of the South Africa Act of 1909.

[782] John Luiz, 'The Evolution and Fall of the South African Apartheid State: A Political Economy Perspective' (1998) 26 UFAHAMU 49 at 51, 52.

[783] Nancy Clark and William Worger, *South Africa: The Rise and Fall of Apartheid* (Longman 2011) at 38.

[784] ibid.

[785] ibid.

[786] ibid at 68. See Thompson (n 740) at 190, who states that the 'National party government applied apartheid in a plethora of laws and executive actions. At the heart of the apartheid system were four ideas. First, the population of South Africa comprised four "racial groups" – white, coloured, Indian and African – each with its own inherent culture. Second, whites, as the civilised race were entitled to have absolute control of the state. Third, white interests should prevail over black interests; the state was not obliged to provide equal facilities for the subordinate races. Fourth, the white race group formed a single nation, with Afrikaans- and English-speaking components, while Africans belong to several distinct nations or potential nations – a formula that made the white nation the largest in the country.'

[787] ibid.

Germany in the 1980s, respectively.[788] The apartheid period also converged with the republican era in South Africa in 1961, which consolidated the major regions into one entity.[789] This fused the pre-and post-Union legislation into four Acts that became applicable in the Republic of South Africa.[790]

The repressive laws that made Africans subservient to white rule encouraged the white minority's use and enjoyment of the natural resource wealth at the expense of Africans who were excluded from the economy.[791] Despite the improvement in the economy, Africans were worse off as their economic situation did not change for the better. There were no wage increases; the mine wages received by Africans in 1971 were less than what they had been in 1911.[792] Whites' per capita income was about ten times more than that of Africans. Accordingly, in the 1980s, South Africa became known as the country with the most inequitable income distribution from its resources globally.[793]

Apartheid policy was based on the principle of the complete isolation of all racial and ethnic groups in South Africa.[794] This was to guarantee the absolute ownership and governance of natural resources by the whites as opposed to the involvement of Africans, Indians and coloureds.[795] Over 3.5 million Africans were removed from areas considered the economic domain of the white minority in a process that the government referred to as 'erasing black spots'.[796] The government intended to repatriate Africans back to their 'homelands', areas originally proclaimed as African

[788] ibid. See also Allister Sparks, 'Foreign Companies Profit from Apartheid in South Africa' *Washington Post* 10 April 1987 <https://www.washingtonpost.com/archive/politics/1987/04/10/foreign-companies-profit-from-apartheid-in-s-africa/3184f3b1-d568-4d75-a7f3-881a52850ffc/> accessed 24 August 2022. Sparks states: 'At a time of increasing international pressure many foreign investors led by companies from Taiwan and including some from Israel and Hong Kong are streaming in here to take advantage of cheap labour created by the apartheid system. They are setting up factories in tribal "homelands" and large resettlement camps where millions of black people have been relocated under the Pretoria administration's system of racial and ethnic separation.'

[789] Van der Schyff (n 754) at 148.

[790] See the Precious Stones Act 73 of 1964, the Mining Rights Act 20 of 1967, the Mining Titles Registration Act 16 of 1967 and the Atomic Energy Act 90 of 1967.

[791] Clark and Worger (n 783) at 68.

[792] ibid.

[793] ibid.

[794] See Penelope Andrews, 'Apartheid the Legal Death of Black Worker' (1987) at 40 <https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=2257&context=fac_articles_chapters> accessed 22 August 2023.

[795] Clark (n 783) at 70.

[796] ibid.

land and established as reserves by the British colonial government. These areas were deemed unprofitable for white economic interests from the start of the South African conquest in the 1870s and 1880s.[797] The homelands were planned to create ethnic separation, diverting the attention of Africans from the economic exploitation that was entrenched in the apartheid government. The homelands were Transkei, Ciskei (both Xhosa), Bophuthatswana (Tswana), Venda (Venda), Gazankulu (Tsonga), Lebowa (Northern Sotho), Qwaqwa (Southern Sotho), Kwazulu (Zulu), KaNgwane (Swazi) and Kwandebele (Ndebele).[798]

The apartheid government of Prime Minister Hendrik Verwoerd, under the Bantustan Self-Government Act,[799] instituted national political institutions in every homeland. Chiefdoms were resuscitated after over a century of white conquest to assist with the promotion of homeland independence.[800] This process, however, caused great suspicion as traditional native communities were annihilated largely because their chiefs defended natural resources from exploitation by the white settlers. Nonetheless, they became representatives with limited powers to self-govern in the homelands. The homelands were later granted full independence by the apartheid government to run their own affairs.

Although the citizens of these independent homelands were deemed aliens in South Africa, they remained under the firm control of the white South African government. This was a clear attempt to disguise the severe social, political and economic repression of the African majority. In addition, it reduced financial spending on what

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[797] ibid.

[798] ibid at 71. See also Thompson (n 740) at 191: 'The government also transformed the administration of the African population. In 1951, it abolished the official countrywide African institution, the Natives Representative Council. Then it grouped the reserves into eight (eventually ten) territories. Each such territory became a "homeland" for a potential African "nation" administered under white tutelage by a Bantu authority consisting mainly of hereditary chiefs … The legislative framework foreshadowed by Verwoerd was completed in 1971, when the Bantu Homelands Constitution Act empowered the government to grant independence to any Homeland … The Transkei was the pacesetter for this process. The government made it self governing in 1963 and independent in 1976. Bophuthatswana followed in 1977, Venda in 1979 and Ciskei in 1981. As they became independent, their citizens were deprived of their South African citizenship.'

[799] See the Bantu Authorities Act 68 of 1951 and the Promotion of Bantu Self-Government Act 46 of 1959 <https://omalley.nelsonmandela.org/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01899.htm> accessed 8 September 2023.

[800] Clark (n 783) at 70.

the apartheid government considered an unproductive part of the entire population.[801] The constitutional reform and referendum of 1983, which excluded Africans but included and separated the coloured and Indian communities from white parliamentarians, increased the struggle against apartheid.[802] This galvanised African opposition through community civic organisations that comprised the United Democratic Front (UDF). The UDF was an umbrella organisation for community groups that were opposed to apartheid constitutional reforms and supported the Freedom Charter provisions of the then-banned ANC.[803] Protests and opposition around the country shocked the apartheid regime to its foundation. Black trade unions also played a prominent role in dismantling the economic and political apartheid control of resources through protests.[804] The Congress of South African Trade Unions (COSATU), which represented over 30 trade unions, in conjunction with the UDF, organised protests around South Africa against economic conditions and denounced the apartheid structures.[805] These protests exerted so much pressure on the apartheid economy that they were eventually banned. However, the combined impact of international sanctions and internal protests devastated the economy. The prices of gold and diamonds, the most important foreign exchange earners, plunged to half their original prices in the 1980s, and the value of rand tumbled as well.[806] South Africa could not borrow internationally; it spent over half of its foreign reserves between August 1987 and October 1988 on servicing existing loans.[807]

In 1989, the apartheid government, faced with imminent economic collapse, entered into negotiations to dismantle apartheid and remedy the unjust and inequitable economic and political dynamics playing out in South Africa.[808] This triggered the passing of the Minerals Act 50 of 1991. The Minerals Act did not necessarily curtail the entrenched ownership and control exercised by the apartheid government.[809] It

[801] ibid.
[802] ibid at 90.
[803] ibid at 92.
[804] ibid at 99.
[805] ibid.
[806] ibid at 108.
[807] ibid.
[808] ibid at 111. See also Eldred de Klerk, 'South Africa's Negotiated Transition Owning the Process: Public Participation inn Peacemaking' (2002) Accord 13 at 17, 18.
[809] See the Minerals Act 50 of 1991 <https://www.gov.za/sites/default/files/gcis_document/201409/a50-1991ocrs.pdf> accessed 23 August 2023.

differentiated between different classes of land and minerals. Consequently, it recognised that the holders of mineral rights should have the prerogative to decide how proposed mining activities could take place on their land, except in situations which allowed the severance of mineral rights from the landowner.[810] The Act further gave these mineral rights holders the power to consent to the issuing of permits or mining authorisations. However, where the landowner's consent became difficult to obtain, a ministerial authorisation could be obtained to exploit the mineral resources.[811] Kaplan and Dale contend that the Minerals Act intended to encourage the alienation of mineral rights held by the state to allow private entities to gain control of mineral rights.[812] This contention cannot be faulted because the appropriated lands were in private white hands. The policy of racial segregation applied by the state favoured and manifested itself through illegitimate land dispossession and ownership by the same white people.

## 5.3 Legislative regulation of natural resource exploration and exploitation in South Africa

### *5.3.1 Domestic law regulation of land rights*

The principal means by which Africans were deprived of their natural resources was through European colonialists' reprehensible and undue land dispossession. Laws such as the Black Land Act 27 of 1913[813] and the Development Land and Trust Act 18 of 1936[814] were used to dispossess Africans of their right to own and control their own land. Africans were thus intentionally excluded from natural resource exploration and exploitation. African communities were only recently permitted to own land through trust-like arrangements with government representatives, which allow ownership within a specific geographical space that is defined by statute. These constraints on African communities' land rights profoundly affected Africans' ownership and control of, and access to, mineral resources. The common-law position was that 'the owner

[810] See s 5(1) of the Minerals Act 50 of 1991.
[811] See s 17 of the Minerals Act 50 of 1991.
[812] Morris Kaplan and Michael Dale, *A Guide to the Minerals Act* (Butterworths 1992) at 14.
[813] Black Land Act 27 of 1913 <http://www.sahistory.org.za/dated-event/native-land-act-passed> accessed 31 August 2022.
[814] Development Land and Trust Act 18 of 1936 <http://www.sahistory.org.za/dated-event/development-trust-and-land-act-no-18-commences> accessed 31 August 2022.

of land is owner not only of the surface but of everything legally adherent thereto, and also of everything contained in the soil below the surface'.[815]

The above-described trust arrangement for African communities could not directly control the exploitation of mineral resources on their land. The insignificant protection of the interests and rights of the communities thus manifested in the wanton exploitation of people's natural resources. Communities received compensation that was markedly lower than market value for the gross exploitation of their mineral resources, and, above all, there was no adequate consultation in this regard. This had considerable consequences because of the fact that the common law and legislation had acknowledged and conveniently separated mineral rights from ownership rights.[816]

The following discussion analyses the various statutes that characterised the ownership and governance of natural resources, including their exploration and exploitation preceding the enactment of the famous Land Act of 1913.

### *5.3.2 Spheres of ownership and the governance of natural resources*

The applicable regulations that characterised the exploitation of natural resources are distinctive and fall within significant periods of South Africa's history. The regulations were arbitrary and this was reflected in the haphazard nature of overall natural resource exploration.[817] Statutory intervention separated the right to mining from the core mineral right. The state had the statutory authority to explore and control natural resources by granting rights to prospect and to manage mining activity.[818] However, the state did not deprive landowners or mineral rights holders even when prospecting rights had been granted.[819] According to Mostert, the driving force behind the state's early legislative control was to optimally develop natural resources in a way that the

[815] See *Taylor and Claridge v Van Jaarsveld and Nellmapius* 1885-1888 (2) SAR TS 137 at 141; *Macdonald v Versfeld* 1885-1888 (2) SAR TS 234 at 236; *Union of South Africa v Marais and Others* 1920 AD 240 at 246.

[816] See ss 70–74 of the Deeds Registry Act 47 of 1937 <http://www.ruraldevelopment.gov.za/phocadownload/Acts/deeds%20registries%20act%2047%20of%201937.pdf> accessed 15 March 2015.

[817] Hanri Mostert, *Mineral Law: Principles and Policies in Perspective* (Juta 2012) at 19.

[818] ibid at 20.

[819] ibid.

private landowners could not do if sole control was vested in them.[820] It remains to be seen if the nature of this legislative control of mining resources ever translated into broad socio-economic development.

#### *5.3.2.1 First-generation mining legislation (1860–1964)*

State policy endorsed the exploitation of South Africa's natural resources. To attain the desired control, legislation was passed to enhance the state's power over mining natural resources.[821] Moreover, the emerging regulatory support created an economic benefit for the state and the landowners where resources were exploited.[822] The regulatory framework as designed was intended for the white minority, which was considered the key socio-economic and political player. The regulatory framework lacked any socio-economic development considerations designed for the benefit of the majority black population.

The tenets of state legislative control in the first period of natural resource development and management were developed between 1860 and 1960.[823] Hahlo and Khan submit that the emergence of statutory regulation of natural resources was based on giving the state extensive control of such resources.[824]

The colonial legislative regulation of natural resources metamorphosed into union legislation in the Union of South Africa.[825] Thus, the scope of control of natural resources was dealt with in this dispensation according to the nature of the resources and the region in which they were mined. The classification of land where the resources were discovered was also considered.[826] Nevertheless, base and precious metals remained regulated by colonial legislation, but the control mechanism differed in each province.[827] This created an intricate system of natural resources law, which broadened state control over natural resources to varying levels in the different provinces of the Union.[828] This study does not examine the different types of natural

[820] ibid at 21.
[821] ibid.
[822] ibid.
[823] ibid.
[824] HR Hahlo and E Kahn, *The Union of South Africa* (Stevens and Sons 1960) at 762.
[825] Mostert (n 817) at 22.
[826] ibid.
[827] ibid.
[828] ibid at 23.

resources in each jurisdiction in the Union, but considers the legislative regulations in the base metal and precious metal jurisdictions.

The discovery of diamonds in 1867 in Griqualand West inspired the passing of an ordinance to control natural resources in South Africa. Other jurisdictions followed suit.[829] In 1870, in Transvaal, any discoverer of diamonds was expected to pay a certain percentage of the value to the state. This position was further expanded by the Precious Stones and Minerals Mining Act 19 of 1883 of the Cape of Good Hope.[830] This Act applied specifically to Crown land and thus reserved the right to mine natural resources for the Crown-on-Crown land and in certain reservations for the Crown. The Act further elaborated on the provisions for granting prospecting rights as well as for diggers on Crown lands.[831] Private landowners were not required to consent to granting any prospecting authorisation. Likewise, the Crown never deprived private landowners of ownership of any unexplored mineral resources nor suspended their rights to the land. Private landowners retained ownership of natural resources found on their land.[832]

[829] ibid. The same pattern applies to gold mining. Mostert states that the early discovery of gold in 1836 followed the same progression as the discovery of diamonds. The outbreak of conflict among diggers, mine owners and landowners presented a situation which required more than the provisions of the common-law principle. By way of resolution, the government of the South African Republic then lifted the general ban on exploration in 1868. However, payable goldfields were discovered within a short period of time. This led to the enactment of Law 1 of 1871 (the first 'Gold Law'), which aimed to regulate and control deposits of gold as well as precious stones. This legislation reserved the right to mine precious stones and metals to the state. Nonetheless, ownership of the mineral resources concerned never vested in the state. Witwatersrand was considered to have the biggest gold deposits in the world around 1886, which inspired a series of amendments and revisions of the original Gold Law from 1883 to 1899. These amendments were tailored by the Transvaal government to duplicate the same principle as was advocated in the Precious Stones and Minerals Mining Act 19 of 1883 of the Cape Colony and as applied to private land. Thus, the ownership of every precious stone as well as metal became vested in the state. Further legislative imposition in 1885 gave the state the exclusive right to mine and dispose of every precious metal and stones. By 1899, about 18 legislative enactments to control minerals and mining had been endorsed in the Transvaal. They were all included in the Precious and Base Metals Act 35 of 1908 (T) which also became applicable in the Orange Free State and Natal.

[830] See the Precious Stones and Minerals Mining Act 19 of 1883 <https://www.gov.za/sites/default/files/gcis_document/201504/act-36-1976.pdf> accessed 23 August 2023.

[831] Mostert (n 817) at 23.

[832] ibid.

The colonial legislative provisions on natural resources governing the precious stones mining industry eventually became part of the Union legislation.[833] They therefore vested mining rights and the disposition of precious stones in the Crown.[834] However, the Precious Stones Act created a system that conferred certificates on owners and other stakeholders, who were entitled to participate in mining activities. Exploration for precious stones, particularly on vacant and unalienated or alienated Crown land under the title that reserved precious stones to the Crown, was made possible through a prospecting permit. This was comprehensively controlled by the Precious Stones Act.[835]

However, after the Act was amended in 1960, the Precious Stones Amendment Act 12 of 1960 created room for granting leases on precious stones on alienated state land.[836] But, with regard to private land, an owner could explore or perhaps authorise about five individuals with digger's certificates to explore for precious stones.[837] Subsequently, precious stones were discovered in commercial amounts. In that case, the mining commissioner granted a certificate of discovery, allowing the owner or explorer to claim for an undivided share in the mine based on the type of land where the discovery was made. Similarly, there was a provision for owners of surface shares to lay claim to funds collected.[838] However, the precious stones regulatory system never affected the surface rights of landowners of proclaimed land. The Mining Commissioner had to be notified of any discovery of precious stones. The Governor-General decided on the amount of profits a prospector had to pay as a share of the precious stones accrued to the prospector and the Crown.[839]

A prospector who discovered precious metals in the Transvaal or the Orange Free State had to report to the Mining Commissioner in writing. An investigation was then done through the Minister of Mines into the nature and degree of the mineral deposits to confirm the commercial viability of the natural resource.[840] The mineral rights holder

[833] See the Precious Stones and Minerals Mining Act 19 of 1883.
[834] ibid.
[835] Precious Stones and Minerals Mining Act 19 of 1883.
[836] Precious Stones Amendment Act 12 of 1960.
[837] Mostert (n 817) at 23.
[838] ibid.
[839] ibid at 26.
[840] ibid.

became entitled to a piece of land known as 'mijnpacht', which was just a quarter of the portion of land. Upon authorisation of the 'mijnpacht' and a certificate being issued to the holder, the Minister granted the exclusive right to explore and mine precious stones in the 'mijnpacht', which lasted between five and twenty years.[841] Thus, the landowners' rights to minerals underground were restricted. The 'mijnpacht' further granted the landowner a surface right as well as the right to half of the accrued revenue.[842] Certain scholars have submitted that the 'mijnpacht' configuration was economically irrational because it hindered the appropriate exploitation of precious metals.[843] However, it was not legislatively implemented any further after 1964.

This first-generation legislation on the mining of natural resources was characterised by white racial nationalism with colonialist support. It therefore clearly resonated with the policy and quality of legislative enactments of the time. The claims by black Africans or indigenous people to land, as well as other natural resources, were flatly denied.[844] The control mechanisms demonstrated in the diamond fields of Kimberley

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[841] ibid.

[842] ibid.

[843] ibid. See also Cornie van der Merwe, *Sakereg* 2 ed (Butterworths 1989) at 575.

[844] See also Mostert (n 817) at 31. The British-controlled Cape Colony and the Boer republic of the Orange Free State considered the Griqualand-West area where diamonds were found a 'no-man's land' because they had no official claim to it. However, indigenous Griquas and Tswanas were living there and thus controlled the land. Diamond explorers and diggers from various parts of South Africa and the world invaded the land, disregarded the indigenous people's sovereignty over their land, and established their own independent republic. Rules were made by the diggers, who were all Europeans, which precluded black Africans from obtaining licences to operate as diggers in the diamond fields. In view of the racially charged discord, the chief of Griqualand requested the protection of the British Crown for more effective control of the diggers and the situation. However, the Crown promptly annexed Griqualand-West, ignoring the chief's request. Consequently, the Griquas and the Tswanas were dispossessed of any claim they ought to have had to their land or diamonds discovered there. Subsequently, the Cape Colony benefited immensely from the diamond-based economy that evolved in Kimberley, which became the commercial centre of Griqualand. According to Mostert, 'the prosperity of the Cape Colony enabled white colonists to take charge of the economy and to campaign against the African societies within and beyond the Cape'. The Richtersveld situation created further discrimination against and colonial ill-treatment of black Africans. Richtersveld, which fell under Namaqualand, was inhabited by the indigenous Khoi-khoi and San peoples. It was annexed by the British Crown in 1847. However, the discovery of diamond deposits in the land led to the indigenous black people being denied access. The Nama people were forced into an exclusively created reserve which made way for the South African government upon their succeeding to the British colonial government to sustain the state-owned Alexander Bay development corporation. See *Richtersveld Community v Alexkor (Pty) Ltd* 2001 (3) SA 1293 (LCC), *Richtersveld Community v Alexkor* 2003 (6) SA 104 (SCA), and *Alexkor (Pty) Ltd v Richtersveld Community* 2004 (5) SA 460 (CC). The Constitutional Court in the newly democratic South Africa acknowledged the deep-seated discrimination and dispossession of land and other natural

and mineral-rich Richtersveld attested to the complete exclusion of Africans. This study highlights the intense discrimination and prejudice that thrived in the mining industry and the making of natural resource legislation at the time.

#### *5.3.2.2 Second-generation mining legislation (1964–1991)*

Natural resource regulation was characterised by official racial segregation after the National Party came to power in 1948. A homeland policy that supported the superficial 'independence' of Africans in certain areas was committed to by the government.[845] The National Party government declared South Africa a republic and withdrew from the Commonwealth due to its segregation policies. The second generation of natural resource and mining legislation did not shift from the radical position of the earlier laws.[846] Instead, it consolidated the position of natural resource exploitation in post-colonial South Africa. The enactment of the Mining Rights Act of 1967 merged the existing legislation on natural resource exploitation. It further articulated that the right to prospect for and mine natural resources would remain vested in the state. The Precious Stones Act of 1964, supporting the previous legislation, equally vested mining rights and the disposal of natural resources in the state.[847]

The Act did not invest ownership in the state; however, it created a control measure that allowed the state to confer the capacity to exploit natural resources on individuals.[848] The Mining Registration Act 16 of 1967 created the Registrar of Mining Titles office, which compiled a database of statutorily created mining titles. The register was created to capture and record all natural resources titles on natural resources exploitation.[849] The natural resources regulation applicable in this era fell between two fundamentals: absolute state monopoly and somewhat free private enterprise.

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resources from the Nama people of Richtersveld. The court found that the dispossession of land as well as natural resources was discriminatory and racially motivated. Mostert opines that the Richtersveld claim demonstrates the profound level of discrimination ingrained in the fabric of South African society to the extent that the acts and omissions of the government which occurred after the Restitution Act's cut-off date triggered racially discriminatory dispossession.

[845] ibid at 39. See also Thompson (n 740) at 189, 191.

[846] ibid.

[847] ibid. See the Mining Rights Act 20 of 1967 and the Precious Stones Act 73 of 1964.

[848] ibid.

[849] ibid. See also the Mining Registration Act of 16 of 1967 <https://www.gov.za/sites/default/files/gcis_document/201505/act-16-1967.pdf> accessed 22 August 2023.

The Mining Rights Act 20 of 1967 created an obligatory conferral system regarding all natural resource rights. The state's interest in and contribution to natural resource exploitation are significantly reflected as general principles.[850] As reflected in preceding legislative enactments, the state's power to interfere in exercising individual mineral rights was given credence and perpetuated.[851] The Minister was empowered to provide direction to the Department of Mineral and Energy Affairs regarding any investigation into the occurrence of natural resources.[852] The department maintained the existing 'mijnpachten' but also provided for new ones. The Precious Stones Act 73 of 1964, in conjunction with the earlier legislation, provided that holders of rights in private land could explore them upon the issuance of a permit for exploration.[853] Such a right of holdership could be alienated through a contractual arrangement registrable in the Deeds Registry.[854] However, discoveries made on private or alienated state land allowed the owner, leaseholder or holder of mineral rights claims to exploit portions of the natural resources.[855]

African access to the exploration of natural resources was further restricted during this period by the homeland policy, which endorsed the ideals of racial segregation and apartheid.[856] The Tomlinson Commission of 1954's recommendation for economic injection triggered the Bantustan project for economic development.[857] However, development was non-existent because there was no economic support as advocated by the commission. There was no systematic surveillance of natural resources to accelerate mineral wealth.[858] Africans were denied prospecting licences for natural resource exploration. The only exception to this arrangement was private land held in

[850] See the Mining Rights Act 20 of 1967 <https://www.gov.za/sites/default/files/gcis_document/201505/act-16-1967.pdf> accessed 23 August 2023.
[851] See s 11 of the Mining Rights Act 20 of 1967.
[852] Mostert (n 817) at 49.
[853] See s 6 of the Precious Stones Act 73 of 1964.
[854] ibid.
[855] See s 17 of the Precious Stones Act 73 of 1964.
[856] Mostert (n 817) at 51.
[857] The Tomlinson Report was a 1954 report released by the commission for the socio-economic development of the Bantu areas. It was intended to study the economic viability of the native reserves.
[858] Mostert (n 817) at 51.

trust for black people by the South African Bantu Trust.[859] The Bantu Mining Corporation was also entrusted in 1969 with the exploitation of natural resources in the homelands. It served as an agent for African individuals and communities with white companies who had invested in exploiting natural resources in the homelands.[860] The governments of the homelands were neither allowed nor empowered to participate in negotiations for active natural resource exploration and exploitation.

The second generation of natural resources law preserved the common-law position, which vested the right to mineral resources on the land. Likewise, the control and exploitation of the discovered mineral resources were within the domain of the state.[861] Essentially, the Mining Rights Act of 1967 and the Precious Stones Act of 1964 vested the exploration of mineral rights in the state. The state thus bequeaths the same through the common law on the land and mineral rights owners.[862] The clear exclusion of Africans is indicative of the fact that they were not considered by the white majority government with regard to the exploration and exploitation of natural resources. Mostert states:

> The philosophy of state control over minerals during the period 1964 to 1990 resulted in an elaborate system whereby the state, in which the right to mine was vested, conferred rights to mine and prospect to mineral right holders. Though … the state had significant powers of control.[863]

The state's hostile control of natural resources sought to disadvantage Africans but was deemed valuable to the economy. Therefore, legislation enacted in 1964 replaced the colonial and Union era's piecemeal legislation and control mechanisms. This process became very complex due to the political objectives of the apartheid government.

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[859] ibid. See amended Bantu Administration Act of 1973 <https://www.gov.za/sites/default/files/gcis_document/201504/act-7-1973.pdf> accessed 30 August 2023.

[860] ibid.

[861] ibid at 53.

[862] ibid.

[863] ibid at 55.

#### *5.3.2.3 Third-generation mining legislation (1991–1992)*

The government underwent a policy shift on natural resource exploration and exploitation in the 1980s and 1990s. This policy was centred on privatisation and deregulation, and culminated in the Minerals Act 50 of 1991.[864] South Africa was under immense political and economic pressure from the international community to abolish its apartheid regime. Its privatisation and deregulation agenda was focused on transferring state functions and services to the private sector to be regulated by market forces.[865] The country also reduced state regulation of the private enterprise sector. The government was pretending to adhere to the prevailing global economic policy direction by enacting the Minerals Act of 1991 to negotiate an inclusive government. It was suggested that South Africa's economic interest was to simplify its body of natural resource legislation to attract foreign investment.[866] However, Thomas Walde contends that the Minerals Act of 1991 was instigated by minority white capital 'to cement [their] position of privilege by changing the mining law in their favour shortly before a black government came to power'.[867]

The Mining Act of 1991, which came into force in 1992, completely repealed the 1960s mineral resource legislation to achieve the uniform regulation of mineral resources in South Africa.[868] The Act introduced the authorisation system against the previous regulatory system through the conferral of rights. It thus simplified the multifaceted means of natural resource control that had existed. The Act codified the rights of mineral rights holders.[869] Consequently, holders of the rights to mineral resources and persons who had the consent of any holder to exploit were covered by the legislation.[870] The Mining Act brought with it extensive government control of natural resources. Thus, the state was permitted by the Act to effectively control the exploration for and exploitation of natural resources.[871]

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[864] Minerals Act 50 of 1991.
[865] Mostert (n 817) at 57.
[866] ibid.
[867] Thomas Walde, 'Mining Law Reform in South Africa' (2002) 17 Minerals and Energy at 10.
[868] See the Minerals Act 50 of 1991.
[869] See ss 2 to 9 of the Minerals Act 50 of 1991.
[870] ibid.
[871] ibid.

#### *5.3.2.4 Constitutional-era ownership and governance (1994)*

South Africa's situation from 1948 to 1990, prior to the advent of a constitutional democracy, was in conflict with international law, particularly the principle of PSNR.[872] Apartheid was contrary to the law of the UN Charter, norms of human rights, non-discrimination and self-determination that were triggered by the Second World War order.[873] This flows from its foreign policy position that was predicated on state sovereignty and absolute respect for domestic jurisdiction. There was no constitutional provision that recognised or adopted international law principles.[874] Thus, South Africa did not concur with the international law position as illustrated in UN Resolution 1803 on PSNR. The resulting political and legal agenda on human rights, non-discrimination and self-determination prompted by PSNR on the grounds of natural resource exploitation was eschewed by South Africa.[875] The people, particularly Africans, were deprived of their natural resource ownership and control by the colonialist white-dominated government.

Dugard states the following in this regard:

> While South Africa's negative contribution to international law during the Apartheid years was substantial, its positive contribution was minimal … But in large measure South Africa itself opted for exclusion and isolation by refusing to accept the primary values of the post-World War II legal order-racial equality, respect for human rights, and the advancement of self-determination.[876]

However, in 1994, South Africa became a democratic state with an elected democratic President and parliament. The new attitude to international law principles and regulations are considered key pillars of the new democratic dispensation.[877] The dawn of constitutional democracy triggered the merger of all the provinces of South Africa (including the independent states and self-governing territories).[878] The Mineral

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[872] John Dugard, 'International Law and the South African Constitution' (1997) 8(1) European Journal of International Law 77–92 at 77.

[873] ibid.

[874] ibid.

[875] ibid. South Africa voted against UN General Assembly Resolution 1803 (XVII) on PSNR on 14 December 1962.

[876] John Dugard, *International Law: A South African Perspective* (Juta 2005) at 21.

[877] Dugard (n 872) at 77

[878] Mostert (n 817) at 74. See the Constitution of the Republic of South Africa Act 200 of 1993.

and Energy Laws Rationalisation Act 47 of 1994 was enacted to 'provide for the rationalisation of certain law relating to mineral and energy affairs that remained in force in various areas of the national territory of the republic'.[879] This Act was intended to downsize the mineral resource laws in South African territories existing before the constitutional era.[880] Section 2(1) of the Act extended certain mineral laws, as indicated in Schedule 1 of the Act, that were in operation in the former territories or homelands to apply nationally. Similarly, s 3(1) of the Act repealed certain laws as indicated in the second column of Schedule 2 to the extent that they were in force in the remainder of the national territory. The Mineral and Energy Laws Rationalisation Act was intended to repeal certain apartheid laws in the former South African territory to align them with constitutional democratic principles.[881] It also sets the tone for revitalising policy issues and laws in developing South Africa's natural resources to benefit all people, particularly black Africans. This includes ensuring the equitable exploration and exploitation of natural resources to address socio-economic discrimination.

The following discussion analyses the normative constitutional framework and legislation for natural resource ownership and governance considering the PSNR principles.

## 5.4 Critique of the current natural resource ownership and governance framework in South Africa

### *5.4.1 Constitutional framework*

The 1993 interim Constitution of South Africa became active on 27 April 1994 and merged all the provinces of South Africa (including the independent states and self-governing territories).[882] It was the basis upon which the Mineral and Energy Laws Rationalisation Act of 1994 was enacted.[883] The interim Constitution triggered the enactment of other laws to regularise the apartheid-influenced natural resource

[879] See the Mineral and Energy Laws Rationalisation Act 47 of 1994. <https://www.gov.za/sites/default/files/gcis_document/201409/a47-94.pdf> accessed 24 August 2023.

[880] ibid.

[881] See Schedules 1 and 2 of the Mineral and Energy Laws Rationalisation Act 47 of 1994.

[882] Mostert (n 817) at 74.

[883] See s 229 of the Constitution of the Republic of South Africa Act 200 of 1993.

ownership and governance policies and laws.[884] The 1996 Constitution followed the interim Constitution. The 1996 Constitution of South Africa is the product of rigorous and extensive political debate before and after the 1994 election that ushered in a democratically elected government. The country's supreme law holds that no other law or policy document might contradict it because it provides the pillars upon which the mineral policy is anchored. It initiated a unitary government system comprising three tiers: national, provincial and local.[885] The Constitution assigns revenue-sharing arrangements to the national government given the abundance of natural resource wealth. Section 214(1) of the Constitution provides that each province shall be entitled to an 'equitable share' of the income generated by the national government. The Constitution also gives its citizens justiciable socio-economic rights as contained in the Bill of Rights.[886] The national government is obligated to equitably allocate funds for socio-economic development from the state's resource wealth to its constituent parts and the people.

However, custodianship of the natural resources belongs exclusively to the state. This is encapsulated in the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), as discussed below.[887] Essentially, state custodianship of natural resources replaces the unjust and inequitable method used during the apartheid era. The Freedom Charter (1955) created the constitutional basis of custodianship in South Africa.[888] The Charter was drafted in opposition to individuals' and companies' ownership of mineral rights as immovable property.[889] Thus, the Charter stated that 'the people shall share in the country's wealth and mineral wealth beneath the soil … shall be transferred to … the people as a whole'.[890] The Act unequivocally states that

[884] See the Mineral and Energy Laws Rationalisation Act 47 of 1994.

[885] Section 40(1) and (2) of the Constitution of the Republic of South Africa, 1996.

[886] See ss 26 (1), 27(1)*(b)* and *(c)* and 29(1) of the 1996 Constitution. Broadly speaking, socio-economic rights are those rights which entitle the people of South Africa to the material goods necessary for them to live with human dignity and in order to reach their full potential.

[887] Sections 2 and 3(1) of the MPRDA <https://www.capetown.gov.za/en/EnvironmentalResourceManagement/publications/Documents/Minerals-and-Petroleum-Resources-Development-Act-28-of-2002.pdf> accessed 15 February 2016.

[888] Frederick Cawood, 'The South African Mineral and Petroleum Resources Royalty Act – Background and Fundamental Principles' (2010) 35 Resource Policy 199 at 200.

[889] ibid.

[890] Freedom Charter <http://www.anc.org.za/show.php?id=72> accessed 15 February 2016.

the national government is the most appropriate organ to control the fiscal demands emanating from natural resources.[891]

Chapter 2 of the Constitution deals with fundamental rights, such as property linked to natural resources and mining development. The property right provides stability in terms of the development of natural resources in view of past injustices and thus ensures that investors are reassured about policy certainties. Section 25(1) of the Constitution states:

> No one may be deprived of property … and … where any rights in property are expropriated, such expropriation may only continue if it is in the public interest and owners are compensated for any loss.[892]

However, despite this reassurance, the Constitution also provides for land reform to guarantee equitable access to all of South Africa's natural resources.[893]

Section 25 of the Constitution also provides for the restitution of land. African persons or communities can claim the restitution of land that they were dispossessed of based on racial discrimination and the white ruling class' desire to acquire all economically productive land.[894] Section 39 of the Constitution deals with the interpretation of the Bill of Rights. It requires that, when interpreting the Bill of Rights, a court or tribunal must consider international law. This supports the implementation of the ideology of the RDP document. More importantly, this is borrowed from the international law concept of PSNR, which recognises the right of the state and the people to explore for and exploit their natural resources.[895] Clauses dealing with black economic empowerment (BEE)[896] have been directly and indirectly infused into the

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[891] Cawood (n 888) at 200.

[892] See s 25(1) of the 1996 Constitution.

[893] See s 25(4)*(a)* of the 1996 Constitution.

[894] See s 25(7) of the 1996 Constitution. This applies particularly if people were dispossessed of their land based on racial discrimination after 19 June 1913.

[895] UN Resolution on Permanent Sovereignty over Natural Resources <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1803(XVII)&Lang=E&Area=RESOLUTION> accessed 30 August 2023.

[896] Daron Acemoglu, Stephen Gelb and James Robinson 'Black Economic Empowerment and Economic Performance' (2007) <https://www.treasury.gov.za/publications/other/growth/06-procurement%20and%20bee/02-black%20economic%20empowerment%20and%20economic%20performance%20in%20so.pdf> accessed 2 September 2023. The first democratic government was elected in 1994 with a clear mandate to redress the injustices and inequalities of the past and to create a legislative framework

Constitution.[897] The preamble of the Constitution emphasises: 'We, the people of South Africa, recognising the injustices of our past …'.[898] It continues by elucidating the importance of improving the quality of life of all people. The Bill of Rights indicates that all people are equal. To promote substantial equality, the government must take legislative action to protect disadvantaged people from unfair discrimination.[899]

The South African Constitution does not explicitly capture the PSNR provision regarding the inherent right of the state and people to their natural resources. The Constitution also avoids affirming their joint ownership of natural resources. However, the Constitution[900] allows the state to enact laws to address the existing substantial inequality of disadvantaged African peoples whose natural resources were forcefully taken and plundered through racial discrimination and the policies of the apartheid state. In terms of this constitutional provision, there have been attempts to restore the status quo to the advantage of previously disadvantaged African people. The analysis below indicates that the state supervises natural resources, but the question remains if this development has led to socio-economic improvement in the lives of the people.

### *5.4.2 Legislative framework*

The mineral policy steering committee, a tripartite committee comprising business, labour and government representatives, was established to chart a course for the development of mineral policy.[901] A discussion document emerged in 1995, which focused on mineral rights and security of tenure with regard to natural resource management. The document made the following policy proposals:

(a) Mineral rights must be returned to the state and a system of state-held mineral rights, which are leased to companies, be introduced, and

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through black economic empowerment (BEE) to transform the economy. Subsequently, a Broad-Based Black Economic Empowerment (B-BBEE) strategy was published as a precursor to the B-BBEE Act 53 of 2003. The B-BBEE Codes of Good Practice emerged in 2007 to assist with the implementation of the framework for B-BBEE policy and legislation. Institutional mechanisms were established for the monitoring and evaluation of B-BBEE in South Africa.

[897] See s 217 of the 1996 Constitution.

[898] See the Preamble of the 1996 Constitution.

[899] See ss 7, 8 and 9 of the 1996 Constitution. This is what the MPRDA is meant to achieve.

[900] See ss 4*(a)*, 5, 6, 7, 8 and 9 of the 1996 Constitution.

[901] Federick Cawood and Richard Minnitt, 'A Historical Perspective on the Economies of the Ownership of Mineral Rights Ownership' 1998 The Journal of the South African Institute of Mining and Metallurgy at 375.

(b) The freezing or sterilising of mineral resources in areas of privately owned mineral rights should be discouraged by the imposition of mineral tax …[902]

However, the Chamber of Mines of South Africa offered a different view on behalf of the owners of domestic mining industries. It argued for maintaining the security and continuity of tenure and supporting the system of rights that allowed for private and state mineral resource rights ownership.[903] In its view, this would allow for the effective consumption of South Africa's unique natural resources. This point of view disregarded the long history of socio-economic discrimination perpetrated against Africans by way of natural resource control and management. It unjustly made a case for the status quo to remain the same, allowing for the unbridled consumption of South Africa's unique natural resources.

The MPRDA is one of the Acts that support the equitable ownership, governance and distribution of natural resources. It was the product of the 1998 White and Green Papers on mineral and mining policy, culminating in the 2000 draft Mineral Development Bill.[904] There was a clear statement of intent regarding mineral rights ownership, which was approved by the government prior to the draft Mineral Development Bill. The policy proposals align with the government's goals for all minerals to vest in the state and for the promotion of mineral development by applying the 'use it or lose it' principle and vesting all mineral mining rights in the state.[905] The draft Mineral Development Bill was the first major attempt to legislate mineral policy in post-apartheid South Africa. However, certain industry players were unhappy with the draft Bill as it gave open discretionary powers to the Minister.[906] Given the response to the draft Bill in 2000, the Act is different in some respects. Its preamble incorporates the socio-economic aspects of natural resources. The Act highlights the role of natural resource development in South Africa's socio-economic development. It further indicates the need for the vital socio-economic upliftment of previously disadvantaged communities affected by past racial discrimination in natural resource ownership and governance.

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[902] ibid.

[903] Cawood and Minnitt (n 901) at 374.

[904] Cawood (n 888) at 55.

[905] Cawood (n 888) at 56.

[906] The South African Chamber of Commerce had a different view about the government's attempt to become the custodian of all mineral resources in South Africa.

The Act is therefore a fresh legislative reaction to years of inequitable exploration for and exploitation of natural resources. It provides for stronger state control of natural resources as opposed to the privatisation and deregulation provided for by the Minerals Act 50 of 1991. The MPRDA provides a platform to achieve equitable access to natural resource exploration and exploitation given the previous system that excluded Africans for years. It provides for a system of government custodianship of all natural resources.[907] The Act unambiguously positions the state as in control of all rights to natural resources in the context of equitable access to resources, economic growth and black economic empowerment.[908] This was intended to cure the racial injustice of the past.

The Mining Titles Registration Act 16 of 1967 and other statutes were amended to support and complement the Act. The Mining Titles Registration Act currently regulates the registration of mineral resources.[909] The MPRDA differentiates between petroleum and other broad categories of minerals. Only the latter form part of this study.

Section 3 of the MPRDA affirms the universally accepted state sovereignty over natural resources. Section 3(1) states that mineral resources are the people's common heritage, and the state is the custodian. Section 3(2)*(a)* empowers the state through the appropriate Minister to control and manage mineral resource prospecting, exploration and exploitation rights. Essentially, the MPRDA endorses a shift away from the concept of private ownership of mineral resources entrenched and sustained during the apartheid era in South Africa. Private ownership is replaced by the more inclusive governmental administration of natural resources in custodianship, intended to establish a level of equity.[910]

Nevertheless, the MPRDA and, subsequently, the Mineral and Petroleum Development Act of 2008 give the state the exclusive custodianship of natural resources.[911] Thus, the state's role as custodian of South Africa's mineral wealth has

[907] See s 3 of the MPRDA.
[908] ibid.
[909] Mining Titles Registration Act 16 of 1967 <https://www.gov.za/sites/default/files/gcis_document/201505/act-16-1967.pdf> accessed 24 August 2023.
[910] Mostert (n 817) at 79.
[911] Sections 2 and 3(1) of the MPRDA.

been expedited by the Act. This means that the state has exclusive control of mineral rights, which allows the government greater authority to grant legal rights to mineral resources without any contribution by the people. Thus, the PSNR principle, which emphasises the inherent right of the people to their natural resources, seems not to have been considered. The MPRDA authorises the administration of equitable access to mineral resources by the executive arm of the government so that previously disadvantaged African people can benefit from all-round and inclusive socio-economic growth. However, the people's inherent right to natural resources as prescribed by the international law principle of PSNR has not been included in both the Constitution and the enabling MPRDA. Thus, the expected impact of natural resource ownership and governance on people's well-being may still be in jeopardy due to the state's deliberate usurpation of people's rights, particularly the rights of black people.

Provision has also been made in the post-apartheid period to give some level of control to certain traditional authorities, in view of the expansion of mining activities in communal areas.[912] The Traditional Leadership and Governance Framework Act of 2003 empowers traditional chiefs and councils to oversee the administration and control of communal lands, natural resources and socio-economic development.[913] This position is further supported by the MPRDA, which also includes traditional authorities in the control of natural resources found on communal land. Chiefs have, to a large extent, become mediators of natural resource-led development and mining transactions.[914] By implication, traditional communities, through their interactions and engagements with mining companies, have granted mediatory powers and control to the chiefs.

Consequently, the chiefs, as the assumed custodians of rural land and tribal properties, negotiate and enter into contracts with mining companies. They receive royalties and dividends on behalf of rural residents in the natural resource-rich

[912] Cawood (n 888 ) at 200.

[913] Traditional Leadership and Governance Framework Act 2003 <https://www.gov.za/sites/default/files/gcis_document/201409/a41-03.pdf> accessed 2 September 2022.

[914] Mnwana Sonwabile, 'Chief's Justice? Mining, Accountability and the Law in the Bakgatla-ba-Kgafela Traditional Authority Area' (2014) 24 SA Crime Quarterly at 22 <http://www.scielo.org.za/pdf/sacq/n49/03.pdf> accessed 2 September 2022.

traditional authority areas.[915] This does not necessarily constitute the inherent international law right of the people to their natural resources from a pragmatic perspective. The PSNR ownership right of the people may mean that communities located where the natural resources are mined should be entitled to clearly established mining derivation funds and/or royalties. The Constitution should clearly enshrine the derivation fund allocation that accrues to communities. This clearly takes account of people's inherent right to explore for and exploit their natural resources to enhance their socio-economic development.

Various South African court decisions have tested the efficacy of the MPRDA in the democratic era. In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (a trilogy of cases),[916] the issue before the court was the administrative fairness of the allocation of a prospecting right to a third party in terms of the MPRDA on the community's land.[917] The land in question was owned by a community that had been dispossessed of their land and deprived of formal title to their land by apartheid laws.[918] The first respondent (Genorah) was awarded a prospecting right on the community's land.[919] However, the community challenged the rights award because the respondent approached only the tribal authority, not the affected community, as required in the MPRDA.[920] Therefore, the award was defective due to irregularities in the required consultation process. The court held that the purpose of consultation with landowners or the community, as required by the Act, was to provide them with the necessary information to make an informed decision when responding to the application.[921] The court concluded that no consultation had

[915] ibid.

[916] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (Unreported judgment, Transvaal Provincial Division Case No: 39808/2007, 18 November 2008); *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (Unreported judgment, Supreme Court of Appeal, Case No: 71/09, 21 March 2010); *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC).

[917] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (Unreported judgment, Transvaal Provincial Division Case No: 39808/2007, 18 November 2008) para 2.

[918] ibid paras 5 and 6.

[919] ibid paras 7 and 8.

[920] ibid paras 37, 38 and 39. See also ss 5(4), 10, 16(4)*(b)* and 22(4)*(b)* of the MPRDA.

[921] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 66.

occurred between the first respondent and the community about the MPRDA requirement.[922]

The Constitutional Court dealt with the procedural and substantive aspects of the issue, finding in favour of Bengwenyama Minerals. This set a significant precedent on issues of preferential treatment in regard to consultation with landowners and/or communities concerning natural resource exploration and exploitation. The court analysed the nature of the required consultation and decided that the level at which the MPRDA requires consultation indicates the seriousness of the process in light of the rights and interests of landowners and communities.[923] The court considered the requirement from a common-law position and declared that even though the MPRDA does not require an agreement to be entered into, consultation must take place in good faith.[924] The court held further that the granting of and execution of prospecting rights is a serious invasion of the landowner's right. As required by the Act, consultation with the landowners was required to furnish them with all the necessary information so that they could make an informed decision about the application.[925] The Constitutional Court found that the respondent had not consulted with the community in terms of the Act and that the Department of Mineral Resources (DMR) had not given the community a hearing and/or complied with the fairness requirement of the Promotion of Administration of Justice Act (PAJA).[926] The prospecting rights were set aside as the Constitutional Court submitted that the MPRDA:

> seeks to attain its transformation and empowerment aims by making the state the custodian of the country's mineral and petroleum resources, and by placing control of the exploitation of these resources under the control of the state, acting through the Minister. Various provisions in the Act then seek to give specific effect to the object of expanding opportunities in the industry to historically disadvantaged persons. Of particular relevance to this matter are the provisions giving preference in the

[922] ibid para 68.
[923] ibid.
[924] ibid.
[925] ibid para 66.
[926] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 56.

consideration of application for prospecting rights to historically disadvantaged persons and to communities who wish to prospect on communal land.[927]

*Agri South Africa v Minister of Minerals and Energy*[928] was another case that ascertained the efficiency of the MPRDA as transformative legislation to address the injustices of the past through fundamental socio-economic reforms.[929] The *Agri SA* case provided an opportunity to clarify the Bill of Rights provisions about the property right. The case was pursued to clarify whether the MPRDA provided for the expropriation of property.[930] The MPRDA introduced a transitional arrangement, which afforded holders of unused old-order rights a grace period of one year to apply for new-order rights.[931] Before 1 May 2004, a company called Sebenza held coal rights in some farms, which were wound up before any prospecting or mining activity was conducted.[932] These rights therefore became unused rights under the transitional provision of the MPRDA, and since Sebenza could not apply for the new-order rights within the permitted time, the rights expired on 1 May 2005.[933] The liquidators of Sebenza deemed the rights to the natural resources to be expropriated and claimed compensation from the DMR, which rejected the claim. *Agri SA* took cession of the claim and brought the case to the High Court as a test case.[934] The court explained that expropriation entails the state's deprivation of property and the acquisition of the same property. The court established that the MPRDA destroyed the existing mineral rights and vested the substance of these rights in the state.[935] The MPRDA had, therefore, triggered the deprivation and expropriation of unused old rights, which required the payment of just and equitable compensation.[936]

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[927] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 31.

[928] *Agri South Africa v Minister for Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* 2010 (1) SA 104 (GNP); *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA); *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

[929] See Pieter Badenhorst and Nic Olivier, 'Expropriation of "Unused Old Order Rights" by the MPRDA: You have lost it! Agri SA v Minister of Minerals and Energy (Centre for Applied Legal Studies as amicus curiae) [2011] 3 All SA 296 (GNP)' (2012) 75 Journal of Contemporary Roman-Dutch Law at 329.

[930] ibid at 329 and 330.

[931] ibid.

[932] *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) paras 13–16.

[933] ibid.

[934] ibid paras 17 and 18.

[935] ibid.

[936] ibid.

The Minister of Mineral Resources appealed to the Supreme Court of Appeal, which concurred with the High Court's definition of expropriation, but rejected the suggestion that the MPRDA did not have any such effect.[937] The court held that the right to mine, from which all mineral rights are derived, always vests in the state, and the state allocates such rights to private parties at different levels over the years.[938] The Constitutional Court heard the appeal granting *Agri SA* leave to appeal, but subsequently dismissed the appeal.[939] In its majority judgment, the court concurred with the High Court and the Supreme Court of Appeal's definition of expropriation. However, it disagreed with the SCA in respect of the application of the definition to the MPRDA.[940] The court found that before the MPRDA, the right to exploit minerals was inseparably linked to the ownership of those minerals. Thus, the distinction by the SCA between mineral rights and the right to mine was ambiguous.[941] The court found that the MPRDA deprived pre-existing mineral rights holders of elements of that right. However, the deprivation was not arbitrary in light of what the MPRDA intends to achieve and the transitional arrangement.[942] The court further found that the deprivation did not amount to expropriation, citing s 25 of the Constitution. The court stated that the section sits at the heart of an inevitable tension between the interests of the wealthy and the interests of the previously disadvantaged.[943] The section must be read with due regard to the gross inequality that exists in relation to wealth and land distribution.[944] Mogoeng CJ stated in the majority judgment that 'South Africa is rich in minerals'. However, the apartheid system placed about 87 per cent of the land and mineral resources in the hands of 13 per cent of the population. White South Africans exercise real economic power, while black South Africans are overwhelmed by unemployment and abject poverty. They cannot benefit directly from exploiting their mineral resources due to their landlessness, exclusion and poverty. 'To deal with this gross economic inequality, legislative measures were taken to enable equitable access to the opportunities in the mining industry.'[945]

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[937] ibid paras 19 and 20.
[938] ibid.
[939] ibid.
[940] ibid para 75.
[941] ibid paras 37, 38.
[942] ibid para 48.
[943] ibid para 60.
[944] ibid.
[945] *AgriSA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 1.

In *Baleni v Minister of Mineral Resources*,[946] which concerned an application by the uMgungundlovu community of the Eastern Cape for an order declaring that it was entitled to be provided with a copy of the application for a mining right granted to the company Transworld Energy and Mineral Resources (TEM) and deserved to be properly consulted.[947] The community based its application on ss 10 and 22(4) of the MPRDA, requiring the DMR to consult with the interested and affected parties when accepting a mining application.[948] The community lived on land where titanium was discovered. In 2015, TEM applied for a mining right. The community engaged with the regional manager of DMR to ascertain whether such an application had ever been made, and the regional manager confirmed that it had been made and had been accepted. The community was then asked to approach TEM for a copy of the mining rights application or to make a request in terms of the Promotion of Access to Information Act of 2000.[949] However, neither the DMR nor TEM provided the community with the requested copy until after litigation proceedings were instituted.[950] The court found that ss 10 and 22(4) of the MPRDA must be interpreted to promote the spirit, purpose, and object of the Bill of Rights as provided in s 39 of the Constitution and consistent with the objectives of the MPRDA.[951] The court further pronounced on ss 22 and 23 of the MPRDA dealing with the landowners' consent to granting a mining licence. The court deliberated on the level of consent required to obtain a mining licence over land held by a community with informal and/or customary land tenure in view of the fact that such a community had been previously dispossessed of its land during apartheid.[952] The court specifically considered the provisions of the Interim Protection of Informal Land Rights Act of 1996 (IPILRA) and the MPRDA and stated that the provisions of these Acts should be read together when determining the level of consent that is required.[953] The court found that the consent of the community, according to the IPILRA, and not mere consultation with the community as required by the MPRDA, is necessary before a mining right can be obtained over a community's

[946] *Baleni v Minister of Minerals and Energy* 2019 (2) SA 453 (GP).
[947] ibid para 15.
[948] ibid paras 24–26.
[949] ibid paras 23 and 24.
[950] ibid.
[951] ibid paras 41–43.
[952] ibid paras 44 and 45.
[953] ibid paras 57 and 58.

land.[954] Accordingly, the community should have been consulted. The court also held that the community, as an interested and affected party with a direct interest in land and specific socio-economic rights provided for in the MPRDA, was entitled to receive a copy of the mining right application upon request, without a PAIA application.[955]

This situation exposed a gap in the MPRDA, which placed the community's interests in jeopardy if the court had not intervened at a crucial point. However, this study argues that the court should have gone a step further to recommend that the question of consent, which is critical and in line with the international legal principle of PSNR, should be revisited in the MPRDA. This is because the court also engaged in a rigorous analysis of the PSNR position on the fundamental shared rights of the state and people with regard to the ownership of natural resources. The court was attempting to tie the concept and understanding of consent to the people's ownership right of their natural resources, which the Constitution and the MPRDA attempt to circumvent for reasons of political correctness. The court should have meticulously engaged s 39(1), (2) and (3) of the Constitution to position the MPRDA within the international legal principle of PSNR with regard to the people's right to their natural resources. This would give fair consideration to the people's rights from the perspective of actual ownership rights with regard to the socio-economic injustice of the past resulting from dispossessing black people of their natural resources.

The Broad-Based Socio-Economic Empowerment Charter for the Mining and Mineral Industry (the Mining Charter) does, in terms of s 100(2) of the MPDRA, empower the Minister to develop a Broad-Based Black Economic Empowerment Charter for the South African mining and mineral industry.[956] The Charter was developed in 2004 to effect the transformation of the industry and was comprehensively assessed in 2009 to enhance the transformation of the mining industry in line with the objectives and agreed targets of the 2004 Mining Charter.[957] However, shortcomings in implementing

[954] ibid para 83.

[955] ibid para 74.

[956] See Mining Charter 2018 at 4 <https://www.gov.za/sites/default/files/gcis_document/201809/41934gon1002.pdf> accessed 3 September 2023.

[957] ibid. See also Ostsile Matlou, 'Empowering the Mining Industry: Lessons from the Last 10 Years' (2023) <https://businessmediamags.co.za/mining/sa-mining/sa-mining-columnist/empowering-the-mining-industry-lessons-from-the-last-10-years/> accessed 25 September 2023.

certain key elements of the Mining Charter, including ownership, employment equity, procurement, mine community development and beneficiation, were identified and addressed in 2010.[958] This was intended to streamline the Mining Charter's objective to enhance the mining industry's transformation and growth.[959] Another assessment was done in 2014, which showed a noticeable improvement in compliance. However, overall transformation remained low.[960] In 2015, the government conducted another comprehensive review of the Mining Charter to establish its effectiveness in transforming the mining and mineral industry.[961] Regulatory uncertainties and ambiguities were identified, and new definitions, terms and targets were introduced in order to harmonise the Charter with other legislation.[962] This was done to ensure the meaningful participation of historically disadvantaged Africans in line with the MPRDA.[963] The review also recognised that the growth and transformation of the junior mining sector, the precious metals sector and the diamond sector are imperative for the competitiveness of the upstream and downstream minerals sector.[964] Accordingly, the Mining Charter of 2018 encapsulated these new provisions. However, this discussion only analyses the Mining Charter with regard to the international law principle on PSNR, the Constitution and the enabling legislation.

The Mining Charter constitutes a social and economic transformation strategy that aims to address racial injustice and discrimination in mineral resource exploitation.[965] Its preamble aptly captures the reason for social and economic transformation, stating as follows:

> The systematic marginalisation of the majority of South Africans, facilitated by exclusionary policies of the apartheid regime, prevented Black Persons,

[958] ibid.
[959] ibid.
[960] ibid at 5.
[961] ibid at 6.
[962] ibid.
[963] ibid.
[964] ibid.
[965] See Mining Charter 2018 at 4. The Mining Charter is a government document setting out black economic empowerment (BEE) targets and a blueprint for the transformation of the mining industry. It was first developed in 2004 (the original charter) and amended in 2010 as a tool to drive transformation in the industry. The third iteration of the Mining Charter was gazetted on 27 September 2018.

> as defined herein, from owning the means of production and from meaningful participation in the mainstream economy.[966]

The task of the Mining Charter is therefore to facilitate the sustainable transformation, growth and development of the mining industry. This is to be achieved by giving effect to s 9 of the Constitution and s 100(2)*(a)* of the MPRDA to harmonise state policies.[967] The Mining Charter sets out in its objectives the elements required to ensure equity and fairness for black South Africans. However, the main objective appears to negate the international law principle of PSNR, which guarantees the joint right of states and peoples to their mineral resources.[968] The Charter states: 'The affirmation of the internationally recognised principle of state sovereignty, its right to exercise authority and make laws within its boundaries over the life of its country – including all mineral wealth.'[969] The state circumvents the authentic position of the international law principle of PSNR through the main objectives of the Mining Charter. This concerns the ownership of mineral resources, which is apparently bestowed on both the state and the people, as opposed to the state only.[970] However, the state has clearly usurped the people's rights through the Mining Charter's objectives, where the people's rights are not mentioned. Other objectives are: acceptable ownership, participation and benefit from mining and prospection, including by black Africans; participation by black Africans and being part of the management of mining operations; adequate skills development of black South Africans; the involvement of black South Africans in the procurement chains of operations; ownership and participation by black South Africans in mining beneficiation; the socio-economic development of hosting communities; and the socio-economic development of all black South Africans from the proceeds of mining operations.[971] These objectives are all based upon on the international law principle of PSNR, which outlines the need to achieve the socio-economic development of the people pursuant to their inherent right to their natural resources.[972]

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[966] ibid.

[967] See s 9(2) of 1996 Constitution of South Africa: 'Equality includes the full and equal enjoyment of all rights and freedom. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.' See s 100(2)*(a)* of the MPRDA.

[968] See Garg (n 285) at 625.

[969] See Mining Charter 2018, Objects of the Mining Charter at 12.

[970] ibid.

[971] ibid.

[972] Garg (n 285) at 625.

Section 9(2) of the Constitution clearly addresses past injustice by calling for enabling legislation to promote equality, particularly regarding the removal of the natural resource rights of black Africans. The MPDRA is the primary enabling legislation resulting from the constitutional provision in this regard. Section 100(2) of the MPRDA empowers the Minister of Mineral Resources and Energy (the Minister) as follows:

> To ensure the attainment of Government objective of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must … develop a broad-based socio-economic empowerment Charter that will set the framework for targets and a time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and to allow such South Africans to benefit from the exploitation of the mining and mineral resources and beneficiation of such mineral resources.

It is generally accepted that the different versions of the Mining Charter and the associated mineral resource rights are intended to empower historically disadvantaged South Africans (black Africans). Thus, historically disadvantaged South Africans must hold a prescribed shareholding percentage in any natural resource mining establishment that holds a mining right, which is an empowerment requirement. The original Charter requirement was 26 per cent shareholding by historically disadvantaged South Africans. However, the recent Mining Charter has made three additions:

(a) Existing mining right holders who have reached the historically disadvantaged South African mark before the start of the recent Mining Charter will be recognised as being compliant with the empowerment requirements in terms of the MPRDA for the duration of the mining right.

(b) Existing mining right holders who reached their mark at any stage during the existence of the mining right and whose historically disadvantaged partners exited before the start of the recent Mining Charter will receive recognition for complying with the empowerment requirements for the duration of the mining right, which will not be further applicable upon the renewal of the mining right.

(c) The holders of mining rights granted after 27 September 2018 must achieve 30 per cent of the historically disadvantaged South African shareholding. The shares must

contain economic interest and proportional voting rights per mining rights or within the mining business that holds the mining right.

The recent Mining Charter has been rejected, particularly by the Minerals Council South Africa. It is contended that the requirements indicated in para (b) require the mining right holder to continuously replace its historically disadvantaged South African partner after the MPRDA provides an exit. The Council also questioned the provision that the recognition of compliance with the empowerment requirement with regard to mining rights lapses upon the transfer of the existing mining right. The Council also challenged the Minister's decision regarding how the rights of historically disadvantaged South Africans should be upheld, as well as the failure to comply with the ownership elements of the Mining Charter, resulting in a breach of the MPRDA. The Minerals Council also contended that the Minister lacked the authority to publish the recent Mining Charter in a way that suggests that it is legislation, thus usurping the role of the legislature. The Council contended that the clauses are not authorised by s 100(2) of the MPRDA.

In *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*,[973] the court examined the above issues. The High Court in Pretoria handed down a judgment in an application under PAJA to ascertain if the 2018 Mining Charter is a formal policy document that sets out policy developed by the Minister with regard to s 100(2) of the MPRDA or subordinate legislation.[974] The application sought to review and set aside certain clauses of the 2018 Mining Charter, and sought a declarator that the clauses are inconsistent with the principle of legality in s 1*(c)* of the Constitution and should be set aside. The application was previously heard on 5 May 2020, when the court ordered the joinder of the parties as respondents and postponed the matter on merits for hearing.[975] The joined respondents are the mining communities affected by mining operations, the various organisations representing mining communities, and trade union organisations.[976] The trade unions opposed the

[973] *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others* 2021 (4) All SA 836 (GP). This judgment is sound in law, but it is likely that it may still go on appeal.

[974] See also *Minerals Council South Africa v Minister of Mineral Resources and Energy and Another* [2020] ZAGPPHC 301.

[975] *Mineral Councils South Africa v Minister of Mineral Resources and Energy and Others* (2021) (n 1037) para 3.

[976] ibid para 4.

relief sought by the Minerals Council. However, the communities did not oppose the relief but sought other relief because there was inadequate consultation with them before the publication of the 2018 Charter.[977] The Charter failed to substantially address the environmental degradation and gender-based injustice caused by mining and the poverty and inequality of mining-affected communities.[978]

The enquiry before the court concerned the ambit of the powers of the Minister under s 100(2) of the MPRDA to make law as subordinate legislation and the legal nature and role of the 2018 Mining Charter within the context of the MPRDA.[979] The Minister argued that s 100(2) of the MPRDA empowered him to make law through the development of the 2018 Charter, and therefore the Charter is subordinate legislation binding on the holders of mining rights.[980] The Minerals Council contended that the 2018 Charter is a formal policy document in terms of s 100(2) of the MPRDA, and it is binding on the Minister when he considers applications for mining rights in accordance with s 23(1)*(h)* of the MPRDA.[981] This provision therefore permits the Minister to grant a mining right only if the grant is in accordance with the Charter as contemplated in s 100(2) of the MPRDA.[982]

The court applied a contextual approach to interpreting s 4 of the MPRDA. It noted that s 100(2) empowers the Minister to 'develop a broad-based socio-economic empowerment charter that will set the framework for targets and timetable for effecting the entry into and active participation of historically disadvantaged South Africans into the mining'.[983] Although the word 'Charter' is recognised in South African law, it is observed that the commonly used words 'law' and 'regulation' appear in the MPRDA.[984] Certainly, the Minister is expressly authorised to make subordinate legislation in s 107.[985] However, the court concluded that the word 'Charter' was deliberately designated by the legislature to indicate something other than what the

[977] ibid.
[978] ibid.
[979] ibid para 7.
[980] ibid para 8.
[981] ibid para 9.
[982] ibid.
[983] ibid para 20.
[984] ibid paras 22–23.
[985] ibid.

law intended.[986] Similarly, the legislature does not use the word 'develop' to describe law-making but to formulate policy.[987] Moreover, the permissive rather than the peremptory wording of s 100(2) indicates that the legislature did not intend the Charter to be subordinate legislation, as the legislature could have used peremptory wording if the Charter was meant to be anything other than a guiding principle.[988] The court finally noted in its interpretation of the MPRDA that if s 100(2) was to be taken as a delegation of the power to make legislation, it would breach the doctrine of separation of powers, resulting in unbridled law-making.[989] The court further declared that the purpose of s 100(2) is transformational and that the transformational objective of the section does not require the Charter to take the form of subordinate legislation.[990] In light of the above, the court found that s 100(2) does not empower the Minister to make law and that the 2008 Charter is therefore not binding subordinate legislation, but an instrument of policy.[991] The court set aside certain clauses of the Mining Charter in terms of PAJA.[992]

## 5.5 A socio-economic analysis of natural resource ownership and governance in South Africa

According to Sorenson, South Africa is regarded as a modern, middle-class state.[993] This status has been achieved through mining and exploiting its mineral resources for over 120 years.[994] In the nineteenth century, South Africa's socio-economic development as a colony under the control of the British unreservedly emphasised the exploitation of its mineral resources for the sole benefit of the colonial power.[995] In the early part of the twentieth century, just after the self-rule of Jan Smuts' government, socio-economic development was encouraged by the state to support its

[986] ibid.
[987] ibid para 30.
[988] ibid para 34.
[989] ibid para 35.
[990] ibid para 37.
[991] ibid para 59.
[992] ibid para 68.
[993] Paul Sorensen, 'Can the Mining Industry in South Africa Kick-Start a Second Development Phase to Alleviate Poverty and Inequality?' (2015) 72(6) International Journal of Environmental Studies 921 at 921.
[994] ibid.
[995] ibid.

developmental state theory.[996] However, the authoritarian apartheid system did not allow Africans, who are in the majority, to benefit from the inclusive socio-economic development agenda of the state.[997] Mining has been influential in moving South Africa's industrialisation forward, ever since the nineteenth century.[998]

By all indications, present-day South Africa was built upon mining enterprises. However, the mining industry is currently under strain.[999] The democratic dispensation has subjected the industry to a series of requirements in the Mining Charter to give effect to BEE. This is an attempt to address the injustice wrought by apartheid.[1000] Sorensen submits that '[since] the transition to democracy in 1994, the country has been exhibiting characteristics of a welfare state to deal with the inequalities caused by apartheid'.[1001] The Constitution of South Africa makes provision for sustainable development in this regard. It gives direction and sets out the essential principles to regulate the exploitation of the country's natural wealth to 'secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.[1002]

The ANC government's focus on BEE was inspired by human rights protection, which emphasises socio-economic justice for past and present generations.[1003] Thus, mining was targeted in order to provide jobs and tackle increasing poverty.[1004] The MPRDA was enacted against the backdrop of the socio-economic development of the people where other instituted policies have been unsuccessful. For instance, eliminating

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[996] ibid. See Thompson (n 740) at 188: 'The National party used its control of the government to fulfil Afrikaner ethnic goals as well as white racial goals … The government meanwhile Afrikanized every state institution, appointing Afrikaners to senior as well as junior positions in civil service, army, police and state corporations, medical and legal professional associations, too, came increasingly under Afrikaner control. The government also assisted Afrikaners to close economic gap between themselves and the English-speaking white South Africans … By 1979, Afrikaner entrepreneurs had obtained a firm foothold in mining, manufacturing, commerce and finance – all previously exclusive preserves of English – speakers … The political success of the National Party was due in part to the rising standard of living of white South Africans of all classes.'

[997] ibid. See also Thompson (n 740) at 188.

[998] ibid.

[999] ibid.

[1000] ibid at 937.

[1001] ibid at 921.

[1002] Section 24*(b)*(iii) of the 1996 Constitution.

[1003] Sorensen (n 993) at 936.

[1004] ibid at 937.

poverty and creating jobs triggered the establishment of the RDP.[1005] However, the RDP was seen as a socialist scheme that effectively deterred foreign direct investment (FDI) in South Africa.[1006] Subsequently, the neo-liberal GEAR economic plan of 1996 was put into operation to attract FDI.[1007] GEAR aimed to launch the economy in the international market to create employment and eradicate poverty, but GEAR failed to support the needs of the people, particularly those in the informal sector.[1008] The Accelerated and Shared Growth Initiative for South Africa (ASGI-SA) was initiated in 2006 to use state and private assets to support the socio-economic development of very disadvantaged South Africans.[1009] Nevertheless, it is uncertain whether these policy positions could achieve the desired objectives. As at 2010, the official unemployment rate was 24.3 per cent.[1010] The tax base was about five million people, to sustain a population of over 50 million. Over 13.8 million people were on welfare support. There is little or no sustainability.[1011]

The labour social and planning requirement of s 25(2)*(f)* of the MPRDA, and its broad-based socio-economic empowerment charter for the South African mining industry of 2002, as amended in 2010, empowers this government position.[1012] A new tax system in the form of the Resources Royalty Act of 2008[1013] came into force to increase revenue from the mining industry for the socio-economic advancement of the people. This legislation accords with the broader context of national development plans.[1014] Mining industries are now compelled to support the socio-economic development of mining communities, according to sustainable development criteria.[1015] This position has culminated in corporate social responsibility (CSR), where 1 per cent of profit

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[1005] ibid.

[1006] ibid.

[1007] Paul Sorensen, 'Sustainable Development in Mining Companies in South Africa' (2011) 68(5) International Journal of Environmental Studies 625 at 628.

[1008] ibid.

[1009] See Accelerated and Shared Growth Initiative for South Africa (ASGI-SA) <https://www.gov.za/sites/default/files/gcis_document/201409/asgisa2008.pdf> accessed 23 August 2023.

[1010] Sorensen (n 1007) at 628.

[1011] ibid. The unemployment rate as at 2021 was 34.9 per cent, according to Statistics South Africa <http://www.statssa.gov.za/?cat=31> accessed 24 August 2022.
Paul Sorensen, 'Mining in South Africa: A Mature Industry?' (2012) 69(1) International Journal of Environmental Studies 21 at 25. See also the MPRDA.

[1013] See the Mineral and Petroleum Resources Royalty Act.

[1014] Sorensen (n 993) at 937.

[1015] ibid.

made before tax by mining companies is willingly invested back in the community.[1016] This is separate from the socio-economic legislative requirements of the MPRDA, including taxes, royalties and other levies.[1017]

The systematic regulatory approach of the democratic order in South Africa echoes the expectations of most participating constituencies. Thus, the negotiation of the Broad-Based Socio-economic Charter for the mining industry in terms of s 100 of the MPRDA occurred between the government, industry and labour unions.[1018] The policy document resulting from the negotiations seemed tilted in favour of the government and organised labour.[1019] Thus, from every indication, the MPRDA created a situation that allows industry to provide for labour and a viable socio-economic programme to obtain the expected new order mining licences.[1020]

Sorensen considers the MPRDA to be overburdening the mining industry. He asserts that 'the fact that they have to give up 26% of the equity in favour of the formerly Highly Disadvantaged South Africans (HDSAs) and also paying taxes and lately royalties on gross income, is apparently not seen as mitigation'.[1021]

He further states that the government has abandoned its constitutional responsibility to provide socio-economic development for the people of the mining companies. This suggests a failure of its constitutional obligation.[1022] In recent years, it has been recorded that the South African Revenue Service (SARS) has received more tax returns from individuals and companies.[1023] This improvement in revenue is not prudently used, thus resulting in protests about poor or non-existent socio-economic assistance. This is a result of perceived insufficient capacity and endemic corruption.[1024]

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[1016] ibid.

[1017] See ss 2 and 4 of the MPRDA Royalty Act 28 of 2008 <https://www.gov.za/sites/default/files/gcis_document/201409/316351260.pdf> accessed 23 August 2023.

[1018] See Sorensen (n 1007) at 625.

[1019] Sorensen ibid.

[1020] ibid.

[1021] ibid.

[1022] ibid.

[1023] ibid.

[1024] ibid.

South Africa has an impressive natural resource inheritance. It had the longest sustained commodity boom; however, between 2001 and 2008, it added little or no value to its GDP.[1025] This is in stark contrast to mining activities in other parts of the world; for example, between 2001 and 2008, Chile, a key mining hub in the developing world, had a 12 per cent growth per value added to its GDP.[1026] A stable mineral regulatory regime, such as Australia's, had an incredible growth rate of about 24 per cent compared to South Africa's 7 per cent.[1027] Peter Leon opines that the decline in growth can be attributed to a large extent to the regulatory uncertainty created by the MPRDA and its implementation.[1028] This study agrees with Leon's position to the extent that there were administrative difficulties in the implementation of the MPRDA. However, the custodianship by the state of its natural resources to trigger socio-economic development, as espoused in the UN Resolution 1803 of 1960, needs to be taken into account and established, particularly in view of the colonial and apartheid past.

Like other countries in sub-Saharan Africa, South Africa has seen a slow pace of employment growth and little transformation in poverty levels.[1029] The mining sector has not lived up to its billing in terms of growth, and has reinforced inequality. Even the dismal contribution of mining to the GDP has not significantly impacted poverty alleviation.[1030] Thus, South Africa's natural resource industry has not supported anticipated socio-economic growth over the last decades. The GDP from natural resources has halved from the mid-1990s to the early twenty-first century, by about 5 per cent of the GDP.[1031] It mainly represents the socio-economic hub of a society with high levels of poverty and inequality. Although mining directly and indirectly provides over half a million jobs, it is no longer a route out of poverty.[1032] A substantial number

[1025] Peter Leon, 'Whither the South African Mining Industry?' (2012) 30(1) Journal of Energy and Natural Resources Law 5 at 7.
[1026] ibid at 8.
[1027] ibid.
[1028] ibid.
[1029] Africa Progress Report 'Equity in Extractives Stewarding Africa's Natural Resources for All' (2013) at 33 <https://static1.squarespace.com/static/5728c7b18259b5e0087689a6/t/57ab29519de4bb90f53f9fff/1470835029000/2013_African+Progress+Panel+APR_Equity_in_Extractives_25062013_ENG_HR.pdf> accessed 1 September 2022.
[1030] ibid.
[1031] ibid.
[1032] ibid.

of mine workers continue to live in terrible informal settlements. They are deprived of the most fundamental services and, in most cases, receive wages that cannot provide for their basic needs.[1033]

### 5.6 The natural resource curse: the South African experience

Little has been said about the so-called 'resource curse' in South Africa. It is safe to say that the natural resource extraction experience, as it affects other resource-rich countries in Africa, applies to South Africa.[1034] This is evident given the gross disadvantage of a significant percentage of the population. This contradicts the state's position that suggests that South Africa is socio-economically strong with mining as its mainstay, contributing greatly to its wealth.[1035] The discovery of gold and diamonds reinforced the mining industry's rapid expansion, lasting through the colonial and apartheid periods and culminating in the era of constitutional democracy in South Africa. However, mining and related business activities were controlled by companies mainly owned by the minority population. South Africa depended heavily on its mining sector for socio-economic development during the colonial, apartheid and post-apartheid periods.[1036] Mining comprises 48 per cent of South Africa's total exports,[1037] confirming South Africa as a natural resource-dependent state. However, it is vital to acknowledge that the steady abundance of natural resources during South Africa's political development may not have translated into prosperity for all. Most of the population lives in poverty, consistent with the resource curse narrative.[1038]

Slower economic growth, which characterises the resource curse in resource-rich countries, is present in South Africa.[1039] Its historically lower economic growth indicates this, compared to other upper middle-income countries. The economic growth of South Africa has averaged 3.26 per cent since the demise of apartheid, as opposed to 4.72 per cent for sub-Saharan Africa and 4.18 per cent for middle-income

[1033] ibid.
[1034] Ansley Elbra, 'The Forgotten Resource Curse: South Africa's Experience with Mineral Extraction' (2013) 38 Resource Policy 549 at 551.
[1035] ibid.
[1036] ibid.
[1037] ibid.
[1038] ibid.
[1039] ibid at 552.

countries.[1040] However, the GDP matrix of South Africa suggests a country that is as wealthy as upper middle-income countries, thus excluding South Africa from the scope of resource-cursed countries. The GDP matrix had slowed down slightly after apartheid, compared to upper middle-income countries. Although its GDP matrix per capita is three times above the average of its sub-Saharan neighbours,[1041] it is not distributive so as to show that the majority of the citizens are from an upper middle-income country.[1042] Elbra submits: 'Missing from the commonly accepted definitions of the resource curse is an acknowledgement that growth without improvement inequality may well be no growth for the poorest in society.'[1043] Thus, South Africa's severe income inequity corresponds with most neighbouring states facing the resource curse conundrum.

Fresh grievances emerging in South African mining areas reflect an obvious inequality between mining and non-mining regions and workers working in the mines and mining corporations in South Africa.[1044] Industrial action in the mining sector has been rampant in recent times. This was reportedly the highest in 2012, since the beginning of a democratic South Africa in 1994. Miners and mining communities often refer to their socio-economic conditions as justification for their actions.[1045] The August 2012 violence at the Lonmin mining company in Marikana, which resulted in 44 deaths, reflected a discontented mining community and workers who are disadvantaged and aggrieved in terms of the socio-economic benefits of mineral wealth. The workers were seeking a reasonable pay increase from R4,000 to R12,500. This proposed increase would have addressed the existing income inequality, and ensured a fairer distribution of the mining corporation's resource profits.[1046] Harvey contends that 'in the wake of Marikana tragedy … the relationship between mining and development has been brought into sharp focus'.[1047] South Africa's lacklustre socio-economic development in

[1040] ibid.
[1041] ibid.
[1042] ibid.
[1043] ibid at 553.
[1044] ibid at 554.
[1045] ibid.
[1046] ibid.
[1047] Ross Harvey, 'Mining and Development: Lessons Learnt from South Africa and Beyond' (2014) 86 Policy Briefing, Governance of Africa's Resources Programme 2014 at 3 <https://saiia.org.za/wp-content/uploads/2014/04/Policy-Briefing-86.pdf> accessed 9 September 2022.

view of its mining resources could be attributed to legislative diffidence and a lack of clarity in its mining law.

## 5.7 Conclusion

This discussion of South Africa's natural resource development with regard to gold and diamonds is one of the case studies used to measure Africa's socio-economic development based on its natural resources. The chapter examined natural resource development in South Africa in the colonial, apartheid and constitutional periods from a political economy perspective. The chapter established that the white colonialist apartheid government dominated the ownership and governance of natural resources. Land was forcefully confiscated and this triggered and promoted an illegitimate natural resource exploration and exploitation agenda for the socio-economic benefit of the white minority, and to the disadvantage of black Africans.

The assessment of colonial and apartheid legislation enacted during these periods clearly sustains the argument that black Africans were purposefully excluded from being part of any ownership and governance of the natural resources inherent in their communities. Natural resource exploitation, ownership and control were the main incentives that prompted the colonialist incursion and offensive into South Africa. Therefore, the general socio-economic well-being of the colonised people, particularly Africans, was never a priority.

The post-apartheid constitutional provisions attempt to correct the injustice of the past. They capture fundamental rights, especially the right to property linked to natural resources. They also make provision for the restitution of land taken by the white minority and the application of international law to interpret fundamental constitutional rights. Further mechanisms to address past injustices and inequities related to natural resources were highlighted in the MPRDA. However, natural resources fall within the exclusive control of the state as the custodian of natural resources. The study argues that the MPRDA is overburdened by the state's discretion, which emphasises the exploitation of natural resources for direct state gain as opposed to people's socio-economic development. An assessment of this post-apartheid legislation with regard to the ownership and governance of natural resources shows an arrangement that expressly gives the custodianship of natural resources to the state. The legislation fails

to clearly espouse and show a direct link to the principle of PSNR which bestows the ownership and governance of natural resources on both the state and the people. People's inherent right to their natural resources in terms of international law principles appears to have been overridden by the state's right, without being clearly spelt out in this instance. The government may have usurped the intended shared right to natural resources between the people and the state in South Africa for its own political gains.

The chapter contends that the current practice of natural resource development in South Africa is driven by state and capitalist exploitation, rather than the core socio-economic advancement of the people. The legislative provisions regulating natural resource development are ostensibly exploitative and lack the direct inclusion of previously disadvantaged peoples. The legislative framework in South Africa has not clearly infused the principle of PSNR to ensure its realisation in the governance and management of natural resources. The framework gives the state excessive ownership and control rights against the people, as evidenced in the court cases discussed. This also indicates a clear misuse and/or neglect of the principle of PSNR. The chapter submits that in the colonial-apartheid order and the current constitutional order natural resources have not achieved growth that has translated into people's socio-economic upliftment.

# CHAPTER 6:

# CONCLUSION: KEY FINDINGS AND RECOMMENDATIONS

## 6.1 Introduction

This chapter provides a conclusion and recommendations. The chapter reflects on the study's purpose, which is an analysis of the ownership and governance of natural resources with reference to the inherent and shared rights of the people and the state as prescribed by the principle of PSNR in Nigeria and South Africa. The study investigated the impact of the principle of PSNR on the socio-economic development of people in Africa. Africa's quest for the ownership and governance of its natural resources to stimulate the socio-economic development of its people has been ongoing for decades. However, states' self-seeking political and economic motives appear still to be promoted at the expense of the people's interests.

In comparison, the developments in the EU concerning the collective governance of natural resources are inspiring and have transformed the quality of the socio-economic upliftment of its people through natural resources. The AU CA embodies Africa's answer to European-style supranational governance of its natural resources and the resulting socio-economic benefits. The tacit indicators and communications of its designers all point to the potential of the AU supranational platform to address Africa's governance and control of its natural resources to ensure the socio-economic upliftment of the people.

Section 6.2 of this chapter reflects on the purpose of the study. Section 6.3 deals with the key findings, section 6.4 deals with recommendations, and section 6.5 is the conclusion.

## 6.2 Reflection on the purpose of the study: research questions and the hypothesis

The research question posed at the beginning of the study seeks to analyse the impact of natural resource ownership and governance on socio-economic development in

Africa using the principles of PSNR[1048] and the ACHPR.[1049] To put it differently, the study assessed the socio-economic development impact of PSNR on people from the natural resource ownership and governance operations. The study further considered if there is a need for a paradigm shift to achieve improved socio-economic outcomes for people from their natural resources.

The study investigated the natural resource ownership and governance patterns in Nigeria and South Africa to assess the progress and impact of the principles of PSNR in Africa. The study considered the extent to which this contribution has advanced and improved the well-being of the people in Africa, and if the present form of natural resource ownership and governance, taking cognisance of the rights of the people and the state, has made any socio-economic contribution as anticipated by international law.

The study is based on a general hypothesis that the inadequate management of Africa's rich natural resources has left people in poverty. It focused on the Nigerian and South African examples of how the mismanagement of natural resources has led to a situation of poverty and inequality. The study assumed that natural resources are fundamental to the growth of socio-economic development in Africa and constitute important national wealth.

Accordingly, the research question was answered during the course of this study. The rights inherent and shared by the people and state by virtue of the principles of PSNR have failed to transform into the satisfactory socio-economic development of the people. The inherent and joint rights to natural resources between the people and the state have been appropriated by the state for its own political convenience.

## 6.3 Key findings of the study

The key findings of this study are based on its legal analysis of the governance and management of natural resources in Africa with reference to the case studies of Nigeria and South Africa. The study ascertains whether the shared rights between

[1048] UN Resolution 1803 of 1962 on PSNR.
[1049] Articles 21 and 22 of the ACHPR.

states and their peoples from PSNR and the ACHPR have assisted with socio-economic development.

The study investigated specific research questions pertaining to the extent to which the principles of PSNR have been accommodated and realised within the legislative framework for the governance and management of natural resources. Another issue is the extent to which states have misused and/or neglected the principles of PSNR for their own political goals as opposed to socio-economic development.

Chapter 2 provided a theoretical analysis of natural resources, states and people. It provided an economic basis for natural resource ownership and governance targeted at creating wealth to achieve national socio-economic goods. The chapter established that the sovereign nature of the state means that the state has the responsibility to oversee good policy that drives the socio-economic development of its people. In this instance, there is a connection between the state and its people, to the extent that the people within a state have an inherent right to natural resources for their overall socio-economic development. The chapter further established that the right to natural resources in Africa belongs separately to the state and simultaneously and equally to the people. Elites and corrupt politicians in Africa have the tendency to abuse the right to natural resources of the state to the exclusion of the right of the people.

The study contends that political independence, as experienced by states and their people, stimulated the rights to political and economic self-determination. Thus, the socio-economic development ideas provided by the PSNR principles and confirmed by the ACHPR principles recommend a reasonable economic order. The implication is that the rights of the developing state and the people are clearly paramount in the ownership and governance of its natural resources. The study found that the state, as a sovereign international law subject, is bestowed with the shared primary authority to superintend and govern its natural resources for the socio-economic advantage of its people.

Furthermore, the study examined the PSNR principles on the ownership and governance of natural resources, which are based on promoting human rights, economic wealth and the socio-economic well-being of the people through their natural resources. The study laid the basis for the right to natural resources shared by the

state and its people. It took over two decades to develop this international law principle, which overwhelmingly entrenched the right to natural resources that is to be enjoyed by the people for their national development and benefit. The principle further resolved that the search for, exploitation and use of natural resources must be conducted considering the shared rights between the state and the people in the context of UN Resolution 1803 of 1962.

The study examined regional frameworks for the governance of natural resources by analysing the ECSC approach to the ownership and control of natural resources, which has developed into the present-day EU. The study confirmed that this regional framework was stimulated by a comprehensive socio-economic development plan. This regional framework was instituted by an alliance of states through regional agreements or treaties setting out the rules and obligations for state relationships. The ECSC treaty established a joint governance and control model for European natural resources. It was intended to manage socio-economic development using natural resources to benefit the people and member states. The study established that the European model of natural resource governance was grounded on supranationalism, which delegates authority to the central body above the member states, for the effective and unbiased governance of natural resources. The study found that various EU, international and regional legislative initiatives on natural resource governance and control for the socio-economic development of the people resonate positively with member states.

In making a practical assessment, the study compared the AU position; it established that the OAU, which became the AU, did not have a clear collective approach to continent-wide socio-economic progress through natural resources. However, the study found that the AU was designed to resemble the EU with regard to its values on general political and socio-economic fundamentals. The study further assessed the EU's and the AU's stance on the governance and control of natural resources for socio-economic development, to determine if the EU experience provides a workable solution for the AU in solving the challenges of socio-economic development through natural resources in Africa.

The study also evaluated the ACHPR from the AU regional perspective. It found that the sovereign right of the state and the people to the ownership, disposal and use of

their natural resources to ensure the socio-economic development of the people is in line with Articles 19, 20, 21(3) and 22(1) of the ACHPR.

In its investigation of the AU CA, the study confirmed that the AU CA ensures collective sovereignty by creating common institutions with supranational authority. The study therefore found that the AU CA makes it possible for member states to harmonise their natural resource governance policies in order to attain collective socio-economic development that directly benefits the people. This aligns with the provisions of Articles 3(j), (i) and (l), 54(1) and (2)(a) and 56(a) and (d).

With regard to the two case studies – Nigeria and South Africa – the study investigated their domestic and international ownership and control of natural resources during the pre- and post-independence periods. These case studies made it possible to determine and understand the implications of the previous and existing circumstances of natural resource ownership and control in light of the socio-economic needs of the people in Africa. The study argued in this regard that even with the entrenched rights of the people flowing from the inherent right to natural resources, the existing natural resources management has had little impact on socio-economic development.

The study showed that, by virtue of the PSNR principles, Nigeria and South Africa are in exclusive control of their natural resources as the state entity and on behalf of the people. The Nigerian Constitution expressly provides that the state is not only the custodian but also the owner of all natural resources. Although South Africa is seen as the custodian of the natural resources of the people and the state, there is no express constitutional provision handing ownership to the state and the people. Only the MPRDA refers to the control of natural resources pertaining to custodianship. This largely negates the customary international law position in the PSNR and ACHPR declarations. Consequently, the people's rights to natural resource co-ownership with the state for facilitating the socio-economic development of the people, especially communities in the natural resource locations, do not appear to be constitutionally enshrined and promoted.

The study found that the exclusivity of ownership and control of natural resources in Nigeria causes huge resentment and the subjugation of the natural resource communities. Totalitarian ownership and control, as legislated by the state, has

created anguish in the natural resource communities due to the high levels of poverty there. Similarly, the study found that the South African MPRDA empowers the state, through the Minister, to solely oversee mineral rights and to grant mineral rights without involving the people, which ignores the PSNR principle of people's inherent rights. Thus, the state has appropriated the people's legitimate rights in this regard. The study further established that the MPRDA, by providing for the equitable administration of access to mineral resources through the executive, intended to ensure socio-economic benefits for previously disadvantaged Africans. However, the people's inherent right in terms of the PSNR principle is not captured and embedded in the Constitution and the MPRDA.

The study also found that the state institutional arrangements for the ownership and governance of natural resources are unclear with regard to their regulatory and commercial functions. The state runs natural resource exploration and exploitation unilaterally, without the people's direct participation, especially those communities in the natural resource locations. In Nigeria, the NNPCL is both a regulator and a commercial player. Similarly, in South Africa, the DMR, through the Minister, regulates and participates in granting mineral rights. This results in weak institutional systems, a lack of pure democratic values, disregard for separation of powers, the absence of the rule of law, conflicts of interest, political instability and corruption. Broader and transparent rehabilitation and restructuring of the existing natural resource ownership and control patterns are needed to ensure the substantial socio-economic upliftment of the people.

## 6.4 Recommendations

The study takes cognisance of the discussion and analysis of Nigeria and South Africa as case studies in relation to the investigation of the research question. The study established that the governance and management of natural resources are neglected due to the failure to effectively adopt the principle of PSNR within the extant legislative framework, thus allowing the state to abuse and manipulate the principle for its own political convenience despite the socio-economic pitfalls. The study engaged in the analysis of theories, international principles and institutional design, particularly the design of the EU and the AU. The study found that even though international relations requires state relationships, supranationalism will establish the core principle to

address the common socio-economic problems of the states and the people through a specialised and impartial institution that will take the EU and the AU design and theory into consideration. The study confirmed that institutions may need to be formed based on the common situations in the environments that they are intended to serve. This consideration should lead to a discussion on the mandate, functions, and practicability of compliance with institutional decisions.

Based on the findings above, the study proposes the development of a joint African Natural Resource Regulatory Panel (ANRRP) that follows the model of the EU supranational principles. The socio-economic deficits resulting from the poor natural resource governance structures must be addressed. The EU example illustrates how to capture the socio-economic benefits of natural resources through a multilateral engagement that allows for the efficient and productive ownership and governance of natural resources by an independent, supranational high authority for the people. Similarly, the study submits that the ANRRP could address the historical structural deficiencies in exploiting natural resources. The study contends that Africa needs to derive quality returns from its natural resources through superior collective regulatory engagement and the pooling of sovereignties, which will allow the continent to speak with one voice through a common democratic blueprint, as proven already in the EU.[1050] The study suggests the introduction of a comparable independent

[1050] The discussion in chapter 3 considered the EU position, which underpins the success of the EU's consolidated approach from the ECSC era with regard to the ownership and governance of natural resources. It takes into consideration the democratic guidelines which are part of the requirements that regulated the EU's operations in this regard. Thus, it involves the following: (1) Political criteria, which entail that the intending new member state should have a stable democratic structure which allows for the rule of law, human rights and respect for the protection of minorities to thrive; (2) Economic criteria, which imply an active market economy that wholly allows citizens and businesses to interact in making economic decisions. Thus, there is capacity to deal with market forces and competitive pressure within the EU; (3) Institutional criteria, which revolve around the handling of the obligation that comes with association, particularly being able to support the aims of the EU. The intending member must have an existing public administration structure that is competent in the application and administration of existing EU laws. Similarly, the AU through its CA promotes the principles of democracy, rule of law and human rights. However, the poor democratic culture in Africa may not allow for the appropriate implementation of CA guidelines in the activities of member states. Therefore, in practical terms, the AU may still need to make more effort to support the democratic values as exemplified in the EU's operations, which made the EU's governance of its natural resources worthy of emulation. However, only a real commitment to democratic ideals that promote a uniform culture of democratic practice will bring socio-economic development to the people. It may be difficult to do away with the existing individual sovereignty-centred AU states' arrangement in terms of natural resource ownership and governance. See also C Ake, 'Unique Case of African Democracy' (1993) 62(2) International Affairs at 240.

supranational high authority to oversee the continent's natural resource affairs so as to drive and support the socio-economic development of the people.

The study suggests that the ANRRP be designed and elevated to a pragmatic multilateral institution that will assist in systematically regulating governance and controlling natural resources to ensure the people's socio-economic development. This position can be garnered from the ECSC mechanism, which streamlined coal and steel resources for the socio-economic upliftment of the EU constituent states.[1051]

Therefore, the study proposes that the ANRRP should be designed like an AU organ. Thus, it will comprise a high authority, a committee of natural resource experts[1052] and a council of ministers on natural resources. This grouping follows the provisions of Article 3(d), (f), (g), (h), (i) and (j)[1053] and Article 4(m) and (n)[1054] of the AU CA. Similar to the ECSC framework, the high authority of the ANRRP will be the executive arm of the ANRRP. Its members will be appointed independently by the people from the AU's

[1051] The state ownership of resources in many EU states also did not give ownership of the enterprises to the supranational authority. The EU allows for a well-organised centralised decision-making body and the degree of EU control is based on rules and regulations designed to protect the various states' interests as well as the interests of the people. Although there is ownership of natural resources in various EU states, the ownership of natural resource enterprises is precluded at the supranational EU level. Therefore, the effectiveness of the ECSC was based on governance and control from these institutions: the High Authority, which was a council of representatives from the state parliaments of member states; a Council of Ministers; and a Court of Justice. These institutions had supranational authority over the production, pricing, investment, labour conditions, research and development of natural resources management. Tariffs and quotas were removed between member states in order to create a single market for natural resources. The impact of the High Authority was very effective for European unification. EU member states took the exceptional step of delegating authority to supranational bodies whose representatives, though selected by the member states, were able to make independent decisions on their behalf.

[1052] The activities of the committee shall supersede the affairs of the Specialised Technical Committee on Natural Resources, as already provided in Article 14 of the AU CA.

[1053] (d) promote and defend African common positions on issues of interest to the continent and its peoples;
(f) promote peace, security, and stability on the continent;
(g) promote democratic principles and institutions, popular participation and good governance;
(h) promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;
(i) establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;
(j) promote sustainable development at the economic, social, and cultural levels as well as the integration of African economies.

[1054] (m) respect for democratic principles, human rights, the rule of law and good governance;
(n) promotion of social justice to ensure balanced economic development.

member states' parliaments for a specific period. Article 9(d) and (e)[1055] of the AU CA empowers the assembly of the head of states to establish any AU organ, implement policies and decisions of the AU, and ensure compliance by members.

The high authority will have supranational authority in the governance and control of natural resources. The assembly of natural resource experts will have an oversight function in terms of the activities of the high authority and thus serve as a supervisory body. The high authority will comprise delegated members from participating states for a specified term. The Minister of Natural Resources in each state would be that state's government representative in the high authority. However, pertinent issues concerning the legal sustainability of the restructuring of the ANRRP would be determined by two elements: creating legal standing and the harmonisation of laws.

Therefore, the formation of the ANRRP as an institution will give rise to questions about its legal personality or standing.[1056] This is because granting legal standing to an institution to fulfil its purpose allows it to engage in treaty consultations, obtain rights and obligations, and enforce its resolutions.[1057] If the ANRRP exists without a defined legal status, its constitutive documents will not be regarded as agreements and will not have much legal force. Therefore, the participating states will not be compelled to adhere to the vision, principles and provisions of the ANRRP.[1058] This is in line with the findings in chapter 2 on state relations, which are based on harmonised principles of international treaties that bind states. The study submits that a substantial legal regulatory framework must be created.

Without claiming to have developed any conclusive approach, this study is intended to serve as motivation for future research on natural resource ownership and governance for the practicable socio-economic development of the people. The study provides a guide for an alternative understanding of the problem of natural resource ownership and control with regard to people's socio-economic development – and

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[1055] (d) establish any organ;
(e) monitor the implementation of policies and decisions of the Union as well ensure compliance by all member states.

[1056] Philippe Gautier, 'The Reparation for Injuries Case Revisited: The Personality of the European Union' at 332, 333 <http://www.mpil.de/files/pdf2/mpunyb_gautier_4.pdf> accessed 6 June 2022.

[1057] ibid.

possible solutions. This contribution will assist related research. It is also hoped that this study might contribute to the design of policy frameworks aimed at the consolidation of natural resource ownership and control to accomplish and maximise the socio-economic development of the people. Even if the core proposal of this study is not fully implemented, the study will at least influence the thinking on natural resource ownership and governance with regard to the people and the state as a fundamental component in the socio-economic upliftment of the people.

## 6.5 Conclusion

The study made findings from the investigation and discussion of the various elements that motivated this research. The study examined the shared rights of the state and the people to their ownership and control of natural resources, looking at the examples of Nigeria and South Africa to evaluate the socio-economic development benefits of natural resources for people in Africa. These shared rights are derived from the principles of PSNR and the ACHPR. However, the investigation of the ownership and governance of natural resources in Nigeria and South Africa revealed that the state has appropriated the inherent right of the people to their natural resources.

The study found that the people, particularly communities in the natural resource areas, do not participate significantly in the governance of their natural resources. The state ostensibly has the exclusive authority to govern and control natural resources in line with their often self-centred political and economic configurations. The study therefore found, within the framework of the purpose of the study, the research questions and the hypothesis, that natural resource ownership and governance in Africa has not ensured the people's anticipated socio-economic development.

The study found that the ECSC / EU's established supranational approach to the governance and control of natural resources can be adapted for Africa using the provisions of the AU CA. The study therefore recommended a fresh approach with the potential to replicate the ECSC / EU supranational governance arrangement in the form of the ANRRP to galvanise direct socio-economic benefits for the people through their natural resources. This will promote the broader political and socio-economic advancement of both states and their people.

## BIBLIOGRAPHY

### Books and monographs


Ake C, *Social Science as Imperialism: The Theory of Political Development* (Ibadan University Press 1982)

Alao A, *Natural Resources and Conflict in Africa: The Tragedy of Endowment* (University of Rochester Press 2007)

Allen S and Xanthaki A (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011)

Amartya S, *Development as Freedom* (Oxford University Press 1999)

Anaya J, *Indigenous Peoples in International Law* (Oxford University Press 2004)

Andreassen B and Marks S (eds), *Development as a Human Right: Legal, Political and Economic Dimensions* (Intersentia Publishing 2010)

Anheier H and Juergensmeyer M (eds), *Encyclopedia of Global Studies* vol 5 (Sage 2012)

Arezki R, Gylfason T and Sy S (eds), *Beyond the Curse* (International Monetary Fund Publication Services 2012)

Atsegbua L, *Oil and Gas in Nigeria: Theory and Practice* (New Era Publication 2004)

Badedau M and Mehler A (eds), *Resource Politics in Sub-Saharan Africa* (Institute of African Affairs 2005)

Badie B, Berg-Schlosser D and Morlino L (eds), *International Encyclopedia of Political Science* (Sage 2011)

Bastida E, Walde T and Warden-Fernandez J, *International and Comparative Mineral Law and Policy: Trends and Prospects* (Kluwer International 2005)

Beitz C, *Political Theory of Public International Law* (Stanford University Press 1979)

Blanco E and Razzaque J, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Edward Elgar Publishing 2011)

Bulajic M, *Principles of International Development Law* (Martinus Nijhoff Publishers 1993)

Carmody P, *The New Scramble for Africa* (Polity Press 2011)

Cassese A, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995)

Cassese A (ed), *U.N. Law-Fundamental Rights: Two Topics in International Law* (Martinus Nijhoff Publishers 1979)

Clark N and Worger W, *South Africa: The Rise and Fall of Apartheid* (Longman 2011)

Collier P and Venables A (eds), *Plundered Nations? Success and Failures in Natural Resource Extraction* (Palgrave Macmillan 2011)

Crawford J, *The Creation of States in International Law* (Oxford University Press 2006)

Dugard J, *International Law: A South African Perspective* (Juta 2005)

Elian G, *The Principle of Sovereignty over Natural Resources* (Sijthoff and Noordhoff International Publishers 1979)

Eromosole V (ed), *Nigerian Petroleum Business: A Handbook* (Advent Commons Ltd 1997)

Falola T and Heaton M, *A History of Nigeria* (University of Texas 2010)

Fanon F, *The Wretched of the Earth* (Penguin Classics 2001)

Farmer K and Fredl B, *Intertemporal Resource Economics: An Introduction to Overlapping Generations Approach* (Springer 2010)

Foighel I, *Nationalisation: A Study in the Protection of Alien Property in International Law* (Praeger 1957)

Friedman S, *Expropriation in International Law* (Greenwood Press 1953)

Frynas G, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Transaction Publishers 2000)

Hahlo H and Kahn E, *The Union of South Africa* (Steven and Sons Limited 1960)

Hanson K, D'Alessandro C and Owusu F (eds), *Managing Africa's Natural Resources: Capacities for Development* (Palgrave Macmillan 2014),

Hayes C, *The Historical Evolution of Modern Nationalism* (The Macmillan Company 1931)

Heilperin M, *Studies in Economic Nationalism* (L' Institut Universitaire De Etudes Internationals 1960) <https://cdn.mises.org/Studies%20in%20Economic%20Nationalism_2.pdf>

Hogan W and Sturzenegger F (eds), *The Natural Resources Trap: Private Investment Without Public Commitment* (MIT Press 2010)

Hossain K and Chowdhury R (eds), *Permanent Sovereignty over Natural Resources in International Law* (Frances Pinter Publishers 1984)

Humphreys M, Sachs J and Stiglitz J (eds), *Escaping the Resource Course* (Columbia University Press 2007)

Ian S, *The Ecology of Natural Resources* (Halsted Press 1974)

Jaap Z, Martijn L and Abiola M (eds), *Governance of Security Issues of the European Union: Challenges Ahead* (Asser Press 2016)

Kaberuka D, *Natural Resources for Sustainable Development in Africa: African Development Report* (Oxford University Press 2007)

Kaplan M and Dale M, *A Guide to the Minerals Act* (Butterworths 1992)

Katzarov K, *The Theory of Nationalisation* (Martinus Nijhoff Publishers1964)

Kay G, *Development and Underdevelopment: A Marxist Analysis* (Macmillan Press 1975)

Kreijen G, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Martinus Nijhoff Publishers 2004)

Lecomber R, *The Economics of Natural Resources* (Macmillan Press 1979)

Lester A, Nel E and Binns T, *South Africa Past, Present, and Future: Gold at the End of the Rainbow* (Longman 2000)

Lowe V, *International Law* (Oxford University Press 2007)

Momoh A and Adejumobi S (eds), *The National Question in Nigeria: Comparative Perspectives* (Ashgate Publishing 2002)

Mostert H, *Mineral Law: Principles and Policies in Perspective* (Juta 2012)

Muchlinsky P, *Multinational Enterprise and the Law* (Blackwell Publishing 1999)

Nafziger E, *Economic Development* (Cambridge University Press 2012)

Obadare E and Adebanwi W (eds), *Nigeria at Fifty: The Nation in Narration* (Routledge 2011)

Obi C and Rustad S (eds), *Oil and Insurgency in Niger Delta: Managing the Complex Petro-Violence* (Zed Books 2011)

Ochola W, Sanginga P and Bekalo I (eds), *Managing Natural Resources for Development in Africa: A Resource Book* (University of Nairobi Press 2018)

Ojeleye O, *The Politics of Post-War Demobilisation and Reintegration in Nigeria* (Ashgate Publishing 2010)

Olaniyan R (ed), *The Amalgamation and its Enemies (An Interpretative History of Modern Nigeria*) (Obafemi Awolowo University Press 2003)

Pescatore P, *The Law of Integration*: *Emergence of a new Phenomenon in International Relations, Based on the Experience of the European Communities* (AW Sijthoff 1974)

Rees J, *Natural Resources: Allocation, Economics and Policy* (Methuen 1994)

Rosenstein J, *Oil Corruption and Conflict in West Africa: The Failure of Governance and Corporate Social Responsibility* KAIPTC monograph No. 2 (2005) <http://www.kaiptc.org/Publications/Monographs/Monographs/mono-5_Rosenstein.aspx>

Ross R, *A Concise History of South Africa* (Cambridge University Press 1999)

Roth B, *Governmental Illegitimacy in International Law* (Oxford University Press 2000)

Salacuse J, *Law of Investment Treaties* (Oxford University Press 2010)

Schrijver N, *Sovereignty over Natural Resources* (Cambridge University Press 1997)

Sklar R, *Corporate Power in African State: The Political Impact of Multinational Mining Companies in Zambia* (University of California Press 1975)

Snyder L (ed), *The Dynamics of Nationalism* (D Van Nostrand Company, Inc 1964)

Szirmai A, *The Dynamics of Socio-Economic Development: An Introduction* (Cambridge University Press 2005)

Terreblanche M and Kevin D, *Research in Practice: Applied Methods for the Social Sciences* (UCT 1999)

Thompson L, *The History of South Africa* (Yale University Press 2000)

Van der Merwe G, *Sakereg* (2nd edn, Butterworths 1989)

Watkins D and Burton M, *Research Methods in Law* (2nd edn, Taylor and Francis Routledge 2018)

Weiler J, *The Political and Legal Culture of European Integration: An Exploratory Essay* (Oxford University Press 2011)

Wole S, *You Must Set Forth at Dawn* (Ayebia Clarke Publishing 2009)

Worden N, *The Making of Modern South Africa* (Blackwell Publishing 2000)

Wortley A, *Expropriation in Public International Law* (Cambridge University Press 1959)

**Journal articles**

Aberbach D, 'Nationalism and the Hebrew Bible' (2005) 11(2) Nations and Nationalism 223

Adejugbe M, 'The Myths and Realities of Nigeria's Business Indigenization' (1984) 15 Development and Change 577

Adewoye O, 'Sapara Williams: The Lawyer and the Public Servant' (1971) 6 Journal of Historical Society of Nigeria 47

Akinlo A, 'How Important is Oil in Nigeria's Economic Growth?' (2012) 5 Journal of Sustainable Development 165

Akpan W, 'Putting Oil First? Some Ethnographic Aspects of Petroleum-related Land Use Controversies in Nigeria' (2005) 9(2) African Sociological Review 134

Aladeitan L, 'Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria: Between Legality and Legitimacy' (2013) 38 Thurgood Marshall Law Review 159

Alam M, 'Contemporary Ideas and Theories of Nationalism' (1980) 41(3) The Indian Journal of Political Science 367

Ameh M, 'The Shift from Joint Operating Agreement to Production Sharing Contracts in the Nigerian Oil Industry: Any Benefits for the Players?' (2006) Energy Law and Policy CEPMLP 1

Amuwo A, ‘Between Elite Protectionism and Popular Resistance: The Political Economy of Nigeria’s Fractured State Since Juridical Independence’ (2010) 28(4) Journal of Contemporary African Studies 423

Asante S, ‘International Law and Foreign Investment: A Reappraisal’ (1988) 37 The International and Comparative Law Quarterly 588

Badenhorst P and Olivier N, ‘Expropriation of “Unused Old Order Rights” by the MPRDA: You have lost it! Agri SA v Minister of Minerals and Energy (Centre for Applied Legal Studies as amicus curiae)’ [2011] 3 All SA 296 (GNP) (2012) 75 Journal of Contemporary Roman-Dutch Law 329

Bebr G, ‘The European Coal and Steel Community: A Political and Legal Innovation’ (1953) 63(1) Yale Law Journal 43

Bedjaoui M, ‘The Right to Development and the *Jus Cogens’* (1986) 2 Lesotho Law Journal 93

Bignami F, ‘Formal Versus Functional Method in Comparative Constitutional Law’ (2016) 83 Osgood Hall Law Journal 442

Bilder R, ‘International Law and Natural Resource Policies’ (1981) 20 Natural Resources Journal 453

Brownlie I, ‘The Rights of Peoples in Modern International Law’ (1985) 9 Bulletin of the Australian Society of Legal Philosophy 104

Bush R, ‘Scrambling to the Bottom? Mining, Resources and Underdevelopment’ (2008) 35(117) Review of African Political Economy 361

Cawood F and Minnitt R, ‘A Historical Perspective on the Economics of the Ownership of Mineral Rights Ownership’ (1998) 98 The Journal of the South African Institute of Mining and Metallurgy 376

Chi M, ‘Resource Sovereignty and WTO Dispute Settlement: Some Comments on China – Raw Materials and China – Rare Earths’ (2015) 12 Manchester Journal of International Economic Law 15

Clark L, ‘International Law and Natural Resources’ (1977) 4 Syracuse Journal of International Law and Commerce 377

Dinstein Y, ‘Collective Human Rights of Peoples and Minorities’ (1976) 25 International Law and Comparative Law Quarterly 102

Dolzer R, ‘Permanent Sovereignty over Natural Resources and Economic Decolonization’ (1986) 7 Human Rights Law Journal 217

Domke M, ‘Foreign Nationalisations: Some Aspects of Contemporary International Law’ (1961) 55 American Journal of International Law 585

Drucker P, ‘Multinational Corporations and Developing Countries: Myths and Realities’ (1974) 53(1) Foreign Affairs 121

Dugard J, ‘International Law and the South African Constitution’ (1997) 8(1) European Journal of International Law 77

Duruigbo E, ‘Permanent Sovereignty and Peoples Ownership of Natural Resources in International Law’ (2006) 38 George Washington International Law Review 33

Duruigbo E, ‘The World Bank, Multinational Oil Corporation, and the Resource Curse in Africa’ (2005) 26 University of Pennsylvania Journal of International Law 1

Dwumfour R and Ntow-Gyamfi, ‘Natural Resources, Financial Development and Institutional Quality in Africa: Is there a Resource Curse?’ (2018) 59 Resource Policy 411

Eberle E, ‘The Methodology of Comparative Law’ 2011 Roger William Law Review 51

Edu K, ‘A Socio-Legal Appraisal of Nigeria’s Joint Venture Arrangement in the Petroleum Industry’ (2010) 22 Sri Lanka Journal of International Law 1

Edward D, ‘The Nationalisation of Foreign-Owned Property’ (1951) 36 Minnesota Law Review 323

Egugbo C, ‘Resource Control and the Politics of Revenue Allocation in Nigeria Federation’ (2016) 5(4) International Journal of Arts and Humanities 186

Ekeh P, ‘Colonialism and the Two Publics in Africa: A Theoretical Statement’ (1975) 17 Comparative Studies in Society and History 91

Elbra A, ‘The Forgotten Resource Curse: South Africa’s Experience with Mineral Extraction’ (2013) 38 Resource Policy 549

Gainer G, ‘Nationalisation: The Dichotomy Between Western and Third World Perspectives in International Law’ (1983) 26 Howard Law Journal 1547

Garg A, ‘Permanent Sovereignty Over Natural Resources: An Analysis’ (2021) 4(1) International Journal of Law Management and Humanities 624

Fagbayibo B, ‘A Supranational African Union? Gazing into the Crystal Ball’ (2008) 3 De Jure 497

Fagbayibo B, ‘Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview’ (2013) 16(32) Potchefstroom Electronic Law Journal 1

Fagbayibo B, ‘Looking Back, Thinking Forward: Understanding the Feasibility of Normative Supranationalism in the African Union’ (2013) 20(3) South African Journal of International Affairs 411

Farnie D, ‘The Mineral Revolution in South Africa’ (1956) 24(2) South African Journal of Economics 125

Freeman M, ‘National Self-determination, Peace and Human Rights’ (1998) 10(2) Peace Review: A Journal of Social Justice 157

Gilbert J, ‘The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right’ (2013) 31(2) Netherlands Institute of Human Rights 314

Gittleman R, ‘The African Charter on Human and Peoples Rights: A Legal Analysis’ (1982) 22(4) Virginia Journal of International Law 667

Hassan A and Ari O, ‘Fiscal Federalism and Resource Control in Nigeria’ (2023) 4(1) Zamafara Journal of Politics and Development 118

Hervey T, Cryer R and Sokhi-Bulley B, ‘Legal Research Methodologies in European Union and International Law: Research Notes (Part 1)’ (2007) 3(2) Journal of Contemporary European Research 48

Hosman L, ‘Dividing the Oils: Dynamic Bargaining as Policy Formation in the Nigerian Petroleum Industry’ 2009 Review of Policy Research 609

Gordley J, ‘Comprehensive Legal Research: Its Function in the Development of Harmonized Law’ (1995) 43(4) The American Journal of Comparative Law 555

Ijalaye D, ‘Was “Biafra” at any Time a State in International Law’ (1971) 65 American Journal of International Law 551

Ikelegbe A, ‘The Economy of Conflict in the Oil Rich Niger Delta Region of Nigeria’ (2005) 14 Nordic Journal of African Studies 208

Itagaki Y, ‘Economic Nationalism and the Problem of Natural Resources’ (1973) 11(3) The Developing Economics 219

Johnson K, ‘Whither Nationalism? Are we entering an era of post-nationalist politics in Southern Africa?’ (2005) 58 Transformation: Critical Perspectives on Southern Africa 1

Khubana K, Rootman C and Smith E, ‘Antecedent of Shared Value: Perception within the South African Mining Industry’ (2022) 19 Journal of Contemporary Management 132

Kivunja C and Kuyini A, ‘Understanding and Applying Research Paradigms in Educational Contexts’ (2017) 6(5) International Journal of Higher Education 26

Kiwanuka R, ‘The Meaning of “People” in the African Charter on Human and Peoples’ Rights’ (1988) 82 The American Journal of International Law 80

Lauterpacht H, ‘Recognition of States in International Law’ (1944) 53 Yale Journal of International Law 385

Leon P, ‘Whither the South African Mining Industry?’ (2012) 30(1) Journal of Energy and Natural Resources Law 5

Liodakis G, ‘The People-Nature Relations and the Historical Significance of the Labour Theory of Value’ (2001) 25 Capital and Class 113

Luiz J, ‘The Evolution and Fall of the South African Apartheid State: A Political Economy Perspective’ (1998) 26 UFAHAMU 49

Mahmood M, ‘State and Civil Society: Reconceptualizing the Birth of State Nationalism and the Defeat of Popular Movements’ (1990) 15 African Development 46

Morrison F, ‘Recognition in International Law: A Functional Reappraisal’ (1967) 34 The University of Chicago Law Review 857

Ndlovu-Gatsheni S, ‘Africa for Africans or Africa for “Natives” Only? “New Nationalism” and Nativism in Zimbabwe and South Africa’ (2009) 1 Africa Spectrum 61

Ngambi P, ‘Permanent Sovereignty over Natural Resources and the Sanctity of Contract, From the Angle of Lucrum Cessans’ (2015) 12(2) Loyola University Chicago International Law Review 153

Nnadozie R, ‘Access to Basic Services in Post-Apartheid South Africa: What has Changed? Measuring on a Relative Basis’ (2013) 16 The African Statistical Journal 82

Norbert K, ‘New Nationalism and Xenophobia in Africa–A New Inclination?’ (2009) 44(1) Africa Spectrum 7

Ogunleye T, ‘A Legal Analysis of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry’ (2015) 5(8) Journal of Energy Technologies and Policy

Ojo E, ‘The Politics of Revenue Allocation and Resource Control in Nigeria: Implications for Federal Stability’ (2010) 7(1) Federal Governance 38

Okafor J and Aniche E, ‘A Critical Appraisal of Enforcement of Nigeria Oil and Gas Industry Content Development (NOGICD) Act, 2010’ (2014) 31 Journal of Law, Policy and Globalisation 82

Okolo P and Okiemute R, ‘Federalism and Resource Control: The Nigerian Experience’ (2014) 4(2) Public Policy and Administration Research 99

Okoro B, ‘A Case for the Participation of the Oil Producing States and Communities in the Ownership and Control of Petroleum Resources in Nigeria’ (2021) 3 International Review of Law and Jurisprudence 171

Olowu D, ‘Regional Integration, Development, and the African Union Agenda: Challenges, Gaps, and Opportunities’ 2003 Transnational Law & Contemporary Problems 211

Omeje K, ‘Oil Conflict in Nigeria: Contending Issues and Perspective of the Local Niger Delta People’ (2005) 10 New Political Economy 321

Omorogbe Y, ‘The Legal Framework for the Production of Petroleum in Nigeria’ (1987) 5 Journal of Energy and Natural Resource Law 273

Onejeme A, ‘The Law of Natural Resources Development: Agreements Between Developing Countries and Foreign Investors’ (1978) 5 Syracuse Journal of International Law 1

Orogun P, ‘Resource Control, Revenue Allocation and Petroleum Politics in Nigeria: The Niger Delta Question’ (2010) 75(5) Geo Journal 459

Ovadia J, ‘The Nigerian “One Percent” and the Management of National Oil Wealth Through Nigerian Content’ (2013) 77(3) Science and Society 315

Ozoigbo B and Chukuezi C, ‘The Impact of Multinational Corporation on the Nigerian Economy’ (2011) 19(3) European Journal of Social Sciences 380

Peters P, Schrijver N and De Waart P, ‘Responsibility of States in Respect of the Exercise of Permanent Sovereignty over Natural Resources: An Analysis of Some Principles of the Seoul Declaration (1986) by the International Law Association’ (1989) 36 Netherlands International Law Review 285

Raji A and Abejide T, ‘The British Mining and Oil Regulation in Colonial Nigeria c. 1914-1960s: An Assessment’ (2014) 2 Singaporean Journal of Business Economics and Management Studies 62

Rood L, ‘Nationalisation and Indigenisation in Africa’ (1976) 11 The Journal of Modern African Studies 427

Sachs J and Warner A, ‘Natural Resources and Economic Development: The Curse of Natural Resources’ (2001) 45 European Economic Review 827

Salacuse J, ‘BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries’ (1990) 24 International Lawyer 675

Sengupta A, ‘The Human Right to Development’ (2004) Oxford Development Studies 179 at 180

Sloane R, ‘The Changing Face of Recognition in International Law: A Case Study of Tibet’ (2002) 16 Emory International Law Review 107

Smis S and Cambou D, ‘Permanent Sovereignty over Natural Resources from a Human Rights Perspective: Natural Resources Exploitation and Indigenous Peoples’ Rights in the Arctic’ (2013) 22(1) Michigan State International Law Review 348

Sorensen P, ‘Can the Mining Industry in South Africa Kick-Start a Second Development Phase to Alleviate Poverty and Inequality?’ (2015) 72(6) International Journal of Environmental Studies 921

Sorensen P, ‘Sustainable Development in Mining Companies in South Africa’ (2011) 68(5) International Journal of Environmental Studies 625

Sorensen P, ‘Mining in South Africa: A Mature Industry?’ (2012) 69(1) International Journal of Environmental Studies 21

Stevens L, ‘The Illusion of Sustainable Development: How Nigeria’s Environmental Laws are Failing the Niger Delta’ (2011) 36 Vermont Law Review 387

Steyn P, ‘Oil Exploration in Colonial Nigeria, c. 1903-1958’ (2009) 37 The Journal of Imperial and Commonwealth History 249

Van Hoeck M, ‘Methodology of Comparative Legal Research’ 2015 Law and Method 1

Verwey D and Schrijver J, ‘The Taking of Foreign Property under International Law: A New Legal Perspective?’ (1984) 15 Netherlands Yearbook of International Law 3

Visser F, ‘The Principle of Permanent Sovereignty over Natural Resources and the Nationalisation of Foreign Interests’ (1988) 21 Comparative and International Law Journal of Southern Africa 77

Walde T, ‘Mining Law Reform in South Africa’ (2002) 17 Minerals and Energy 17

Weiler J, ‘The Community System: The Dual Character of Supranationalism’ (1981) 1 Year Book of European Law 267

Wenar L, ‘Property Rights and the Natural Resource Curse’ (2008) 36(1) Philosophy and Public Affairs 36

Wiig A and Kolstad I, ‘Multinational Corporation and Host Country Institutions: A Case Study of Corporate Social Responsibility in Angola’ (2010) 19(2) International Business Review 178

**Online materials**

African Development Bank Group Report, ‘African Economic Outlook 2023: Mobilising Private Sector Finance for Climate and Green Growth in Africa’ (2023) <https://www.afdb.org/en/documents/african-economic-outlook-2023>

African Network for Environment and Economic Justice, *Oil of Poverty in Niger Delta* (June 2021) <https://www.aneej.org/oil-of-poverty-in-the-niger-delta-report/>

Africa Progress Report ‘Equity in Extractives Stewarding Africa’s Natural Resources for All’ (2013)

<https://static1.squarespace.com/static/5728c7b18259b5e0087689a6/t/57ab29519de4bb90f53f9fff/1470835029000/2013_African+Progress+Panel+APR_Equity_in_Extractives_25062013_ENG_HR.pdf>

Agwara J, 'Resource Curse in Nigeria: Perception and Challenges' Centre for Policy Studies, Central European University (2006)

Alden C and Alves C, 'China and Africa's Natural Resources: The Challenges and Implications for Development and Governance' South African Institute of International Affairs (SAIIA) Occasional Paper No 41, September 2009

Alter K, 'The Theory and Reality of the European Coal and Steel Community' Working Paper No 07-001 2007

Amnesty International Report, 'Nigeria: Petroleum, Pollution and Poverty in the Niger Delta' (2009)

ANCYL Discussion Document, 'Towards the Transfer of Mineral Wealth to the Ownership of the People as a Whole: A Perspective on Nationalisation of Mines' (2010)

'AU Leaders Agree to Reform to Reduce Donor Dependence' <https://www.news24.com/Africa/News/pics-au-leaders-agree-reforms-to-reduce-donor-dependence-20181119>

Barna N and others, *Rents to Riches? The Political Economy of Natural Resource-Led Development* World Bank, Washington DC (2012)

Chikwanha A, 'The Many Shades of Resource Nationalism' <https://saiia.org.za/research/the-many-shades-of-resource-nationalism/>

Council of the European Union, Council Conclusions on the Fifth Report on Economic, Social and Territorial Cohesion 3068th General Affairs Council Meeting, 21 February 2011 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/119400.pdf>

Cristescu A, ‘The Right to Self-Development, Historical and Current Development on the Basis of United Nations Instrument’ <http://www.cetim.ch/en/documents/cristescu-rap-ang.pdf>

De Klerk E, ‘South Africa’s Negotiated Transition Owning the Process: Public Participation in Peace-making’ (2002)

Deloitte ‘Petroleum Industry Act: Nigeria’s New Oil and Gas Regulatory Framework’ (2021) <https://www2.deloitte.com/content/dam/Deloitte/ng/Documents/energy-resources/Petroleum%20Industry%20Act_Nigerias%20New%20Oil%20and%20Gas%20Regulatory%20Framework.pdf>

Diminas S, Obinna R and Ibezim-Ohaeri V, ‘An Analysis of the Nigerian Petroleum Industry Bill 2012 Vol 1’ <http://www.westpaq.com/wp-content/uploads/2013/05/An-Analysis-of-the-Nigerian-Petroleum-Industry-Bill-2012_WESTPAQ_v1_FINAL.pdf>

Du Plessis M, ‘Implication of the AU Decision to Give the African Court Jurisdiction Over International Crimes’ Institute for Security Studies Paper No. 235 (June 2012)

EU Council <https://www.consilium.europa.eu/en/european-council/>

European Parliament Resolution of 9 July 2015 on Resource Efficiency: Moving Towards a Circular Economy <https://www.europarl.europa.eu/doceo/document/TA-8-2015-0266_EN.pdf>

European Union 6th Environmental Action Programme Final Report ‘Towards a Thematic Strategy on the Sustainable Use of Natural Resources’ <http://ec.europa.eu/environment/archives/natres/pdf/final_report_wg1.pdf>

General Secretariat of the Council Delegations, European Council Conclusion 28-29 October 2019 <http://data.consilium.europa.eu/doc/document/ST-25-2010-INIT/en/pdf>

Gioski N and Sedlaacko M, ‘Resource Policies in the Context of Sustainable Development: Current Trends and Challenges Ahead’ (2011) ESDN Quarterly Report

Goodman S, Rajagopaul A and Cassim Z, ‘Putting the Shine Back into South African Mining: A Path to Competitiveness and Growth’ (2019) McKinsey & Company <https://www.mckinsey.com/~/media/mckinsey/featured%20insights/middle%20east%20and%20africa/putting%20the%20shine%20back%20into%20south%20african%20mining/mck-putting-the-shine-back-into-south-african-mining-a-path-to-competitiveness-and-growth.pdf>

Gylfason, T and Zoega G, ‘Natural Resources and Economic Growth: The Role of Investment’ World Economy (2006) <http://www.bcentral.cl/estudios/documentos-trabajo/pdf/dtbc142.pdf>

Harvey R, ‘Mining and Development: Lessons Learnt from South Africa and Beyond’ Policy Briefing 86, Governance of Africa’s Resources Programme (2014) <https://saiia.org.za/wp-content/uploads/2014/04/Policy-Briefing-86.pdf>

Heymann T (ed), ‘Natural Riches? Perspective on Responsible Natural Resource Management in Conflict-affected Countries’ World Economic Forum (2013)

Higgins K, ‘Regional Inequality and Niger Delta’ Policy Brief No. 5 prepared for World Development Report, Overseas Development Institute (2009) <https://cdn.odi.org/media/documents/3383.pdf>

Human Rights Watch, ‘Transparency and Accountability in Angola’ (2010) <https://www.hrw.org/report/2010/04/13/transparency-and-accountability-angola>

ISS/PSC Report, ‘Option to Restructure the AU to Ensure Greater Peace and Security’ <https://issafrica.org/pscreport/psc-insights/options-to-restructure-the-au-to-ensure-greater-peace-and-security>

Kaufman D, Kray A and Zoido-Lobaton P, ‘Governance Matters’ <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.200.2726&rep=rep1&type=pdf>

Knox C, ‘The Secession of South Sudan: A Case Study in African Sovereignty and International Recognition’ <http://digitalcommons.csbsju.edu/cgi/viewcontent.cgi?article=1001&context=polsci_students>

Mahler A, ‘Nigeria: A Prime Example of the Resource Curse? Revisiting the Oil-Violence Link in the Niger Delta’ (2010) No. 120 Working Papers, German Institute of Global and Area Studies <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1541940>

Makinwa F, ‘Nigeria Petroleum Industry Bill 2012: Conflict Analysis Report’ (2012) <http://integritynigeria.org/wp-content/uploads/2012/09/PIBReportFinal_v3.pdf>

Mele C, Pels J and Polese F, ‘A Brief Review of Systems Theories and their Managerial Application’ <https://pubsonline.informs.org/doi/10.1287/serv.2.1_2.126>

Mundial B, ‘Making Petroleum Revenue Work for the Poor: Transparency and Good Governance Dominate Discussion on Petroleum Revenue Management’ (2002)

Murombedzi J, *World Social Report* (2016) <https://en.unesco.org/inclusivepolicylab/sites/default/files/analytics/document/2019/4/wssr_2016_chap_09.pdf>

Natural Resource Charter Natural Resource Governance Institute Second Edition <https://resourcegovernance.org/sites/default/files/NRCJ1193_natural_resource_charter_19.6.14.pdf>

NNPC Draft Service Contract Model <https://nnpcgroup.com/insights/NNPC-Limited-Contract-Transparency>

Nordic Africa Institute Policy Notes 2009/1 ‘Causes and Curses of Oil-related Niger Delta (2009)’ <https://www.files.ethz.ch/isn/97598/policy_notes2009-1.pdf>

Oluwole V, The Business Insider Africa Report (24 July 2023)

Onyeukwu J, ‘Resource Curse in Nigeria: Perception and Challenges’ Centre for Policy Studies, Central European University, Budapest (2007)

Oxfam Report, ‘Inequality in Nigeria Exploring the Drivers’ Oxfam International (May 2017) <https://www.oxfam.org/en/research/inequality-nigeria-exploring-drivers>

Peck S and Chayes S, ‘The Oil Curse: A Remedial Role for the Oil Industry’ Carnagie Endowment for International Peace (2015) <https://carnegieendowment.org/files/CP_250_Peck_Chayes_Oil_Curse_Final.pdf>

Perera S, ‘Research Paradigm, Workshop on Research Methodology’ (2018) <http://www.natlib.lk/pdf/Lec_02.pdf>

‘Regional Initiatives against the Illegal Exploitation of Natural Resources’ UN Economic Commission for Africa, Sub Regional Office of East Africa <https://archive.uneca.org/sites/default/files/PublicationFiles/special_report_-icglr.pdf>

Rittberer B, ‘The European Coal and Steel Community (ECSC) and European Defence Community (EDC) Treaties’ <https://www.researchgate.net/publication/304650621_The_European_Coal_and_Steel_Community_ECSC_and_European_Defence_Community_EDC_Treaties>

Saavedra M, ‘Diversity as Paradox: Legal History and the Blind Spots of Law’ Max Planck Institute for Legal History and Legal Theory Research Paper Series (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3554952#>

Sayne A, Gillies A and Katsouris C, ‘Inside NNPC Oil Sales: A Case for Reform in Nigeria’ Natural Resource Governance Institute (2015) <http://www.resourcegovernance.org/sites/default/files/documents/nrgi_insidennpcoilsales_completereport.pdf>

Scotland J, ‘Exploring the Philosophical Underpinning of Research: Relating Ontology and Epistemology to the Methodology and Methods of the Scientific, interpretive, and Critical Research Paradigms’ (2012) <https://files.eric.ed.gov/fulltext/EJ1080001.pdf>

Socio-Economic Rights and Accountability Project 2022 Report <https://serap-nigeria.org/download/download-we-are-all-vulnerable-how-lack-of-accountability-is-fuelling-human-right-violation-in-the-niger-delta/>

Sonwabile M, 'Chief's Justice? Mining, Accountability and the Law in the Bakgatla-ba-Kgafela Traditional Authority Area' SA Crime Quarterly 24, 2014 <https://www.scielo.org.za/pdf/sacq/n49/03.pdf>

South African Socio-Economic Framework of the ANC of Nelson Mandela in 1994 <https://www.gov.za/faq/finance-business/where-do-i-get-copy-reconstruction-and-development-programme-rdp>

Supplement to African Development Report, 'Oil and Gas in Africa' <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Oil%20and%20Gas%20in%20Africa.pdf>

Svetlana T and Anya S (eds), 'Covering: A Reporter's Guide to Energy and Development' <http://www.opensocietyfoundations.org/sites/default/files/osicoveringoil_20050803.pdf>

'The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities' Human Rights Watch Report (1999) <http://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf>

'The Raw Materials Initiative–Meeting Our Critical Needs for Growth and Jobs in Europe' Communication from the Commission to the European Parliament and the Council <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0699:FIN:EN:PDF>

Tribunal of Inquiry into Crude Oil Sales, *Federal Government Press* (1980) full inquiry report

Ubertazzi B, 'The End of ECSC' (2004) 8 European Integration Online Papers (EIOP) <http://eiop.or.at/eiop/pdf/2004-020.pdf>

Ukiwo U, ‘Governance Regimes of Oil in Nigeria: Issues and Challenges’ Centre for Research on Peace and Development (CRPD) Leuven, Belgium, Working Paper No. 69 (2018) <https://soc.kuleuven.be/crpd/files/working-papers/crpd-no-69-ukiwo-full.pdf>

Ushie V, ‘From Aspiration to Reality: Unpacking the African Mining Vision’ Oxfam Briefing Paper (2017) <https://www-cdn.oxfam.org/s3fs-public/bp-africa-mining-vision-090317-en.pdf>

Van der Schyff E, ‘South African Mineral Law: A Historical Overview of the State’s Regulatory Power Regarding the Exploitation of Minerals’ <https://repository.nwu.ac.za/bitstream/handle/10394/16988/New%20contree-2012-64-Van%20der%20Schyf.pdf?sequence=1>

Werle G and Vormbaum M, ‘The Search for Alternatives: The African Criminal Court’ Commentary, 28 March 2017 <https://www.ispionline.it/sites/default/files/pubblicazioni/commentary_werle_wormbaum_28_03.2017.pdf>

**Dissertations and theses**

Dale M, ‘A Historical and Comparative Study on the Concept and Acquisition of Mineral Rights’ (PhD thesis, University of South Africa, 1979)

Ekwere K, ‘Sustainable Development of Oil and Gas in the Niger Delta: Legal and Political Issues’ (PhD thesis, University of Hamburg, 2010)

Fagbayibo B, ‘A Politico-Legal Framework for Integration in Africa: Exploring the Attainability of a Supranational African Union’ (LLD thesis, University of Pretoria, 2010)

Paterson T, ‘Unmasking Ecological Warfare-Shell-BP, Nigeria, and the Movement for Survival of the Ogoni People’ (MA thesis, Georgia State University, 2023)

**Newspapers and magazines**

Business Day Report (Lagos, 25 July 2019)

Business Day Report (Lagos, 25 April 2023)

Business Day Report (Lagos, 27-29 June 2018)

Cable Newspaper Report (Lagos, 25 November 2022)

Nation Newspaper Report (Lagos, 21 February 2016)

Nigeria Punch Newspaper Report (Lagos, 6 September 2022)

Nigeria Punch Newspaper Report (Lagos 6 April 2001)

Nigerian Tribune Newspaper Report (Benin City, 7 March 2013)

Premium Times Newspaper Report (Lagos, 17 August 2017)

This Day Newspaper Report (Lagos, 9 October 2018)

The Guardian Newspaper Report (Lagos, 16 July 2018)

The Guardian Newspaper Report (Lagos, 20 May 2001)

This Day Newspaper Report (Lagos, 15 April 2001)

Washington Post (Washington, 10 April 1987)

**Internet sources**

Acemoglu D, Gelb S and Robinson J, 'Black Economic Empowerment and Economic Performance' August 2007 <https://www.treasury.gov.za/publications/other/growth/06-procurement%20and%20bee/02-black%20economic%20empowerment%20and%20economic%20performance%20in%20so.pdf>

African Mining Vision (2009) <http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf>

Andrews P, ‘Apartheid the Legal Death of Black Worker’ (1987) <https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=2257&context=fac_articles_chapters>

EU Parliament <https://www.europarl.europa.eu/about-parliament/en/in-the-past>

EU’s Long Term Budget for 2014-2020 <https://www.europarl.europa.eu/about-parliament/files/home-page/en-ep-brochure.pdf>

European Union Institutions <https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies_en>

EU-ACP Cotonou Agreement <https://www.consilium.europa.eu/en/policies/cotonou-agreement/>

Europe 2020: A European Strategy for Smart, Sustainable and Inclusive Growth <http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf>

Ijaw Youths of the Niger Delta, The Kaiama Declaration <https://www.hrw.org/reports/1999/nigeria2/Ngria993-02.htm>

Joint Africa-EU Strategy 2017 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/603849/EXPO_STU(2017)603849_EN.pdf>

Malabor Protocol <https://www.refworld.org/pdfid/56a9ddcf4.pdf>

Matlou O, ‘Empowering the Mining Industry: Lessons from the Last 10 Years’ (2023) <https://businessmediamags.co.za/mining/sa-mining/sa-mining-columnist/empowering-the-mining-industry-lessons-from-the-last-10-years/>

Official Gazette of the Petroleum Industry Act 2021 <http://www.petroleumindustrybill.com/wp-content/uploads/2021/09/Official-Gazette-of-the-Petroleum-Industry-Act-2021.pdf>

OPEC, Annual Statistical Bulletin, Nigeria Facts and Figures, 2022 <https://enterprise.press/wp-content/uploads/2022/06/ASB_2022.pdf>

Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament 2001 <https://au.int/sites/default/files/treaties/36301-treaty-0022_-_protocol_to_the_treaty_establishing_the_african_economic_community_relating_to_the_panafrican_parliament_e.pdf>

TEU <https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF>

'The Paradox of Plenty' The News International, 27 June 2013 <http://www.thenews.com.pk/Todays-News-9-186255-The-paradox-of-plenty>

Treaty Establishing the African Economic Community <https://au.int/en/treaties/treaty-establishing-african-economic-community>

UNCTAD Trade and Development Board: Resolutions on Permanent Sovereignty Over Natural Resources 19 October 1972 <http://heinonline.org/HOL/LandingPage?handle=hein.journals/intlm11&div=206&id=&page=>

**Case law**

***Nigeria***

*Attorney General of the Federation v Attorney General of Abia State and Others* (2002) 96 LRCN 559, (2002) 6 NWLR (Part 764)

***South Africa***

*Agri South Africa v Minister for Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* 2010 (1) SA 104 (GNP)

*Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC)

*Alexkor (Pty) Ltd v Richtersveld Community* 2004 (5) SA 460 (CC)

*Baleni v Minister of Minerals and Energy* 2019 (2) SA 453 (GP)

*Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (Unreported judgment, Transvaal Provincial Division Case No 39808/2007, 18 November 2008)

*Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (Unreported judgment, Supreme Court of Appeal Case No 71/09, 21 March 2010)

*Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC)

*Minerals Council South Africa v Minister of Mineral Resources and Energy and Others* 2021 (4) All SA 836 (GP)

*Minerals Council South Africa v Minister of Mineral Resources and Energy and Another* [2020] ZAGPPHC 301

*Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA)

*Macdonald v Versfeld* 1885-1888 (2) SAR TS 234

*Richtersveld Community v Alexkor (Pty) Ltd* 2001 (3) SA1293 (LCC)

*Richtersveld Community v Alexkor* 2003 (6) SA 104 (SCA)

*Taylor and Claridge v Van Jaarsveld and Nellmapius* 1885-1888 (2) SAR TS 137

*Union of South Africa v Marais and Others* 1920 AD 240

***Others***

*East Timor case* (*Portugal v Australia*) <http://www.icj-cij.org/docket/files/84/6951.pdf>

**Legislation**

***Nigeria***

Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act of 2004

Constitution of the Federal Republic of Nigeria 1999 as amended

Constitution of Nigeria of 1979

Exclusive Economic Zone Act of 1978

Independence Constitution of Nigeria of 1960

Mineral Ordinance 1907/ C 80 1290, National Archive Ibadan

Mineral Ordinance Regulation Prof, CSO, 422/1916 Regulation, National Archive Enugu

Mining and Mineral Act of 2007

Mineral Ordinance 1946 Cap 121 Laws of 1958 Nigeria

Offshore Oil Revenue (Registration of Grants Act) of 1971

Oil Pipeline Act of 1956

Petroleum Act of 1969

Petroleum Control Act of 1967

Petroleum Act 51 of 1969

Petroleum Act Cap 350

***South Africa***

Bantu Authorities Act 68 of 1951

Black Land Act 27 of 1913

Constitution of the Republic of South Africa, 1996

Crown Land Disposal Ordinance 13 of 1908

Minerals Act 50 of 1991

Mineral and Energy Laws Rationalisation Act 47 of 1994

Minerals Land Leasing Act 9 of 1877

Mineral and Petroleum Resources Development Act 28 of 2002

Mining Lease Act 12 of 1883

Mining Registration Act 16 of 1967

Mining Rights Act 20 of 1967

Natal Mines Act 43 of 1899

Promotion of Bantu Self-Government Act 46 of 1959

Precious Stones Act 73 of 1964

Precious Stones Amendment Act 12 of 1960

Precious Stones and Minerals Mining Act 19 of 1883

Traditional Leadership and Governance Framework Act 41 of 2003

**International Instruments**

African Charter on Human and Peoples' Rights <https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf>

AU Constitutive Act <https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf>

Lisbon Treaty Third Edition 2007 <http://en.euabc.com/upload/books/lisbon-treaty-3edition.pdf>

Statute of the African Court of Justice and Human Rights <http://www.peaceau.org/uploads/protocol-statute-african-court-justice-and-human-rights-en.pdf>

UN General Assembly Resolution 626 of 1952 <https://digitallibrary.un.org/record/211441?ln=en>

UN General Assembly Resolution 1803 of 1962 on Permanent Sovereignty over Natural Resources <https://digitallibrary.un.org/record/211441?ln=en> and <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/resources.pdf>

UN General Assembly Resolution 3281 on Charter of Economic Rights and Duties of States <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2778/download>

UN General Assembly Resolution 3201 on Declaration on the Establishment of a New Economic Order <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2775/download>