

*This is a pre-copyedited, author-produced version of an article accepted for publication in the Denning Law Journal. The definitive published version is in (2016) 28 Denning Law Journal available at <http://ubplj.org/index.php/dlj/article/view/1272>*

## **AFRICAN 'SOCIAL ORDERING' GRUND-NORMS AND THE DEVELOPMENT OF AN AFRICAN LEX PETROLEA?**

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### **ABSTRACT**

*This article interrogates the constitutional relevance of African social ordering rules in petroleum governance in Sub-Saharan African petroleum producing states. At the apex of the hierarchized African legal system is the national constitution which contains the basic norm or grundnorm derived from Western received law. Yet some African scholars have described African social ordering norms as grundnorms. This goes contrary to the conventional positivist position that 'a legal system cannot be founded on two conflicting grundnorms.'<sup>2</sup> This article will consider whether African social ordering norms have actually attained the level of a grundnorm as expounded in Kelsen's pure theory. Utilising the Ekeh's 'two publics' model, it investigates how the basic norm for African social ordering grundnorms is presupposed.*

*The article considers whether there is a conflict between the domanial system of state ownership as approved by African national constitutions and indigenous African social ordering norms premised on communitarianism. The article presents for analysis the recent study undertaken by African Petroleum Producers Association (APPA). This study considers whether it is possible to standardise the rules of petroleum contractual governance in Africa. This has led to some discussion on whether the standardisation of these rules could lead to the development of an African Lex Petrolea. This article explores the role that African social ordering norms can play in the development of a continent-wide Lex Petrolea.*

**Keywords:** African Social Ordering Norms; Conflicting Grundnorms; Ubuntu; African Communitarianism; Two Publics; Lex Petrolea; Domanial Ownership; Petroleum Governance

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<sup>2</sup> Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, 2006) 158.

## PART 1

### 1. INTRODUCTION

The grundnorm is described as the fundamental or ‘foundation’ rule that underpins a legal system.<sup>3</sup> In many post-colonial African states, the grundnorm is presented in the national constitution, the supreme law of an African hierarchical legal system.<sup>4</sup> The typical hierarchical African legal system is a pluralist system. It consists of Western received law which operate side by side with non-Western norms and rules. These non-Western norms and rules are described as African social ordering grundnorms.<sup>5</sup>

The status of these indigenous social ordering ‘grundnorms’ in the hierarchized legal systems of post-colonial African states is in debate. Chigara, in his leading work<sup>6</sup>, describes these social ordering rules as grundnorms. He offers very limited evidence on how these rules have attained the presupposed status of a grundnorm as required in Kelsen's pure theory. In contrast, it is presupposed that the national constitution of an African democratic state embodies the grundnorm or foundation rule.<sup>7</sup> A conflict of norms will arise if it is agreed that African social ordering norms have attained the status of a grundnorm. This will contradict the positivist approach which holds that ‘a system founded on the Grundnorm cannot allow for two equally valid norms to contradict each other as this would threaten the unity of the system.’<sup>8</sup>

Following Kelsen’s theory of pure law, the validity of the basic norm is premised on a presupposition exercise.<sup>9</sup> This exercise is linked to the concept of efficacy where the grundnorm is presupposed as the highest law because it is followed and obeyed. This of course raises the question on why people follow and obey the basic law and treat it as the highest norm. The positivist school will point to sovereign power or to the will of the people.<sup>10</sup> The national constitution is established by the will of the people as the supreme law of the land.<sup>11</sup>

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<sup>3</sup> Hans Kelsen, *Pure Theory of Law* (Translation from the Second German Edition by Max Knight. Berkeley: University of California Press, 1967. x) 356 pp. Reprinted 2005 by the Lawbook Exchange, Ltd; Trevor Hartley, ‘National Law, International Law and EU Law- How do they Relate?’ in Patrick Capps, Malcolm Evans, (eds) *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing, 2003) 67.

<sup>4</sup> Richard Opong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press, 2011) 208

<sup>5</sup> Ben Chigara, ‘The Humwe Principle: A Social-Ordering Grundnorm for Zimbabwe and Africa’ in Robert Home (eds) *Essays in African Land Law* (Pretoria University Law Press, 2011) 113.

<sup>6</sup> *Ibid.* See 113, 120 where he describes Humwe as a new social ordering grundnorm.

<sup>7</sup> Opong (n 3) 208.

<sup>8</sup> Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration* (BRILL, 2015) 167.

<sup>9</sup> Uta Bindreiter, *Why Grundnorm?: A Treatise on the Implications of Kelsen’s Doctrine* (Kluwer International, 2002) 19.

<sup>10</sup> *Ibid.*

<sup>11</sup> Donald Dahlin, *We the People: A Brief Introduction to the Constitution and its Interpretation* (Springer, 2012) Chapter three

There are drawbacks to this position. This is because of the existence of 'two publics' in post-colonial African states. Ekeh presents a seminal discourse<sup>12</sup> on these two key publics. These two publics are the 'civic public' and the 'primordial public'.<sup>13</sup> The civic public consists of the Westphalian state and its structures while the primordial public consists of families and ethnic groupings. The claim is that Africans pay more allegiance to the 'primordial public' than to the 'civic public.'<sup>14</sup> While there has been some criticism<sup>15</sup> on Ekeh's 'two publics' theory, it does provide some context on why some local communities within an African sovereign state find it difficult to accept the national constitution as the foundational norm on community matters. Utilising Ekeh's two publics theory, this article will explore whether recurring resource conflicts in some African oil producing states is due to the insistence of the amoral African state that its national constitution should be regarded as the fundamental norm for petroleum governance. It considers whether oil resource conflicts can be resolved by affording greater legitimacy to indigenous social ordering norms that primordial communities can identify with.

To address these issues, the article is organised in the following manner. Part one of this article provides the introductory context. Part two focuses on the legal governance of petroleum resources in Sub-Saharan African states. Part three of the article considers the construction and development of the African social ordering grundnorm. Part four considers the merits and demerits of developing an African Lex Petrolea based on indigenous social ordering norms. Part five provides the concluding remarks of the article.

## **PART TWO**

### **2. LEGAL GOVERNANCE OF PETROLEUM RESOURCES IN SUB-SAHARAN AFRICA**

#### ***Petroleum Ownership Structures***

Legal governance of petroleum resources in Sub-Saharan Africa has its roots in the continent's colonial legacy. The constitutions of most petroleum producing African states vests

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<sup>12</sup> Peter Ekeh, 'Colonialism and the Two Publics in Africa: A Theoretical Statement' (1975) 17(1) *Comparative Studies in Society and History* 91-112.

<sup>13</sup> Ibid 92.

<sup>14</sup> Ibid 107-108.

<sup>15</sup> Brown Onouha 'Publishing postcolonial Africa: Nigeria and Ekeh's two publics a generation after' (2014) 40(2) *Social Dynamics: A Journal of African Studies* 322-337.

ownership of petroleum resources with the state based on the domanial system of ownership. Petroleum ownership structures are generally based on Regalian and Domanial systems. The Roman based regalian system entitles the sovereign to exercise dominium directum (dominion over the soil) and to assume ownership over minerals extracted from the soil. The regalian system also recognises a separate subsidiary right known as dominium utile (the right to profit and use of soil).<sup>16</sup> Hepburn<sup>17</sup> claims that the regalian system of dominium directum is integrated into the domanial system. Under this system, ownership of petroleum resources in the soil and within the sub-soil is vested with the sovereign state. An examination of the legal systems of post-colonial African states establishes that many of these states operate the domanial system of petroleum ownership. In the domanial system of ownership structure, petroleum resources in strata is exclusively vested in the State. Table 1 below provides a case study of the Sub-Saharan African member countries of the African Petroleum Producers Association (APPA).<sup>18</sup> This table illustrates that most APPA countries practice the domanial legal systems of ownership within their constitutional and state law framework. The North African APPA countries have been excluded from this table due to the fact that the focus of this article is legal governance in Sub-Saharan African oil producing countries.

**Table 1: Legal Ownership of Petroleum Resources in APPA Sub-Saharan African Countries**

African Oil Producing States	Region	Legal Framework on Ownership	Ownership Structure	Constitutional and Statutory Provisions
Angola	Southern Africa	Constitution of Angola 2010	Domanial	The preamble of the 2010 Constitution vests ownership in the State.

South Africa	Southern Africa	Constitution of the Republic of South Africa  Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA")	Domanial	Section 24 of the Constitution requires the natural resources should be developed in an ecological sustainable manner. The MPRDA vests ownership of mineral and petroleum resources in the nation of South Africa and the Minister of Natural Resources.
<sup>16</sup> Samantha Hepburn, <i>Mining and Energy Law</i> (Cambridge University Press, 2015) 11. <sup>17</sup> Ibid. <sup>18</sup> The APPA is an Inter-Governmental and Collaborative Association of African Petroleum Producers (AAPA). See <a href="http://www.aapa.int/en/pres/">www.aapa.int/en/pres/</a> .				

Equatorial Guinea	West Africa	Decree Law No. 8/2006 of November 2006 (Hydrocarbons Law) and Petroleum Regulation of the Republic of Equatorial Guinea Num. 4/2013 (Petroleum Regulation).	Domanial	Decree Law No. 8/2006 of November 2006 (Hydrocarbons Law) and Petroleum Regulation of the Republic of Equatorial Guinea Num. 4/2013 (Petroleum Regulation).
Ghana	West Africa	Constitution of the Fourth Republic of Ghana (Amendment) Act, 1996 (Act 527)	Domanial	Article 257(6) of the 1996 Constitution states that minerals in their natural state as property of the state.
Nigeria – West Africa	West Africa	The 1999 Constitution of Nigeria and the Nigerian Petroleum Act 1969.	Domanial	S.44 (3) of the Constitution and the Nigerian Petroleum Act 1969 vests oil and gas resources in the Federal Government of Nigeria.
Benin	West Africa	Petroleum Code of 2006 -18.	Domanial	Article 3 of the Code separates the deposits of liquid and gaseous hydrocarbons from the ownership of land. It regards these deposits as public property that belongs to the nation.
Cameroon	West Africa	Constitution of the Republic of Cameroon 1996 as amended by Law No 2008/001 and Law No. 99/013 of 22 December 1999, instituting the Petroleum code (the Petroleum Code).	Domanial	Article 21 of the Constitution endorses charter rights that vests all peoples with rights to freely dispose of their wealth and resources. The Constitution is silent on who owns petroleum resources.  Article 3 of the Petroleum Code 1999 provides for state ownership of all deposits or natural accumulations of hydrocarbons and treats these deposits as the exclusive property of the Cameroonian state.

Chad	West Africa	<p>Chad's Constitution of 1996 with amendments through 2005.</p> <p>Law no. 006/PR/2007 dated 20 April 2007 on hydrocarbons, as amended and supplemented by Ordinance no. 001/PR/2010 dated September 30, 2010 and Decree no. 796/PR/PM/MPE/2010 dated September 30, 2010 implementing the Hydrocarbons Law.</p>	Domanial	<p>Article 57 of the Constitution vests the State with permanent sovereignty over all the national natural resources for the well-being of the national community.</p> <p>Article 2.1 of the Hydrocarbon Laws vests hydrocarbons in their natural state to the Republic of Chad.</p>
Democratic Republic of Congo	Middle/Central Africs	<p>Congo (the Democratic Republic of the) Constitution of 2005 with amendments up to 2011.</p> <p>The Petroleum Law (Law No. 15/012 dated 1 August 2015)</p>	Domanial	<p>Article 9 of the Constitution provides for permanent sovereignty over natural resources with the state.</p>
Republic of Congo (RoC)	Middle/Central Africa	<p>Congo's Constitution of 2001</p> <p>Law no 24-94 dated 23 August 1994 (Petroleum Code), Decree no 2008-15 dated 11 February 2008 (Attribution Code).</p>	Domanial	<p>The Constitution is silent on ownership. The state is vested with ownership of hydrocarbons in the Congolese soil and sub-soil.</p>
Cote D'Ivoire	West Africs	<p>Cote D'Ivoire Constitution 2000</p> <p>The Petroleum Code of Côte d'Ivoire, instituted by Law N° 96-669 of August 29, 1996.</p> <p>Ordinance N° 2012-369 of April 18, 2012, amending Law N° 96-669 of August 29, 1996 establishing the Petroleum Code.</p> <p>Decree N° 96-733 of September 19, 1996, laying down general rules for the application of the law on the Petroleum Code.</p>	Domanial	<p>The Constitution is silent on ownership of Petroleum resources.</p> <p>Mineral rights in oil and gas are vested in the state by the Petroleum Code which state ownership of natural hydrocarbon deposits and accumulations.</p>
Gabon	Central/Middle Africa	<p>Gabon's Constitution of 1991 with amendments through 1997.</p> <p>Hydrocarbons Law (Law No. 11/2014 of August 28 2014).</p>	Domanial	<p>The Gabon Constitution does not expressly discuss ownership of petroleum resources.</p> <p>The Hydrocarbons Law vests ownership of petroleum resources with the state.</p>

Mauritania	West Africa	Mauritania's Constitution of 1991 with amendments through 2012.  Act No. 2008-011 on the Mining Code (27 April 2008).  Ordinance No. 2002-005 regulating the activities of the downstream oil sector (28 March 2002).	Domanial	The Mauritanian Constitution does not expressly set out provisions on ownership of natural resources.  The Mining Code states that deposits are separate from land ownership. It vests ownership of these deposits in the state.
Niger	West Africa	Niger's Constitution of 2010.  Petroleum Code Act No 2007-01.	Domanial	Article 149 of the Constitution provides state sovereignty over natural resources and the sub-soil.

The domanial system of state ownership derives its legitimacy from the constitutional framework in a petroleum producing state.<sup>19</sup> While the state is the owner of petroleum resources in strata, the exploitation of petroleum resources is undertaken on a collaborative basis with multinational companies (MNCs). This is because many African states lack risk capital and the required technical know-how for the exploitation of oil and gas resources. Under the domanial system, the state will grant MNCs the right to exploit petroleum resources through a host state agreement (HSA). There are different models of the HSAs, but the most common types utilised in Sub-Saharan Africa are the Production Sharing Agreements (PSAs), the modern Oil Concessions and Service Contracts (SCs) respectively.<sup>20</sup> The PSA and SCs are well suited for domanial systems of petroleum governance due to the fact that the MNCs acts as a contractor for the State. Unlike the modern Oil Concession where the MNC can claim ownership of produced oil at the wellhead, the MNC has no legal title to produced oil under the PSA and SC. The PSA does permit the MNC to participate with a State Owned Company (SOC) or National Oil Company (NOC) in a stream of oil revenue known as profit oil.

The state constitution and petroleum legislation regulate these contracts alongside with rules of international investment law. This establishes the pluralist nature of petroleum governance

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<sup>19</sup> Ibid 11-12.

<sup>20</sup> Emmanuel Laryea, 'Contractual Arrangements for Resource Investment' in Francis Botchway (eds) *Natural Resource Investment and African Development* (Edward Elgar, 2011) 108 -116.

in African oil producing states. It is instructive that within this pluralist system, there appears to be no place for African social ordering rules. The exclusion of indigenous rules from the pluralist petroleum legal system raises some concerns. This is because the exploitation of petroleum resources is undertaken in indigenous oil producing communities. Ekeh's 'two publics' theory shows that these communities adhere more to the dictates of the customary rules developed by the 'primordial public,' than to state law which is developed by the 'civic public'.<sup>21</sup>

There is some concern that HSA contracts are executed between amoral civic state and MNCs without the direct involvement of local communities.<sup>22</sup> The bilateral nature of these contracts is premised on state sovereignty over petroleum resources. Equally, MNCs provide the necessary risk capital to secure the contractual bargain of these contracts. In contrast, the local oil producing communities which bear the brunt of oil and gas exploitation are not contractual parties to these HSAs. Table 1 above shows that control and management of natural resources is constitutionally vested in the national state. Local communities are therefore not considered as having the necessary constitutional standing to participate in HSAs. This is an unsatisfactory state of affairs and is a contributory factor for the resource conflicts that take place within these communities.<sup>23</sup>

### ***Oil Producing Communities and the Right to Self-Determination***

In contrast, under International Law, local communities can exercise qualified sovereignty and self-determination over their natural resources. These rights are set out in international instruments such as the *United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources*<sup>24</sup> which embodies the right of sovereign states and their peoples to exercise sovereignty over their resources.<sup>25</sup> The *2007 United Nations Declaration on the Rights of Indigenous Peoples* provides indigenous peoples with the rights to self-determination and participation in the decision making process over their natural resources. The 2007 Declaration however does not vest indigenous peoples with 'expressis verbis' with permanent sovereignty over their natural wealth and resources or entails exclusive rights for

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<sup>21</sup> Ekeh (n 12) 198.

<sup>22</sup> Hephzibah Egede and Edwin Egede, 'The Force of the Community in the Niger Delta of Nigeria: Propositions for New Oil and Gas Legal and Contractual Arrangements (2016) 25 *Tulane Journal of International and Comparative Law* 1-37 (Forthcoming). This current article is a follow-up to this work.

<sup>23</sup> Abiodun Alao, *Natural Resources and Conflicts in Africa: The Tragedy of Endowment* (University of Rochester Press, 2007) 170-198.

<sup>24</sup> UNGA Resolution 1803 (XVII) of 14 December 1962.

<sup>25</sup> *Ibid* para 1.



indigenous peoples over the natural resources within their territories.<sup>26</sup> It does however provide these communities with participatory or consultative rights in the decision making process over the management and control over natural resources. Article 32 of the Declaration requires states to undertake bona- fide consultations and cooperation initiatives with their indigenous communities before undertaking or engaging with projects that may impact on their lands and resources. Article 46(1) stipulates that the conferment of the right to self-determination under this Declaration should not be construed as:

' authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.'

This establishes that the right to self-determination as provided in Article 4 is confined to the participatory rights set out in Articles 25-28 of the Declaration. It does not entitle communities to secede or assert political independence outside the sovereign states in which they are situated. Article 21(1) of the *African Charter on Human and Peoples' Rights*<sup>27</sup> also entitles African peoples with the right to:

'... freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.'

The right of African peoples to exercise self determination over their wealth and resources has been deliberated upon by the African Commission on Human and Peoples Rights. In the decided cases of *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*<sup>28</sup> and *Endorois v. Kenya*<sup>29</sup>, the Commission affirmed the obligation of states to respect and protect the rights granted to African peoples under the Charter.

In the *Endorois'* case, the Commission specifically affirmed that Kenya should have obtained the Endorois community's 'free, prior, and informed consent, according *to their*

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<sup>26</sup> Nicolaas Schrijver, 'Self-determination of Peoples and Sovereignty over Natural Wealth and Resources' in *Realising the Right of Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations, 2013) 99.

<sup>27</sup> Adopted in Nairobi June 27, 1981. Entered into Force October 21, 1986.

<sup>28</sup> Communication No. 155/96, 2001.

<sup>29</sup> Communication No. 276/2003.

*customs and traditions*<sup>30</sup> before undertaking development projects within their territory. This decision highlights the role that African 'social ordering' rules can play in natural resource governance. It further underscores Ekeh's claims that many Africans simultaneously live and function within the 'primordial' and 'civic publics'. This is why it is important to consider the relevance of African 'social ordering rules' in petroleum governance.

### **PART THREE**

#### **THE CONSTRUCTION OF SOCIAL ORDERING GRUND-NORM IN SUB-SAHARAN AFRICA?**

##### **The Mixed African Legal System of Governance in Norm Formulation**

The use of received Western Law in the legal systems of many African states is a legacy of colonialism. Menski<sup>31</sup> explains that these received rules are derived from the legal systems of other countries. He argues that involuntary imposition of these rules has created a cultural conflict between Western received law and the indigenous rules of post-colonial states.<sup>32</sup> As previously stated, many African states have adopted the system known as legal pluralism to resolve the conflict between Western received Law and indigenous rules. The seminal work of Griffiths<sup>33</sup> establishes that there are weak and strong constructions of the concept of legal pluralism. The weak construction of legal pluralism is a system where the state sanctions or permits the operation of multiple legal systems within its jurisdictional sphere. The difficulty with the weak construction of legal pluralism is that the civic state has the final say on the rules that apply in its legal system. Griffiths therefore views the weak construction of legal pluralism as a form of legal centralism since it is still reliant on the concept of a hierarchy of rules where state law has pre-eminence. Conversely, the strong construction of legal pluralism discredits the purist positivist construction of law which focuses on a 'single, unified and exclusive hierarchical normative ordering depending from the power of the state.'<sup>34</sup> Rather, Griffiths argues that the strong construction of legal pluralism envisions a system where multiple bodies of rules can operate within a decentralised system.

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<sup>30</sup>Ibid, para 291.

<sup>31</sup> Menski (n 2) 126.

<sup>32</sup> Ibid.

<sup>33</sup> John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 5.

<sup>34</sup> Ibid.

It is debatable if African states actually practise the strong construction of legal pluralism. It appears that the mixed African legal systems of most African states is premised on a hierarchy of rules where the state constitution is situated at the apex of the system. This hierarchised system which prioritises Western received law above customary law creates the cultural conflict described in Menski's work<sup>35</sup>. Arguably, the modernisation theory has played a role in the prioritisation of Western received law above African customary law. This is because it requires that Africa follow in the 'developmental footsteps of Europe (largely the former colonizer of Africa).'<sup>36</sup> Notwithstanding the role that the modernisation theory has played in the development of the African civic public and in its formation of legal rules, the Endorois decision underscores the continuing importance of African customary law. Within this customary framework, Chigara<sup>37</sup> argues that there are fundamental social ordering rules or norms which can be regarded as African grundnorms. This is because the primordial public pre-supposes them to be so. He further claims that these 'ancient social ordering' rules predate colonialism and were presupposed by Africans as the foundational rules that governed pre-colonial African communities. He however does not provide definitive evidence on how these specific norms attained the revered status of 'grundnorm' except to point to their historical relevance and applicability continent-wide.

Chigara presents *Humwe* (a Shona concept) as an example of an indigenous social ordering grundnorm. The term is defined as 'in this together' or 'us all.' It can be described as African communitarianism or interdependence. He further argues that there are similar African norms and points to the popular Zulu concept '*Umntu ngumuntu ngabantu*' (abridged as *Ubuntu*-People are people through people) and to *Umoja*, a Swahili term for communal unity. His research also identifies similar norms in other parts of Africa including West Africa. Ramose, in his leading African philosophical text, argues that indigenous norms such as *Ubuntu* are important because they stem from 'the wellspring flowing from African ontology and epistemology.' He further argues that they apply continent wide because of the 'philosophical affinity and kinship between the indigenous people of Africa'<sup>38</sup> It is however unclear if this 'affinity and kinship' of African peoples is the determining consideration for the claim that these rules have attained the status of grundnorms.

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<sup>35</sup> Menski (n 2) 126.

<sup>36</sup> Jephias Matunhu, 'A Critique of Modernisation and Dependency Theories in Africa: Critical Assessment' (2011) 3(5) *Journal of History and Culture* 65.

<sup>37</sup> Chigara (n 5) 113.

<sup>38</sup> Mogobe Ramose, *African Philosophy through Ubuntu* (Mond Books, 1999).

There is another school of thought that rejects the continent wide application of norms like *Ubuntu* or *Humwe*. Vans Binsbergen for example expresses some scepticism on the continent-wide application of concepts like *Ubuntu*. He argues that there is insufficient evidence to substantiate this claim.<sup>39</sup> Similarly, Simiyu<sup>40</sup> argues that African communitarianism is a Utopian ideal in light of the political realities of many post-colonial countries bedevilled with ethnic conflicts and poor governance. This position may hold true if concepts like *Ubuntu* are simply confined to the notion of African communitarianism. This is not the case since these terms also connote 'personhood' and 'humanness'.<sup>41</sup>

### ***State Recognition of African Social Ordering Grundnorms***

Notwithstanding the ongoing debate on the continent wide use of indigenous social ordering norms, some African states have attempted to incorporate these rules within their constitutional framework. South Africa is a pertinent example of an APPA state that regards *Ubuntu* as a fundamental social ordering norm. Constitutional recognition of this rule was provided within the transitional South African Constitution 1993. It is instructive that the final 1996 Constitution did not follow suit. But the importance of this norm in the South African legal framework has been recognised by the South African courts. In the landmark South African constitutional court case of *S v. Makwanyane*,<sup>42</sup> the South African Constitutional Court approved the constitutional importance of the indigenous *Ubuntu* norm. This case considered s.277 of the Criminal Procedure Act No. 51 of 1977 which provided for the use of the death penalty. The court denounced the use of death penalty in the South African criminal law system. In framing its decision, the Court invoked the ontological concept of *Ubuntu* with its emphasis on the value of human life and dignity. It held that the death penalty could be characterised as 'inhumane punishment' since it deprived the convicted person of human dignity. The Court further held that the continuing use of the death penalty was contrary to the constitutional focus on national unity and reconciliation which in a large part is premised on the norm of *Ubuntu*. The Court held:

‘The notion of *Ubuntu* expressly provided for in the epilogue of the Constitution, the underlying idea and its accompanying values are also expressed in the preamble. These

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<sup>39</sup> Wim Van Binsbergen, *Intercultural Encounters: African and Anthropological Lessons Towards a Philosophy of Interculturality* (Munster: Lit Verlag 2003) Chapter 14.

<sup>40</sup> Simiyu, V. G., 1987, “The Democratic Myth in the African Traditional Societies”, in Walter Oyugi and Afrifra Gitonga (eds), *Democratic Theory and Practice in Africa* (Heinemann, 1987) 51-54.

Chikosa Silungwe 'On African Legal Theory: A Possibility, An Impossibility or Mere Conundrum' in Oche Onazi (ed) *African Legal Theory and Constitutional Problems: Critical Essays* (Springer, 2014) 27.

<sup>42</sup> (CCT3/94) [1995] ZACC 3

values underlie, first and foremost, the whole idea of adopting a Bill of Fundamental Rights and Freedoms in a new legal order. They are central to the coherence of all the rights entrenched in Chapter 3 - where the right to life and the right to respect for and protection of human dignity are embodied in Sections 9 and 10 respectively.<sup>43</sup>

There are other judicial cases<sup>44</sup> within the South African legal framework which provide similar recognition of the use of *Ubuntu* in the South African legal system. It is unclear if there is similar state practice in other African states. This does not however mean that customary rules do not play a role within the legal systems of these states. They however may not have the same relevance as Western received law especially with regard to commercial matters.

The article turns to the state practice of Nigeria, another APPA state example. Nigeria is a major oil producing state in the African sub-continent. Unlike the South African experience, the Nigerian legal system has not singled out a specific indigenous rule or norm that could serve as a guiding rule in the development of law. In allowing for the establishment of Customary and Sharia Courts of Appeal,<sup>45</sup> the 1999 Nigerian Constitution does however recognise the role that customary law and Islamic law play in the Nigerian mixed legal system.

Comparative perspectives can be provided on why it may pose a challenge for Nigeria to single out one particular indigenous social norm to guide its legal system. First the Nigerian cultural milieu is different from South Africa. Unlike South Africa, Nigeria communal life is not only governed by indigenous African rules but also by Shariah law. Second, Nigerian is much more ethnically diverse than South Africa and its customary law practices are not unified. The localisation of Nigerian customary law is confirmed in Section 258(1) of the Nigerian Evidence Act 2011.<sup>46</sup> This section states that ‘a rule which, in a particular district has from long usage obtained the force of law.’ By confining the rule to a particular district, the Nigerian Evidence Act recognises how ethnically diverse the Nigerian state is. It will therefore be difficult to single out a particular customary rule of law as a basic grundnorm, except evidence can be properly shown that it transcends all districts in Nigeria. To establish this, native chiefs or other person who are recognised as have special knowledge of customary law will have to provide evidence that validates the validity of the custom.<sup>47</sup> Some have pointed to certain

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<sup>43</sup> Ibid, paragraph 307.

<sup>44</sup> See for example *Mayelane v Ngwenyama* 2013 4 SA 415 (CC), *MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 , *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

<sup>45</sup> Sections 260 -268 of the 1999 Constitution.

<sup>46</sup> **In force June 2011.**

<sup>47</sup> Sections 68, 70 and 73 of the 2011 Evidence Act; Christine Ohuruogu, Okechukwu Umahi, *Nigerian Legal Methods* (Cambridge Scholars Publishing) 27.

customary law rules in Nigeria that have ‘near universality of application.’ One such customary rule can be found in customary interstate succession where it is argued that widows have very limited capacity to inheritance.<sup>48</sup>

The localisation of customary law in Nigerian law may explain why it has limited or no application in the regulation of the Nigerian oil and gas sector. But, this creates a conundrum in light of Ekeh’s ‘Two Publics’ theory. If as Ekeh argues that the ‘Primordial Public’ is more legitimised than the ‘Civic Public’ then surely the Nigerian legal framework should lend itself to the application of indigenous social grund-norms in the governance and regulation the Oil and Gas sector. This is necessary as oil producing communities bear the brunt of oil and gas exploitation that is undertaken in their territories. A key African ‘social ordering’ rule that is relevant to petroleum Governance is communal ownership of land (and its resources).

### ***African Ownership of Land and its Resources: Public or Communal Ownership***

Ubuntu, Humwe and similar social ordering rules focus on inter-dependence, communality, fairness and humanness. These rules recognise the concept of communal ownership in land.<sup>49</sup> Following colonialization of Sub-Saharan Africa, attempts were made to replace the communal land ownership with the Native Land tenure system. This system disallowed Africans from purchasing property outside so called native land. In the Southern African region, the Native Land tenure system was strictly enforced during the apartheid era and led to the dispossession of indigenous property rights in land.<sup>50</sup> The Native Land tenure system resulted in the subjugation of customary rights in land and led to the introduction of the domanial system where rights in land were transferred to the colonial state.<sup>51</sup> The Native Land tenure system in a warped way preserved communal land, but at the same time denied indigenous communities the right to manage and control their lands and resources. This was done through the concept of trusteeship where the colonial state held customary land in trust for the indigenous population.<sup>52</sup>

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<sup>48</sup> Charles Iruonagbe, ‘Land Ownership Patterns and the Economic Life of Women: A Study of Ozalla Community, Edo State, Nigeria’ (VDM, Verlag 2009) 1.

<sup>49</sup> Oshisanya Lai Oshitokunbo ‘An Almanac of Contemporary Judicial Restatements’ (Civil Law) 409.

<sup>50</sup> Robert Hone, ‘The Colonial Legacy in Land Rights’ in (ed) Ben Chigara, *South African Development Community Land Issues: Towards a New Sustainable Land Relations Policy* (Routledge, 2012). 7-11. Hone refers to the 1913 Natives Land Act (also called the Black Land Act) which prohibited the black population from acquiring rights outside ‘designated native land reserves.’

<sup>51</sup> See for example Sections 3 and 4 of the Land and Natives Rights act which placed Native Land and Rights under the control and subject to the disposition of the colonial governor.

<sup>52</sup> Hone (n 59) 12.

Independent African states have repealed these Native Land Tenure legislation, but some African states, including Nigeria have maintained the trusteeship concept of land. During the tenure of military governance, radical changes were made to the land tenure system through the enactment of the Land Use Act 1978.<sup>53</sup> The Land Use Act vests all land in the states of the Federation of Nigeria to their respective state governors. These governors hold land in trust for the use and benefit of all Nigerians.

Unlike the Native Land Tenure system, the Land Use Act confers certain property rights to individual, families and communities. The rights are described as a statutory right of occupancy and the customary rights of occupancy respectively.<sup>54</sup> The effect of the Land Use Act is to extinguish the pre-existing rights in land and replace them with limited rights similar to a leasehold.<sup>55</sup> The trusteeship system of land set out in section 1 of the Land Use Act raises some interesting issues. This is because 'at the core of a trust concept is a duty of confidence imposed upon a trustee.'<sup>56</sup> Further, as stated by Lord Evershed MR, 'for a trust to be effective, it must have ascertained or ascertainable beneficiaries.'<sup>57</sup>

Section 1 of the Land Use Act identifies the ascertained beneficiaries of the trusteeship system developed by the Act. These beneficiaries are 'all Nigerian citizens.' The focus on citizenship (which is one of the key features of the Westphalian state system) and not on ethnic groups or indigenous peoples is connected with the public interest concern of fostering social cohesion and national development.<sup>58</sup> But as Ekeh's 'Two Publics' model demonstrates, the 'Primordial Public' is viewed by some Africans as more important than the 'Civic Public.'<sup>59</sup> The extinction of preexisting rights, and the replacement of such rights, with the limited rights' regime set out in the Act is seen as an attempt to prioritise the interests of the 'Civic Public' above those of the 'Primordial Public.' This creates a confidence gap which goes against the core of the trust concept which is predicated on the 'confidence imposed upon a trustee.'<sup>60</sup>

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<sup>53</sup> No. 6 of 1978.

<sup>54</sup> Sections 5(1) and 6(1) of the Act.

<sup>55</sup> See the case of *Abioye vs. Yakubu* (1991) 5 NWLR (Pt.190) 130 where the Supreme Court held that "Rights of Occupancy bear resemblance to leasehold interests. They can be assigned. They can be mortgaged and they can be underlet or sublet."

<sup>56</sup> Underhill and Hayton *Law of Trusts and Trustees* (15th Ed) 3.

<sup>57</sup> Re Endacott [1960] Ch 232, 246.

<sup>58</sup> Namso Udoekanem, David Adoga, Victor Onwumere ' Land Ownership in Nigeria: Historical Developments, Current Issues and Future Expectations (2014) 4(21) *Journal of Environment and Earth Science* 185.

<sup>59</sup> Ekeh (n12) 198.

<sup>60</sup> Underhill, Hayton (n 56) 3.

This has led to the call for the repeal or fundamental restructuring of the Land Use Act in certain quarters.<sup>61</sup> It will be a difficult task to repeal or change this law. This is because of the constitutional importance of the Land Use Act 1978. Section 315 (5) of the 1999 Constitution confers the Act with the same status as the provisions of the Constitution. It states that the Act cannot ‘be altered or repealed except in accordance with the provisions of section 9 (2) of this Constitution.’<sup>62</sup> This means that the Land Use Act 1978 cannot be repealed or altered except the proposal for repeal or amendment is supported by no lower than a two-third majority of the National Assembly and by no less than two-thirds of all the states of Nigeria. Notwithstanding the substantive changes that have been made by the Land Use Act, local communities still perceive indigenous land tenure as communal

The reforms to communal ownership is not only confined to the land tenure, it also applies to ownership of mineral resources. The Nigerian 1999 Constitution as the supreme national law confers ownership of the ‘entire property in and control of all minerals, mineral oils and natural gas in under or upon land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone’<sup>63</sup> to the Government of the Federation of Nigeria. Public ownership of petroleum resources is also re-affirmed in the Petroleum Act 1969 where the ‘entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State.’<sup>64</sup>

The Constitution and the state legislation cited above shows that natural resources, inclusive of petroleum is owned by the Nigerian state and not oil producing communities. Since the Nigerian Constitution as the supreme law stipulates public ownership of petroleum resources, it may explain why social ordering indigenous rules play no apparent role in the regulation and management of the Nigerian Oil and Gas sector. Yet, the exploitation of these resources are undertaken in the communities that still subscribe to communal ownership of all resources.

### ***Recurring Resource Conflicts: The Tale of Two Publics***

This article has explained how ownership of communal land and natural resources has evolved from strict communal ownership to public ownership in some African countries. The land tenure system in Nigeria, an APPA state has been presented as a case study of the growing role of public ownership of land. The concluding section of this part considers whether the

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<sup>61</sup> Udoekanem et al (n 58) 187.

<sup>62</sup> S. 315(5) and S 9 (2) of the 1999 Constitution of Nigeria.

<sup>63</sup> Section 44 (3) 1999 Constitution of Nigeria.

<sup>64</sup> Section 1(1) Nigerian Petroleum Act 1969.



prioritisation of public ownership over communal ownership creates a conflict between the two publics discussed in Ekeh's work? Oshio, in an early piece,<sup>65</sup> on the Land Use Act argues that Section 1 of the Act has borrowed from the indigenous system of communal ownership. He asserts that state governors hold a role similar to community or family head in that they hold land in trust for the people they govern. He further points out that while there may be some basis for this comparison between public ownership and communal ownership, the Land Use Act has created areas of conflict between these two systems of land tenure governance. These areas of conflict arise in the management and control of the land, particularly with regard, to the allocation to members of the community and the partition of the sale of land.

Another key area of conflict which Oshio's article did not consider is the legitimisation process of the reforms initiated by the Land Use Act. As previously stated, the Land Use Act is a legacy of military governance which continues to enjoy constitutional protection under the Nigerian 1999 Constitution. Applying Ekeh's 'Two Publics' model<sup>66</sup>, it could be argued that the continuing legitimisation of the Land Use Act by the 1999 Constitution has been undertaken within the 'Civic Public' and its institutions. It is therefore questionable whether the Land Use Act has received the same legitimisation process within the 'Primordial Public' where oil and gas exploitation takes place. The same concern applies to public ownership of the petroleum resources where oil producing communities continue to clamour for resource control.

This issue is important as it provides some explanation on why there are recurring resource conflicts in regions like the Niger Delta. This is because as Ekeh asserts the primordial public which consists of family, clan and community is more legitimised by ordinary Africans than the civic public which is premised on colonial structures and received law. Yet, as the studies<sup>67</sup> on Nigeria's constitutional history show, the framing and development of the different Nigerian Constitutions and other state laws has been undertaken by institutions within the 'Civic Public' with little or no direct involvement by the 'Primordial Public' in the decision making process. This may explain why there is a sense of alienation within oil producing communities, regarding the transfer of ownership of natural resources, from communal ownership to public (state) ownership. It brings to light the 'cultural conflict' highlighted in Menski's work<sup>68</sup> between received law and indigenous law. Yet the reality of the post-colonial African

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<sup>65</sup> P. Ehi Oshio, 'The Indigenous Land Tenure and Nationalisation of Land in Nigeria' (1990) 10(1) *Boston College Third World Law Journal* 54.

<sup>66</sup> Ekeh (n 12).

<sup>67</sup> Toyin Falola, Matthew Heaton, *A History of Nigeria* (Cambridge University Press, 2008) 148; Kalu Ezera, *Constitutional Developments in Nigeria* (Cambridge University Press).

<sup>68</sup> Menski (n 2).

experience is that both sets of rules operate within most African pluralist systems. The real conflict stems from a hierarchized legal system which prioritises one set of rules above another instead of allowing for a co-existence of rules.

This is why the interim 1993 South African Constitution has been held up as a good example of how an indigenous social ordering can be effectively incorporated into the supreme law of the land. Sadly, the 1996 final South African Constitution did not follow suit and failed to expressly enshrine Ubuntu in its text. There are concerns on why the 1996 final Constitution expressly failed to include Ubuntu within its framework. Mokgoro, a leading jurist and proponent of Ubuntu however argues that the fundamental values of the current South African Constitution coincides with 'some of the key values of ubuntu(ism) e.g. human dignity itself, respect, inclusivity, compassion, concern for others, honesty and conformity.'<sup>69</sup> While this position may hold true to some extent, the non-inclusion of Ubuntu in the 1996 Constitution is a missed opportunity for the constitutional legitimisation of indigenous normative development. It also means that the development of natural resources may not need to be based on indigenous normative obligations. Indeed all that the final 1996 Constitution requires is that natural resources should be developed in an ecologically sustainable manner. While this is a positive step, the control and management of mineral and petroleum resources still rests with the State as custodian.<sup>70</sup>

This again confirms the domanial nature of petroleum ownership and the continuing role that the international rule of permanent sovereignty over natural resources<sup>71</sup> plays in petroleum governance in Sub-Saharan Africa. Yet, the considered position is that the principle of permanent sovereignty over natural resources does not only apply only to states but to their peoples.<sup>72</sup> It is therefore questionable why many African oil producing states in their municipal systems have adopted the narrow construction of this principle which confines sovereignty over natural resources to domanial state ownership.

This appears to be an unsatisfactory state of affairs considering that some African states have failed to manage natural resources for national development and for 'the well-being of

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<sup>69</sup> JY Mokgoro, *'Ubuntu and the Law of the South* (A paper delivered at the first Colloquium Constitution and Law held at Potchefstroom on 31 October 1997.)

<sup>70</sup> ICLG, *South Africa Oil and Gas Regulation 2016*, 3.1 available at <http://www.iclg.co.uk/practice-areas/oil-and-gas-regulation/oil-and-gas-regulation-2016/south-africa> accessed October 25 2016.

<sup>71</sup> Richardo Pereira, O Gough 'Permanent Sovereignty over Natural Resources in the 21st century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law' (2013) 14 *Melbourne Journal of International Law* 451, 463.

<sup>72</sup> *Ibid*, 453.

the people of the State concerned.<sup>73</sup> How the ‘people of the State’ are to be defined is quite crucial to a further understanding of the continuing tension between the primordial and civic publics. The failure of African governments to equitably manage resources for the wellbeing of their peoples has created the growing sense of the delegitimisation of the ‘Civic Public’ within local communities. This is why some in the Niger Delta oil producing region have argued that the Nigerian state is an artificial creation which lacks true affinity with nations that exist within the Nigerian nation state.<sup>74</sup> The argument that Nigeria is a nation state of nations alludes to a situation where communities identify more with the ‘Primordial Public’ than the ‘Civic Public’ as discussed in Ekeh’s work. Robinson<sup>75</sup> describes this as putting ethnic identity above national identity. In the illuminating work ‘*Oil, Democracy and the Promise of True Federalism*’ the argument for focusing on ethnic identity above national identity is set out below:

‘It would be foolhardy for somebody from the Niger Delta to hope that a Hausa-Fulani, or Yoruba or Igbo person at the helm of affairs at the federal level to take the issue of the latter’s development as serious developmental matter. What is the portion in the Niger Delta? Except of course for there to be peace enough for oil to flow for him to use in developing himself and his true God created nation.’<sup>76</sup>

This may explain why oil producing communities within the Niger Delta continue to canvass for true federalism. This will allow the communities to participate in the decision making process on how oil and gas resources extracted from their regions are developed and utilised. They view the current system which vests ownership of petroleum resource in the Federal Nigerian State as unsatisfactory as it permits the development of other regions of Nigeria at the expense of the Niger Delta region.<sup>77</sup> The quest for true federalism will require significant reforms of the municipal petroleum laws. Any proposed reforms should also be undertaken at the continent wide level to facilitate a greater harmonisation of rules. It is q The APPA recently undertook a study on the possible standardisation of petroleum laws and contracts<sup>78</sup>. This has led to the debate on whether there is an African Lex Petrolea? The

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<sup>73</sup> Paragraph 1, General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources" available at <http://www.ohchr.org/Documents/ProfessionalInterest/resources.pdf> (accessed October 25 2016).

<sup>74</sup> Augustine Iken, D.S.P Alamiyeseiga, Steve Azaiki, *Oil Democracy, and the Promise of True Federalism in Nigeria* (University Press of America, 2008) 20.

<sup>75</sup> Amanda Robinson, *National versus Ethnic Identity in Africa: State, Group, and Individual Level Correlates of National Identification* (Working Paper, University of Beckerly, 2009) 5-6.

<sup>76</sup> Iken et al (n 74) 20.

<sup>77</sup> Ibid.

<sup>78</sup> Nima Tabari, *Lex Petrolea and International Investment Law: Law and Practice in the Persian Gulf* (CRC Press, 2016) 1.89.

following part of this article further debates this point and considers the role that African social ordering norms can play in the development of a continent wide Lex Petrolea.

## **PART FOUR**

### **THE DEVELOPMENT OF AN AFRICAN LEX PETROLEA AND THE RELEVANCE OF INDIGENOUS SOCIAL ORDERING NORMS**

#### *Conceptualising Lex Petrolea*

Lex Petrolea is defined as ‘transnational customary law applied by tribunals and courts dealing with hydrocarbon-related disputes.’<sup>79</sup> Like other systems of rules, Lex Petrolea has had to go through a legitimisation process. When the concept was first raised in the case of *Kuwait v. Aminoil*,<sup>80</sup> the arbitral tribunal refused to accept Kuwait’s arguments that there was a customary body of rules known as Lex Petrolea specifically as it pertains to the valuation of damages. Since this arbitral decision, scholarly debate has arisen on whether Lex Petrolea can be considered as a sub-set of international law.<sup>81</sup> Doak Bishop in his 1998 seminal work<sup>82</sup> debated whether Lex Petrolea had been developed from ‘the internationalisation of business practices, usages and customs of the members of the international petroleum industry or community.’<sup>83</sup> He found that there was inconclusive state practice and *opinio juris* to justify the maturation of a sub-set of rules in international law known as Lex Petrolea.<sup>84</sup> He however opined that Lex Petrolea had begun to crystallise even if it was yet to ‘coalesce into a hard system of black letter law.’<sup>85</sup>

Other works argue that Lex Petrolea falls within a branch of law known as international merchantile law or Lex Mercatoria.<sup>86</sup> Lex Mercatoria is said to be derived from the ‘trade usage and practices of merchants.’<sup>87</sup> The fact that Lex Mercatoria is developed by the practices of merchants implies that it is not state law neither can it be strictly defined within international

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<sup>79</sup> Ibid.

<sup>80</sup>Published in: XXI International Legal Materials (1982) pp. 976â1053.

<sup>81</sup> Tahari (n 78), 1.90.

<sup>82</sup> R Doak Bishop, *International Arbitration of Petroleum Disputes: the Development of Lex Petrolea* (1998) XXIII YB Com. Arb. 1131, 1151.

<sup>83</sup> Ibid.

<sup>84</sup> Tabari (n 78) 1.90.

<sup>85</sup> John Burritt McAuthor, *Oil and Gas Implied Covenants for the Twenty-First Century: The Next Steps in Evolution* (Juris, 2014) 384.

<sup>86</sup> Georges Delaume, 'Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria' 63 *Tulane Law Rev.* 575, 576-7.

<sup>87</sup> Alex Waryrk 'Petroleum Regulation in an International Context' in Tina Hunter (ed) *Regulation of the Upstream Petroleum Sector: A Comparative Study of Licensing and Concession Systems* (Edward Elgar, 2015).

law. This is why some have argued that it is a third realm of law that exists independently outside international law and national law.<sup>88</sup> Since Lex Petrolea is considered as part of Lex Mercatoria, it can be further argued that it is designed to serve the needs and aspirations of the business community.<sup>89</sup> In this sense, the legitimacy of Lex Petrolea is presupposed by the international petroleum industry that it caters to.<sup>90</sup> The stakeholders within this industry consist of national oil companies (NOCs), large oil majors, independent companies and industry associations like the AIPN. The latter body is responsible for the negotiation and development of internationalised oil and gas contracts which set out the principles and norms of Lex Petrolea.

This however provides an incomplete picture on how Lex Petrolea is legitimised as a recognised field of law. Apart from its validation by the industry that it caters to, Childs points to the role that arbitral awards have played in validating the existence of Lex Petrolea.<sup>91</sup> He argues that these published awards have addressed a range of issues regarding the exploration and production of oil and gas resources and can be considered as creating ‘a lex petrolea’ or customary law comprising of legal rules adapted to the industry’s nature and specificities.<sup>92</sup> It has been suggested that Lex Petrolea is further validated by petroleum development contracts.<sup>93</sup> Chief among these contracts are host state agreements (HSAs) or government contracts which are transacted between oil producing states and international oil companies (IOCs). While there is still some debate on the need to formulate a global host state model agreement, there is a school of thought that argues for the standardisation of terms ‘regardless of the identity of the host state.’<sup>94</sup>

National legislation has also contributed to the development of Lex Petrolea. The development of the body of arbitral case law on oil and gas transactions is largely due to state nationalisation or expropriation of foreign investment in the oil and gas sector.<sup>95</sup> These acts of expropriation and nationalisation are generally premised on the principle of permanent sovereignty which asserts domanial state control over the exploitation of petroleum resources.

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<sup>88</sup> Munir AFM Maniruzzaman, ‘The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?’ (1999) 14 *American University International Law Review* 657,658.

<sup>89</sup> Waryrk (n 87) 21.

<sup>90</sup> Ibid, 21. See also Thomas C Childs, ‘Update on Lex Petrolea: The Continuing Development of Customary Law Relating to International Oil and Gas Exploration and Production’ (2011) 4(3) *J World Energy Law & Business* 214

<sup>91</sup> See discussions of Child’s thesis in Waryrk’s work (n 87) 27.

<sup>92</sup> Ibid 28.

<sup>93</sup> Timothy Martin ‘Lex Petrolea in International Law’ in Ronnie King (ed) *Dispute Resolution in the Energy Sector: A Practitioner’s Handbook* (Globe Law and Business, London, 2012) 95 discussed in Waryrk’s work (n 87) 28D

<sup>94</sup> Waryrk (n 87) 14-15.

<sup>95</sup> Ibid, 17- 18.

This establishes that although Lex Petrolea is derived from the trade usage and practices of the international petroleum industry, it does not negate the role that state legislation has played in its development as a separate field of law.

One significant stakeholder that has been largely ignored in the debate on Lex Petrolea is the local or indigenous oil community.<sup>96</sup> Yet, as this article argues, the local community bears the brunt of oil and gas exploitation. This raises an important question on why indigenous social ordering rules have not played a role in the formulation and further development of Lex Petrolea?

### **Framing an African Lex Petrolea**

A leading energy law firm, Ashurst<sup>97</sup> has recently debated whether an African Lex Petrolea exists? This debate has arisen due to the comparative analysis of national legislation and host state contracts that is currently being undertaken by APPA states. The study is designed to identify the key principles, practices and trends that are apply to the African industry. It also seeks for the development of a model production sharing agreement (PSA).<sup>98</sup> It is suggested that the development of these standardised rules and the model PSA could lead to the establishment of an African Lex Petrolea.<sup>99</sup> It is questionable whether this comparative study undertaken by APPA states on the one hand and by ‘a consortium of international law firms and consultants,’<sup>100</sup> on the other, will necessarily bring about the development of an African Lex Petrolea that will meet the needs of all stakeholders. It will appear that the APPA study as currently formulated is designed to cater for the needs of African National Oil Companies (NOCs) and International Oil Companies (IOCs). It does not appear that local oil communities are directly involve in its decision making process. The non-inclusivity of local community needs may mean that an ‘African Lex Petrolea’ solely developed from this APPA study will fail to make any meaningful impact in resolving resource conflicts between APPA states, MNCs and local communities.

Understanding that the oil and gas industry is prone to the risk of disputes, industry stakeholders have developed Lex Petrolea to assist in the resolution of such disputes. While these body of transnational rules have proved useful in the resolution of disputes between states and MNCs, the notion of Lex Petrolea as presently conceived is unlikely to play any major role in the resolution of current and emerging disputes between States (and MNCs) and local

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<sup>96</sup> Waryrk (n 87)13.

<sup>97</sup> Ashurst, *Moving towards an African Lex Petrolea* (Ashurst Energy Briefing, 2012)

<sup>98</sup> Ibid, 1.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

communities. This is because the norms that currently shape Lex Petrolea are primarily derived from Western received law and practices.

This article argues that there is a place to embed African social ordering norms which focus on communitarianism, human dignity and social justice in oil and gas dispute resolution mechanisms. The inclusion of these rules in the legal system of governance of oil and gas resources will help to de-escalate the tensions between the 'Civic Public' represented by African State structures and the 'Primordial Public' represented by Oil and Gas producing communities.

A close appraisal of ongoing conflicts in regions like the Niger Delta establish that community agitations extend beyond environmental degradation of their land and resources. These conflicts focus more on the fundamental concern that the African civic state has failed in its 'custodian' role to properly utilise and administer petroleum resources derived from the local oil communities. These communities still value and hold on to the tenets of fundamental African social ordering rules such as Ubuntu which are based on humaneness, fairness, social justice and sharing. There are variants of the Ubuntu principle which exist in the Niger Delta region, including the Ijaw concept '*Kemesese-ebi*' (the common good of all). This supports the arguments of Chigara<sup>101</sup> and Ramose<sup>102</sup> that there is an underlining African social ordering norm that promotes social justice, fairness and communality. The overarching argument of this article is that there is a role that this underlining norm can play in promoting a more equitable framework of petroleum governance in Sub-Saharan Africa.

A call for the inclusion of this underlining African social ordering norm in Lex Petrolea and in Oil and Gas dispute resolution mechanisms may not be such a Utopian ideal. The recent edition of the TDM journal shows that there is growing call for the inclusion of African indigenous rules in the arbitration of oil and gas disputes arising from Africa.<sup>103</sup> This does not mean that these rules will necessarily gain the same status as the current Western rules that frame transnational petroleum law and national legislation. But the South African 1993 interim constitutional model demonstrates that it is possible to embed indigenous African rules within a civic public legal framework that focus on an African understanding of humaneness, social justice and communitarianism. However, the universalism and cultural relativism debate which

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<sup>101</sup>Chigara (n 5).

<sup>102</sup> Ramose (n 38).

<sup>103</sup> See for example Florence Shako 'Towards a Transnational Legal Order: The Role of Culture in Commercial Arbitration in Africa' (2016) 13(4) TDM Journal and Victoria Safran, 'African Voices on Cultural Issues Impacting the Role of Africans and Africa in International Arbitration' (2016) 13(6) TDM Journal available at <https://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=68> .

resonates in the Human Rights Law may have an impact on the development of an African Lex Petrolea. This is an important point that requires further deliberation.

### **African Lex Petrolea: Unintended Consequences of Cultural and Ethnic Relativism**

The call for the inclusion of African social ordering rules evokes the universalism and cultural relativism debate. This is a debate that continues to resonate in Human Rights Law. The debate is premised on the viewpoint that human rights are universal and do not require cultural validation.<sup>104</sup> This is because human rights are premised on the inherent value of being human. But Donnelly<sup>105</sup> in his leading work points out, there are aspects of human nature that can be considered culturally relative. He therefore argues that some recognition should be given to the 'crosscultural variations in human rights.'<sup>106</sup> Conversely, those who argue against 'cultural variability'<sup>107</sup> have based their arguments on the fact that cultural relativism can be used as a tool of oppression<sup>108</sup> and for perpetuating repugnant norms and practices. They further argue that rights universalism ensures that all human beings are entitled to equal rights.<sup>109</sup>

A full discussion on the 'Human Rights' Universalism and Cultural Relativism' debate is beyond the scope of this paper, it does show the challenges that could arise if an African Lex Petrolea is shaped primarily on indigenous African social ordering norms. It raises the important concern on whether an African Lex Petrolea primarily based on indigenous social ordering norms can result in cultural and ethnic relativism respectively? Ethnic relativism, in particular, is a matter of concern as it focuses on the superiority of one ethnic group over another and delegitimises national hegemony and identity.<sup>110</sup>

The example of the Niger Delta which is a current theatre of oil and gas resource conflicts demonstrates the dangers of a petroleum governance framework that perpetuates ethnic relativism and not national hegemony and identity. As previously stated, there is the continuing belief that wealth extracted from minerals within this region is being utilised by other ethnic groups within Nigeria to the detriment of the developmental needs of the groups within the Niger Delta.<sup>111</sup> While it is important to promote true federalism which allows the component

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<sup>104</sup> Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6(4) *Human Rights Quarterly* 400.

<sup>105</sup> Ibid, 403.

<sup>106</sup> Ibid .

<sup>107</sup> Ibid.

<sup>108</sup> Chi-yu Shih 'Opening the Dichotomy of Universalism and Relativism' (2002) 2(1) *Human Rights and Human Welfare* 13.

<sup>109</sup> Leon Calleja, 'Universalism, Relativism and the Concept of Law' (2014) *Journal of the Philosophy of International Law* 59.

<sup>110</sup> Robinson (n 75).

<sup>111</sup> Ikien et al (n 74.)



units to exert greater control over the natural resources situated within their regions, this should not detract from the fundamental objective of the common national good.

It is debatable whether the underlining normative rule of Ubuntu and its different variants will perpetuate ethnic relativism. This is because the concept itself canvasses for interdependence and common humanity where all is done for the common good of all. Unfortunately, many African states which are obligated by their Constitutions and national laws to manage natural resources in trust for the common benefit of their citizens have failed to do so. This is why there is a need for the restructuring of the framework of petroleum governance which is currently premised on domanial state ownership. The inclusion of an underlining African social ordering norm which facilitates 'a bottom to top' approach which encourages local communities to participate in the decision making process may help to de-escalate current volatilities within theatres of resource conflicts in the African sub-continent.

## **PART FIVE**

### **CONCLUSION**

The Sub-Saharan African continent is a key region for oil and gas exploitation. Yet some of its key petroleum basins are regarded as theatres of resource conflicts. These conflicts are partly due to dialectical conflicts between the 'Civic Public' and the 'Primordial Public'. This article argues that these conflicts can be deescalated through the development of an African Petrolea comprising of received Western law and practices and indigenous African social ordering norms. The current effort of the APPA states to develop standardised rules for the continent is a step in the right direction in ensuring effective governance of petroleum resources. The APPA study however has some shortcomings. This is because the study primarily caters to the needs of oil companies and African civic states. Yet as Ekeh's 'Two Publics'<sup>112</sup> demonstrates, many African communities operate within 'Two Publics'- the 'Civic Public' consisting of the state apparatus and institutions, and the 'Primordial Public' consisting of the family, community and ethnic groupings. The article recommends for the development of an inclusive framework work of petroleum governance that is not only premised on dominos state ownership alone, but one that embodies the underlining African social ordering norm of social justice, fairness and inter-dependence. This norm is known by many names, the most popular description of the norm is the term 'Ubuntu.'

This article however questions whether this norm has attained the status of grundnorm as argued in other literature.<sup>113</sup> This is because the 'Civic Public' represented through the state

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<sup>112</sup> Ekeh (n 12).

<sup>113</sup>Chigara (n 5) above.

structure controls the legitimisation process of legal normative formation. The presupposition exercise for normative formation is premised on state sovereignty. This has led to the establishment of a hierarchical system of legal governance where the State Constitution is regarded as the supreme law of the land and embodying the grundnorm or fundamental rule.

The 1993 interim or transitional Constitution of South Africa was presented as a bold attempt of an African state to incorporate the underlining basic African social ordering norm known as Ubuntu. Unfortunately this was not followed through in the final 1996 Constitution. This demonstrates the continuing application of the modernisation theory which requires Africa to continue to treat Western received law as its benchmark for development and modernisation, without equal regard to African social ordering norms. This article recommends further empirical study be undertaken by the APPA or similar bodies to ascertain the continent-wide application of these norms and their relevance to the development of an inclusive framework of petroleum governance for all stakeholders in the Sub-Saharan African continent.