CONSTITUTIONAL APPROACHES TO
RESOURCE CONTROL IN
OIL PRODUCING FEDERATIONS

BY

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ABSTRACT

This thesis considers models of approach adopted by oil producing federations in the way their constitutions regulate the control of such resources, particularly in the assignment of ownership and legislative competence to federal and sub-national authorities. I argue that any federal democratic constitution adopted in any oil rich country after 1973 is more likely to provide for an approach in favour of greater federal involvement through a central control model that vests ownership of such oil resources in the federal authority coupled with the legislative competence to regulate such resources. This is because (a.) oil is now a more lucrative commodity, (b.) the means and technology used to exploit it are now safer, more advanced and more available (c.) and because in today’s global economy, federal and national governments face more challenges and responsibilities, thus requiring access to more resources and greater flexibility to address these challenges.
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1 INTRODUCTION

1.1 Oil and Gas in Federal Constitutions

According to a 2010 conference report by the World Bank and the Forum of Federations, countries practising federal systems of government account for 40 percent of the world’s proven oil reserves and 50 percent of crude production. Incidentally these oil producing federations are constitutional democracies with division of powers between their respective national and sub-national levels of government. In today’s rapidly expanding global economy, energy has emerged as a vital factor in geo-political calculations and oil and gas resources continue to constitute a significant bulk of the world’s energy solutions. In many respects, the politics of oil can make or break a nation and can make the difference between war and peace. Considering the enormous economic and political issues at stake, one may pose the question as to how countries go about regulating the ownership and control of oil and gas resources given the division of powers that attend a federal structure. This thesis will offer an explanation as to why oil and gas democracies in the last 25 years have adopted particular models of approach, inquire into the desirability and effectiveness of such models as adopted and ask whether alternative models would be better suited for those countries.

This explanation will be predicated on the view that the constitutional approaches to resource control, that is, the constitutional definition and assignment of oil gas ownership and control in federal democracies can be categorised under three theoretical models. These models can be described as follows: the central control model, the devolved interest model and the concurrent-interest model. Considering the continuing importance of oil and gas in meeting

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the world’s energy needs, and the economic significance to the producers themselves, participants at a recent conference on oil and gas in federal systems in Washington D.C. expressed surprise that there has been “little structured focus” on the inevitable socio-economic and political challenges posed to federal democracies.²

This is not an idle observation as federal states, more so than unitary states are more likely to be products of ethno-religious and cultural heterogeneity with diverse power structures and interests, all of which compete and must contend with each other in creating a viable federation. The constitutional and legal framework which defines the ownership and legislative control of natural resources that a country adopts has real economic and political consequences. These consequences can range from macro to micro-economic policy choices including determining how the federation is to share profits and royalties.

This thesis is concerned with the question of why federal countries adopt particular models of approach in dealing with minerals like oil and gas in their constitutions. As federal democracies are invariably constitutional regimes, there must always be a constitutional basis for how the different levels of government deal with such resources. Even when the constitutional document is silent on the issue, that silence can itself communicate an implicit delegation of power authorised under a different legal basis.

1.2 Key words and Definitions.

The thesis seeks to address two aspects of oil and gas resource control and to a lesser degree a third aspect. The first two aspects are ownership and legislative control. The third which will

² Ibid.
be dealt with to illustrate or offer manifestations of the other two is revenue sharing, that is, vertical sharing of oil and gas revenues between the national government and sub-national authorities. The models discussed in this thesis are concerned with issues of ownership and legislative control as the two vital but separate interests subject to constitutional regulation in a constitutional democracy.

Simply put each model answers the questions; who does the oil in the land belong to? And which level of government has the direct power to make laws on it and formulate policies regulating it. Accordingly, it is likely that both interests may not be vested in the same authority. The authority that owns the resources may or may not have power to regulate issues relating to it and vice versa. The models therefore try to explain the different ways such interests may or may not be reconciled in the constitutional traditions and texts of oil producing federal democracies. Needless to say that this discourse is limited to only federal democracies which are oil producing countries with a particular emphasis on countries that have adopted constitutions after the year 1973. 1973 is significant in this context because it was the year of the OPEC boycott, the oil crises caused when the Organisation of Petroleum Exporting Countries, OPEC shut off oil exports to consumer nations in protest at American foreign policy in the Middle-East triggering a huge spike in world oil prices.

1.3 Principal Argument
It is my argument that in the post 1973-OPEC boycott era, a model adopted by a country in its constitutional approach to defining the ownership and control of oil and gas mineral resources is connected and more often explained by three keys factors; (a) the economic significance and revenue potential of oil and gas earnings, as measured by the percentage of oil and gas contributions to the national gross domestic product or of government revenues;
(b) the great advances in science and technology that have made oil exploration and production faster and safer and (c) the contemporaneity of the constitution. By contemporaneity, I mean the constitution is existing modern times, specifically post 1973 and must address societal problems that are themselves reflective of a contemporary issues such as globalization. As with every rule, there are exceptions and this proposition is no different. However, this thesis will draw attention to the countries and case studies where this argument finds practical evidentiary bases. Attention will also be given to the exception to this proposition and what accounts for it.

Put another way, it is my contention that post 1973, when an oil producing country is making a decision or choice on writing a constitution, the country is more likely to behave in particular way given some factors; the higher the significance of the oil and gas industry in a federal democracy as measured either by its contribution to government revenues or the gross domestic product, the more recent or contemporaneous the time of adoption of the constitutional text, the more likely that country is to adopt a model with greater emphasis on central or national control as against regional or sub-national control.

Even where the oil and gas sector may not necessarily form the most substantial part of the country’s economy, it is still my argument that a federal constitution written after 1973 on the eve of the OPEC boycott would more likely opt for a central control model than a devolved interest or concurrent interest model of approach. Accordingly, it would follow from this argument that a federal democratic constitution adopted prior to 1973, which is not contemporaneous and which was adopted in a period with different social and political attitudes towards oil and mineral resources will more likely have or provide for a devolved-
interest or concurrent interest model as opposed to the central control model. These models and their respective distinctions shall be set out in greater detail later in this Thesis.

My first reason for taking this position is predicated on the argument that the 1973 OPEC boycott radically altered the commercial value of oil internationally, established oil as a diplomatic weapon as between nations and crucially here, increased its economic significance within the domestic politics of oil producing federal countries.

The oil embargo or boycott by the Organisation of Petroleum Exporting Countries in October of 1973 had been the culmination of several factors, the primary trigger being the anger of Arab and Middle-Eastern governments to the supply of Israel by the United States during the Yom Kippur War of October 1973. The effect of the boycott on oil prices was so drastic that by the time the crises ended, OPEC countries had collectively earned $88.8 Billion for oil sales in 1974 as opposed to $22.8 Billion in 1973. To illustrate this change, Nigeria’s “Bonny Light” crude and Venezuela’s “Tia Juana Light” crude averaged at $2 per barrel of oil in 1970. By the height of the crises in 1974, they were selling for $12 and $9 per barrel respectively. In many ways the 1973 oil crises marked the end of an era of innocence and oil prices were never again to return to anything near the levels of the pre-boycott era.

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4 Steven A. Schneider, *The Oil Price Revolution*, Baltimore and London, The John Hopkins University Press, 1983 at page 234, the author argues that: “the Arab oil embargo was intended to pressure the United States into greater support for the Arab cause and it was lifted in response to the pressure the United States placed on Israel”

5 Schneider, *supra* at page 253

My second reason for taking this position is that the world of 1973 and the world of 1787 and that of 1867 were not the same. Indeed the worlds of the 1963 Nigerian Constitution and the 1961 Venezuelan Constitution are not the same as the worlds of the Nigerian and Venezuelan Constitutions of 1999. What would the Canadian fathers of confederation or authors of the United States Constitution have said, if told of the vast reserves of oil and gas resources under the feet of their various states and provinces, at the time they drew up their respective constitutions. Countries like Venezuela, Nigeria and Iraq all had the opportunity to write constitutions after 1973 and in most cases, they adopted a central-control model.

Furthermore, federal democracies in the post 1973 era, which boast substantial reserves of oil and gas resources, will if given the opportunity, prefer to have a system that vests the federal government with the flexibility and the constitutional means to direct and set a single national oil and gas policy, enact uniform regulations and derive maximum benefit from oil and gas revenues in order to meet modern economic and financial challenges that simply did not exist before 1973. These challenges were fulsomely articulated by Anwar M. Shah, when he observed that:

*With globalization, it is becoming apparent that, as Daniel Bell wrote, “nation-states are too small to tackle large things in life and too large to address small things.” Globalization and the Information Revolution represent a gradual shift to supra-national regimes and local governance. In adapting to this world, there is growing tension among various orders in federal systems to re-position their roles in order to retain relevance. One continuing source of tension is vertical fiscal gaps, or the*
mismatch between revenue means and expenditure needs at lower orders of government.\textsuperscript{7}

Globalization and its effects as manifested in national mass unemployment, complex international financial arrangements, budget deficits, entitlement programmes and welfare services, instantaneous communications, international freight, global trading are not issues that a federal constitutional draftsman would have had to contend with barely half a century ago in dividing fiscal powers between federal and sub-national authorities.

If we also consider the advances made in oil drilling technology, seismology, geology and economics, it is now easier, safer, faster and more efficient to explore and exploit oil and gas resources in places and at depths that would have been impossible with the available science and technology prior to 1973. We see this in incredible feats of engineering like British Petroleum’s \textit{Tiber} well in the Mexican Gulf that drills to depths of some 35,000 feet and the Shell Company’s \textit{Perdido Spa} oil well\textsuperscript{8} which when completed will drill for oil and gas at depths of up to 10,000 feet under water and mud and pump up 100,000 barrels of oil per day and gas of up to 60 million cubic feet.\textsuperscript{9} We also see this in offshore drilling units like the \textit{Cajun Express}, a “semi-submersible drilling unit capable of operating in moderate


\textsuperscript{9} Ibid at page 9
environments and water depths up to 8,500 feet”. In other words, technology makes a huge difference now than four decades ago and countries can now drill more and export more. A welcome addition to the national economy.

As no two countries are the same, so too no two federal democracies are the same. Accordingly, one may expect that the manner and methods employed by such countries will reflect their respective political histories and economic realities. This thesis will therefore argue that following case studies of the constitutional arrangements of specific countries identified in this Thesis, and observations of other older democratic federations, approaches to the regulation of the ownership and control of oil and gas would seem more likely to fall within one of the four models listed previously. These models may be unambiguously expressed in a country’s constitution by specific provisions or it may be drawn by reasonable implication. For instance, an express provision entrenching the devolved interest model would look like Sections 92A (1) (a) - (b) and 109 of the Canadian Constitution Act of 1867 which provides as follows:

Section 92A -

(1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;
(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom;

Section 109 -

See Cajun Express Fleet Specifications, Transocean Online
All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same

In the above example, the constitutional text is clear as to which level of government has ownership and legislative competence. In the same way, an example of an express provision entrenching the central control model of approach would be Section 44 (3) of the Nigerian Constitution of 1999 which provides as follows:

Notwithstanding the foregoing provisions of this section, the entire property in and 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 vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

Like the Canadian constitutional provisions, the above clause leaves little doubt as to whom ownership and legislative control is vested. An example of where the constitution is silent on ownership but other legal provisions allow an inference to drawn in favour of a level of government is exemplified by the Australian Constitutional experience. The constitutional text makes no mention of ownership or control of mineral resources. Thus one is compelled to look outside the constitution to find the answer. According to Michael Crommelin, in the early part of the 20th century, the states constituting the Australian Commonwealth enacted
various statutes expropriating all petroleum resources in their respective territories.\textsuperscript{11} These statutes effectively entrenched the colonial policy of granting land whilst reserving minerals to the government. Notwithstanding the adoption of the 1901 Constitution, Crommelin contends that:

\textit{The result is that each state owns all naturally occurring petroleum within its territorial boundaries. The Australian Constitution does not disturb this position. Moreover, in 1978 the federal parliament placed the Northern Territory in a similar position when it conferred self government on the territory.}\textsuperscript{12}

The same unspoken rule can be found in the Constitution of the United States of 1889 which does not expressly assign power over mineral resources to the either the government of the union or of the states. Nevertheless, the 10\textsuperscript{th} Amendment to the Constitution ventures a little to provide that:

\textit{Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people}

This residual power reiterates some of the pre-constitutional power of the states.\textsuperscript{13} According to Kenneth R. Thomas, while the “States may generally legislate on all matters within their


\textsuperscript{12} Ibid

territorial jurisdiction,” this power is not rooted in the 10th Amendment to the United States Constitution but “is an inherent attribute of the states’ territorial sovereignty” and goes back to the founding of the union.\textsuperscript{14} Accordingly, the US constitution’s silence with respect to minerals may suggest that the ownership of lands in the states and control of mineral resources is subject to state legislative power. This assumption must however be tempered by the fact that more than one third of all lands in the United States or some 650 Million square kilometres belong to and are subject to the direct control of the Government of the United States.\textsuperscript{15}

When one considers the unavoidable role played by the central government within a federal system in regulating commerce, offshore minerals and entering international treaties affecting the production and sale of minerals, one cannot but agree that federal involvement in oil and gas control is unavoidable. Indeed, it is inevitable in a globalized economy. Accordingly, the argument will be made that a contemporary federal constitution enacted post 1973, is more likely to adopt a central control model that emphasizes federal ownership and legislative control. The only exception to this position is Iraq under the 2005 constitution and this is because of the role played by Kurdistan. This thesis will also offer prescriptive comments on whether these models as adopted by the various constitutional systems considered are desirable and effective in meeting the objects of their respective constitutional orders.

\textsuperscript{14} Ibid
1.4 Countries and constitutions reviewed

For the purposes of this discussion, this thesis will consider the approach to resource control as provided for in constitutional systems of older federal democratic countries such as those of the United States and Canada. Having highlighted the constitutional approaches and models taken by this countries, the thesis will then draw attention to the approach taken in the Venezuelan, Nigerian and Iraqi Constitutions, which shall collectively be referred to as the newer federal democratic traditions. The division of the two sets of countries is not a historical commentary on the longevity of their federal characters but on the contemporaneity of their current democratic constitutions. The choice of these countries for the purpose of this discourse is informed by the reasons set out in the succeeding paragraphs.

As earlier noted, this Thesis takes the view that 1973 marked a turning point in the political and socio-economic role played by oil as a result of the OPEC boycott. As a result of that event, I argue that constitutions adopted after that date in oil producing countries that are federal democracies could not take or follow the same approach adopted by federal democracies before 1973. To emphasize this point, the Thesis looks at the constitutions adopted in the newer federal democracies such as Venezuela (1999), Nigeria (1999) and Iraq (2005). To demonstrate that the models of approach adopted by these newer democracies is a recent shift in federal constitutional tradition, a contrast will be made between these three newer federal democracies with the constitutional experiences of the older federal democracies such as the United States (1787) and Canada (1867). The club of oil and gas producing federations with democratic constitutions is small relative to the total membership of the comity of independent nations.

With the exception of Russia, the five countries mentioned above account for most of the oil and gas produced by federal democracies in the world. Older federal democracies like the
United States and Canada have individual states and provinces that rely to a significant degree on revenues from oil. The amount of revenues in such cases collected by such sub-national units cannot be isolated from the model of approach applicable to their respective federal systems as entrenched in their constitutions. Whether a sub-national unit such as a state or province can collect revenues derived from oil or can make a law regulating oil production, is inextricably linked to what the constitution says or does not say.

The choice of Venezuela, Nigeria and Iraq is also justified by the unavoidable fact that oil and gas export earnings account for a substantial chunk of their respective government revenues and of their respective national gross domestic products. Accordingly, it is clear that the public control of minerals like oil and gas resources and the constitutional means of achieving that control is an issue that still remains contentious in these three newer democracies. Taken together, these five countries represent a full spectrum of models of approach explained in this thesis. It is on this note, that we now turn our attention to these models.

1.5 What Kind of Models?
The first model can be described as the central control model. This is one in which the constitution vests absolute ownership and legislative control of mineral resources in general and oil and gas in particular, in the central or federal government. In this model, one can count the Constitutions of oil producing developing federal democracies like Venezuela

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16 In 2007-08 oil and gas resources accounted for 28% of own-source revenues in the Canadian Provinces of Alberta, 17.5% in the province of Saskatchewan and 45% in Newfoundland and Labrador. As against industry’s portion of 3% of the national gross domestic product, it accounted for 15.2% and 8.3% of the provincial GDP in Alberta and Saskatchewan respectively. Also see André Plourde, “Oil and Gas in the Canadian Federation” (Washington: World Bank Conference on Oil and Gas in Federal Systems, 2010) at page 8. Online: <www.worldbank.org>
(1999) and Nigeria (1999). This is the model of approach I will argue is most likely to be adopted by newer federal democracies going by the three criteria discussed earlier.

The second model, which can be described as a devolved interest model is one in which ownership or legislative control, or in some case both ownership and legislative control of mineral resources is explicitly or implicitly vested in the sub-national or regional governments. Accordingly, one may say that there are two sub-models under this model. In the first sub-model here, public ownership of oil and gas resources is said to be vested in the sub-national units, while legislative control is vested in the federal government. An example of this would be under the 1963 Republican Constitution of Nigeria discussed in a later part of this thesis. The second sub-model would be one in which both ownership and legislative control is vested in the sub-national units. In this sub-model model, both ownership and legislative control are explicitly set out in the constitutional document. An example of this would be the Canadian Constitution Act of 1867.

The third model is the concurrent-interest model. This model is divided into two sub-models; the first is one in which the constitutional document is silent on the ownership of the natural resources and makes no explicit delegation of legislative competence to either the national or sub-national governments. In this sub-model, ownership and legislative control of specific portions of such oil and gas resources is vested in either the federal authority or in the provinces by necessary implication, drawn from extra-constitutional legal arrangements or from the circumstances of the de facto control of such resources. Good examples of this sub-model will include older federations like the United States, which as earlier noted lack specific and express constitutional provisions dealing with mineral resource control.
The second sub-model under the concurrent-interest model would be instances in which the constitutional document expressly vests ownership in the nation or in the people themselves but not in the national government. This sub-model has the following three characteristics; (1) there is no express provision as to how or through what agency that ownership is to be manifested; (2) it does not clearly provide for exclusive legislative control in either the federal legislature or the regional legislature (3) regulatory control of mineral resources is expressed in a language that suggests a legislative power exercisable by one level of government over only a part of such resources, with either the cooperation or acquiescence of the other. Under this sub-model, we can include Iraq.

In a federal democracy, it is customary that a written constitution be in existence and make provisions for the establishment of various institutions of the state in general and for the assignment of specific responsibilities and powers to the respective levels of government usually found in a federation. It therefore follows that the constitution will provide for certain matters upon which the national or federal authority may act or legislate upon and those for which, legislative competence is reserved to the sub-national units or provinces.

In order to identify which of the several models of approach is employed by the constitutional systems of the countries under consideration in this thesis, it will be pertinent to set out to some degree the legal provisions of these countries that bear on the public ownership and control of oil and gas resources within their respective federal systems. Before delving into the constitutional arrangements provided for in Venezuela, Nigeria and Iraq, it might prove helpful to first consider the approaches adopted by older oil producing federal democracies like the United States and Canada. By looking at the constitutional traditions of
these two older democracies, one will note the inclination of pre-1973 boycott constitutional drafters towards greater regulatory devolution and less centralization of public ownership.

2. CONSTITUTIONAL REGULATION OF OIL RESOURCES IN THE OLDER FEDERAL DEMOCRACIES (Pre-Boycott Era)

Prior to the 1973 OPEC boycott and the radical transformation of oil and gas resources as a socio-economic and political arsenal, it was the general tendency of oil producing federal democracies to adopt constitutions that were either silent on the issue of ownership or control of such resources or to expressly delegate such matters to the sub-national units or provinces. In other words, they were more likely to enact constitutional arrangements providing for either the devolved interest model or the concurrent interest model (first sub-model) discussed earlier.

There are several possible explanations for this dichotomy between pre and post 1973 federal constitutions; the older federations were usually the product of a “coming together”,¹⁷ that is a negotiated union of formerly sovereign or highly autonomous political units; the relative unimportance of mineral resources as issues worthy of direct and specific constitutional regulation and the absence of the factors that existed after 1973, such as high prices for commodities like oil and gas, cheaper and safer means of extraction and the greater need for stronger national control of the means and resources of economic development. Countries adopting constitutions after 1973 like Venezuela, Nigeria and Iraq were not in the same

situation and therefore have had to adopt a different approach to meet contemporary challenges.

### 2.1 Oil and gas in the United States
According to Professors Mieszkowski and Soligo, the history of Oil in the United States finds its origin in the east coast state of Pennsylvania in 1859. From then until the 1940s, the petroleum output of the United States grew to be the largest in the world accounting for a hefty 63% of the world’s oil production.\(^\text{18}\) According to information available from the Energy Information Administration, American crude production of 9.1 million barrels of oil per day in 2009 places the country among the league of top oil producers in the world behind only Russia and Saudi Arabia.\(^\text{19}\) Given the large size of the world’s largest economy, it is no wonder that with a contribution of only $159 billion to a total gross domestic product of some $13.2 Trillion, the petroleum industry constitutes a relatively small part of the American economy.\(^\text{20}\)

These national statistics notwithstanding, the oil and gas industry forms a significant part of the economic life of the various individual states where production takes place. Mieszkowski and Soligo note that the industry is much more significant for those states. Indeed, oil and gas


\(^{\text{20}}\)Peter Mieszkowski, and Roland Soligo, supra at page 3.
accounts for 24.7 percent of Alaska’s GDP, 16.2 percent for Wyoming, 10.4 percent for New Mexico, 10.1 percent for Louisiana and 7.5 percent for Texas.  

Most of the total production is reported to be concentrated in only six states and from offshore resources. In terms of gas, the country produced some 21.1 Trillion cubic feet with five of the six top oil producing states also accounting for 70% of the total output of natural gas. This production is supplemented by exports from overseas to meet domestic energy consumption demands.

2.2 Oil and the US Constitution

The United States Constitution was negotiated by the thirteen colonies that had united in 1776 to declare their independence from the British Crown. When the Articles of Confederation under which their loose union was administered proved inadequate to engendering an effective national government, they as free sovereigns adopted the Constitution. The 1787 Constitution does not make express provisions as regards the ownership of minerals resources in the United States nor does it not explicitly assign legislative competence over such matters to either the congress of the United States or the legislatures of the states.

However like most federal constitutions, the federal legislature is given extensive powers to regulate interstate commerce, to impose taxes and for validly made federal laws to take

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21 Ibid.
23 Kenneth R. Thomas, supra at page 8
24 United States Constitution Article I, Section 8, Clause 3.
precedence over the laws of the states where conflict occurs. However the constitution while not providing an exhaustive list of matters upon which the legislatures of the states can legislate, does however assign a wide spectrum of residual powers to them via the instrumentality of the 10th Amendment which provides as follows:

\[
\text{Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people}
\]

As earlier noted, the general power of the states to legislate is not solely predicated on the above constitutional provision but was as Kenneth Thomas argued “an inherent attribute of the states’ territorial sovereignty” the antecedents of which can be traced to the time of adoption and ratification. This lacuna in the law therefore leads one to conclude that in so far as any mineral is found in the territory of a state within the union, it is for the legislature of the state to determine ownership and how those resources are to be regulated.

This argument is however subject to any valid constitutional impediment to the state’s exercise of legislative sovereignty, for instance the fact that the minerals though falling within the geographical territory of a particular state, is located on land that belongs to the federal government. In such circumstances, the supremacy of federal laws and jurisdiction will operate to override the state’s legislative powers with respect to that specific area. This override provision is set out in the supremacy clause in Article VI, Clause III of the Constitution which declares that:

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25 United States Constitution Article IV, Clause 2.

26 Kenneth R. Thomas, supra at page 4.
This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

As it happens, some 650 Million square kilometres belong to and are subject to the direct control of the Government of the United States.\textsuperscript{27} This vast legacy is the result of the federal government’s retention of rights in lands west of the Mississippi following their acquisition by the United States as the country expanded.\textsuperscript{28} Accordingly, both the federal government and the states can claim to have both ownership rights and legislative competence over oil and gas resources found within their respective physical jurisdictions.

To that extent therefore, one can described the approach taken by the US Constitution to be illustrative of the first sub-model of the concurrent interest model described earlier in this thesis. That is, ownership and legislative control of specific portions of such oil and gas resources is vested in either the federal authority or in the states by necessary implication, drawn from extra-constitutional arrangements or from the circumstances of the \textit{de facto} control of such resources. In this case, the key factor to determine where the federal government or a state authority is responsible is by ascertaining whether the land in question where the oil is found, belongs to the federal government or to the state.

\textsuperscript{27} Peter Mieszkowski, and Roland Soligo \textit{supra}, page 8.
\textsuperscript{28} Ibid
2.3 Oil and Gas in Canada

Canada is a federal constitutional monarchy comprising ten provinces and three territories. It is also an oil producing country. According to André Plourde, two factors have determined the development of the oil and gas industry in the country.29 The first of these would be geology and demographics and the second would be constitutional provisions.30 It is the second that is of interest to the present discussion.

According to a report in the Oil and Gas Journal cited in an analysis brief prepared by the Energy Information Administration, Canada boasts of proven crude oil reserves of some 175.2 billion barrels behind only Saudi Arabia and Venezuela.31 In terms of production, the country’s output as of 2010 stood at 3.46 million barrels per day, of which 2.65 million barrels per day was crude oil.32 In addition to its oil resources, Canada also holds reserves of 61.95 Trillion cubic feet of gas. In 2009, the country produced 15.43 Billion cubic feet of gas per day, a lot of it consumed domestically and in the United States where Canadian gas accounts for 85% of natural gas imports.33 These statistics notwithstanding, the oil and gas

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30 Plourde, ibid.


32 Ibid, at page 3

33 Ibid, at page 11
industry accounted for only 3% of the national gross domestic product.\textsuperscript{34} This national picture however stands in stark contrast to the significant role played by the industry in individual provincial economies particularly in the west of the country.

For some of the individual provinces in Canada, oil remains an important economic asset. For example, in 2007-08 oil and gas resources accounted for a princely 28% of internally generated or own-source revenues in Alberta, 17.5% in the province of Saskatchewan and 45% in Newfoundland and Labrador.\textsuperscript{35} As against industry’s portion of 3% of the national gross domestic product, it accounted for 15.2% and 8.3% of the provincial GDP in Alberta and Saskatchewan respectively.\textsuperscript{36} These figures are the practical manifestations of the model of approach adopted by the fathers of confederation when they negotiated the terms of the Constitution Act of 1867 \textsuperscript{37} as severally amended and reiterated. We now turn to these constitutional provisions.

\section*{2.4 \textit{Oil and Gas in the Constitution of Canada.}}

The relevant constitutional provisions are set out in Section 50 of the Constitution Act, 1982 now consolidated as Section 92A (1) of the Constitution Act of 1867 and Section 109 of the Constitution Act, 1867. They provide thus:

Section 92A -

\begin{enumerate}[\it (1)]
  \item In each province, the legislature may exclusively make laws in relation to
  \begin{enumerate}[(a)]
    \item exploration for non-renewable natural resources in the province;
  \end{enumerate}
\end{enumerate}

\footnotesize
\textsuperscript{34} Plourde, \textit{supra} at page 9
\textsuperscript{35} Ibid
\textsuperscript{36} Ibid
\textsuperscript{37} \textit{British North America Act} 1867, 30 & 31 Victoria, C.3 (Statute of the United Kingdom)
(b) development, conservation and management of non-renewable natural
resources and forestry resources in the province, including laws in relation to
the rate of primary production therefrom;

Section 109 -

All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of
Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or
payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several
Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same
are situate or arise, subject to any Trusts existing in respect thereof, and to any
Interest other than that of the Province in the same

Taken together, these two provisions constitute a good example of the devolved interest
model discussed earlier. Both public ownership and legislative competence are explicitly
vested in the provincial government. In a manner similar to federal lands in the United States,
oil and gas resources in areas and lands owned by the Crown in right of Canada, such as First
Nations reservations and national park belong to and are subject to the legislative control of
the Government of Canada.38 According to Plourde, the effect of the constitutional provisions
with respect to oil and gas resources found onshore, is that the government of the various oil
producing provinces have played the predominant role, especially by tying regulations
regarding proposed to assessments of environment impact and human health concerns.

In older democracies like the United States and Canada, and others not discussed here like
Australia, one sees a federation formed through a process of negotiation and compromise.

38 Plourde, supra, at page 7.
Under the constitutions of the United States and of Canada, public ownership of oil and gas resources in particular or minerals in general, was not conceived as an issue to be assigned to the federal government. The federal government was to be limited to broad issues affecting the nation at large whilst leaving issues like oil and gas ownership and control either concurrent to both levels of government as in the United states or devolved to the sub-national units as in Canada. In neither case was it conceived that the federal government could claim unqualified ownership or legislative control of such assets in general.

However even in these older democracies like in Canada, we see that the federal government’s limited constitutional role can become an obstacle in addressing national challenges and meeting international obligations. Commenting on the Canadian government’s disengagement from actively setting oil and gas policy Plourde has observed that:

> **In a sense, the disengagement of the federal government from oil and gas policy and the prominent role of the provinces in environment policy arguably make it difficult for Canada to address the challenges posed by climate change.... To the extent that national energy policy is articulated around provincial policies, how can the federal government design a climate policy for all of Canada without calling into question aspects of provincial energy and environmental policies, especially in the oil and gas producing provinces?**

The question can be asked another way and broadened: how can any national government in a federal democracy fully and effectively discharge its economic and environment

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responsibilities to all the provinces in addition to international obligations, when it lacks the full range of ownership rights and the legislative competence to deal with mineral resources like oil, gas and the environment, freely and without recourse to the provinces and sub-national units? With respect, this may be a handicap in the globalised world of the 21st century.

3. CONSTITUTIONAL APPROACH IN NEWER DEMOCRACIES.

3.1 Oil and Gas in Venezuela

According to statistics available from the World Bank, Venezuela is an upper middle income country with a population of about 28.3 million people and a gross domestic product of $326 billion as of 2009. Venezuela is also a democratic federal republic, having first adopted a federal constitution in 1811. According to several scholars like Christi Rangel Guerrero, Allan R. Brewer-Carías and Osmel Manzano Christi et al it is a subject for debate whether what Venezuela currently operates under the Presidency of Hugo Chavez is federalism given

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42 Ibid


recent centralizing and unitary trends. For the purpose of the present discussion, we shall proceed with the view that Venezuela is a federation with a strong centralist theme.

Without a doubt, oil and gas production is the most significant activity in the national economy and the highest source of government revenue at all levels.\textsuperscript{45} The oil and gas industry accounts for 80\% of exports, between 40\% to 60\% of the government’s income and constitutes a princely 20\% of the gross domestic product.\textsuperscript{46} Oil production is concentrated in the three states of Anzoátegui, Monagas and Zulia with the later two accounting for 85\% of total production and the former for 11\% with the remaining being produced by the five other states. Manzano et al have argued that the usual fiscal tensions between oil producing regions and central government that often characterise other federal countries is largely absent in Venezuela as oil has historically been a federal matter. To that extent, the three main oil producing states “have not been the leading beneficiaries of from their geological fortune”.\textsuperscript{47}

An Analysis Brief complied by the Energy Information Administration of the United States Department of Energy cited a report by the \textit{Oil and Gas Journal} that Venezuela had 211 billion barrels of proven oil reserves as of 2011, the second largest in the world.\textsuperscript{48} This figure is said to include the massive reserves of extra-heavy oil in the country’s Orinoco belt and represents a major upward revision from 2010 when the country’s reserves were estimated at

\textsuperscript{45} Ibid at page 1
\textsuperscript{46} Ibid
\textsuperscript{47} Ibid at page 2.
99.4 billion barrels.\textsuperscript{49} As earlier noted, Venezuela is a major exporter of crude oil and natural
gas with the country recording net exports of 1.75 million barrels of oil per day in 2009 and
1.59 million barrels of oil per day in 2010. Venezuela is therefore the eleventh-largest
exporter of oil in the world and the largest in the Western Hemisphere.\textsuperscript{50}

Overall, the EIA estimates that in 2010, Venezuela produced around 2.36 million barrels of
oil per day, including crude of about 2.09 million barrels per day with condensates and
natural gas liquids (NGLs) accounting for the remaining production.\textsuperscript{51} In terms of gas, the
EIA has cited figures reported by the \textit{Oil and Gas Journal} that estimated Venezuela’s gas
reserves at 179 trillion cubic feet (Tcf) of proven natural gas as of 2011, the second largest in
the Western Hemisphere behind the United States.\textsuperscript{52} In 2009, Venezuela is estimated to have
produced 651 billion cubic feet (Bcf) of dry natural gas

While not directly connected to the choice of a model of constitutional approach, it should be
noted that fiscal policy and revenue sharing in Venezuela is determined by the national
government and all oil revenues are channelled through the national budget.\textsuperscript{53} Oil and gas
royalties and income tax are paid only to the national government and the states and
municipalities have no say in the matter, neither are they entitled to special compensation for
oil produced in their territories.\textsuperscript{54} Oil and gas producing states that have to bear the

\textsuperscript{49} Ibid
\textsuperscript{50} Ibid
\textsuperscript{51} Ibid
\textsuperscript{52} Ibid
\textsuperscript{53} Manzano, supra at page 12, particularly footnotes 31 – 35 detailing the various applicable taxes
imposed by the national government.
\textsuperscript{54} Ibid
environmental burden of the industry are not constitutionally entitled to a say or to a special share of the profits. They are thus put in the same position of non-oil producing states.

3.2  **Constitutional Framework and Federal Structure of Venezuela**

Venezuela adopted its current constitution in 1999 following the approval by the people through a popular referendum held on the 15\textsuperscript{th} December, 1999 of a draft prepared by a national constituent assembly.\textsuperscript{55} Mozano et al, have argued that while this new constitution formally reaffirmed the federal character of the country and reiterated the federal system that had been in place, it however signalled a definite shift towards increased presidentialism and a diminution of federal institutions as evidenced by the abolition of the federal senate and bicameralism.\textsuperscript{56} The formal commitments and declarations contained in the constitution notwithstanding, Venezuelan scholars like Former Minister of State for Decentralization and Professor at the Central University of Venezuela, Allan R. Brewer-Cariás argue that the 1999 constitution uses a democratic veil to cover an authoritarian regime, provides for a very centralized system of government and concentrates all powers of the State at the national level.\textsuperscript{57}

Venezuela became a federation when it adopted a federal constitution in 1811 largely influenced by the then novel American Constitutional experience.\textsuperscript{58} It has been argued that federalism was adopted as a means to uniting the seven former colonial provinces of the Spanish crown that composed the territory of the country.\textsuperscript{59} For much of the 19\textsuperscript{th} century and

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55 Allan R. Brewer-Cariás, *supra* at page 2
56 Manzano, *supra* at page 8
57 Allan R. Brewer-Cariás, *supra* at page 2
58 Ibid.
59 Ibid at page 4
the first half of the 20th, Venezuela was ruled by a succession of undemocratic regimes that appropriated power to the centre to the detriment of the states. Accordingly, Manzano et al, note that while Venezuela “continued being formally a federal country, in practice it has been a de facto centralized/unitary country with some limited effective federal features.”

For much of the 20th century prior to the 1973 OPEC boycott, the fiscal regime in Venezuela gradually took a decidedly more centralized tone with the national government taking constitutional control over mineral resources. In addition to this, the central government assumed a monopoly for collecting all tax revenue from all oil production and mining and determining the sharing of revenue among the various states. According to Diaz Caveros, this shift can be explained by the increased role over finance given to the central government in 1881 when “the central government negotiated with regional caudillos and obtained control of the customs and mining taxes in exchange for significant revenue sharing.”

Bearing in mind that the country was founded as “a confederation of regional caudillos in constant turmoil”, one can surmise that the bargain of 1881 allowed the central government to introduce greater stability in the polity whilst greatly expanding its jurisdiction over mines. Added to this is the probability that the succession of military dictatorships that ran the country were denied the checks of an elected legislature and may not have been enthusiastic champions of devolution.

In any event, given that political climate, Manzano et al., cite Caveros’ contention that the bargain of 1881 contributed to moving the country “towards fiscal centralization earlier and deeper than the other federations in the region.” Specifically, Manzano posits that;

60 Manzano, supra at page 7
61 See Manzano et al, ibid particularly footnote 12
Venezuela was the first formally federal country in Latin America to recentralize revenue collection, the other three Argentina, Brazil and Mexico did it later and only partially. This fact is crucial because it meant that later on, when oil production became significant, the central government was able to obtain total control of all oil revenues. Oil revenues thus significantly reinforced centralization. Venezuela’s federal history would have been significantly different if oil revenues had been initially collected by the states.62

Democratization came with the adoption of the 1961 Constitution. It is however apposite to take a closer look at the 1961 Constitution in order to better appreciate the constitutional changes that took place almost 40 years later in the post 1973 OPEC boycott era. That being said, it is always open to the a constitution writing body or constituent assembly to choose to abolish or reiterate the country’s approach to public ownership of mineral resources within its federal system. That choice was open to the Venezuela in 1961 and again in 1999 and the country adopted the same model on both occasions. We now consider both constitutional documents.

3.3 Oil and the 1961 Constitution

Article 102 of the 1961 Constitution of Venezuela provides as follows:

The lands acquired for the exploration or exploitation of mining, including oil and other mineral fuels, (sic) it will be in full ownership to the nation.

62 Ibid
without compensation to terminated for any reason, the respective concession. (sic)\textsuperscript{63}

The direct effect of this provision according to Luis Cuervo was that existing oil concessionaires were not entitled to any compensation at all for terminated contracts.\textsuperscript{64} The first Petroleum Law enacted in 1920 officially vested property rights firmly in the national government and it would seem that that principle was simply entrenched in the 1961 Constitution.\textsuperscript{65} Article 136 of the 1961 Constitution of Venezuela vests the national government with the power to make laws with respect to;

\begin{quote}
The organization, collection and control of taxes, income, capital and inheritance and gift contributions levied on the importation, registration and stamp duty and those that fall on the production and consumption of goods wholly or partially preserved by the National Power Act, such as alcohol, liquor, cigarettes, matches and salt, the mining and oil (sic) and other taxes, fees and income not allocated to States and municipalities, as a matter of national contributions [to] create law.\textsuperscript{66}
\end{quote}

\textsuperscript{63} See Article 102 in Spanish:–

\textquote[Spanish]{Las tierras adquiridas con destino a la exploración o explotación de concesiones mineras, comprendidas las de hidrocarburos y demás minerales combustibles, pasarán en plena propiedad a la Nación, sin indemnización alguna, al extinguirse por cualquier causa la concesión respective}\textsuperscript{63}


\textsuperscript{65} Manzano et al., supra at page 9. See footnote 20.

\textsuperscript{66} See Article 136, Venezuela Constitution 1961 in Spanish:–

\textquote[Spanish]{La organización, recaudación y control de los impuestos, a la renta, al capital y a las sucesiones y donaciones; de las contribuciones que gravan la importación, las de registro y timbre fiscal y las}
To further underscore the legislative monopoly and omniscience of the central legislature, Article 126 of the 1961 Constitution subjects oil related agreements to prior approval by Congress by providing as follows:

*Without the approval of Congress, no contract shall be entered in the national interest, except as may be necessary for the normal development of public administration or permitted by law. You cannot proceed in any case the (sic) granting of new concessions of oil or other natural resources that determine the law, the Chambers in joint session, informed by the National Executive of all relevant circumstances, authorization and under the conditions to establish and without waiver of legal formalities (sic). You also cannot enter into any contract of national public interest, state or municipal foreign States or official entities or with companies not domiciled in Venezuela, or transferred to them without congressional approval. The law may require certain conditions of nationality, domicile or other matters, or require special guarantees, contracts of public interest.*

67 See Article 126 in Spanish:

“Sin la aprobación del Congreso, no podrá celebrarse ningún contrato de interés nacional, salvo los que fueren necesarios para el normal desarrollo de la administración pública o los que permita la ley. No podrá en ningún caso procederse al otorgamiento de nuevas concesiones de hidrocarburos ni de otros recursos naturales que determine la ley, sin que las Cámaras en sesión conjunta, debidamente informadas por el Ejecutivo Nacional de todas las circunstancias pertinentes, lo autoricen, dentro de las condiciones que fijen y sin que ello dispense del cumplimiento de las
The above clause is another illustration of the central control model articulated previously in this thesis. Not only is ownership and title exclusively vested in the “nation” acting through the instrumentality of the national government, the national government enjoys exclusive legislative competence over all matters relating to oil and gas resources. It is an unqualified competence that leaves no room for state or municipal initiative or fiscal action. The states are thus mere spectators in the process and powerless beneficiaries of the largesse of the national treasury, without any requirement for setting aside a special portion or percentage of oil and gas revenue for the benefit of the oil producing states.

3.4 The 1999 constitution and the current law
The political history of Venezuela will not be complete without some mention of the rise of current President Hugo Chavez. After having failed to take power in a botched military coup in 1992, he stood for and won election to the presidency in 1998. Upon his assumption of office he swiftly set about convoking a national Constituent Assembly that was elected in July 1999 to write a new constitution which was ultimately put to the nation and approved in a referendum on 15th December 1999.68 While the constitution reaffirmed the federal structure of the country69, a member of the 1999 Assembly that drafted the document criticized the final draft’s fiscal provisions in the following terms:

formalidades legales. Tampoco podrá celebrarse ningún contrato de interés público nacional, estadal o municipal con Estados o entidades oficiales extranjeros, ni con sociedades no domiciliadas en Venezuela, ni traspasarse a ellos sin la aprobación del Congreso. La ley puede exigir determinadas condiciones de nacionalidad, domicilio o de otro orden, o requerir especiales garantías, en los contratos de interés público.” available from http://pdba.georgetown.edu/Constitutions/Venezuela/ven1961.html (assessed 1st August, 2011).

68 Allan R. Brewer-Cariás, supra at page 6.
69 Manzano et al, supra, page 8
Virtually everything in the 1999 Constitution concerning the taxation system is more centralized than in the previous 1961 Constitution, and the powers of the states in tax matters has essentially been eliminated. The National Constitution lists the national government competencies with respect to basic taxes, including, income tax, inheritance and donation taxes, taxes on capital, production, value added, taxes on hydrocarbon resources and mines, taxes on the import and export of goods and services, taxes on the consumption of liquor, alcohol, cigarettes and tobacco (Article 156.12). In contrast, the Constitution does not grant the states competencies in matters of taxation, except with respect to official stationery and revenue stamps (Article 164.7).  

Unlike the previous Venezuelan constitution of 1961, one need not look too long to find the relevant provisions of the 1999 constitution regulating oil, gas and mineral resources. Article 12 provides that:

_The mineral and hydrocarbon deposits, whatever their nature, existing in the country, under the bed of the territorial sea, exclusive economic zone and continental shelf belong to the Republic are public property, and therefore inalienable and indefeasible. The coastal seas are public property._

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70 Allan R. Brewer-Cariás, _supra_ at page 18  
71 See Article 12, Constitution of Venezuela 1999 in Spanish:  
_“Los yacimientos mineros y de hidrocarburos, cualquiera que sea su naturaleza, existentes en el territorio nacional, bajo el lecho del mar territorial, en la zona económica exclusiva y en la plataforma continental, pertenecen a la República, son bienes del dominio público y, por tanto, inalienables e imprescriptibles.”_
To further guarantee the authority of the central government over all matters connected to oil resources, the 1999 Constitution emphatically provides in Article 302 as follows:

The State reserves through organic law, and for reasons of national expediency, the petroleum industry and other industries, farms, goods and services of public interest and strategic character. The State shall promote the domestic manufacture of raw materials from the exploitation of nonrenewable natural resources, in order to assimilate, create and innovate technologies, generating employment and economic growth and creating wealth and wellbeing for the people (sic).  

Irrespective of arguments that have been made against the centralist theme of the 1999 Constitution and President Hugo Chavez’ appetite to alter the constitutional order, the above provisions clearly reaffirm the centralization of resource control that started in 1881. Also necessary to be borne in mind is that between 1978 and 1998 when Chavez came to power, the country had been experiencing protracted economic crises and poor growth rates, said to be the worst in Latin America with the exception of Nicaragua. In this economic atmosphere, a political message that called for stronger central government involvement to spur growth or state funded economic expansion may have had a more attentive national audience that one calling for less centralization and more devolution.

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72 See Article 302 in Spanish version:-

“El Estado se reserva, mediante la ley orgánica respectiva, y por razones de conveniencia nacional, la actividad petrolera y otras industrias, explotaciones, servicios y bienes de interés público y de carácter estratégico”

73 The Country has held constitutional referendums in 2007 and 2009.

74 Manzano et al, supra at page 8.
The 1990s witnessed efforts at decentralization which Manzano et al., argue may have precipitated the replacement of national parties with regional parties and combined with the economic downturn, the emergence of attractive newcomers in the political field like Hugo Chavez. If this argument is to be accepted, it then means that rightly or wrongly, the population may have made a connection between the decline of national prosperity and economic stability with the rise or regional parties and decentralization. The economy was not working and people turned to a candidate and a message that called for a return to national solutions and strong central government.

The post 1973 boycott era has seen oil and gas resources becoming a more strategic economic asset that countries can possess and bargain with today, akin to territory and trade routes in medieval times. Oil and gas resources account for 20% of Venezuela’s gross domestic product and about half of government revenues. It is unlikely that the constituent assembly drawing up a constitution for Venezuela in 1999 would not have considered the implications of either retaining the existing central control model enshrined in the 1961 Constitution or moving towards the alternative option of devolving resource control to the sub-national units. Ultimately, the assembly had to contend with an existing economic situation as its background, a national challenge in a sense. Consequently, such an assembly would have wanted to give the national government the maximum possible flexibility in addressing economic problems that may not have been the case with the inaugural federal constitution of 1811.

For a constitutional body sitting in the post 1973 boycott era, minerals like oil and gas are not likely to be viewed in isolation of domestic power sharing arrangements in the constitution but as part of the economic arsenal available to the nation in general. These are not
considerations that would have weighed on the mind of the average 19th century Venezuelan legislator or constitutional scholar. The vast amounts of foreign exchange revenue accruing from oil and gas production and exports today, the complex commercial contracts associated with them, international monopolistic arrangements like OPEC, servicing national debts owed to foreign private entities and international financial institutions and the availability of sophisticated drilling and seismological technology are all factors that a contemporary legislator and constitution drafter have to bear in mind in writing a constitution for the 21st century.

Accordingly, it can be argued that given the significance of the petroleum industry in Venezuela as previously elaborated, added to the fact that the 1999 constitution was written in contemporary times, by a draftsmen dealing with extra-constitutional economic and scientific factors that did not exist pre-1973 or even a century previously, it was more likely that Venezuela would have adopted a constitutional approach consistent with the central control model. Given Venezuela’s established experience with that model, it was therefore a virtual certainty that the country would have been more inclined to continue in that approach in the current 1999 constitution rather than moving towards a more decentralised approach such as the devolved interest or concurrent interest models.

3.5 The best approach for Venezuela?
Is the current brand of the central control model right for a country like Venezuela? Maybe not. My reason for this is principally because the current law that excludes oil producing states from having a special interest in minerals produced from their territory, defeats the essence of having a federation in the first place. Admittedly, Venezuela has for much of the 20th century leaned towards a more centralized federal system albeit with the a brief
interregnum of decentralising policies in the 1990s, however a situation in which oil producing states have no say in oil policy at all and are put in the same position as non-oil producing states within “a federal” system seems incongruous.

Surely, one of the things to be said in favour of federalism is the benefit of a having a level of government closer to the people, but above the municipal affairs, with the constitutional and fiscal capacity to deal with local and regional problems with a level of familiarity and proximity that the national government may not possess. Inevitably, national priorities are not always local priorities and *vice versa*. If the intendment of the constitution’s drafters was the creation a strong national government, this could still have been possible without excluding oil producing regions from having some say or stake in oil and gas matters.

A possible alternative to the present constitutional arrangement that gives no stake whatsoever to oil and gas producing states, could have been something akin to adopting the first-sub model of the concurrent interest model as practiced in the United States. In that case, the federal government and the states could share individual tracts of land thus dividing ownership and control over most oil and gas resources. Understandably, this may not be directly practicable in Venezuela given that in the United States, the federal government’s ownership of vast amounts of onshore oil and gas reserves was a consequence of the process of acquiring those territories as the country expanded west. However, even under the concurrent interest model practised in the United States, states still receive some 50% of all

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75 See Allan R. Brewer-Cariás, *supra* at page 2, where he mentions “important efforts” made during his tenure as Minister of State for Decentralization (1993-1994) to politically decentralize the Venezuelan federation. Efforts he said were subsequently abandoned, “due to the crises of the centralised party system, and to the consequential political void produced in the country.”
mineral revenues derived from federal lands by the federal government. A similar result is possible even under the central control model by vesting both ownership and legislative control in the federal government but going further and making provision for a constitutionally mandated portion of oil revenues to be paid over to the oil producing states. An example of such a provision could look like Article 20 - §1 of the Brazilian Constitution 1988 which states thus:

Under the terms of the law, the States, Federal District, and the Municipalities, as well as the agencies of the direct administration of the Republic are assured of participation in the result of the exploitation of petroleum or natural gas, of water resources for the purpose of generating electric energy, and of other natural resources in their respective territory, continental shelf, territorial waters, or exclusive economic zone, or financial compensation for such exploitation.

(Emphasis mine)

Another example under a central model approach could specify a percentage in the constitution rather than leaving it to a federal statute to determine, as is the case in Section 162(2) of the Nigerian Constitution 1999 which states:

76 Peter Mieszkowski and Roland Soligo, supra at page 11.
77 See Article 20, Sec. 1, Constitution of Brazil in Portuguese:

“É assegurada, nos termos da lei, aos Estados, ao Distrito Federal e aos Municípios, bem como a órgãos da administração direta da União, participação no resultado da exploração de petróleo ou gás natural, de recursos hídricos para fins de geração de energia elétrica e de outros recursos minerais no respectivo território, plataforma continental, mar territorial ou zona econômica exclusiva, ou compensação financeira por essa exploração.”

For complete text see Political Database of the Americas, Georgetown University Centre for Latin American Studies, online: <http://pdba.georgetown.edu/Constitutions/Brazil/vigente.html>; also For English translation see <http://www.servat.unibe.ch/icl/br00000_.html>
The President, upon the receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density;

Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources

(Emphasis mine)

The advantage of such a system is to that while the centralist theme of the constitution is maintained and legislative control and ownership is left in the hands of the federal government, the oil producing areas are not denied practical and meaningful benefits for resources extracted from their territories, often with deleterious consequences to the local environment and community. Another advantage is the reduced potential for conflict on issues of legislative competence or policy direction, because the role of the states is limited to collecting revenues to deal with local problems.

3.6 Oil and gas in Nigeria
Nigeria became a federation whilst still a colony of the United Kingdom on June 29th, 1951 with the promulgation of the Macpherson Constitution, named after Sir John Stuart Machpherson, Governor and later (from 1954) Governor-General of the Federation of
The federal system was maintained and strengthened by the 1960 independence constitution and was based on a decentralised structure of three and later four largely autonomous regions with generous constitutional leeway in fiscal matters. The 1960 constitution was repealed in 1963 when the monarchy was abolished with the country becoming a republic under the 1963 Constitution which was a substantial replica of the previous text.

As illustrated by the break-up of the initial three regions into the current 36 state structure, one can argue that federalism in Nigeria has undergone a fundamental change in the fifty years following the promulgation of the Independence Constitution in 1960. With a population of 154 million people and a gross domestic product of $173 billion, Nigeria is Africa’s largest democracy and the third largest economy, behind South Africa and Egypt. Nigeria’s current 1999 Constitution which restored democratic rule is the longest “surviving” constitution given the country’s history of military coups against elected authority.

The petroleum industry in Nigeria constitutes a vital part of the economy. Oil and gas products account for 95% of exports and 65% of government revenues. An Analysis Brief compiled by Energy Information Administration of the United States Department of Energy cited a report by the *Oil and Gas Journal* that Nigeria has an estimated 37.2 billion barrels of...
proven oil reserves as of January 2010.\textsuperscript{82} Most of these reserves are located onshore in the nine states of \textit{Abia, Akwa-Ibom, Bayesla, Cross River, Delta, Edo, Imo, Ondo and Rivers.} Which together compose the region called the \textit{Niger Delta.} Nigeria also has substantial offshore resources located in Atlantic Ocean, specifically in the Bight of Benin, the Gulf of Guinea and the Bight of Bonny.\textsuperscript{83}

While recent violent attacks on oil pipelines and infrastructure by militant groups aggrieved by decades of economic neglect and environmental damage have reduced oil production and exports, the EIA still reports that in 2009, Nigeria produced slightly over 2.2 million barrels of oil per day.\textsuperscript{84} This means that Nigeria is Africa’s largest oil producer. For the first quarter of 2010, production averaged at about 2.03 million barrels per day. As the country is a member of the OPEC cartel, Nigeria has agreed to crude oil production limits that have varied over the years but are currently set at 1.673 million barrels per day.\textsuperscript{85} Of the total 2.2 million barrels of oil per day produced in 2009, 1.9 million barrels per day were exported. In that same year, 40 percent of oil exports were shipped to the United States, thus ranking Nigeria as the 5th largest foreign oil supplier to the United States in 2009.\textsuperscript{86}

Aside from crude oil, Nigeria also has substantial reserves of untapped natural gas. The EIA has cited statistics compiled by the \textit{Oil and Gas Journal (OGJ)} which estimate


\textsuperscript{83} Ibid


\textsuperscript{85} Ibid

\textsuperscript{86} Ibid
that Nigeria had reserves of some 185 trillion cubic feet (Tcf) of proven natural gas as of January 2010. These reserves accordingly place Nigeria as the eighth largest in the world and the largest in Africa.\(^\text{87}\) However, due to inadequate technology and infrastructure to produce and market associated natural gas, the country was only able to market 1,400 Billion cubic feet (bcf) of natural gas in 2008, out of a total gross production was 2,600 Bcf. Most of the gas is flared or burnt into the atmosphere. As with oil, most of Nigeria’s natural gas reserves are located in the *Niger Delta* and have been affected by violent militant activity.\(^\text{88}\) The EIA reports that a significant part of Nigeria’s gas is processed into liquefied natural gas. In 2009, the country exported 500 Bcf of liquefied natural gas, 66% of which was exported to Europe.

The fiscal system for the federation is coordinated and controlled by the federal government through a special joint pool account established by the Constitution called the Federation Account. Despite the undeniable importance of the oil and gas sector in the economy, the level of the productivity of the petroleum industry as measured by its share of GDP in Nigeria declined from a high of about 47.7% in 2000 to a current estimate of 28.4%.\(^\text{89}\) This may be explained by the expansion of the other sectors of the economy especially the banking and telecommunications industries.\(^\text{90}\)

\(^{87}\) ibid


\(^{89}\) Ibid

3.7 **Constitutional Framework and Federal Structure of Nigeria**

In May 1999, the Federal Military Government of Nigeria promulgated a new Constitution for the country following the conduct of national and state elections earlier in the year and in accordance with their planned transition to democratic rule. The new 1999 Constitution had not been prepared by a constituent assembly or ratified by the people through a referendum. Rather, the military government had set up a committee headed by an eminent jurist to undertake a series of consultations.\(^9\) The consensus of the Nigerian public according to the committee was that the people wanted the restoration of a modified version of the former 1979 constitution that had been suspended in 1983 following a military coup. Accordingly, the military government made certain modifications to the old 1979 text and promulgated the new constitution less than a month before it was due to leave office. To that extent therefore, the current 1999 Constitution is in most respects, the same as the 1979 Constitution.

Under the 1960 Independence and later the 1963 Republican Constitutions, and prior to the Nigerian civil war of 1967 – 1970, Nigeria had a decentralized federal system with autonomous regions exercising enormous fiscal initiative and powers. In approaching the issue of oil and gas regulation, the independence constitution of 1960 which was amended and re-enacted in virtually in the same form in 1963 when the country became a republic provided for a devolved interest model. However, starting from the end of the civil war in 1970 up until the promulgation of the 1999 Constitution, Nigerians become accustomed to fiscal system that was predicated on a central control model. We shall see how this change occurred.

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3.8 Oil and the 1963 constitution of Nigeria

The 1963 Republican Constitution adopted the devolved interested model (1st sub-model) in approaching issues of oil and gas ownership and control. The constitution was silent on ownership but assigned the power to legislate to the federal parliament. The Constitution vested the Federal Parliament with the exclusive legislative competence to make laws with respect to, “Mines and minerals, including oilfields, oil mining, geological surveys and natural gas.”92

Issues of land and property ownership rights fell within the residual legislative powers of the regions and federal legislative competence over oilfields and mines did not extended to the ownership of such mines or oilfields onshore. In addition to the federal Parliament’s power in that regard, Section 140(1) of the 1963 Nigerian Constitution provided as follows:

(1) There shall be paid by the Federation to each Region a sum equal to fifty percent of –

(a) the proceeds of any royalty received by the Federation in respect of any minerals extracted in that Region; and (b) any mining rents derived by the Federation from within that Region.

The above system of resource sharing which guaranteed oil producing areas half of oil earnings implicitly acknowledged the regions’ interest in the resource. The concept encapsulated in the above provision is known in Nigeria as the principle of derivation and is similar to the Brazilian Constitution’s requirement for the payment of compensation to oil producing states.93

93 Constitution of Brazil 1988, Article 20, (See footnote 74)
At the time the 1963 Constitution was written, there were no indigenous Nigerian oil companies and Nigeria had only recently started producing oil in commercial quantities in 1958. At that time also, oil still formed an insignificant source of revenue for both the federal government and the regions which were more concerned in exporting their agricultural produce in world markets. During this period, it would have been politically inconceivable for any of the legislatures of the any of the three ethnically heterogeneous regions to have contemplated the idea of giving up control or ownership of valuable land with oil and gas reserves to the federal parliament.

That all changed within a space of three years. By January 1966 the democratic government was overthrown following a military coup and eighteen months later, the country descended into civil war when the oil rich Eastern Region seceded. The war was to last 30 months and forever altered the federal structure of the country. In order to dilute the secessionist fervour that had precipitated the civil war, the military government divided the existing four regions into 12 states. Crucially, it also enacted Decree 51 of 1969, the Petroleum Decree, during the

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“In the 1950s and 1960s, agriculture accounted for 60-70 percent of total exports. Nigeria’s was then a major exporter of cocoa, cotton, palm oil, palm kernel, groundnuts and rubber. Average annual growth rates of 3-4 percent were achieved for agricultural and food crops. Government revenues depended heavily on agricultural export taxes, and both the current account and fiscal balances depended to some extent on agriculture. Between 1970 and 1974, agricultural exports as a percentage of total exports fell from about 43 percent to slightly over 7 percent.”

They also argue that “the major cause of the decline in agricultural exports was the oil price shocks of 1973-74 and 1979, which resulted in large inflows of foreign exchange and neglect of the agricultural sectors (Dutch Disease)”
later months of the civil war when federal victory became certain. For the first time in Nigerian history, the Petroleum Decree stripped the states of all claims and interests in the control and ownership of oil and gas resources in their territory. The decree further vested the federal government with sole responsibility for the formulation and execution of oil and gas policy.\textsuperscript{95}

By the following year in 1970, the Nigerian military had successfully put down the secession, thereby ending the civil war and allowing full oil production to resume on an accelerated scale. By 1971, Iledare and Suberu note that Nigerian had established a state controlled Oil Company, joined the OPEC cartel and had collected a staggering $718 million dollars in export earnings from oil.\textsuperscript{96} Needless to say, the OPEC 1973 boycott vastly increased the price of oil globally and more than tripled Nigeria’s oil revenues and directly herald a period in Nigerian history called the oil boom.

This was not the world of the constitution of the 1963 with powerful regions and weak federal institutions. The 12 new states that now formed the Nigerian federation in 1973 were not led by popular local politicians eager to protect local assets and interests but by military


governors loyal to the regime in the capital city. It was a unitary system in all but name. That was the fiscal system that remained until 1999 when the armed forces finally handed power to a civilian government. In 1970/71, oil accounted for 26% of federally collected revenue, a distant cry from current levels where it hovers around 83% of government revenues.\textsuperscript{97} The 1999 constitution thus reflects this new fiscal reality in its approach to oil and gas control.

3.9 \textit{The 1999 constitution and the current law}
As a matter of Nigerian constitutional law, the previous military regime had always claimed a power akin to the English law concept of parliamentary sovereignty.\textsuperscript{98} Accordingly, on the two occasions the military handed power over to democratically elected governments in 1979 and again in 1999, it refused to countenance the idea of putting the respective drafts before the people in a referendum. Unlike the 1963 Republican Constitution that had been enacted by the federal parliament and then ratified by the various regional legislatures, in 1999 the people of the 36 states that made up the Federal Republic of Nigeria did not have the final say on the matter nor did their respective military governors lobby their superiors to protect local assets or regional interests.

On 5\textsuperscript{th} May, 1999, just three and half weeks left to the inauguration of the elected civilian administration, the federal military government of Nigeria enacted Decree No. 24 which promulgated the new 1999 constitution with effect from 29\textsuperscript{th} May, 1999.\textsuperscript{99} While the

\textsuperscript{97} Ibid at Page 8.


\textsuperscript{99} Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24 of 1999, Section 1, Online:
Exclusive Legislative List of the 1963 Constitution contained 45 items listing matters upon which the federal parliament could legislate upon including “mines and minerals, including oilfields, oil mining, geological surveys and natural gas,” the current 1999 Constitution contains 68 general items including “mines and minerals, including oilfields, oil mining, geological surveys and natural gas,” inter alia.

The politics of resource control in Nigeria as entrenched in the current 1999 Constitution cannot be separated from the kind of federal system that the constitution provides for. This politics is a legacy of the Nigerian civil war caused by the attempted secession of the then Eastern Region that today comprises 6 of the 9 oil producing states and of post-civil war revisionist attempts to explain the war as a conflict over the control of oil rather one of unity versus self-determination. In addition to this, the federal military government had to entrench palliative measures to address the ever present potential for ethno-religious strife which was a principal cause of the civil war. These measures were designed to reduce the size, fiscal autonomy and political potency of the states, and to ensure that no state would ever be in a position to secede from the federation.

The Nigerian 1999 Constitution confirms the shift to the central control model by perpetuating the policy of the civil war era Petroleum Decree of 1969. Section 44(3) of the 1999 Constitution provides as follows:

Notwithstanding the foregoing provisions of this section, the entire property in and 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 vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

The provision is unambiguous and leaves no doubt as to which level of government actually owns and controls oil and gas resources. Ownership is however just one half of the constitutional approach articulated in the three theoretical models of approach described earlier. The other half is legislative jurisdiction. To further underscore the federal government’s legislative monopoly over mineral resources like oil, and for the avoidance of any doubt, the federal legislature, the National Assembly is given exclusive power to make laws relating to “Mines and minerals, including oil fields, oil mining, geological surveys and natural gas”. This is a verbatim reproduction of a similar item in the 1963 Constitution but now in a different socio-economic and political context.

From the end of the civil war in January 1970 until May 1999, oil producing states in Nigeria were not constitutionally entitled to compensation or to a portion of the revenues derived from oil and gas resources produced from their territory; similar to the current situation in Venezuela under the current 1999 Venezuelan Constitution. The 1999 Constitution restored the principle of derivation that that had existed under the 1963 Republican Constitution but not at the same levels. The 1963 Constitution guaranteed mineral and oil producing states at least 50% of all royalties and mining rents but the 1999 Constitution only guarantees 13%.

Coming after the post boycott world of 1973, it pertinent to consider the social and economic reality of the year the 1999 Nigerian Constitution was enacted and how big a role oil played as an economic factor in 1999 compared to 1963 when Nigeria adopted the Republican Constitution and ended the constitutional attachment to the British Monarchy. The world of 1999 was not the world of 1963. At the time the 1999 Constitution was being enacted, oil accounted for 21.8% of the gross domestic product and Nigeria was grinding under an external debt burden of $28 Billion owed to international creditors.\footnote{Memorandum on Economic and Financial Policies of the Federal Government of Nigeria for 1999, International Monetary Fund, Online: <http://www.imf.org/external/NP/LOI/1999/022299.HTM>}

In 1999, oil prices were languishing at an average of $10.60 per barrel of Nigerian “Bonny Light” crude,\footnote{See Energy Information Administration, US Department of Energy, Crude Oil Prices by Selected Type, 1970 – 2010, Energy Information Administration Online: <http://www.eia.gov/emeu/aer/txt/ptb1107.html>} and the country could only afford to spare $1.5 Billion to service the debt, far short of even the maturities and interests on arrears of $4 Billion.\footnote{Memorandum on Economic and Financial Policies of the Federal Government of Nigeria for 1999, International Monetary Fund, Online: available from <http://www.imf.org/external/NP/LOI/1999/022299.HTM> (assessed 1st August, 2011)} None of these comes close to describing the dire economic inheritance the military was about to bequeath the new democratic regime.

Given this contemporary reality and the significant role oil would have to play in paying for the necessary investments that had to be made to halt the economic decline of the country, spur growth and restore international financial confidence in Nigeria, it is more likely than not that the Country would have adopted and did indeed adopt a central control model in its constitutional approach to regulating oil and gas. In the post 1973 era, an argument can be made that the federal government had to be free to deal with property rights and be able to tax
and legislate on oil and gas issues. The socio-economic circumstances facing Nigeria and other emerging federal democracies from 1973 and in the 21st century are such that they require national governments with the maximum flexibility to exploit the full revenue potential of all the economic assets within their territory.

3.10 The best approach for Nigeria?
One of the few policy departures of the 1999 from the 1979 constitution in Nigeria, was the return to the system previously entrenched in the 1963 republican constitution of providing for a minimum percentage of revenues to be paid to oil and gas producing states. The 1979 Constitution had left the issue entirely to the federal legislature as just one of several factors to be considering in sharing revenues among the various states making up the federation. This would be akin to the present approach in Venezuela that completely shuts out the oil producing states as stakeholders. However while the 1963 Constitution left issues of land and public ownership in the hands of the sub national units, the regions, it also guaranteed 50% of oil revenues to the regions as set out in its Section 141 reproduced earlier in this thesis.

The current 1999 Constitution takes a central control model approach and gives the federal government both ownership and legislative control. For the reasons given in this thesis so far, I think that is the most ideal model for an emerging democracy operating a federal constitution in the post 1973 OPEC boycott era. An argument can however be made that the 13% percent guaranteed is too small and ought to be augmented to a figure closer to the 50% paid by the US government to states in the United States for oil revenues derived from resources on federal lands in those states or the 50% guaranteed to the regions under the former 1963 republican constitution of Nigeria. Certainly there are many reasons why that figure may not be politically agreeable given the post civil war phobia for secession by
fiscally powerful states. However I think that a central control with a minimum share set aside for oil producing states is the right way to go for countries like Nigeria.

4. EXCEPTION TO THE RULE

4.1 Federalism in Iraq under the 2005 Constitution

With the adoption of the 2005 Constitution by the Iraqi people following the referendum of October 15th, 2005, the country has become the newest federal democracy in the comity of oil producing nations. As with other emerging democracies, the institutions that define a constitutional state may be described as nascent and still in their formative years. However, there is a constitution in place that clearly defines the kind of democracy Iraq is supposed to be. Article 1 of the 2005 Constitution declares as follows;

*The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq* \(^{108}\)

Prior to the 2005 Constitution and the Transitional Administrative Law, the interim constitution that preceded the 2005 constitution, Iraq had never formally been governed as a federation or as a democracy for that matter. The 2005 Constitution and the widely publicized process that led to its drafting and approval can therefore be considered a watershed in the history of the country in particular and the Middle-East in general.

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4.2 Oil and Gas Resources in Iraq

According to an Analysis Brief prepared by the Energy Information Administration (EIA), “Iraq was the world’s 12th largest oil producer in 2009, and has the world’s fourth largest proven petroleum reserves after Saudi Arabia, Canada, and Iran.”\(^\text{109}\) Unsurprisingly, crude oil export revenues accounted for over two-thirds of GDP in 2009. In a report cited by the EIA, the Oil and Gas Journal indicates that Iraq’s proven oil reserves currently stand at about 115 billion barrels, with a possible additional reserve of between 45 to 100 billion barrels of recoverable oil still unrecorded by geological surveys. Interestingly but also politically problematic is the fact that most oil and gas resources are located in the mostly Shiite governorates of the south and in the ethnically Kurdish Region in the north, with little to be found in the predominantly Sunni areas.\(^\text{110}\) The EIA estimates that the Region of Kurdistan holds about 20% of oil reserves especially in the areas of Kirkuk, Mosul and Khanaqin. Of the 2.4 million barrels of oil per day produced in Iraq in 2009, about 1.8 million barrels of crude oil were exported of which about 1.5 million barrels of oil per day were being shipped through Iraq’s Persian Gulf seaports and the rest being delivered via the Iraq-Turkey pipeline in the north.\(^\text{111}\)

In terms of gas, the EIA cites figures from the Oil and Gas Journal, which put Iraq’s proven natural gas reserves at 112 trillion cubic feet, the tenth largest in the world. The vast majority of this or some 70% of these lie in the Shiite dominated Basra governorate in the south.\(^\text{112}\) As with Venezuela and Nigeria, Two-thirds of Iraq’s natural gas resources are associated with oil

\(^{110}\) Ibid \\
\(^{111}\) Ibid \\
\(^{112}\) Ibid
fields. Just under 20% of known gas reserves are non-associated; around 10 percent is salt dome gas. Not unlike in Nigeria, a lot of the gas or over 40 percent of the production in 2008 was flared due to insufficient infrastructure to utilize it for consumption and export. As a result this handicap, EIA reports that Iraq’s five natural gas processing plants, which can process over 773 billion cubic feet per year, sit mostly idle.\textsuperscript{113}

\section*{4.3 Oil and the 2005 Constitution}

To get a complete picture of the constitutional approach to oil and gas regulation under the new constitution, it is necessary to look at the text itself. The relevant provisions are reproduced below in extenso:

\textit{Article 111:}

\textit{Oil and gas are owned by all the people of Iraq in all the regions and governorates.}

\textit{Article 112:}

\textit{First: The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.}

\textsuperscript{113} Ibid.
Second: The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment. 114

(Emphasis mine)

It must certainly be noted that the above English translation by the United Nations Mission in Iraq is subject to the original Arabic and Kurdish translation and may not perfectly reflect the exact meaning of the above provisions as rendered in their original versions. However, a careful reading of the above provisions will make it evidently clear that the Iraqi Constitution does not vest ownership in the federal government exclusively nor in the regions or governorates but rather in “the people”.

The constitution also does not vest exclusive legislative control in either the federal legislature or that of the governorates or in regional legislatures like the Kurdistan National Assembly. It does not say through what agency or level of government, “the people” are to manifest and express that ownership or exercise the rights that attach to it. One may suggest that the framing of this clause though politically convenient and unifying for a country like Iraq also leaves several pertinent questions unanswered. The drafters could have been clearer in definitively setting out whether either the federal or regional governments can ever act alone or whether either must seek the consent of the other in the formulation of laws or policy on oil and gas issues. Rex J. Zedalis has argued in relation to articles 111 and 112 that:

The language of [article 111] recognizes the importance of the nation’s oil and gas resources to the restoration of stability and the eventual development of the country. And as other provisions of the Constitution seem to suggest a sense of equality in a nation populated by diverse ethnic and sectarian groups, the language endorses the opportunity of all to share in the benefits of Iraq’s oil and gas resources.\textsuperscript{115}

Zedalis maintains that ownership belongs to the people and that the Federal Government has constitutional power to legislate.\textsuperscript{116} He is however not entirely clear as to whether this is an exclusive power but he makes a distinction between the power to legislate on oil and gas resources from existing "present fields" as explicitly mentioned in Article 112 - First on the one hand, and presumably other future oil fields on the other.\textsuperscript{117} Present fields according to a definition provided by Professor James Crawford would mean “fields already under production”\textsuperscript{118} at the commencement of the Constitution. This would seem a sensible interpretation of the clause. Zedalis also argued that as both the first and second paragraphs of Article 112 “begin by emphasizing that it is the federal government – albeit in collaboration with the subcentral units – that is empowered to act”.\textsuperscript{119} If so, the relevant question then becomes - what type of action? Is it legislative or executive \textit{cum} administrative.

\textsuperscript{115} Rex J. Zedalis, \textit{The Legal Dimensions Of Oil And Gas In Iraq, Current Reality And Future Prospects}, Cambridge, Cambridge University Press, 2009 at Page 35
\textsuperscript{116} Ibid at page 36
\textsuperscript{117} Ibid
\textsuperscript{119} James Crawford, Ibid
Article 112 – First, allows the details of the management of present fields and sharing of revenues to be “regulated by law”, but the same legislative mandate is not given to the federal government in article 112 – Second. Unsurprisingly, Zedalis does not explicitly rule out a concurrent and potentially conflicting legislative power of the regions, such as the Kurdistan Regional Government, to enact laws on future oil fields, which incidentally it already has. When the constitution says that “The federal government, with the producing governorates and regional governments, shall undertake” and “The federal government, with the producing regional and governorate governments, shall together formulate”, it certainly suggests at least a cooperative power to act – whether that action is legislative or merely administrative is another matter entirely. I would argue that this would be an example of the second sub-model discussed under the concurrent interest model.

Under Article 112 – First, the federal government has a direct constitutional power to legislate on “present fields”. That much is certain. However the same case can be made in favour of the regions with respect to for future fields. In a 2008 legal opinion addressed to the Kurdistan Regional Government, Professor James Crawford advised that the first part of article 112 could not apply to the KRG as there were no “present fields” in existence in the region and in production at the time of the adoption of the constitution nor could it apply to unexplored fields. More significantly, Crawford disagrees with Zedalis’s argument that Article 112 - Second offers a constitutional basis for federal legislation. He advised as follows:

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120 Rex J. Zedalis, 2009, supra at page 42
121 James R. Crawford, supra at page 7
It should be stressed that Article 112, Second, provides for the joint formulation of the “the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.” Again the emphasis is not on “management” but on policies, this time policies jointly formulated. But it should be stressed that Article 112 second does not confer any legislative authority on the federal government, much less exclusive federal authority.\(^\text{122}\) (emphasis mine)

He further explains the distinction between the two paragraphs of Article 112 in the following terms:

One dealing with oil and gas extracted from “present fields”, the other dealing with future developments, and the involvement of the federal government in the later is limited to formulating strategic policies for hydrocarbon development together with the producing regional governments. That is not a general competence, still less an exclusive one. Moreover, a key point is that the priority provision in Article 115 applies to “all powers not stipulated in the exclusive powers of the federal government”. It is obvious that oil and gas development is not an exclusive federal power. Article 115 accordingly applies to it.\(^\text{123}\)

For the sake of clarity, Article 115 is the residual clause which provides thus:

All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a

\(^{122}\) Ibid at page 8

\(^{123}\) James R. Crawford, supra at Page 8
region. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute.

Going by the above, in the event of a conflict between a federal oil and gas statute regulating future oil fields and a regional law, the doctrine of covering the field cannot apply.\(^{124}\) This is because the constitution has given priority to regional laws. Without enumerating the whole hog of items set out as being within the exclusive competence of the federal government as listed in Article 110 of the constitution, not one of those items refers explicitly to oil or as Zedalis himself admits, “come anywhere close to approaching a basis for authority affecting oil and gas.”\(^{125}\) He does however suggest that the federal government’s competence in issues of economic, fiscal and commercial policy may plausibly touch upon oil and gas.\(^{126}\) Nevertheless, these provisions are not as emphatically couched as Articles 112 - First when it speaks of “present” or existing oil producing fields.

That is not however to say that there are no other provisions that can support a potential federal assertion of its legislative competence over both present and future oil fields, that is competence beyond management and strategic policy formulation. An example of this would be the power to determine sharing of oil revenue, discernable from a combined reading of Articles 111, 112 - First and 121. To get a better sense of this view, Article 121 – Third, provides:

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\(^{124}\) That is the presumption that a valid federal law always overrides a valid but inconsistent state law.

\(^{125}\) Rex J. Zelalis, 2009, supra at page 43.

\(^{126}\) Ibid at pages 254-6
Regions and governorates shall be allocated an equitable share of the national revenues sufficient to discharge their responsibilities and duties, but having regard to their resources, needs, and the percentage of their population.

While Article 121 itself does not say who is to effectuate the sharing, however Article 112 - First already gives the federal government the pre-eminent role in making that decision – “with the producing governorates and regional governments”. It is necessary to point out here that this Thesis is not generally concerned with the sharing of revenue, however the power to determine how such revenue is shared is illustrative of which level of government has the constitutional authority to take such decisions.

Going by my previous arguments, and given (a) the significant part played by oil and gas revenues in the Iraqi economy as measured by the petroleum sector’s contribution as a percentage of gross domestic product or of government revenues, (b) the contemporaneity of the constitutional text, having been enacted in the post 1973 boycott era and (c) in age of greater availability of more sophisticated scientific, geological and technological means to harness oil and gas resources, one would have expected that Iraq like Venezuela and Nigeria would also have adopted a central control model in its constitutional approach to oil and gas ownership and regulation. However to every rule there is an exception; Iraq’s unique political history and the agitation for self determination by the Kurds in Northern Iraq are two key factors in explaining why Iraq is an exception to my previous arguments.

At the time of the 2003 invasion of Iraq by the United States led coalition, Kurdistan was a de facto autonomous region with its own government, parliament, military forces, police, civil service and physical control of portions of territory above the 36th parallel north of the
It was not just another simple sub-national unit within a cohesive federal whole. Until 2005, there was no federation to speak of at all. Accordingly, the Kurdistan Regional Government was in a position similar to that of the original thirteen colonies that agreed to constitute themselves into a United States or the Canadian colonies that came together into confederation. A pseudo-sovereign position. Kurdistan unlike the sub-national units in Venezuela or Nigeria, had a monolithic or bloc vote from the onset of the constitutional drafting process and was able to negotiate a text that did not and still does not directly disturb the status quo in the areas and on the issues the regional government already controls.

The approach the 2005 Iraqi constitution takes in defining the ownership and control of oil and gas resources is consistent with the three characteristics of the second sub-model of the concurrent interest model articulated in part One. Briefly, these include; (1) there is no express provision as to how or through what agency that ownership is to be manifested; (2) it does not clearly provide for exclusive legislative control in either the federal legislature or the regional legislature (3) regulatory control of mineral resources is expressed in a language that suggests a legislative power exercisable by one level of government over only a part of such resources, with either the cooperation or acquiescence of the other.

It may be argued that while the constitution is clear on the issue of ownership oil and gas, the same cannot be said for legislative competence. When Article 111 says that Iraq’s oil and gas

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127 See Denise Natali, *The Kurdish Quasi-State, Syracuse-New York*, Syracuse University Press, 2010 at page 33, where the author notes that after the Gulf War:

“a group of diasporic Kurdish lawyers prepared a constitution and what it perceived were institutional guidelines in which a modern parliamentary political system could be sustained...the KRG also devised government programs, fortified its peshmerga, and established a council of governors at the provincial level to liaise with INGOs, the UN and donor agencies. It also created the legal framework in which to integrate civil society into local authority structures”
resources are owned by all the people of Iraq, surely that can not ipso facto entitle every citizen of Iraq to go around signing oil field leases and collecting royalties from any oil company that bestrides the Iraqi countryside. The ownership vested in the people by the constitution can only be expressed through the instrumentality of either the federal or regional governments acting in the accordance with the constitution. With respect to the present producing fields – that is those fields in production at the time the constitution came into force, the competent legislative authority would be the federal government.

That being said, it must therefore be assumed that future oil fields are covered by Article 115 of the constitution that vests all powers unassigned to the federal government in the regions and governorates. Accordingly, regions have legislative control, but not ownership of oil and gas resources, provided that they may not exercise that power inconsistently with a “strategic policies” formulated by the federal government pursuant to Article 112 – Second. Bearing in mind that a federal oil and gas policy made pursuant to Article 112 requires the unanimous agreement of the regions and the governorates, where such agreement is obtained (and the policy is enacted into federal law), Article 115 cannot logically operate to demote it in favour of an inconsistent regional law. For instance, Kurdistan having being consulted and consented to a federal law enacting a strategic policy, cannot turn round to enact its own regional polices contracting that federal policy, which it consented to. In order words, the federal government can still exercise legislative control over future fields – provided it has the prior agreement of all the regions and governorates in formulating the policy. With respect to the authors of Articles 112 and 115, the same objective could have reached without having to go this circuitous process.
In the light of the above, one can surmise that had it not been for the unique role played by the Kurdistan Regional Government in the recent political history of Iraq, one can assert that a democratic and federal Iraq would like Venezuela or Nigeria, have adopted a strong central model in its constitutional approach to oil and gas regulation. Iraq is therefore an exception to the hypothesis articulated in part One.

4.4 The concurrent interest model and multiethnic democracy in Iraq?

The purpose of the constitution may be national unity and consensus however, the current model of approach to mineral resource control as enshrined in the Iraqi Constitution of 2005, particularly the assignment of legislative competences in Article 112 is an invitation to gridlock and dysfunction. Contrary to the suggestions of Professors Crawford, it is my argument that both arms of Article 112 give the federal government power not only legislate on management of existing producing oil fields but also power to enact legislation to give effect to its formulation of “strategic policies to develop the oil and gas wealth” of the country. With the greatest respect to Professor Crawford’s position, Article 112 – Second would be devoid of efficacy if the federal legislature is unable to make its policies on oil and gas binding on the regions. If the federal government pursuant to its Article 112 mandate to formulate “strategic policies to develop the oil and gas wealth” in consultation or with the consent of the governorates and regions were to enact an Oil and Gas Law setting out the strategic policies of the nation, it cannot thereafter be open to the regions to act inconsistently with that federal policy as enacted into law. Their only recourse and avenue to influence the kind of policy that is formulated is prior to the enactment of such a policy, but the federal legislature must have an implied and necessary power to legislate, in order for the second paragraph of Article 112 to have any real practical meaning or binding force.
As recent events have shown, getting the consent of the regions, particularly the Kurdistan Regional Government to the federal government’s draft Oil and Gas Law is a difficult matter for both sides. In his report prepared for the United States Congress, Christopher M. Blanchard, quoted Yahia Said of Revenue Watch who said, “the most contentious issue in the legal framework is the division of authority between the federal centre and the regions.” 128 Blanchard however adds thus:

*The concept of federalism has been incorporated into Iraq’s constitution and law, Iraqi attitudes towards the oil sector and proposed oil legislation often correspond with regional differences of opinion about the proper role and power of the federal government and regional and governorate authorities to make oil policy and revenue decisions. However, the constitution’s ambiguity about the roles and powers of federal, regional, and governorate authorities has contributed significantly to the ongoing impasse over these issues.* 129

With respect to the linguistic ambiguity in Article 112, Blanchard surmises that the ambiguity is deliberate measure by the drafters of the constitution and argues that:

*Articles 111 and 112 of the Iraqi Constitution states that Iraq’s natural resources are the property of “all the people of Iraq in all regions and governorates,” and that “the federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from the present fields (italics*

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129 Ibid
added).” These provisions were included as a means of ensuring consensus among Iraqis and the adoption of the Constitution.\textsuperscript{130}

As at the end of July 2011, the draft Oil and Gas law contemplated under the Article 112 and drafted as far back as 2007 was yet to be enacted into law as a result of “opposition over who controls the world’s fourth largest oil reserves, some in areas disputed by ethnic Arabs and Kurds and some in Iraq’s semi-autonomous north”.\textsuperscript{131} A local oil analyst was quoted by a news agency in July 2011 to have expressed the view that the only way to get the law passed was through “a political deal” with the Kurds.\textsuperscript{132} So, yes the federal government has the right of legislative initiative, but this power is subject to the federal government reaching a consensus with the “producing governorates and regional governments.”\textsuperscript{133}

There is nothing in Article 112 that allows an interpretation that an agreement with only a majority of governorates would do thereby overcoming the objection of one or more regions or governorates. The Constitution severally says that “the federal government, with the producing governorates and regional governments, shall undertake” and “The federal government, with the producing regional and governorate governments, shall together formulate”. It does not say in either case, “with a majority of”. The existing language therefore strongly suggests that the agreement of the oil producing regions and governorates must be unanimous. Again where this may have been intended to engender compromise and consensus, it also creates an unnecessary constitutional bottleneck that gives one party a veto

\textsuperscript{130} Ibid


\textsuperscript{132} Ibid

\textsuperscript{133} See Constitution of Iraq 2005, Article 112.
that cannot be overridden. Even the search for consensus cannot be perpetual if democratic government is to function effectively.

For a multiethnic country like Iraq with still nascent democratic institutions, how can such an approach and process work without an override provision or tie-breaker clause in the event of a logjam that allows one side to take a final decision where consensus is impossible? In the present circumstances and according to Blanchard, the constitution demands consensus – no matter what. Recent negotiations towards reaching that consensus have not been made easier by Article 1 of the proposed draft of the federal Oil and Gas Law that vests the “Ownership of oil and natural gas”\textsuperscript{134} in a federal council chaired by the federal prime minister and which only guarantees each oil producing region or province only one seat at the table heavily populated by federal appointees. This totally contradicts Article 111 of the constitution which vests ownership in “the people” and does nothing to encourage the Kurds to take a less rigid position in negotiations.

In reaction to the draft, the Kurdistan Regional Government enacted its own regional Oil and Gas Law in 2007. The Kurdish statute formally reiterates the ownership provisions of Articles 111 and 112 of the Iraqi Constitution before proceeding to grant to the Regional Government extensive powers to “oversee and regulate all petroleum operations, pursuant to Article 115 of the Federal Constitution.”\textsuperscript{135} Susan Sakmar has argued that the Kurdish statute underscores the insistence by the Kurdish Regional Government that “Kurdistan’s oil belongs

\textsuperscript{134} The Iraq Draft Oil And Gas Law, (2006-2007) 13 Y.B. Islamic & Middle E. L. 423 (HeinOnline)

to people of Kurdistan”\textsuperscript{136} whilst being amenable to an agreeable revenue sharing arrangement with the central government. In effect, Kurdistan Regional Government appreciates that it does not have final word but is unwilling to wait for the federal government to get round to offering the region a national oil and gas law that it can agree to, all the while covered by the nebulous umbrella of Article 115, the residual powers clause. For a country like Iraq that is war-torn and in a hurry for national development and foreign investment, this self-induced constitutional paralysis seems hardly desirable.

4.5 \textbf{The best approach for Iraq?} 
Adam Felsenthal has recently observed that Iraq shares similar qualities with Nigeria, beyond being oil producing and developing. According to him,

Many federations, including Nigeria and Iraq, are a conglomerate of pre-existing ethnic, religious, and regional identities. Scholars describe three different models of federation: “holding together”, “coming together”, and “putting together”. \textsuperscript{137} In the “holding together” model, a federation serves as a conflict-management tool to create as unitary a state as possible. In the “coming together” model, a federation allows previous autonomous sovereigns to share their power common interests.\textsuperscript{138}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{136} Susan L. Sakmar, \textit{The Status of the Draft Iraq Oil and Gas Law}, (2007-2008) 30 Hous. J’l L. 289 at page 305 (HeinOnline)
\item \textsuperscript{138} Adam B. Felsenthal, \textit{ibid} at page 792
\end{itemize}
\end{footnotesize}
It is my argument that Iraq is a holding together federation and ought to have adopted a central control model in approaching the constitutional regulation of oil and gas in the country. That is, the federal government ought not to have been compelled to search in perpetuity for a consensus with the regions and governorate before exercising its powers under Article 112. My reason for holding this view is this; Iraq is clearly not an example of a “coming together” federation, however the 2005 Constitution clearly intends to use oil and gas resources as a one of the means of unifying the nation and creating a sense of inclusion and economic equality.

A central control model of approach could still have accomplished this intention without the need for unanimity among the regions and the federal government. For Iraq to be held together firmly and tightly in an economic and political union, the federal government ought not to have been made subject to a perpetual veto by any region. The federal government ought to have been given unqualified legislative competence over oil fields in general, both present and future. Furthermore, the federal power to formulate strategic policies for future oil fields should have been expressed in more centralist language and coupled with a clear legislative power. I however disagree with Professor Crawford that the current language is insufficient to support federal legislation under Article 112 – Second. Quite simply, the power to formulate policy must – necessarily and properly – include the power to make those policies binding. Without that ancillary competence, the federal government’s constitutional mandate to formulate policy would be a paper tiger.

The support of the Kurds to such a centralist model may have been obtained in exchange for a generous constitutionally guaranteed minimum percentage of oil and gas revenues. A similar alternative was proffered earlier in thesis with respect to Venezuela. The previous
examples as provided in the Brazilian and Nigerian constitutions apply here as well. Although given Iraq’s history, the Nigerian example of a specifying an actual percentage of revenues might suit Iraq better than the current situation that breeds a climate of confusion for investors and the country in general. The concurrent interest model has enthroned a situation where the federal legislature is unable to exercise its modest legislative powers due to the hanging threat of a regional veto and the country is effectively awarding oil and gas contracts under two separate legal regimes, the Kurdish statute and a Saddam Hussein era national law.\textsuperscript{139} Such confusion is hardly a health dose for political stability.

5. CONCLUSION
The 1973 OPEC boycott changed the nature of oil as an economic commodity and affected the way democratic federal democracies approached issues of public ownership and regulatory competence in their constitutions. The constitutional traditions of the old democracies like the United States and Canada say little or nothing regarding federal involvement in the defining ownership rights or legislative control of mines and mineral resources. In Canada the Constitution Act of 1867 explicitly vests ownership of oil and gas resources in the provinces and states they are found.\textsuperscript{140} In most cases, the federal governments have other avenues to controlling oil and gas policy and imposing taxes for example through the power to regulate commerce or impose taxes. In the United States, ownership and legislature control is effectively determined by who owns the land and whether particular tracts of land and the resources they hold belong to the states or the federal


\textsuperscript{140} British North America Act 1867 (U.K), 1867, c.3., as amended by the Canada Act 1982 (U.K.), 1982, c. 11, Sections 92A (1) (a) - (b) and 109.
government. These older democracies have constitutions that pre-date the 1973 boycott and their approaches to oil and gas resource ownership and regulation are reflective of the era in which they were adopted.

In general, constitutions that pre-date in 1973, such the United States and Canada would tend to adopt either a devolved interest model or the first sub-model of the concurrent interest model. Even the Nigerian constitution of the 1963 provided for a devolved interest model (first model). None of the older federal constitutions contemplated a central control model of approach. This was simply a consequence of the era in which they were written and enacted. Oil was just another mineral resource, another aspect of property and land, not necessarily warranting specific constitutional directives on its use, except perhaps with respect to the payment of compensation for public acquisition and eminent domain.

Accordingly, it is my view that any federal constitution written after 1973, is more likely to provide for a model of approach in favour of the federal government through a central control model that vests both ownership of oil resources in the federal authority and also legislative control to deal with it economically and fiscally. This is because, oil is now a more lucrative commodity, because the means to exploit it are safer, more advanced and more available than they were before 1973 and because in a global economy, federal governments face more challenges and socio-economic needs and responsibilities than existed at the time older federal democracies wrote their constitutions. In summary therefore, the more contemporaneous a federal constitution, the more likely it is to adopt a central control model of approach to oil and gas ownership and regulation and in my view, justifiably so.
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