ONE

THE APPLICATION OF ACCOMMODATION DOCTRINE IN THE NIGERIAN PETROLEUM INDUSTRY

Igwe Lawson Nyebuchi*

Abstract

This paper examined the Accommodation Doctrine in Nigeria with respect to civil litigation and causes arising from Onshore Exploration and Production of Petroleum. It considered the origin of the doctrine and its application in other Jurisdictions as well as the requirements for a successful litigation or enforcement of the breach of Accommodation Doctrine and defences available to a Defendant in suit emanating from breach of Accommodation Doctrine. In the course of this work, the author discovered that Accommodation Doctrine equally applies in Nigeria and its application is backed by Statutory Provisions. Apart from the Accommodation Doctrine, this paper briefly considered other doctrines such as the doctrines of "due Regards". Also considered is the Jurisdiction of courts to entertain cases relating to the violation of Accommodation Doctrine in the Nigerian Petroleum Industry. The author revealed that the Federal High Court by virtue of the Constitution and other relevant laws is the Court with exclusive Jurisdiction to entertain matters relating to the breach of Accommodation Doctrine. At the end of this paper, recommendation was made for the enactment of a law to be known as Surface Damage Act to Regulate/Coordinate the Operation of Accommodation Doctrine in Nigeria.

Keywords: Accommodation, Doctrine, and Petroleum and Application

*DRS, DL, BSc, LLB, LLM (in View)

1. Introduction

Petroleum as one of the greatest and lucrative resources known to man carries with it proportionate, if not more impact on the environment. Therefore, whatever affects the environment is consequently expected to affect the predominant inhabitants of the environment, which include humans as well as, their use of the environment. Onshore Petroleum Exploration and Production activities involves the use of sophisticated Equipments which interact with the surface part of the land where the petroleum deposits are found. This is particularly so, because petroleum exists beneath the land. Petroleum Exploration and Production on/from land creates two distinct rights or estate in the land. This is better put in the words of Harrison Declan when he opined thus:

> *The existence of mineral oils beneath a land creates two different estates in the land. The mineral estate and the surface estate. The term Mineral estate is used to refer to all the minerals beneath the land, while the surface as the name implies, refers to the surface of the land…This consequently creates the mineral rights (rights overthe mineral estate) and the surface rights (rights over the surface estate) as two distinct rights in land….*[2]

The existence of the surface owner's rights calls for the observance of same by operators in the course of petroleum exploration and production activities. This is because failure to observe such rights may result in a dispute between licensed operators and the surface owners. In order to properly deal with this topic, it would be good to consider the key terms/words which include Petroleum, Civil litigation, Cause of Action, Onshore Exploration and Production of Petroleum. The term Petroleum has been variously defined both by statutes and scholars. In Section 15(1) of the Petroleum Act[3] it is defined as:

> …Mineral oil (or any related hydrocarbon) or natural gas as it exists in its natural state in strata and does not include coal or bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation.

It is pertinent to state that the Petroleum Act, by implication seemed to have been repealed under the Petroleum Industry Act[4] by the combined effects of s.311 (2) and 311 (9) (a) among other provisions of the PIA. Although s.311 (9) (a) of the PIA saved Petroleum Act pending the termination or expiration of all subsisting Oil Prospecting Licenses (OPL) and Oil Mining Leases (OML) made under it. Also all regulations made under or pursuant to the Petroleum Act are saved by the PIA until alternative Regulations are made in their place[5]. These however, justifies our reference to the Petroleum Act in this work. Under the Petroleum Industry Act, Petroleum means hydrocarbons and associated substances as exist in its nature state in strata, and includes Crude Oil, Natural gas, condensate and mixtures of any of them, but does not include bitumen and Coal[6]

The first commercial discovery of petroleum was made in Nigeria in 1956 in an area close to Oloibiri town in the present-day Bayelsa State.[7] While Civil litigation involves the process of enforcing, protecting/defending the existence of a right other than crime before a court of law and which may end with an order of a court for payment of compensation or directing the doing or not doing of a particular thing. Cause of action on the other hand, is a fact or set of facts whose existence would entitle the party/parties to a remedy from a court of law.[8] Onshore means any land areas above the high-water mark, other than Frontier Acreages[9]. Onshore Resources are resources found on land[10]hence, onshore exploration and production of Petroleum and Production on Land.

Under the Nigerian jurisprudence, all land belongs to the State (Governor) who holds same in trust for the people, to this end, the interest of individual citizens over land are merely reduced into the Rights of Occupancy which may be Statutory or Customary depending on the location of such land. In the

[2] Harrison Declan, Nigerian Oil and Gas Law: Case, Commentaries and Materials (Westhill Publishers 2018)2.
[3] CAP P10 LFN 2004
[4] PIA 2021
[5] S. 311 (1) PIA 2021
[6] S 318 PIA 2021
[7] Etikerentse G. Nigerian Petroleum Law (2nd Edn, Dredew Publishers 2004) 8.
[8] See the case of Attorney-General Federation v Attorney-General Abia State (2001) 11NWLR (Pt. 725) 689.
[9] S. 318 PIA 2021
[10] Harrison Declan (n-1) 29

same vein, the ownership of petroleum/minerals in Nigeria is vested in the Federal Government by virtue of Section 44(3) of the Constitution of the Federal Republic of Nigeria 1999 (As Amended)[11]; Section 1 of the Petroleum Act and Section 2(1) of the Exclusive Economic Zone Act[12]. This is a justification of the fact that Nigeria operates the command and control regulatory framework in her Oil and Gas sector which recognizes state ownership of oil in its natural state in *strata*[13]. It is important to note that, while the ownership of minerals is vested with the Government, the surface rights remain with the individual owners of the Land[14].

Even though it is said that the interest of Government/license holder over the petroleum deposit on the land does not vitiate the rights of the surface owner and the provisions of Section 43 of the CFRN 1999 (As Amended) which gives a right to every citizen to acquire landed property in any part of Nigeria, the Government nevertheless have the power to revoke the right of citizens on land for overriding public interest[15]. There are many other statutes in Nigeria which tend to strip surface owners of the right to their land or limited access to same. These statutes are generally referred to as coercive statutes[16]. These statutes include the Land Use Act (LUA)[17]; the Petroleum Act (PA)[18]; The CFRN 1999(as amended)[19]; the Exclusive Economic Zone Act[20] among others. Although, most of these statutes allow for the compensation of surface owners in event that there is need for compulsory acquisition of their properties for activities which may affect the surface use of same.

The issue concerning the Government Ownership of petroleum/ minerals in Nigeria has been placed beyond argument by statutory provisions including the CFRN 1999 (as amended).[21] It follows therefore, that the rights of surface owners over a land which has some deposits of petroleum/minerals should not be misplaced by the interest of the government over the petroleum deposit in that land. It is to be noted therefore, that before oil companies/mineral interest holders are allowed to commence operations, compensations are expected paid for the loss of use of surface interest/rights.[22]

Further, considering the complex processes involved in the exploration and production of petroleum and its attendant environmental consequences which in turn affect the rights of the surface owners, there had been some legislative protection of these rights by way of guidelines to petroleum exploration, and production activities among others. Even though the government has right over petroleum /minerals accumulated beneath the land, the surface right over the land remain with the land owners as noted above, the government in exercising its rights may grant license or lease to operators or organisations to exercise its rights to explore or produce the petroleum.

Under Regulation 17 (1) (c) of the Petroleum (Drilling and Production) Regulations made pursuant to s.9 of the Petroleum Act, a Licensee or Lessee is not authorised to enter upon or occupy or exercise any of the rights and powers conferred by the license or lease in relation to any part consisting of private land until such permission by the Minister of Petroleum upon payment of adequate or fair compensation to land owners.[23]It is important to note, that there is no adequate statutory provision made for the protection of the rights of surface owners in events of damage resulting from oil exploration/production activities or individual victims of oil pollution.[24]

[11] C F R N 1999 (as Amended)
[12]1978
[13]Kato Gogo Kingston and others, 'The Effects of Correlative Rights on Oil and Gas Production in Ogoni Lands' [2019] (6) (1) Rivers State University Journal of Public Law 1.
[14]Harrison Declan (n-1) 3
[15] S 28(1) LUA
[16]Coercive statutes are laws which allow government to forcefully take over the ownership of/interest in land from individual owners.
[17]Ss 1 and 28
[18] S. 1
[19] s 44(3).
[20] s 2(1)
[21] s 44(3); see also Ss 1 PA, S. 1 PIA.
[22]Chris Wigwe, Oil and Gas and Valuation of Compensation (Readwide publishers 2017) 42
[23] H Declan (n-1) 20; Regulations 21(1) and (2) and 23 of the Petroleum (Drilling and Production) Regulations.
[24] Amari Omaka, Municipal and International Environmental Law (Lion Unique Concept 2012) 314

The inadequacies which exist in most of the legislative enactments, as well as regulations made pursuant to their respective provisions, victims or surface owners, who suffer damage or injuries arising from oil exploration and production activities, are forced to resort to other principles of law[25]such as negligence, nuisance, etc. One major and important doctrine which exists as an aid in the protection of the surface owners' right over the land is the accommodation doctrine. For the purpose of this work, we shall focus on the accommodation doctrine.

2. The Accommodation Doctrine:

Since the discovery of petroleum in the United States in 1859[26] and the existence of Mineral Rights and Surface Rights, there have been persistent legal struggle for supremacy between these two rights. This struggle brought about the implementation of new laws by the respective States even though this was done in piecemeal, with options by States to opt for a suitable one that fits all circumstances.[27] Prominent among these laws include the Accommodation Doctrine and the Surface Damage Act. The Surface Damage Act which is applicable in Oklahoma State of the United States of America (USA), is targeted at ensuring adequate provision for compensation to the surface right holders/owners for damages which result from activities conducted by operators in the Oil and Gas Sector[28]. The Surface Damage Act shares similarities with Accommodation Doctrine although differences exist between the two and may not be part of this discussion.

The Accommodation Doctrine is based on the theory of '***Due Regards***'[29] and may also be referred to as the doctrine of ***Alternative Means***.[30] The accommodation doctrine is implemented to attempt/achieve a balance between the petroleum/mineral interest owner and the surface interest owner.[31] The doctrine was established in 1971 by the Supreme Court of Texas[32] in the case of ***Getty Oil Co. v Jones***,[33] thereby making Texas the first State to formally adopt the accommodation doctrine.[34] In the Case of **Getty Oil Co v Jones (Supra)**, a surface right holder (owner) by name John Jones instituted a suit to enjoin a petroleum/mineral interest holder (Getty Oil Co.) from carrying out activities which adversely affected his (Jones) surface use of the land. In the said suit, Jones specifically sought to restrain Getty Oil Company from the use of vertical space for oil pumping unit which prevented Jones from the use of his automatic irrigation sprinkler system that is hung over his property. Getty Oil Co. on its part argued that in so far as it acted reasonably in its bid to achieving the purposes of Oil and Gas lease, it has an absolute right to the use of the surface including the air above and that the consequences of such use to the right of the surface owner exist without legal consequences or effects. This is particularly so because mineral interest under the Texas Law was given priority over surface interest. However, the court upon acknowledging the necessity of the right to reasonably access the land in a bid to produce and remove minerals added that such right must be exercised with due regard for the rights of the owner of the Surface Estate/Surface Owner.

The court rightly considered it unfair to allow a mineral interest holder to out rightly disregard and disrupt the rights of the surface right holder and consequently implemented a new judicial order in the

---

[25] Ibid.

[26]Chantel P. James, 'Windustry and the Accommodation Doctrine: Should Oklahoma Follow in the Steps of the Lone Star state? (2015) (67) (4) Oklahoma Law Review, 902 < https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi? Article=1004 &context=olr> accessed 10/6/2020.

[27] Ibid

[28] Mark L. Walker, 'Note, Oil and Gas: Surface Damages, Operators and Oil and Gas Attorney' (1983) (36) (2) Oklahoma Law review, 404. <https://digitalcommons.law.ou.edu> accessed 29/06/2021.

[29] Kato Gogo Kingston and Samuel Chisa Dike, 'The Accommodation Doctrine and the Compulsory Acquisition of Lands for Oil and Gas Projects in Nigeria' [2019] J L P England (9)(1)4 <https;//www.reseachgate.net/publication/339663342_THE_ACCOMMODATION_DOCTRINE_AND_THE_ COMPULSORY _ACQUISITION _OF_LANDS_FOR_OIL_ AND_GAS_PROJECTS_IN_NIGERIA> accessed 10/06/2020

[30] Ibid

[31]Chantel P. James(n-25)

[32] Ibid

[33] 470 S.W 2d 618 (Tex. 1971)

[34]Chantel P. James (n 25) 902

field of Oil and Gas operations. This landmark decision or position of the Supreme Court of Texas marked the beginning of a rule now referred to as ***Accommodation Doctrine***[35] which states thus:

Where there is an existing use by the surface owner which would otherwise be precluded or impaired and where under the established practices in the industry, there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee[36].

It is pertinent to note, however, that before the Supreme Court decision which formally established the accommodation doctrine in ***Getty Oil Co v Jones,*** Texas Oil and Gas practices allowed lessees to use as much tract of land as reasonably necessary for mineral production without regard for surface and subsurface damage[37]. Thus, the Texas law does not recognise the right of surface owner especially where damage is caused by the production of minerals by a lessee, under this circumstance, a surface interest owner cannot complain[38] except such damage is caused by wilful negligence of the lessee[39]. However, the Accommodation Doctrine changed the above position of the law in Texas. This made it a duty on the mineral right owners/holders to reasonably accommodate the surface right owners/holders[40]in the cause of their exploration and production activities on the land.

The Accommodation Doctrine applies in the protection of the interest of surface owners, where the surface interest owner is able to show or prove an existing use of the surface which stands as a foundation or prelude for the consideration of other issues[41]. Upon the establishment or prove of the existing use of the surface, before the mineral development or production, the surface interest/right holder must show that there are no reasonable alternative methods for the existing surface use.[42]To achieve these, the surface owner is required to produce legally sufficient evidence showing the non-existence of any reasonable alternative for the conduct/exercise of his surface Right/operation on the track and not whether he proved by evidence that he had no reasonable alternatives for general use[43]. From the above, it is to be noted thatthe surface owner is expected to first show the two basic elements thus:

1. Existing surface use; and
2. The absence of an alternative method for that use as well as proof that the petroleum /mineral operator's proposed operations would preclude his use. To seal a successful reliance on the accommodation doctrine, the surface owner must in addition to other requirements, show that the operator or lessees have a reasonable alternative method of production, established by industry practices to continue operations[44].

Further, from the decision of the court in the above case of ***Getty Oil Co v Jones***, the implied rights of the mineral interest owners/holders must be exercised with due regards for the rights of the surface interest owners/holders[45]. Consequently, the mineral right owners/holders may be required to reasonably accommodate the surface right owners/holders under the following circumstances:[46]

1. There is an existing use of the surface by the surface interest owner.
2. The use of the surface by the mineral interest owner/holder precludes or impairs the existing use of the surface by the surface right owner.

---

[35] Ibid, (n-25) 4.
[36] Ibid
[37] Ibid
[38] Ibid, see also the case of Kenny v Tex Gulf Sulfur Co, 351 S.W. 2d 612, 614 (Tex. Ct. APP. 1961)
[39] Ibid
[40] Kato GogoKingston and Soibi George-Ibikiri, 'The Necessity for the Enactment of surface Damage Act for Oil and Gas projects in Nigeria' (2020) (10) (1) J P L England, < https;//www.reseachgate.net/publication/339663182_ THE_NECESSITY_FOR_THE_ENACTMENT_OF SURFACE_DAMAGE_ACT_FOR_OIL_AND_GAS_PROJECTS_IN_NIGERIA > accessed 27/06/2020.
[41] See the case of Getty Oil Co. V Jones (Supra)
[42] Ibid
[43] See the case of Mariman v XTO Energy Inc. 407 SW. 3d 244 (2013)
[44] See the Getty Oil Co. V Jones (Supra) see also Chantel P. James (n-25)
[45] Kato Gogo Kingston, Oil and Gas Laws: A Guild for International Practitioners (2nd edn, Lambert Academic Publishing 2018) 61.
[46] Ibid.

3. That under the established industry practices there are available alternatives for the extraction/production of minerals/petroleum.[47]

From the above, the mineral interest owner in the use of the land for petroleum exploration and production activities must be without a violation of the accommodation doctrine[48]. Hence, where there is need for the use of the surface by the mineral interest owner/licensee or lessee, such use must be reasonably exercised with care, and the use of appropriate skills which are reasonably necessary for the extraction of the mineral and without substantial burden to the surface owner, this was the position of the court in the case of ***Buffalo Mining Co. v Martin.***[49]

It is pertinent to note that in situations where there are multiple mineral interest owners, from the decision of the court in the case of ***Chartiers Block Coal Co. v Mellon,***[50] the rule implies that "… against the owner(s) of the surface, each of the several purchasers would have the right… to go upon, the surface to open by way of shaft, or drift or well to his underlying estate…"[51]this shows judicial readiness for the protection of the rights of surface owners against reckless and unreasonable mineral interest owners[52]. This position is predicated on the fact that "when the soil belongs to one person and the mine, another, the right to work the mine carries with it the use of so much of the surface as is strictly necessary and reasonable"[53]. On what act amounts to unreasonableness, the English Supreme Court in the case of ***Associated Provincial Picture Houses Ltd vWednesburyCorporation***[54]explained that action is construed as unreasonable if is so unreasonable that no reasonable person acting reasonably could have made it[55].

3. What a Claimant/Surface Interest Owner Must Proof to Establish Breach of Accommodation doctrine:

As noted earlier, for a successful proof of the breach of accommodation doctrine, the Claimant/Surface interest owner must prove the following:

1. That the use of the surface by the mineral interest owner/holder or Oil Company completely impedes or substantially damaged the existing surface use by the surface interest owner/holder[56]; and
2. That there is no reasonable alternative method available to the surface interest owner/holder for continuous existing use of the surface given the existence of the reckless use and/or damage by the mineral interest holder/owner.[57]
3. That given the circumstances resulting in the damage, there exist some alternative(s), reasonable, customary, and industry-accepted methods that are available to the mineral interest owner which would/could have been used by such mineral interest owner for the extraction/production of petroleum without causing damage or interfering with the surface owner's existing use of the surface.[58]The surface owner/claimant can establish this requirement by putting forward are liable and convincing evidence showing that the damage to the surface could not have occurred, ***"but for"*** the wilful negligence and reckless conduct of the mineral interest owner.[59]

It is pertinent to note that the "***but for***" test was advanced/improved by the court in the case of ***Merriman v XTO Energy, Inc.***[60] where the above requirements for proof of a violation of

[47] Ibid
[48]Kingston and Dike (n28) 5
[49] 267 S.E. 2d 721 (W.Va.1980).
[50] 152 Pa. 286, 25 A597 (1893)
[51] Kingston and George-Ibekiri (n39) 4
[52]Ibid
[53] See Dewey V. Great Lakes Co 84 A 913 (Pa. 1912)
[54] (1948) IKB 223
[55] Ibid.
[56]Kingston and George. Ibikiri (n39) 5
[57] Ibid
[58]Ibid
[59] Ibid
[60] 407 S.W. 3d 244 (2013)

accommodation doctrine was made.[61] The claimant/surface interest owner succeeds in an action for breach of accommodation doctrine if he can show by evidence that the interference/damage would not have occurred ***but for*** the wilful negligence/reckless method adopted by the mineral interest owner in the mineral/petroleum exploration and production or its related activities. In the case of ***Amaco Production Co. v Carter Farms,***[62] the court found the defendants liable to pay substantial damages for breach of accommodation doctrine because they (defendants) recklessly neglected the due regards for the claimants' (surface interest owner) rights to the use of the surface. Also, this position was maintained by the court in the case of ***Hunt Oil Co. V Kerbaugh***[63]where it held among others that "…The owner of the mineral estate must have due regard for the rights of the surface owner and is required to exercise that degree of care and use which is a just consideration for the rights of the surface owner…"

It is within the rights of the mineral right or interest owner and the surface interest owners to use and enjoy their respective properties without interference. Hence, the mineral interest owner is allowed to make reasonable use of the surface but may be held liable for damage caused by unreasonable use of such surface.[64]

4. Defences to an Action for Breach of Accommodation Doctrine:

To escape liability for breach of accommodation doctrine, the mineral interest owner is required to show that his conduct was reasonable in the circumstance to minimise the impact or damage caused to the land surface. In the case of ***Dewey v Great Lakes Coal Company***[65]**,** the court set out some test for determining whether the use of the surface by the mineral interest owner was reasonable as to shield or obviate them from liability under the accommodation doctrine thus:

1. The Necessity Test: Under this test, the mineral interest owner is required to show or prove that the use of the surface was completely "necessary" without agreement with the surface interest owner for such use;
2. The Norm Test: The mineral interest owner must in addition to the above, show that the norm or practice applicable in the country, the mineral interest owner is allowed to use the surface without the consent and agreement with the surface interest owner; and
3. The Acquiescence Test: This defence is founded on the legal principle which holds that the law of equity aids the vigilant and not he who sleeps over his rights (the indolent which emanated from a Latin maxim ***"Vigilantibus Et Non Dormientibus Etjurasubvenuent"***. To succeed under this defence, the mineral interest owner must show that such a breach had been consistent on his part for a long time without any complaint or resistance by the surface interest owner.

5. The Applicability of Accommodation Doctrine in Nigeria:

As we have earlier pointed out in this work, all lands in Nigeria by virtue of the provisions of the Land Use Act[66]belongs to the State and the interest of individual citizens over land is reduced into Rights of Occupancy. In the same vein, all Minerals/Petroleum deposits in Nigeria belongs to the Federal Government.[67] This being the case, two distinct interests are usually created. These interests are the mineral interest and the surface interest. While the mineral interest remains with the government, right over the surface part of the land resides with the individual land owner (surface interest owner). In order words, the discovery of petroleum on a land cannot automatically extinguish the right of the surface owner over such land.

In Nigeria, the Federal Government usually grants licence to oil companies who conduct petroleum exploration and production activities among others. The licence or lease when granted gives the licensee or lessee the right over the minerals/petroleum that lay beneath the earth's surface within the

[61] Ibid
[62] 703 P. 2d 894 (N.M. 1985)
[63] 283N.W 2d (N.D. 1979)
[64]See Mining Co. v Martin, 267 S.E. 2d 721
[65]236 Pa.498, 84 A. 913 (1912)
[66] S. 1.
[67] S. 44(3) CFRN 1999 As Amended; s 1 Petroleum Act; S. 1 PIA 2021 etc

area covered by such lease or licence. However, the licence/ lease so created or granted does not automatically create a legal right which allows the licence holder to enter upon the land to carry out petroleum operations.[68]The implication of this, is that the licensee or lessee cannot exercise any right or power conferred by the lease or licence in respect to areas occupied or within an existing use by private individuals or surface right owners unless with the written permission of the Minister of Petroleum and upon payment of fair and adequate compensation to the persons in lawful occupation of or the owner or owners of the land.[69] This issue of compensation is constitutionally rooted.[70]

It is pertinent to state that the licensee or lessee (mineral interest holder) are in most cases allowed access to the land surface in which case he is expected to act reasonably and in due regard for the right of the surface owner to use the land surface and would be liable to compensate the surface right holder for damage resulting from unreasonable use of the land surface where same impaired or negatively affect the right of the surface interest holder from the continuous existing use of same. This is the hallmark of the *Accommodation Doctrine*. The accommodation doctrine is applicable in Nigeria. There are some statutory provisions which could be considered an importation of the Accommodation Doctrine into the Nigerian jurisprudences as it relates to operation in the Petroleum Industry. Section 16 of the Oil Pipeline Act[71] allows the application of the Accommodation Doctrine. The said Section provides thus:

The holder of a licence shall make and maintain for the accommodation of the owners or occupiers of any land in respect of which the licensebeen(sic) granted or of the owners or occupiers of adjoining land or for the accommodation of the users of any customary track or path such crossing, bridges, culverts, drains or passages as may be necessary for making good any interruption to the use of such land or the amenities thereof or the use of such customary track or path caused by the exercise of the powers granted by this Act.

From the above provisions of the Oil Pipeline Act, the mineral interest holder (lessee or licensee) is required to accommodate the interest of the surface owners in the course of petroleum activities/exercise of the rights conferred on them by the license or lease. This position or requirement is the principles embedded in the Accommodation Doctrine. Similarly, the Petroleum Act recognises the Accommodation Doctrine, this is particularly true because Paragraph 37 of the First Schedule to the Petroleum Act makes specific provisions that promote or support the principles laid out in Accommodation Doctrine. The said Paragraph 37 provides among others thus:

> The holder of an Oil Exploration Licence, Oil Prospecting Licence or Oil Mining Lease shall, in addition to any liability for compensation to which he may be subject under any other provision of this Act, be liable to pay fair and adequate compensation for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licenced lands

Further, the Petroleum Industry Act 2021 which serves as a replacement to the Petroleum Act and the principal legislation regulating the Nigerian Oil and Gas Industry made an expanded provision which captures the *Accommodation Doctrine* in its Section 101 (1), (2) and (3) among other provisions. Section 101 (2) and (3) provide:

(2) *A person shall not in the cause of Petroleum Operations*
(a) Injure or destroy any tree or object which is-
(i) Of commercial value or
(ii) The object or veneration to the people residence within the license or lease area
(b) Damage or destroy any building or property; or
(c) Disturb or damage the surface of the land or any other right to any person who owns or its in lawful occupation of the surface area covered by the license or lease.

[68]Harrison Declan, Nigerian Oil and Gas Law: cases, Commentanes, and Materials, (Westhill Publishers, 2018) 20.
[69] Ibid; Regulation 17(1) (c) of the petroleum (Drilling and Production) Regulations; s 6 of the Oil Pipeline Act CAP 07 LFN.2004; s 107 of the Mineral and Mining Act 2007
[70] Section 44 (1) CFRN 1999 (as Amended) see also ELF Petroleum Nig. Ltd V Daniel C Umah & Ors (2008) LPELR-43600 (SC).
[71] Cap 07 LFN 2004.

(3) A Licensee or lessee who causes damage under subsection (2) shall pay fair and adequate compensation to the persons or communities directly affected by the damage or injury.

From the provisions of these laws, Accommodation Doctrine could be said to have legislative recognition in Nigeria. It is the duty of the court to give effect to these provisions. This emphasises the critical role of the Judiciary in deciding what constitutes law and its applications in certain circumstances.[72] Hence, the Nigerian courts are enjoined to give full force or effects the provisions of these laws on the Accommodation Doctrine.

6. Court with Jurisdiction to Entertain Cases Relating to the Violation of Accommodation Doctrine in the Nigerian Petroleum Industry.

The Accommodation Doctrine seeks to protect the interest or right of the surface owner over the surface part of the land against the unreasonable use of the surface by the mineral interest holder in the course of petroleum exploration or allied operations. In the Oil and Gas/Petroleum Industry most disputes are resolved by parties without having need to litigate such dispute in the court of law.[73] However, where litigation becomes necessary, parties (plaintiff) must decide on which court that has the jurisdiction[74] to hear such matter.

Although section 101 (1) (a) of the PIA seemed to have ascribe jurisdiction on the Customary Court with respect to the determination of questions as to whether an area is sacred or not for purpose of restricting license holder access to such areas for petroleum exploration and production activities.

Even though the PIA places a duty on the license holder to deposit with the Federal High Court certain sum to be determined by the Federal High Court with due regard to the regulatory framework where there are dispute as to the amount of compensation payable.[75] The PIA also placed the power to determine the amount payable as compensation on the Commission[76] and prescribed by regulation made under the PIA[77]. However, we cannot take a stand on the above provisions of the PIA on the issue of who decides the adequacy or otherwise of compensative visa vis courts with jurisdiction to determine issues emanating from the subject of this work without resort to the Constitution of Federal Republic of Nigeria 1999 (as amended) as well as the Federal High Court Act.

By the combined effects of section 251 (1) of the CFRN 1999 (as amended) and Section 7 of the Federal High Court Act, the Federal High Court has the exclusive jurisdiction to entertain matters arising from, relating to, or ancillary to mines and minerals[78]of which Accommodation Doctrine is one. The implication of this is that matters arising from the breach of Accommodation Doctrine in the Oil and Gas Industry irrespective of the stage at which such breach occurred falls within the exclusive jurisdiction of the Federal High Court.

This section omits the phrases: "arising from", "relating to" or "ancillary to", which have formed the basis on which the courts have constructed the jurisdiction of the Federal High Court. Section 251(1)(n) of the CFRN 1999 (As Amended) Provides Thus:

> ***251. (1) notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as many may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters-(n) mines and minerals (including oil fields, oil mining geological surveys and natural gas);***

[72]Lauren McCaskill,' When Oil Attacks: Litigation Options for Nigerian Plaintiffs in US Federal Courts, Health Matrix' (2013) (22) (2) The Journal of Law-Medicine 562. <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?referer=https//www.google.com/&httpsredir=1&article=1161&context=healthmatrix> accessed 10/6/2020.

[73] Harrison Declan, (n-1) 213

[74] Jurisdiction is the power of a court to hear and decide any matter brought before it.

[75] S. 101 (1) (d) of PIA 2021

[76] The Nigerian Upstream Petroleum Regulatory Commission.

[77] S.101 (4) PIA 2021

[78] Including Oil Fields, Oil Mining, Geological Surveys and Natural Gas.

It is pertinent to note, however, that the Constitution omitted the use of certain phrases such as "arising from", "relating to" or "ancillary to" which may be required to properly vest the intended exclusive jurisdiction on the Federal High Court.This omission has been remedied by *Section 7(1) (n) and (3)* Federal High Court Act which provides thus:

7(1) the Court shall to the exclusion of any other court have original jurisdiction to try civil causes and matters *(n) mines and mineral (including oil fields, oil mining, geological surveys and natural gas).*
(3) Where jurisdiction is conferred upon the Court under subsection (1), (2) and (3) of this section, such jurisdiction shall be construed to include jurisdiction to hear and determine issues relating to, arising from or ancillary to such subject matter.
According to Declan[79], "…inclusion of the phrases "arising from", "relating to" or " ancillary to" in the Federal High Court Act are not inconsistent with *section 251 (1) (n)* of the Constitution but supplementary to it. Accordingly, it can be read alongside with *section 251(1) (n)* of the 1999 Constitution of the Federal Republic of Nigeria. See the case of ***Shell Petroleum Development Company (Nigeria) Ltd v. Lalibo***[80].

The above statutes by their combined effects settled the issue of the court having jurisdiction to entertain suits relating to or emanating from petroleum activity. Giving this position, it would be safe to posit that matters relating to the breach of Accommodation Doctrine fall within the exclusive jurisdiction of the Federal High Court. It follows therefore, that a surface interest Owner or holder who wishes to litigate the breach of accommodation doctrine by the mineral interest holder cannot commerce such proceedings at the State High Court. This is because the accommodation doctrine is a principle developed by the court to guide against unreasonable conduct by Oil companies in the course of petroleum exploration and production activities. In Nigeria, the court in several cases hadcause to interpret the above provisions of the Constitution and Federal High Court Act.

In the case of ***Allison v Shell Petroleum development (Nigeria) Ltd***[81]the Court of Appeal held that trespass which occurred during clearing, drilling, dredging and installation of oil wellheads, gas pipelines with destruction/stoppage of the plaintiff's economic life on the land constitutes one cause of action which cannot be enforced in piecemeal. The cause of action is connected with, or pertains to, or is related to oil and gas exploration and exploitation, hence the Federal High Court has jurisdiction to entertain or determine same.[82] Similarly, in ***MPIDI BARRY & ORS v. OBI-ERIC & ORS,***[83] the Plaintiffs/Respondents claimed that the Defendants/Appellants while conducting oil prospecting/ seismic operations within the Plaintiffs'/Respondents' Bee Farms opened some beehives in the farm which resulted in the migration of the bees which caused damage. The Plaintiffs filed a suit at the High Court of Rivers State claiming Special and General Damages in the sum of ***₦5, 000,000.00*** as well as an order of the court for perpetual injunction, restraining the Defendants from further Seismic Operations in an area called "OKWU OWIRIWA" being the location of the Bee Farms. The Defendants in response raised an objection challenging the jurisdiction of the Rivers State High Court to entertain the suit and the High Court in its ruling dismissed the objection and awarded a cost of ₦2, 500.00 against the Dependants. Being dissatisfied with the ruling by the High Court of Rivers Stateon jurisdiction, the Defendants/Appellants appealed against the ruling at the Court of Appeal. The Court of Appeal held that the damage complained of/about emanated from or arose during the geological surveys in the Oil Field, wherein some explosives were detonated, and this was an oil exploration device and procedure. That having arisen from or in the course of oil prospecting operations it can be seen that the action falls squarely within the jurisdiction of the Federal High Court.[84]

7. Conclusion

[79] Harrison Declan (n1) 214
[80] (2009) 14 NWLR (Pt 1162) 564.
[81] N O G C 8 (2011) 291 C A
[82] Harrison Declan (n-1) 226
[83] (1989) 8 NWLR (Pt.562) 404.
[84] SPDC (Nig) Ltd V Isaiah (2001) 11 NWLR (Pt 7234) 168

Land acquisition/ownership is a constitutional right in Nigeria. Even though the Land Use Act vests all land within a state on the Governor, it still does not strip individual land owners of the right over same. Nigeria operates a State Ownership model of Minerals/Petroleum which by implication placed the ownership of all mineral/petroleum in Nigeria on the Federal Government. This distinction between the owner of the land and the ownership of the mineral/petroleum found beneath land/earth surface created two distinct rights/interest over the land. These are the surface interest and mineral interest/right.

The accommodation doctrine was created by the court in Texas to balance these two interests. The doctrine holds that the mineral interest owner must reasonably accommodate the use of the surface by the surface interest holder in his activities aimed at extracting the minerals found beneath the surface. This doctrine applies in Nigeria by the provisions of Section 16 of the Oil Pipeline Act, paragraph 37 of the Fifth Schedule to the Petroleum Act[85] and Section 101 of Petroleum Industry Act 2021. By the combined effect of Section 251 (1) of the CFRN 1999 (as amended) and Section 7 of the Federal High Court Act, the Federal High Court has exclusive jurisdiction to hear matters relating to, arising from, in respect of mineral/mining operations. Hence, the Federal High Court has jurisdiction to entertain cases emanating from the violation of accommodation doctrine.

8. Recommendations

Relevant sections from different laws make provisions for the protection of the right of the surface owner against the unreasonable conduct of the mineral interest owner/lessee or licensee on the surface in the course of production operations among others. This made the application of accommodation doctrine uncoordinated in Nigeria. Hence, we recommend the enactment of a law to be known as the Surface Damage Act which is to be modelled after Oklahoma's Surface Damage Act and the Texas Accommodation Doctrine to balance the competing interests of the mineral interest holder/lessee or licensee and that of the surface interest owners/ holders.

[85]Now repealed by PIA 2021.