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Nigerian Offshore Seabed: The Challenges of Ownership and Resource Control

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In most federal states, the quest for component littoral states' hegemony over vast mineral deposits within their territories is not necessarily novel and has been a source of political activism and litigation in many jurisdictions. The Supreme Court was confronted with the same issue for the first time in Attorney General of Federation v Attorney General Abia State & 35 ors on the ownership of the offshore seabed between the Federal Government and eight (8) states (Akwa-Ibom, Bayelsa, Cross-River, Delta, Lagos, Ogun, Ondo and Rivers) which are located on the coast (Here in after referred to as the littoral states). The court however reaffirmed the federal government sovereignty and jurisdictional control over the vast resources located in the offshore and adjacent continental shelf of the littoral states. In what follows therefore, our findings is that this judgment has deep-seated implications for municipal maritime laws, international law, seaward boundary, revenue allocation, inter-governmental relationship, national peace and security. It also raises some important issues on true federalism. The Court has given its verdict but the ghost of the argument has refused to rest and as the philosophical pendulum swings to and fro, we hope to argue that the veritable alternative hinges on the broad shoulder of political doctrine solution. The objective of this paper is to critically examine the jurisprudence behind the determination of the ownership of the Nigerian Offshore Seabed between the central government and the littoral states by the Nigerian apex court in order to consider whether the clamour for resource control is justified. In pursuits of this aim the paper employs the dialectical methodology in the sense that it examines the Nigerian legislation vis-a-vis other international jurisprudence on the issue at stake. It equally employs the philosophical tool of critical analysis in considering the various arguments forming parts of the facts in issue here. It is equally prescriptive as it recommends equity in the distribution of oil wealth through resource control as a panacea for solving the crisis.

Key Words: Nigeria, offshore, seabed, resource control, philosophy, Ownership

Introduction

Oceans and seas are large expanse of common space, freely used for navigation, exploited for their living resources and as a disposal area for waste products of industry, domestic life and war. Beyond this, oceans and seas are also repository to vast natural resources that are beneficial to mankind with various coastal states asserting different rights over such ocean territories. Whereas under public international laws, the sovereignty and jurisdiction of coastal states over natural resources located in the seas and seabed adjacent to its coast is well settled. At the municipal level, particularly in the federal states, the question always arises as to whether the rights in those resources are to be held by the national government or by the component littoral state governments. The quest for component littoral states' agitation for resource control is not exclusive to Nigeria alone. It has been a source of political activism and litigations in other jurisdictions like Canada, United States of America and Australia. *(See generally, A.G B.C v A.G Canada 1914, A.G U.S.A v A.G California1947, A.G U.S.A v A.G Texas 1950, A.G New South Wales v Common Wealth 1975).* It was a similar conflict that the Nigerian supreme court was called upon to resolve in *A.G Federation v A.G Abia state & 35Or* (2002)as to the southern (seaward) boundary of each of the littoral states for the purpose of determining the of amount resources accruing to the littoral states and the ownership of the offshore seabed. The Federal Government contended that the seaward boundary of these states is the low-water mark of the land surface or the seaward limit of the inland waters within the state. On the other hand, the littoral states do not agree with the federal government's contentions. Each of the States claimed that its territory extends beyond the low-water mark into the territorial water and even into the continental shelf and the exclusive economic zone. They maintained further that the natural resources from the offshore are derivable from their respective territories and in respect thereof, each is entitled to "not less than 13 percent" allocation as provided for in Section *162 CFRN(constitution of the federal republic*

of Nigeria) 1999. It was another way of claiming ownership of the offshore seabed by the states.
Under the Nigerian Law, the ownership of natural resources is vested in the federal government. However the 1999 Constitution provides a revenue formula whereby states with natural resources being exploited within their territory, are entitled to certain percentage of the revenue accruing directly to the federal account from such exploitation *(The Constitution of the Federal Republic of Nigeria, 1999).* The foregoing section has provided inter alia, for what is popularly known in Nigeria as the **'***Derivation formula'***.** This paper is actuated by the controversy and current clamour for resource control by the littoral states. It has brought to fore the need to determine especially as regards revenue derived from the territorial sea, exclusive economic zone and continental shelf of Nigeria. This is in view of the fact that the natural resources in contention in these offshore zones are located in the seabed. As we do a logical analysis of this case we are arguing that the solution to this problem is not judicial but philosophically political. Hence, the veritable alternative hinges on the broad shoulder of political doctrine.

Clarification of concepts

The clarification of concept is done in full realization that for any discussion to be intelligible, its terms must be clearly defined. And since no word has a meaning except that put by it by the speaker, it is necessary that we are ad idem on the meaning which this paper ascribes to words.

Ownership

The concept of ownership is of both legal and social interest. Ownership could be described as the collection of rights allowing one to use and enjoy property, including the right to convey it to others (Shrager, 1986:324). It implies the right to possess a thing, regardless of any actual or constructive control. It is also the most comprehensive and complete relation that can exist in respect of anything. Ownership implies the fullest amplitude of right of enjoyment, management and disposal over property. 'The owner of the property is not subject to the right of another person. Because he is the owner, he has the full and final right of alienation or disposition of the property, and he can exercise the right without seeking the consent of another party, because as a matter of law and fact there is no other party right over the property that is higher than this' *(Chief Abraham & ors v Olorunfumi, 1991).* Ownership consists of an innumerable number of claims, liberties, powers and immunities with regard to the thing owned and that the various claims constitute the content of ownership *(Dias, 1985:5).*

Offshore

The offshore is that ground that is between the original high-water and low-water mark. This both prima facie and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea *(Okon and Essien, 2005:14).* The Oxford Advance Learners Dictionary *(2002)* defines offshore to mean 'at the sea and not far from the land'. The Encarta World English Dictionary (2008) has this to say; 'on or over land that is near water, especially away from the land towards the sea.'

Seabed

Seabed is simply the sea floor, the ground underlying the ocean, over which nations may assert sovereignty, especially in underlying territorial waters *(Bryan, 2011).* The Encarta dictionary *(2008)* defines it 'as the floor of ocean, the ground at the bottom of the ocean'. It is simply the floor of the sea and nothing more. The offshore seabed of Nigeria includes the territorial sea, Exclusive Economic Zone and Continental Shelf *(Atake, 2011).*

The Nature, Determination and Jurisdiction over the Nigeria Offshore Seabed

The Nigerian Offshore Seabed includes the Territorial Waters, Continental Shelf and Exclusive Economic Zone (Egede, 2005:5). But it must be noted that the low-water is the base point from which the breadth of the offshore seabed is measured. The Supreme Court was emphatic on this, 'the low water mark of the seaward boundary is the base point for measuring the offshore seabed' *(A.G Federation v A.G Abia State & 35 ors. 2002).* Allusion was made to this in the Territorial Waters Act (1971):

The territorial waters of Nigeria shall for the purposes include every part of the open sea within twelve nautical miles of the coast of Nigeria (measured from the low-water mark) or seaward limit of inland waters.

From the above provisions, there seem to be no doubt that in Nigeria the seaward limit of the low-water mark is the baseline for measuring the offshore seabed.

Under the united nations convention on the Law of the Sea (1982), the seaward limit of the different

maritime zones are 12 nautical miles for the territorial sea, 24 nautical miles for the contiguous zone and 200 nautical miles for the exclusive economic zones. *(United Nations Convention on the Law of Sea, 1982: articles 3, 33 and 37)* The Continental Shelf extends to the outer edge of the continental margin, or to a distance of 200 nautical miles where the outer edge of the continental margin does not extend up to that distance. When the margin extends beyond 200 nautical miles, the outer edge limits of the continental shelf shall be determined by a complex formula contained in Article 76 paragraphs 4 and 6 of the convention. It should be noted that the outer limit of the aforementioned maritime zones are measured from the baseline of the low water mark. The UNCLOS provides detailed rules on the baselines from which the breadth of the offshore seabed is measured *(UNCLOS, 1982: articles 5,6,7,9,10,11,12,13,14,16,47 and 121).* Nigeria has in accordance with the UNCLOS, established five maritime zones namely; internal waters, territorial sea (reduced from 30 nautical miles to 12 nautical miles through the adoption of the Territorial Waters Amendment Decree 1978), Contiguous zone of 24 nautical miles, 200 nautical miles exclusive economic zone and the Continental Shelf *(Egede,2009:684).* Under the petroleum Decree *(1969, No.51)*, the continental Shelf of Nigeria means 'the seabed and the subsoil of those submarine areas adjacent to the coast of Nigeria the surface of which lies at a depth not greater than 200 meters below the surface. The only sovereign rights exercisable by Nigeria over the superjacent waters of the continental shelf area per se, are those connected with rights of exploitation and exploration of the shelf's sub-marine areas as allowed by the 1958 convention.

Upon a dispassionate review of the provisions of United Nations Convention on the Law of the Sea *(1982)*, including articles 2,3,55,57,76,77 and 78, the court came to the conclusion that the offshore, maritime zones within the national jurisdiction of Nigeria were not part of the territory of Nigeria but some kind of extra-territorial terrain which international law conceded to Nigeria to exercise certain jurisdictional rights *(Territorial Waters Act 1971).* Ogundare, J.S.C. in his lead judgment captured the scenario as follows:

The sum total of all I have been saying above is that none of the territorial waters act, sea fisheries act and exclusive economic zone act has extended the land territory of Nigeria beyond its constitutional limit, although the acts give municipal effect to international treaties entered into Nigeria by virtue of its membership, as a sovereign state, of the comity of nations. These treaties confer sovereignty and other rights on Nigeria over certain areas of the sea (A.G Federation v A.G Abia State & 35 ors. 2002)

There is no doubt that by the ruling of the Supreme Court that the seaward boundary of the littoral states is the low water mark of the sea front or the seaward limit of inland waters, the Court did in fact a affirmed the exclusive control and jurisdiction of the federal government over offshore zones *(A.G Federation v A.G Abia State & 35 ors.,2002).* But in spite of this legal victory the federal government recently passed into law the Offshore/Onshore Dichotomy Abolition Act *(2004)* as political solution. The Act allows littoral states to have some interest (derivation) in offshore natural resources located within 200 meters water depth Isobaths. This is similar to the position adopted by the united states government where legislative backing was sought by the federal government (despite its legal victory on jurisdiction over offshore natural resources) to allow states have some interest over offshore natural resources *(Atsegbua, 2004:21).*

Political Doctrine Solution: A Veritable Alternative to the Ownership of Offshore Seabed

Immediately after the decision of the Supreme Court, which had far-reaching socio-political and economic implication for certain littoral states, the federal government embarked on what is termed a "political doctrine solution" to the issue. The federal government appointed a presidential committee under the chairmanship of the then works and housing minister, Chief Tony Anenih, to find a political solution to the crisis emanating from the Supreme Court's judgment *(Enyinna,2010:79).* The committee recommended among other things that there should be a legislative intervention in the form of an enactment by the National Assembly that any natural resources found offshore is deemed to be found within the territory of the adjacent littoral state for the purpose of the application of the derivation principle *(Enyinna).* In itself there is nothing new about legislative intervention after a rather controversial decision, the case of (*R.v.Keyn, 1976)* for example, resulted in legislative intervention through the Territorial Waters Jurisdiction Act *(1978).* Further to the committee's recommendation, the former president, Olusegun Obasanjo, sent a Bill to the National Assembly, the purpose of the Bill, to be cited as the Allocation of Revenue (abolition of dichotomy in the application of principle derivation) Act, was to abolish the onshore/offshore dichotomy created by the Supreme Court decision in the application of the principle of derivation. The Bill sent to the national assembly provides in section 1 (2) that:

As from the commencement of this Act, the contiguous zone of a state of the federation shall be deemed to be part of that state for the purpose of

computing the revenue accruing to the federation account from that state pursuant to the provisions of subsection (2) of section 162 of the C.F.R.N (1999).
The bill after much controversy was passed and came into force on 10th February, 2004 as the Offshore/Onshore Dichotomy Abolition Act *(2004).*

This issue of ownership of offshore seabed and the control of natural resources therein is one issue that has given birth to a myriad of arguments and counter arguments. It is an issue that has over the years, sharply divided people in many parts of the country and even the world at large. Indeed, it is not uncommon to see communities and states fighting one another all because of the control of natural resources. It is quiet philosophical to say that the lasting solution to this kind of issue is political rather than legal.

A Philosophical Appraisal of the Principle of Derivation and Resource Control

Resources control is essentially a challenge to the provision of section 44 (3) of *C.F.R.N (1999)*. However, section 162 (1) of the same constitution requires that a Federation Account be opened into which revenue collected by Government of the Federation except the procedure from the personal income tax by certain persons stated in the subsection shall be paid. Section 162 (2) states that the president, upon the receipt of advice from the Revenue Mobilization Allocation and Fiscal Commission (RMAFC), shall table before the National assembly propo,sals for revenue allocations from the Federation Account, and the allocation principle especially internal revenue generation, population, 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 13% of the revenue accruing to the federation account directly from natural resources. The complaint of the governments of the south-south zone before the promulgation of the offshore/onshore dichotomy Act *(2004)*, is that the oil exploited from offshore environment was excluded by the government of the federation in the computation of what is payable to the various states under the derivation principle. There is no doubt that the Supreme Court decision had generated much controversy in the oil producing states which had benefited enormously from revenue derived offshore *(Ugoh, 2012).* The Allocation of Revenue Act *(2004)* which came as a result of seeking for a political solution shows that it shall not be material for the purpose of the application of the principle of derivation whether the revenue accruing the Federation Account from a state derived from natural resources located offshore and onshore *(Ugoh, 2012).*

Various opinions have been expressed as to the constitutionality or otherwise of the Act. *Etikerentse (2004)* has argued that:
Although the promulgation of the act is likely to douse the tension and satisfy the desires of oil producing states of the country for a greater control of their resources, it is doubtful if the act can stand the test of any challenge on its validity having regards to the provisions of section 162 (2) CFRN and the interpretation given the effect that the resources must be derived from within the territory of the state.

It is respectfully submitted that the provisions of the allocation of revenue *(Abolition of Dichotomy in Application of the Principle of Derivation Act, 2004)* do not conflict with the provisions of S. 162 (2) CFRN *(1999).* The same section 162 (2) of the constitution *(1999)* does not state that the principle of derivation shall relate to onshore resources alone. Indeed the constitution is silent on the issue of onshore/offshore dichotomy in relation to natural resources. It is this lacuna that we think the legislature has filled. It is significant that a provision specifically created for the principle of the revenue allocation is designated in section 162(2) of C.F.R.N *(1999)* in which the principle of derivation could have been included *(Nwokedi:2001:23)*.

The significance of the context in which the principle of derivation appears is that it represents a strong constitutional intention that any beneficiary from the federation account whose territory (whether offshore or onshore) contributes to the national wealth by way of input from natural resources should benefit in a unique manner. This in turn, serves to highlight the great value commanded by natural resources *(Adedeji:1999:65).*

The derivation principle in revenue allocation had some advantages. It has been criticized for being discriminatory and also being a potential threat to national integration. *Adedeji (1999)* asserts that 'when fully implemented, the principle leaves the distribution of income in a federation identical to that in Bulkan area of independent unitary country. It qualified use brings more problem of equity. This is because the principle has the tendency of making resource-endowed states richer, and those not endowed poorer. This may lead to friction and unhealthy rivalry among the states in the federation. A major weakness of the principle which is particularly pronounced in developing countries is the absence of lack of reliable data, which aid in the computation of revenue that is allocated to the unit of government in the federation. It has therefore been stated that:

The unqualified application of derivation principle in a country like Nigeria, where statistical data are far from reliable, is bound to lead to an unfair distribution of resources. (Ifurueze et. al. 2012)

However, the derivation principle has many advantages. Against the backdrop of complete ownership and control of the natural resources in any part of the federation it serves to compensate that different states or region in the policy whose natural resources are expropriated for the national interest. If it is properly implemented in Nigeria the derivation principle will help stabilize the policy and reduce the agitation for resource control in the country.

Recommendation

The judgment of the court excluded the offshore seabed as one of the areas where natural resources of a state could be derivable from. This judgment which had snowballed into series of unrest and violent militant activities is a fall out of the dissatisfaction of the people of the littoral states. Other than the above, the decision of the Supreme Court had far-reaching adverse and dangerous implications for certain littoral states, which a political solution' to the issue. Though not being hostile to the legislative relief to the issue as prompted the federal government to embarked on what is termed 'given by the federal government, it is the aspiration of this paper that the following recommendations can lay to rest, the unrest usually occasioned by the all-important issue of ownership of offshore seabed:

1. we recommendation that the current clamour and agitation for resources control as well as the youth restiveness and violent conflicts and attacks on oil and gas in the Niger Delta region of Nigeria can be eliminated, if they could be enactment increasing the derivation principle to fifty percent.
2. It would be recalled that in both the 1960 and 1963 constitutions of Nigeria, the continental shelf of any region was recognized as part and parcel of the region for the purpose of computing the 50-50 (or fifty percent) sharing between the regional and federal government of the revenue from mineral extracted from the regions. The aforesaid independence and republican constitutions were the grund norms of the time. The current grundnorm (i.e. the 1999 constitution) could still be reviewed to inculcate in it the offshore seabed as part of the territories of the littoral states for the purpose of derivation formula.
3. The laws, which dispose oil producing areas of their land and deposits should be, abrogate out rightly to foster accelerated development in the littoral states.
4. Oil and gas matters should be removed from the exclusive legislative list and placed on the concurrent list. This will enhance improved relationship between oil and gas companies and their oil bearing host communities, which are largely manipulated and short-changed.
5. The decision of the Supreme Court had an effect on the Nigerian federalism. For Nigeria's federalism to survive there should be transparent and realistic efforts by the central government to give up some of its powers to the federating states. At the moment the Centre represents injustice to millions of minorities in Nigeria especially the Niger Delta. A center that does not produce but consumes is an unsustainable center. Such center can only protect its fair privileges through the force of arms and covetous laws.
6. It has been noted that this judgment is not only lopsided but implausible. We recommend that the Supreme Court should revisit the case and upturned the decision so as to strengthen the image of the judiciary.
7. There is also an urgent need to empower and make independent the Niger Delta Development Commission (NDDC) as they can implement true and realistic programs of development in the region.
8. The federal republic of Nigeria should be humble enough to borrow the Alaskan example where the proceeds from the natural resources, especially oil, is ploughed into the Alaskan Fund, as excess money, where upon all the aboriginal inhabitants are fundamentally entitled to cash collection from such proceeds for their personal needs.

Conclusion

The political doctrine intervention that gave birth to the legislative enactment in the form of the Allocation of Revenue (Abolition of Dichotomy in the Application of the principle of Derivation) Act 2004 is a step in the right direction to rectify an obviously flawed decision of the Supreme Court. However, the demarcation of the relevant maritime zones, for the purposes of the derivation formula, cannot be arbitrary but must be based on established principles of public international laws. The derivation principle should be extended to the continental shelf of Nigeria as defined by article 76 of the law of the Sea Convention, a treaty that has been ratified by Nigeria. Anything less will be mere political expediency that will derogate from the whole essence of the political doctrine intervention to achieve an equitable outcome based on well-established rules of public international law as to the nature of the offshore zones. A resort to the 200-meters water depth isobaths is a reversion to the depth and exploitability definition of the Continental Shelf Convention (1958) which appears anachronistic

especially in the light of Nigerian's ratification of the 1982 convention. We have considered several studies and we submit extremely that the judgment has far reaching implication for the entire nation. The solution as earlier observed is not in the courts; the solution rather, is rooted in political dialogue and negotiations.

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