RESOURCE CONTROL AND THE NIGERIAN CONSTITUTION

INTRODUCTION

Mineral oil is said to constitute about 70% of the total national revenue in Nigeria with a significant percentage coming from the Niger Delta Area. Prior to the discovery of mineral oil in commercial quantity, Nigeria was earning its national revenue from agricultural produce like cocoa, palm oil, groundnuts, rubber, cotton, hides and skin etc. The burning issue of the moment is the clamour from the people of the Niger Delta for the absolute ownership and control of the mineral oil and gas both from the onshore and offshore oil fields. Put in other words, the elite of the Niger Delta are of the view that the mineral oil and gas derived or sourced from that area is the property belonging to the people of that area and that being in Nigeria, they are prepared to pay some royalty, or tax, or some certain percentage of the revenue generated therefrom to the Federal Government of Nigeria, who will in turn share it between itself (the federal government) and other non oil producing areas or states. This is unlike the present situation that is, all mineral resources including oil and gas belongs to the Federal Government of Nigeria who exploits and market it, using predetermined sharing formula for disbursement based on the principle of derivation. It is the dissatisfaction of the existing principle of derivation by the people of Niger Delta area that gave birth to the term Resource Control.

Now, in this article attention will be focused on the emergence of the concept of resource control in Nigeria and what is obtainable in the Nigerian Constitution.

THE CONCEPT OF RESOURCE CONTROL

Resource control appears to be an emerging concept in Nigeria.[1] Simply put, it means that the mineral resources found in a particular geographical location belongs to the people or community or local government area council or state government where such mineral resources is situated. In the context of this discussion the mineral resources located at particular state should be owned by the Government of that state. It is to exploit and market such resources while paying some certain percentage to the Federal Government.

According to Professor Sagay,[2] it involves three major components:

The power and right of a community or state to raise funds by way of tax on persons, matters, services and materials within its territory.

The exclusive right to the ownership and control of resources, both natural and created within its territory.

The right to customs duties on goods destined for its territory and excise duties on goods manufactured in its territory.

While others posit that:

"Every state should wholly control – or partial over a set period of time its own resources while paying taxes to the federal government.... Resource control, on the other hand, is the magic wand in contemporary economics for empowering and prospering an entire cross section of the socio-economy while promoting individual and property rights expected in a true federalism.[3] Resource control is perhaps, letting people control their resources.[4]

From the foregoing, it appears that those within the Nigerian federation who wish to have control over the natural resources found within their geographical location are simply agitating for economic independence from Nigerian State. To vest the natural resources found within a particular territory or community where such resources are found, out of control or ownership of the Federal Government is simply to grant economic independence to that particular state or community. With this development quite a number of questions come to light. Is that a requirement of a federal state? Does federalism envisage resource control? Is it possible to maintain a federal state, where a particular community retains the land and natural resources under its exclusive control, or ownership? These questions may be answered by looking into the nature and scope Nigerian Federalism.

EVOLUTION OF NIGERIAN FEDERALISM

Formation of Nigeria as a state is the product of the amalgamation of the Northern and Southern Protectorates by the British colonial power in 1914. The system of government was unitary, not until 1951 when the British began to introduce the federal system of governance by establishing regional governments. Therefore, in the case of Nigerian Federalism, it is a case of devolution of power from the center to the regional or states governments. Revenue that was centrally collected by the colonial authority and later Nigerian Government was distributed by the center to the states. Nwabueze aptly captured this viewpoint when he said,

> The absence of sufficient independent state revenue implied in the extreme dependence of the state governments on federally-collected revenue is a by product of the circumstance that Nigerian Federalism originated in an existing unitary state devolving some of its powers to newly created governmental units based in three regions of the country. Had the Federation been formed by the coming together of existing independent states with already developed sources of revenue of their own, the question would have been how much of such sources of revenue should be surrendered to the new Federal Government. In the case of the Nigerian Federation, formed as has been stated by devolution from

> an existing unitary state, the central government had not only to make funds to the new regional governments for their initial take off but also to devolve to them a measure of independent powers for raising revenue of their own."[5]

This statement is much true of all present existing states in Nigeria, because state creation since 1967 was the product of the various successive military administrations. Resources needed to finance each newly created state was provided by the Government at the Centre. The central/federal government existed first and later created all the states in the country. It therefore becomes impossible or inconceivable for the states to have negotiated what in terms of resources it could concede to the central/federal government.

Ever since Nigeria came into being, state revenue has been centrally collected and distributed between the center and regional/state Governments. Although with local variation in the case of cattle and poll tax, that is left to be collected by the regional or native authority. Attention will now focus on the principles of distribution of the resources centrally collected and distributed otherwise called revenue allocation which means "the mechanism for sharing the country's financial resources among the different tiers of government in the Federation, with the overall objective of enhancing economic growth and development, minimizing intergovernmental tension and promoting national unity."[6]

REVENUE ALLOATION IN THE CONSTITUTION OF NIGERIA

Revenue allocation involves the sharing of national revenue and other resources first vertically among the federal, state and local governments, and second horizontally among the states, and among the local governments.[7] Guidance in this light can be found from the various constitutions of Nigeria.

1. The 1963 Constitution

Issues of revenue collection and sharing are a matter that is considered very important, which has a place in the constitution of Nigeria, from its independence to date. In the 1960/63 constitution, thirty percent of general import duties were paid into a distributable pool for the benefit of the regions.[8] Import duties on petrol, diesel oil and tobacco were paid in full to the region to which the product was destined in full percentage less administrative expenses.[9] This equally applies to excise duties on tobacco.[10] Each region was to be paid the amount due to it as par its export of produce like palm oil, groundnuts, rubber, hides and skin etc.[11] Any royalty or mining rents derived from any region attracts the payments of fifty percent to it[12] while thirty percent goes to the Distributable Pool Account.[13]

Items 25 (part 1 of the Exclusive Legislative List) places Mines and Minerals, including oil fields, oil mining, geological surveys and natural gas under the exclusive legislative powers of the Federal Government to the exclusion of all the regions. Needless to point out that at this period mineral oil and gas were not found in commercial quantity but the solid minerals mined in various locations of the country were in commercial quantity such as tin and coal. From the provisions of the 1960/63 constitution, there is nothing to suggest that the ownership of the mineral resources or any other revenue is vested in the community or people where such mineral or natural resources were found. But as earlier pointed out a predetermined sharing formula of both the Natural and Mineral resources were to be shared among the federating units.

The 1979 Constitution

Issues relating to revenue sharing are not spelt out in the 1979 constitution in a way and manner that is clearly and explicitly stated in the 1960/63 constitution. But a distributable pool account was created called the Federation Account into which all the revenues from whatever sources collected by the Federal Government should be paid.[14] The distribution to the Federal, states and local governments from the Federation Account is to be "on such terms and in such a manner as may be prescribed by the National Assembly."[15] The National Assembly is vested with powers to make laws for the distribution of the Nations revenue, however, it appears that the constitution did not make provision for any percentage to be given to any area where any natural resources could be found for the purpose of computing its share from the Federal Collected Revenue.[16]

Similarly, like the 1960/63 constitution, mines, and minerals including oil fields, oil mining, geological surveys and natural gas was placed in the exclusive legislative list for the Federal Government to legislate.[17]

The 1999 Constitution

In the matter of revenue sharing, one can submit that the 1999 constitution is unique, in the sense that unlike all the previous constitutions it made specific provision for the inclusion of the principle of derivation from any natural resources. Thus the Revenue Mobilization and Fiscal Commission, and the National Assembly must take that into account whenever a national revenue allocation formula is to be enacted.

The Constitution States:

The president, upon the receipt of advise from the Revenue Mobilization 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 percent of the revenue accruing to the Federation Account directly from any natural resources[18]

The above quoted provision and indeed its provisor talks of a principle of derivation of not less than thirteen percent from any natural resources. There is nothing in the section or anywhere else in the constitution that suggest or implies a particular community or state or region to own any natural resources found within its territory. It is submitted that the National Assembly is empowered to include the principle of derivation from any natural resources while formulating any revenue allocation formula. Such principle of derivation must not be less than thirteen percent, which simply means the minimum percentage has already been prescribed by the constitution. The National Assembly is at liberty to prescribe a revenue allocation formula that could reach as much as Ninety-Nine percent to a particular state where such natural resources is derived from if the necessity and desirability of doing so arises. A high degree of flexibility is given by the 1999 constitution in this matter.

OWNERSHIP OF MINERAL RESOURCES IN NIGERIA

The constitution of Nigeria vests the ownership of mineral resources in the Federal Government of Nigeria. That being so, neither the states nor the local governments or any community for that matter can attempt to assert ownership of the mineral resources found in their respective states or local government area or territory. Moreover the ownership of the Federal Government as far as mineral is concerned goes beyond the land but extends to the exclusive economic zone of the Federation.

> Section 44(3) of the 1999 Constitution provides that:
> "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."

Not only did the constitution vest the Government of the Federation with ownership of all the mineral resources found within the Nigerian territory but equally vest it with control by placing it under item 37 of the Exclusive Legislative List

In addition to this constitutional provision the Mineral Act provides that the entire property in and control of all minerals in, under or upon any land in Nigeria, and of all rivers, streams and water courses throughout Nigeria, is and shall be vested in the State, save in so far as such rights may in any case have been limited by any express grant made before the commencement of this Act.[19]

What then is the justification for the principle of derivation in the revenue allocation formula enshrined in the constitution?

Indeed a good justification exist for the principle of derivation in the constitution, most especially as it affects the oil producing states. It is beyond doubt that oil exploration is attendant with various environmental hazards and degradation. Therefore a special allocation for the treatment and rectification of the destroyed land, and people's livelihood cannot be overemphasized. Professor Nwabueze has captured the essence, thus,

> "A special allocation of revenue for the development of the particular areas in the mineral producing states from which mineral is extracted is justified by the fact that the production of minerals creates hazards to life and property in the area concerned, and causes a general degradation of the environment and of the ecology of the producing areas, which create for the state governments concerned the additional responsibility for the increase cost of welfare, and the rehabilitation of the people and areas concerned. The case for a special allocation seems therefore incontestable."[20]

However, it is difficult to understand the special allocation to the mineral producing states based on the value of mineral extracted, most especially if it is based on the premise that the state governments are the owners of the land, and as such entitled as of right to the rent paid by the mining companies for operations in their territories, whether it be prospecting, exploration or actual mining operations. This viewpoint cannot be supported in law or even logically if the earlier submission is anything to go by. Thus Nwabueze did not mince words in stating that: "The special grant.... to the mineral producing states based on the value of the minerals extracted from their respective territories must therefore find justification in some unarticulated consideration which may be political or moral."[21]

A leading Nigerian Historian Dr. Bala Usman had this to say on the issue of land and mineral being owned by some people or communities.

> "The claim that are made about people owning land are meaningless because nobody's ancestors has brought land to this place; nobody has brought any water; nobody has brought any vegetable matter. All the things from which we derive the basic mineral and agricultural resources are

> not made by anybody's grand father or great grand father, or by any tribal group or any individual, they are made by God, they are part of nature. What happens is that people come and inhabit some areas at some particular time. When they inhabit these areas government arises which claim sovereign rights and a system of law develops. Under this system law, the sovereignty over the land and resources is vested in the government, whether it is a monarchy, plutocracy – whatever type of government you have, the sovereign will exercise that right."[22]

EMERGING ISSUES IN NIGERIA'S FISCAL FEDERALISM[23]

As earlier pointed out, one of the most significant innovation of the 1999 constitution is the express inclusion of the principle of derivation of not less than thirteen percent of the revenue accruing to the mining of oil fields in Nigeria or in the alternative what amounts to 13% of the oil revenue to be accrued to the states in the oil producing areas? This inter-alia was the issue that squarely came before the Supreme Court of Nigeria in A.G. FEDERATION V. A.G. ABIA STATE (No 2)[24]

In this case there arose a dispute between the Federal Government, on the one hand, and the eight littoral states Akwa-Ibom, Bayelsa, Cross-River, Delta, Lagos, Ogun, Ondo and Rivers States on the other hand, as to the southern (or seaward) boundary of each of these states. The Federal Government contends that the southern (or seaward) boundary of each of these states is the low-water mark of the land surface of such state, or, the seaward limit of inland waters within the state, as the case so requires. The Federal Government, therefore, maintains that natural resources located within the continental shelf of Nigeria are not derivable from any state of the Federation. The eight littoral states do not agree with the Federal Government's contentions.. Each claims that its territory extends beyond the low-water mark onto the territorial water and even onto the continental shelf and the exclusive economic zone. They maintain that natural resources derived from both onshore and offshore are derivable from their respective territory and in respect thereof, each is entitled to the "not less than" 13 percent "allocation as provided in the proviso to subjection (2) of section 162 of the constitution."

The Supreme Court, per Ogundare J.S.C. held that

"... I hold, and determine, that the seaward boundary of a littoral state within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from that sate pursuant to section 162(2) of the Constitution of the Federal Republic of Nigeria 1999 is the low-water mark of the land surface thereof or (if the case so requires as in the

(Cross River State with an archipelago of Islands) the seaward limits of inland waters within the state."

Simply put the import of this Supreme Court landmark judgment is to the effect that the proviso to section 162(2) of the 1999 constitution is that, it is only oil revenue derived from the land surface of any littoral states that will entitle such a state to the 13% of the total revenue derivable therefrom and that calculation does not extend to the amount of oil revenue derived from the offshore i.e. the sea extension of the Nigerian boarder.

Revenue sharing formula being political atimes most especially where serious political pressure could be garnered, it could sometimes give way to crass legalism. The littoral states were disappointed by the Supreme Court judgment in the case of A.G. Federation V. Abia State. Political pressure was undoubtedly mounted on the Federal Government to which it verged, and sought for political solution to the problem. The result is the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act, 2004. The law is stated hereunder:-
As from the commencement of this Act, the two hundred metre water depth isobaths contiguous to a state of the Federation shall be deemed to be a part of that state for the purpose of computing the revenue accruing to the Federation Account from the State pursuant to the provisions of this constitution of the Federal Republic of Nigeria, 1999 or any enactment.

Accordingly, for the purposes of application of other principle of derivation, it shall be immaterial whether what was accruing to the Federation Account from a state is derived from natural resources located onshore or offshore.

With promulgation of this Act, all oil revenue accruing to the Federal Government irrespective of its sources whether onshore or offshore, thirteen percent of such total revenue shall be paid to the oil producing states in the Niger Delta, this notwithstanding even if a littoral state is not an oil producing state.

Neither the Supreme Court judgment in A.G. Federation V. Abia nor the Onshore/Offshore abrogation law could rightly be said to have brought the issue to conclusion. Twenty-two (22) Governors of the federation have headed for the Supreme Court seeking the determination of the constitutionality of the Onshore/offshore Dichotomy Act, 2004 in the application of the principle of derivation, in the case of A.G. Adamawa State & Ors V. A.G. Federation.[25] The Supreme Court unanimously dismissed the case and held that while the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act, 2004 is concerned with the computation of revenue accruing to the Federation Account and notional extension of the state boundaries, the provision of section 44(3) of the 1999 constitution which vests the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria, in the Government of the Federal Republic of Nigeria, etc is about the ownership, control and management of natural resources by the Government of the Federation. Thus since the objects of the provisions are at variance, they are not in conflict.

On the other side of the divide, the people of the Niger Delta Area have not abandoned their struggle for the resource control.[26] The agitation continued with taking oil company personnel as hostages, blowing oil pipelines etc is now the order of the day in the Niger Delta Area

CONCLUSION

All the Nigerian Constitutions from the time of colonial administration to independence and post independence have not vested any community or people with the ownership of any natural resources. Resources, both natural or in form of royalty or taxation is owned collectively and remain in trust for the common good and well-being of all Nigerians irrespective of where such revenue is realized from. To be specific, the present Nigerian Constitution vests the ownership of the mineral resources in the federal government. It enjoins the Federal Government to take into consideration the principle of derivation of not less than thirteen percent to the states where such minerals are found. The thirteen percent is supposed to be used to take care of the ecological devastation caused to the people of the Niger Delta as a result of oil exploration going on in that particular area and not because they own the oil and gas found in that territory.

The principles of federalism are somewhat misconceived by some states in the Federation. A distinguished constitutional scholar captures the situation in the following words in extenso:

> *"The tendency has been for a state government to view itself as "owning" the territory comprised within the state, which creates between it and the people living in the state some kind of personal bond, such as characterizes the relation of a sovereign to his subjects, with the power of the one to exact paramount allegiance from the other. The essential attribute of ownership or dominion is its paramountcy. It implies that the owner's right to control, manage and dispose of the thing owned is superior and paramount over any other rights that may exist in the thing in favour of others. Conceiving themselves therefore as owning the territory and people comprised within their respective states, some of the state governments believe that they have, by virtue of that, a peculiar right which is superior and paramount over that of the Federal Government, to control them and to claim their allegiance."*[27]

This attitude of assuming, believing and behaving in such a manner that the states have some exclusive right in terms of its territory and people is a threat to the principle of federalism and the survival of Nigerian Federation.

Nigeria is one indivisible and indissoluble sovereign state consisting of states and a Federal Territory.[28] Each of the states comprising or consisting of the units of the whole have been clearly stated. The country Nigeria is one that cannot be divided or dissolved as a sovereign nation or state. None of the states is autonomous to the extent of acquiring sovereignty. For any state or group of states to assume that they are not like other states in the federation or that they have acquired or have rights similar to that of the Federation in ownership of land or natural resources is tantamount to simply ignoring the reality as is clearly expressed under the Nigerian Constitution and law or at best is a misconception of the federal principles or federalism.[29]

ENDNOTES AND REFERENCES

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1. is the recent coinage of the Southern Governors particularly Governor James Ibori of Delta State.
2. gay I. Nigeria: Federalism, the Constitution and Resource Control. Text of a speech delivered at the fourth sensitization programme organized by the Ibori Vanguard at the Lagoon Restaurant, Lagos, www.dawudo.com/igbuzor/htm.
3. Clement Ikpatt et al Nigeria's Mineral Resources: A Case for Resource Control.... www.nigerdeltacongress/com/articles
4. Strengthening Nigeria's Diversity through resource control being text of an address by Dr. ChimarokeNnamani, governor of Enugu State address to the conference of Southern Governors. January 2001, p.5. www.dawudo.com/nnamani/.htm
5. Nwabueze, B.O. (1983) Federalism in Nigeria Under the Presidential Constitution Sweet & Maxwell p.181182.
6. T.Y. Danjuma; Revenue Sharing and the Political Economy of Nigerian Federalism. The Nigerian Journal of Federalism, 1994, Vol.1 No.1 p.45.
7. Ibid p.45.
8. S.136(1) 1960 Constitution of the Federal Republic of Nigeria
9. S.137(1) 1960 Constitution of the Federal Republic of Nigeria
10. S.138 1960 Constitution of the Federal Republic of Nigeria
11. S.139 1960 Constitution of the Federal Republic of Nigeria
12. S. 140(1) 1960 Constitution of the Federal Republic of Nigeria.
13. S.140(2) 1960 Constitution of the Federal Republic of Nigeria
14. See S.149(1) 1979 Constitution
15. See S.149(2) – (4) 1979 Constitution
16. Section 150 19799 Constitution alluded to the principle of derivation on tax or duty on matters specific in item D part II of the Second Schedule to the Constitution.
17. See Item 37, Part I Exclusive Legislative List, Second Schedule to the 1979 Constitution.
18. See Section 162(2) 1999 Constitution.
19. See S.3(1) Mineral Act Cap 227 LFN 1990, s.1(1),(2) Petroleum Act Cap 350 LFN 1990.
20. Nwabueze B.O. op. cit. p.211.
21. Nwabueze B.O. opp. cit. p.212
22. See Dr. Bala Usman, Weekly Trust, 15 May 2000 p.2
23. Sani, G.K. <u>Emerging Issues in Nigeria's Fiscal Federalism</u> Vol. 27 No.3. July September, 20(p.10.
24. (2002) 6 NWLR pt 764 P543 at 660.
25. (2005) 18 NWLR 587
26. (see Editorial the Guardian Vol. 21, No.9, 435, Tuesday Sept. 21, 2004.
27. Nwabueze B. O. (1983) Federalism in Nigeria Under the Presidential Constitution p.357.
28. See S.(2)(1) 1999 Constitution.
29. For a better understanding of state/federal relationship see White V. hart 13 Wall 646 (1872), a Massachusetts V. Mellon 262 US 447 (1923)