RESOURCE CONTROL:
BEYOND THE SUPREME COURT JUDGMENT - POLITICAL SOLUTIONS

By Professor I.E. Sagay, S.A.N.

PRESENTED
AT THE CONFERENCE ON CHALLENGES OF DEMOCRATIC CONSOLIATION IN NIGERIA.

UNDER THE AUSPICES OF
THE GOVERNMENT OF EDO STATE.

AT THE CULTURAL CENTRE
BENIN - CITY

2ND & 3RD AUGUST 2002

RESOURCE CONTROL:
BEYOND THE SUPREME COURT
JUDGMENT - POLITICAL SOLUTIONS

By Professor I.E. Sagay, S.A.N.

1. Introduction

In Attorney - General of the Federation v The Attorney - General of Abia State and Thirty-six Others[1], better known as the Resource Control case, the Supreme Court denied the Coastal States of Nigeria, ownership of their continental shelves. Some of us have been able to demonstrate that this judgment was wrong.[2] I think it is now generally accepted that the Supreme Court was indeed wrong and that a coastal state iS inseparable from its continental shelf and vice versa.

One obvious consequence of this wrong decision by the Supreme Court, is that in determining the revenue due to a coastal state, the principle of derivation will not be extended to the mineral resources in its continental shelf. Rather, all the proceeds of the minerals exploited therein will go straight into the Federation Account to be shared by the Federal Government and all the 36 states.

Worse still, this means that whilst bearing the brunt and devastating consequences of the extraction of these minerals in the subsoil of its continental shelf, the coastal state will have no say whatsoever in the manner, quality, rate and style of production. If we consider that the petroleum bearing states and communities are primarily concerned with environmental factors and sustainable development, whilst the Federal Government and its Oil Company Partners are primarily concerned with speedy and expanded production, and dollar returns, it becomes clear, that total loss of control in the production process has very ominous portends for the producing states and communities. It is therefore clear that when those who are enlightened about the processes and consequences of the petroleum extraction industry call for resource control, their concern goes far beyond a mere increase in the revenue from the petroleum resources produced from their soil.

2. The Meaning of Resource Control

1 See [2002] Vol. 16 WRN, P.1

2. See I.E. Sagay "The Resource Control Case: where the Supreme Court Erred", in the Guardian 29th & 30th and 1st May, and Fred Agbeyegbe also in The Guardian, 22nd, 23rd and 24th July 2002.

First what do I mean by the term resource control?

Resource control in my view involves two major components:

i) The power and right of a Community or State to raise funds by way of taxation on persons, matters, services and materials within its territory, for example, the right to raise and control Value Added Tax (VAT).

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

Resource Control generally involves acquiring direct political power over resource production, management and utilization in the area of location to ensure regeneration of the environment and over all sustainable human development of the people. (Segun Ige, Guardian 5 June 2001)

Resource Control which in certain circumstances can be referred to as fiscal federalism (in a federation) goes hand in hand with true federalism. This was recognized and implemented faithfully in the Independence and Republican Constitutions (1960 and 1963).

3. Why Resource Control?

Why is there such an insistent demand for resource control, particularly amongst the indigenes of the Niger Delta area? Well let us hear what President Truman said, when he made the original resource control declaration with regard to the continental shelf of the United States of America in September 1945.

> "Whereas recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken: and
>
> Whereas it is the view of the Government of the United States that the exercise of Jurisdiction over the natural resources of the suboil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation from the shore, **since the continental shelf may be regarded as an extension of the land mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory**, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources."

It is clear, that apart from the fact that (i) the continental shelf is an extension of the land mass of the coastal nation and that (ii) the resources in the continental shelf form a seaward extension of a pool or deposit lying within the coastal states territory, President Truman had a third reason for his resource control declaration. This is control for the purpose of conservation of the resources and conservation in this context includes environmental considerations.

Indeed the really vital aspect of the concept, is involvement in the actual control and management of the resource. Central to the struggle for resource control is the right of the States and Communities most directly concerned (that is the producing States and Communities) to have a direct and decisive role in the exploration for, the exploitation and disposal of, including sales of the 'harvested' resources. It is those who live with the devastating consequences of greedy, cheap, crude, reckless and irresponsible exploitation practices and procedures,

who must control the mode and management of commercial production in order to ensure an environmentally friendly production, process, elimination of pollution, protection of the lands, forests, rivers and atmosphere. It is they who will insist on planned and controlled production to ensure the progressive replacement of the non-renewable resource, by a renewable product that is free of pollution and other environmental hazards.

Mere increase in revenue without control and management is short sighted, and deadly and it condemns the peoples of the Niger-Delta to a present without a future.

The delicate, fragile and precarious condition of the Niger Delta environment was eloquently revealed in the phase one Report of the Niger Delta Environmental Survey, which contained the following findings[3].

> "Some of the high priority environmental problems include silting, incursion of exotic species (water hyacinth), erosion, flooding and land subsidence. Oil industry related problems generally arise from exploration, development and production activities, oil terminal operation, refining processes, oil transportation, construction and dredging. Such problems include: land degradation, soil fertility loss, agricultural yield decline, shortened fallow, intensive deforestation, bio-diversity depletion, fisheries decline, oil spillage, gas flaring, sewage and water pollution, and other industrial contamination. Oil-related high priority social problems arising from traditional practices and modern industrial activities are strictly non-environmental as such, but nonetheless interface with environmental functions and processes. These include: various forms of oil-related conflicts – community – oil company/conflict – Government/intra/inter community conflicts; decaying social-cultural values and practices, crime, population displacement, poor transportation,

3. Taken from Dr. Gramaliel Onosode's Paper entitled "Environmental Management and Sustainable Development in the Niger Delta, in Environmental Problems of the Niger Delta, Edited, by Osuntokun, published by Friedrich Ebert Foundation, 2000.

> housing and infrastructural decay, poverty and unemployment, inadequate compensation and high cost of fuel, among others."

The general disorientation, distortion and disruption which the petroleum industry has introduced into the life of the peoples of the Niger Delta and their environment is openly admitted by the foreign oil companies and their officials.

Thus in a paper presented at a forum on "Community Relations and Sustainable Development" in April, 1997, the Deputy Managing Director of Shell Petroleum Development Company of Nigeria (SPDC), Mr. E.U. Imomoh admitted that the Company's operations had had grave disruptive effects on the socio-economic life of the peoples of the Niger-Delta. According to him, as a result of the operations of oil companies, which acquire large tracts of land, for their purposes, there was increasing scarcity of farmland.

> "Crop yields are dropping, farmers are migrating to marginal land. Increasing numbers of fishermen are catching more collectively than ever before but, crucially, less individually. This coupled with a social infrastructure that is not delivering the services required, high unemployment, a stagnant economy and a rising frustration among oil-producing communities who feel they have not had a fair share of the wealth beneath their land has brought a highly political atmosphere and the oil industry finds itself involved in a whole range of issues whether or not these are a consequence of its activities."

Some statistics of the consequences of oil production in the Niger Delta, will no doubt explain why our people are being subjected do so much devastation.

(i) SPDC (i.e, the Shell Joint Venture Company, which nominally involves the NNPC and some other foreign Oil Companies) operates oil mining leases covering an area over 31,000 square kilometers, i.e., about half the entire area of the Niger Delta.

(ii) The same SPDC, i.e., Shelf Production and Development Company, has an extensive network of about 900 producing wells and, 6,300 kilometres of oil and gas pipelines i.e., more than the distance between Lagos and London.

(iii) The company also has over 100 flow stations/gas plants.

(iv) Before the NLNG gas plant went into production in October 1999, 95% of all g as produced along with oil, known as associated gas, was flared after separation from oil.

(v) In volume, this came to two billion standard cubic feet of gas which was flared into the Nigerian atmosphere every day. Apart from the staggering loss of revenue this represented ($3.1 billion per year) the cost in terms of degradation of the environment and to the health of the people of the oil producing communities was incalculable. However, the coming on stream of the NLNG (Nigerian Liquified Natural Gas) production plant has not made much of a difference because 76% of all associated gas is still being flared.

(vi) The comparative statistics of gas flaring world wide, shows that Nigeria is by far the greatest victim of this crime. A 1995 World Bank Report revealed the following disturbing information[4]

Nigeria	76% (including non-associated gas)
Saudi Arabia	20%
Iran	19%
Mexico	5%
Britain	4.3%
Algeria	4%
Ex-USSR	1.5%

[4] Taken from Human Ecosystems of the Niger Delta, Op. Cit p. 144

USA	0.6%
The Netherlands	0%

This clearly shows that whilst 76% of all the gas (including non-associated gas) produced in petroleum operations in Nigeria is flared, in The Netherlands, the home state of Shell, flaring is zero. In the U.S.A., the percentage is 0.6%, U.K. 4.3%, Iran 19%, Saudi Arabia, 20%. The conclusion is obvious, that whilst pollution is prohibited in the Western developed world, it is permissible in the underdeveloped countries where human lives are less valuable.

(vii) There are now 11 oil companies operating 159 oil fields and 1,481 wells. Shell has 83 fields from 748 wells, all accounting for 50% of Nigeria's total volume. This is followed by Chevron (17 fields/220 wells), Agip (20 fields/137 wells) Elf (6 fields/116 wells) and Mobil (17 fields/104 wells). Of Africa's 66 billion barrels of reserves, Nigeria had 20 billion as at 1997. This will last till about 2027 at current production level. The bulk of the oil production is in the Niger Delta.

It is therefore clear that our orientation as the Victims of the petroleum extraction process must be towards environmental protection sustainable development, the nurturing of renewable resources and preparation for a post petroleum existence. Known petroleum resources will be exhausted in 28 years at the current rate of production. We must now invest in building an economy outside oil production.

The unfolding tragedy of the Niger Delta, is that those who control, manage and exploit its petroleum resources, i.e., the oil companies and those in control of the Federal Government, live far away from the Niger Delta.

Therefore, when in another 28 years, as has been confirmed by experts, the Niger Delta oil reserves are finally exhausted, the Oil Companies and the Federal Government, will pull out, lock, stock and barrel, to look for new hunting

grounds, leaving the people of the Niger Delta to sink in the poisonous and toxic 'sewage' they have created and left behind.

The struggle for resource control therefore, is not merely one for increased revenue, from the proceeds of one's resources; but more importantly it is a move by the people of the Niger Delta to take their destinies into their own hands in order to ensure the environmental protection and restoration of the Niger Delta Territory to a productive and living one, and to insist on environmentally friendly and best oil fields practice in the oil and gas extraction process. It is a programme for ensuring the re-investment of proceeds of petroleum sales in infrastructural development, environmentally sensitive industries, and in agriculture and, aquaculture. It is a campaign for the re-forestation, renewal, detoxification and restoration of the lands and waters of the Niger Delta and the introduction and development of renewable resources. Thus resource control has as part of its primary objective, how to ensure life and a good standard of living for the people of the Niger Delta, long after the exhaustion of its petroleum reserves, which have become its nemesis.

4. Political Solution

A political solution to the crises brought about by the Supreme Court judgment should in my view be implemented in 3 phases - the immediate, the short term and the long term or final solution.

(i) Immediate Solution

The immediate step that needs to be taken, has been proposed to the Presidential Committee set up to find a political solution to the crises. This will involve the President exercising his powers under section 315 of the Constitution to amend Chapter 16 of the 1990 laws of the Federation of Nigeria, i.e., Allocation of Revenue (Federation Account, etc.) Act, 1990, as amended by Decree 16 of 1992, which abrogated the on-shore off-shore dichotomy introduced by Gowon in 1971. All the President needs to do is

to substitute the term "Natural Resources" for Mineral Resources and 13% for 1% in Section 1(d)(iv) of the Act.

In this regard, Onu, JSC made the following helpful suggestion in his judgment in the Resource Control case.

> "The Constitution provides for "*not less than 13%* of the revenue accruing to the Federation Account directly from any *natural resources*" to be distributed on the principle of derivation. Contrast this with Cap. 16 which talks of 1% of the revenue accruing to the Federation Account derived from minerals which is to be distributed. These are undoubtedly inconsistent provisions and by the provision of sections 1(3), 313 and 315(1) of the Constitution the provisions of section 1 of Cap. 16 that are inconsistent with the Constitution must perforce give way to the Constitution.
>
> Subsection 2 of section 315 of the Constitution provides for modification of an existing law to bring it into conformity with the provisions of the 1999 Constitution when it enacted as follows:
>
> > "(2) The appropriate authority may at any time by order make such modifications in the text of any existing law as the appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of this Constitution."
>
> The word modification is defined subsection (4) of section 315 as including:
>
> > "addition, alteration, omission or repeal."

> The appropriate authority in respect of Cap. 16 has been stipulated to be the President. Hence, by the self same Constitution the President is empowered to add to, alter, omit or repeal to bring it into conformity with the Constitution."

So the President can now make these modifications in Chapter 16 of the 1990 Law on very good authority.

The effect of these amendments would be to return the country to the status quo ante before the Resource Control judgment was given. Mineral producing States will thus be entitled to 13% as derivation with regard to mineral resources extracted from both their land and continental shelves.

(ii) **Short Term Solution**

The next step would be a short term solution involving legislation by the National Assembly. First, the National Assembly should re-legislate Section 140(6) of our 1963 Constitution which General Gowon arrogantly and oppressively repealed in 1971. That Section simply provided as follows: "For the Purposes of this Section, the Continental Shelf of a Region shall be deemed to be part of that Region." The restored legislation should provide as follows: "For the purposes of the derivation provision in Section 162(2) of the 1999 Constitution, the Continental Shelf of a state shall be deemed to be part of that State."

This should then be followed by appropriate legislation under Section 162 (2) of the Constitution stating the percentage of revenue accruing to the Federation Account from the state's natural resources which should be paid to the state under the derivation principle. This should not be less than the 50% as it was in the 1960/63 Constitutions.

Constitutionally and legally, the process should be a simple and straight forward one. By Section 162(2) of the 1999 Constitution, the National

Assembly can by legislation determine the percentage of the proceeds of states natural resources they can receive by way of derivation. Whilst this percentage must not be less than 13%, it has no upper ceiling. The real problem will be the willingness of the legislators from the other parts of the country to support the proposal. The attitude of the non-oil producing states towards the plight of the Coastal States, during the hearing of the Resource Control case was unsympathetic and hostile. One could rightly state that most of the non-oil producing states simply plunged their knives into the already open and bleeding wounds of the Southern Minorities or Niger Delta States.

Typical of this was the statement of defense and counter-claim of Bornu, Jigawa and some other Northern States, which not only supported the Federal Governing claim, but went far beyond it thus:

Jigawa State

"10. WHEREOF the 17th defendant claims determination of this Honourable Court that:-

(a) The natural resources derived from any part of Nigeria are deemed to be derived from Nigeria and not from a particular area where the resources may be physically located.

(b) The Federal Republic of Nigeria is a state and not a section thereof when interpreting the economic agenda prescribed by the constitution.

(c) That by section 162(2), all states represented by the defendants in this suit are equally entitled to at least 13% of the revenue accruing to the Federation Account directly from any natural resources

(d) That the rule of not less than thirteen per cent enshrined in the constitution under section 162(2) shall be applied based on principle of equally and justice to embrace all the states forming the Federation.

In its own counter-claim, Bornu state trivialized the grave situation in which the southern minority oil producing states found themselves by making the following claims:

"2. The 8th defendant avers that the plaintiff has been generating revenue from the Natural Resources which are from the 8th defendant's State.

3. The 8th defendant states that the Natural Resources referred to in paragraph 2 of the Counterclaim are:-

Minerals and Agricultural products, namely:- Precious Stones and Metals, Potash, Gypsum, Gold, Livestock, Fish, Hide and Skin, Horns, Groundnuts, Beans, Mangoes, Grains, Pepper, Cotton and Gum Arabic.

4. The 8th Defendant states that the plaintiff generates and/or derives revenue from these Natural Resources by charging export duties, levies, taxes and by issuing licenses for dealership, processing and mining of these Natural Resources.

5. That the 8th defendant contends that the plaintiff failed and/or refused to pay the 8th defendant 13% of the revenue derived from these Resources.

6. Whereof the 8th Defendant/counter claimant claims against the plaintiff the following:-

(a) A declaration that the 8th defendant/counterclaimant is entitled to 13% of the total revenue accruing to the Federation Account directly from the National resources mentioned above."

Although this claim may appear humorous, it was clearly aimed at neutralizing the serious counter-claims of the coastal states by trivializing the meaning of natural resources and therefore the basis of the counter-claim of the Coastal States. For if groundnuts, beans, pepper, grains, etc. are all natural resources as stated in the constitution, then the primary basis of the claim of the Coastal States, is neutralized.

These are clear evidences of what I refer to as celebrating injustice. For the plight of the Coastal States and peoples is well documented. Pollution of the environment, poisoning of the atmosphere, lands and waters, deprivation of livelihood, emergence of new types of cancers and other deadly diseases brought about by oil operations; the list of travails and

devastation is endless. But in place of sympathy, the peoples, these victims are met by cynicism, opportunism and disregard.

What I am seeking to establish here is that we might have a hard time getting necessary legislation passed, to restore the legal ownership of the Coastal States' Continental Shelves to them and to raise the percentage of revenue accruing to them by derivation from 13% to 50%.

(iii) **Long Term Solution - National Conference**

In the Resource Control case, the Supreme Court made some very fundamental pronouncements on the legal and international status and state of affairs of Nigeria's pre-colonial communities.

Those calling for true Federalism, including fiscal federalism, re-structuring, drastic decentralization and of course a national conference to debate and negotiate the terms of a new Nigeria were vindicated by these epic statements of the Supreme Court.

> **"Until the advent of the British colonial rule, in what is now known as the Federal Republic of Nigeria (Nigeria, for short), there existed at various times various sovereign states known as emirates, kingdoms and empires made up of ethnic groups in Nigeria. Each was independent of the other with its mode of government indigenous to it. At one time or another, these sovereign states were either making wars with each other or making alliances, on equal terms. This position existed throughout the land now known as Nigeria. In the Niger Delta area, for instance there were the Okrikas, the Ijaws, the Kalabaries, the Efiks, the Ibibios, the Urhobos, the Itsekiris, etc. Indeed certain of these communities (e.g. Calabar) asserted exclusive rights over the narrow waters in their area. And because of the terrain of their area,**

they made use of the rivers and the sea for their economic advancement, in fishing and trade and in making war tools. The rivers and the sea were their only means of transportation. Trade then was not only among themselves but with foreign nations particularly the European nations who sailed to their shores for palm oil, kernel and slaves."

Thus, Nigeria was constituted by the coming together of sovereign states. This is the classic case for federalism and the presumption in such cases is that each sovereign unit surrenders the very minimum of powers to the federal body, to make it functional, whilst retaining the bulk of their sovereign powers. This authoritative pronouncement on the status of the pre-colonial states of Nigeria is even more fundamental than the resource control aspect of the case, for as contradictory as this may seem, (in view of the court's decision) this pre-Nigerian sovereign and independent status of the indigenous communities of Nigeria, and additionally with regard to the coastal peoples, their pre-colonial possession and control of their maritime territories, is the strongest case for resource control, fiscal federalism and true federalism generally.

It is therefore inevitable that the long term solution to the problem of resource control and revenue allocation is the introduction of true federalism, under which every state will have full control over its resources, whilst paying an appropriate tax (based on its income) to the center, part of which will be for the Federal Government, whilst the other part goes into a common pool for sharing amongst the other tiers of government.

Furthermore, arising, from the politically recognized six-zonal arrangement in contemporary Nigeria, a Niger Delta zone, made up of the South South States of Edo, Delta, Bayelsa, Rivers, Akaw-Ibom and Cross River have come into political existence. Although there is no law backing up such an arrangement, the states are territorially contiguous, and are united by culture, history and common exploitation and marginalisation by the Federal Government and the majority

ethnic groups in Nigeria. **It is therefore absolutely necessary for the people of the six southern minority states to establish some common political, economic and social structures on the ground, through which to plan for the political future of their area within Nigeria, or if necessary, without Nigeria.** One paramount condition for continued willing participation in the on-going Nigerian project must be the total ownership and control by the people of the South South of their God-given natural resources, or at the very least, a resort to the provisions of the 1960 Constitution on revenue allocation, particularly the proceeds of mineral resources, coupled with the right to have a decisive say in the control and management of the resource.

As an instrument for the peaceful realization of these legitimate objectives, and the recovery of ownership of the resources seized from them by the powerful majority groups, the South South should support the convening of a National Conference to discuss the basis of future political economic and social association and co-existence between the ethnic nationalities of this country. However, as an indispensable condition, we must create an environment for the unity of the fractious and quarreling ethnic groups of the Niger Delta. We cannot struggle successfully for our rights in an aggressively exploitative country, without the strength derivable from unity and mutual solidarity.

We must formulate minimum terms which any political party must fulfill before it can have our support. Such terms must include resource control as a priority. If at the end of the day, we are fully in control of our resources and our affairs, it becomes relatively irrelevant who the President in Abuja is, and what the Federal Government does.