HYDRAULIC FRACTURING: CAN LOCAL GOVERNMENTS AUTHORITIES REGULATE FRACKING IN NIGERIA?

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Hydraulic Fracturing: Can Local Government Authorities Regulate Fracking in Nigeria?

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If, and when Nigeria adopts unconventional oil extraction methods such as hydraulic fracturing (“fracking”) system as a means of oil extraction in Nigeria, all stakeholders must resolve the following questions: What measures of legal and institutional regulations should Nigerian stakeholders adopt? How the environmental and economic impacts of fracking be adequately measured and assessed in Nigeria? Will the adoption of fracking methods in oil extraction activities in Nigeria make oil exploration safer? And, whether the proposed Nigerian Petroleum Industry Bill (“PIB”) which aims to comprehensively regulate the Nigerian Oil and Gas sector, contains sufficient provisions to cover fracking? Finally, how will the restive Niger Delta Communities react to the use of fracking methods?

Fracking involves the injection of large amounts of pressurized fluids (water and chemicals) to stimulate or fracture the shale formations, causing the release of the natural gas. In other words, fracking involves the process of drilling a well several thousand feet below ground surface and then turning the well horizontally, injecting millions of gallons of high pressure fluids to fracture the shale formation in which oil and natural gas is embedded. It is an extractive method of drilling oil and gas. The method blasts open fissures in underground shale-rock formations by injecting a high pressure combination of fluids, chemicals and propants causing the fossil fuel to flow to the production well. During the fracking process, millions of gallons of fracking fluid – a mixture of water, sand and toxic chemicals – are injected into the ground to break up the shale and release natural gas. It is one of the most popular techniques adopted by the exploration and production (E & P) companies involved in the extraction of crude oil and natural gas.

Be that as it may be, the fact however remains that the technique, no doubt, has some fundamental consequences and adverse effects upon the environment. Of primary concern is the potentially damaging impact of natural gas drilling on water resources. The contamination of groundwater is of major concern for those who live near drilling operations and rely on drinking water wells. And the contamination of watersheds that provide drinking water for millions of people in cities hundreds of miles away from any natural gas drills poses a significant threat as well. The point to be noted is that the method portends far reaching implications on public health, public safety, environmental sanctity and ecological stability. As such, it is often criticised by its antagonists that the procedure usually cause harm to the public health and the environment, including but not limited to, contaminating water supplies and causing hazardous gas emissions and seismic activity near wells. As a matter of fact, the uncontrolled and unregulated fracking may often lead to unprecedented depletion of the natural resources. This will also distort and disrupt ecological balance in the water bodies and also occasion the destruction of the aquatic fauna. In the same vein, the physical environment in the form of soil and terrestrial habitats will be ultimately affected in the course of utilising the method. The cumulation of these effects results in environmental degradation and depletion.

In spite of all these adverse effects, it has still been proposed especially by the proponents, that the procedure will be of significant benefit to local economies from creating new jobs to people employed in carrying out the process to generating tax revenues to the government of a state as well as the advancement of the nation’s energy independence and expansion of the
energy sector. The abundance of the energy resulting from the increased adoption of the method will no doubt result in an expanded domestic consumption of the energy products and increase in the foreign exchange earnings through increased exports of the energy products. Notwithstanding these advantages, significant efforts must be taken towards mitigating the adverse effects of the procedure especially on the environment. In this regard, attention shall be drawn to what the local government or authority can do to address the detrimental environmental effects of fracking.

Nigerian Local Government Authorities (“LGA”) ought to play significant and vital roles in helping to mitigate the detrimental effects of the method on the state of the environment. This is vitally expedient considering the fact that most of these fracking processes almost always take place in the local area or environs. The permit and licence for the exploration, drilling, location and production of the crude oil and its constituents are usually given by the federal or state government while the location of the process is in the local area. Having regard to the directness of the effects of the process on the local environment, it is necessary that the local council be alert and ever much involved in the entire gamut of the process with a view to particularly addressing the environmental challenges and concerns of the procedure.

We propose that the Nigerians LGAs should regulate the oil exploration process by specifying applicable pre-conditions to be complied with by International Oil Companies (“IOCs”). The target of the rules/regulations are the IOCs, whose activities occasion unprecedented damage on the environment in the course of their operations. Fines and penalties may be imposed on the erring IOCs whose operations contravene the pre-conditions. Alternatively, fracking may be completely banned within the municipality of the local area.

In the United States, there is sufficient judicial authority governing fracking and oil and gas production. However, surprisingly, there exists divergent judicial opinion as to the desirability of the local authority banning fracking though from the different courts on different hierarchical level. There was first a beacon of hope for the local authority on their power to proscribe fracking. The hope dawned when the New York Court of Appeal on June 30, 2014 in the consolidated case of Matter of Wallach v. Town of Dryden N.E 3d-, 2014 N.Y. Slip Op. 04875(2014) wherein it affirmed the two lower court rulings which upheld the municipalities’ home rule authority to regulate land use- specifically by adopting zoning ordinances to restrict or ban the natural gas drilling method known as high volume hydraulic fracturing (fracking). In the case, the court declared valid the zoning ordinances enacted by the towns of Dryden and Middlefield that banned fracking within their respective borders in order to preserve their community’s “small town” character, health and environment. It further held that the zoning bans were not pre-empted by the supercession clause of New York State’s Oil, Gas and Solution Mining Law and affirmed the concept of home rule which vests local governments with broad powers to enact local laws to protect the health, safety and welfare of persons and property within their jurisdiction. A cursory look at the case suggests that the local authority can ban fracking for environmental considerations mainly. This serves as a good precedent for some local authority to regulate land use within their borders and protect their immediate environment character and health through the banning of fracking.

There is a parallel view as laid down in the most recent decision of the Ohio Supreme Court delivered on February 26, 2015 in the case of State Ex. Rel., Morrison v. Beck Energy Corporation (Case No.: 2015 Ohio-485). Herein, the Supreme Court of Ohio invalidated
local ordinances that sought to regulate oil and gas production activities. Specifically, the Court held that the Home Rule Amendment to Ohio’s Constitution does not grant municipalities the power to enact their own oil and gas permitting schemes, as the state government holds “sole and exclusive” authority over the regulation of oil and natural gas. In concluding its lead judgment, Hon. Justice French held that:

“the Home Rule Amendment to the Ohio Constitution, Article XVIII. Section 3, does not allow a municipality to discriminate against, unfairly impede, or obstruct oil and gas activities and production operations that the state has permitted…”

However, the Ohio Court only invalidated five local ordinances that conflicted with State Law, but left the door open for potentially valid local regulation in the zoning context.

The implication of this is that, although the local regulation was invalidated in the matter, the room for the possibility enactment of local regulations in respect of oil and gas production was left opened. In this context, in Ohio, zoning remains an area open for valid local oil and gas regulation. This could prompt municipalities to promulgate zoning ordinances regulating oil and gas drilling within their jurisdiction.

Both Wallach and Morrison decisions suggest that the local authority still retain a place in the production and exploration of crude oil. While Wallach gave a clear greenlight to the local authority, Morrison, while not permitting local regulation directly, still indirectly allows the local authority to enact regulatory laws with respect to oil and gas exploration within their respective borders.

In the Nigerian jurisprudence, the peculiar nature of our federalism as distinct from the American Federalism, the ownership of natural resources found within the Nigerian territory is solely vested in the federal government, which has the right to grant various types of licences to companies for oil and gas exploration. In this regard, Section 44(3) of the 1999 Constitution provides:

“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”.

Further, in the Exclusive List of the 2nd Schedule to the Constitution, mines, minerals, including oilfields, oil mining, geological surveys and natural gas are items allocated to the federal government. The federal government has set up agencies which include the National Environmental Standards Regulation and enforcement Agency (NESREA) and National Oil Spill Detection and Response Agency (NOSDRA) to regulate the environment. States, such as Lagos State, also have agencies like Environmental Protection Agency (LASEPA).

The powers and functions of LGAs as set out in the Fourth Schedule to the 1999 Constitution do not touch on environment save for the provision that the LGA can participate with a State government regarding the development of agriculture and natural resources other than the exploitation of minerals.
Concluding, more often than not, the local areas in Nigeria are the most directly affected by the oil spillages arising from petroleum exploratory activities. The pertinent question to ask now is, does the fact that the LGAs have no regulatory power in respect of oil and gas exploration would also preclude the LGAs from promulgating bye-laws that would protect their immediate environment from degradation? We answer in the negative. Local government councils and areas in Nigeria are the most vulnerable to the harmful effects of improper and the hydro fracturing drilling process. Further, they are the most opportuned to gather all necessary information and data for expedited and appropriate control and amelioration of any harmful effect of oil spillage and/or accidents. We propose that the Nigerian environmental protection laws and jurisprudence be amended towards adopting the American model whereby LGAs make bye-laws and regulate oil exploration in practice, in conjunction with the State and Federal governments. If, and when it is ascertained that fracking poses grave environmental effects to the Nigerian resources, based on Wallach, the Nigerian local authorities should be allowed to ban fracking and other deleterious oil exploratory activities.

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