

# **Excess crude oil account, 1999 constitution and the rule of law**

**Written by Akpo Mudiaga Odje**

The foundation of every modern democratic society is premised on the Rule of Law which accentuates constitutional order and legal certainty. In such a society, the activities of government and its agencies are duly regulated by the laws of the land principally referred to in a federal system as the “Constitution.”

Regrettably, however, in Nigeria, the executive as previously personified by our former President Olusegun Obasanjo and the incumbent Alhaji Umaru Yar’Adua, seem not to be in a hurry to comply with the dictates of our Constitution, especially Section 162(1), (2) and (10) which establishes a Federation Account as well as the method for sharing the proceeds in same amongst the three tiers of government. This is the *raison detre* for this discourse.

## **What is Excess Crude Oil Account?**

The vexed issue of excess crude oil proceeds accruing from the sale of crude oil in the Niger Delta has remained in the front burner in recent times. It is an account into which the excess of the amount of the budget benchmark of the sale of crude oil is paid into since September 2004. At a time, a barrel of crude oil sells for over \$147 US dollars, yet the Federal Government paid only \$59 US dollars into the Federation Account.

If we may ask, Nigerians, where did the balance of almost \$88 dollars x 2.45 million barrels a day go? With this calculation, the people of the Niger Delta got only 13% of \$59 dollars instead of 13% of \$147 dollars as provided by the Constitution as at March, 2008. Yet, the Federal Government speaks about the Rule of Law! In 2006, we budgeted with \$35 per barrel when same was selling for \$70 per barrel. This is the conundrum we seek to unravel by asking the National Assembly and the Government to pass the Freedom of Information (foi) Bill without any further delay.

Section 162(1), (2) & (10) of the 1999 Constitution prescribes mode of sharing the revenue of the Federation. Section 162(1) for ease of reference provides that: “The Federation shall maintain a special account to be called “the Federation Account” into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Force, the

Ministry or department of government charged with responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja.”

Subsection (2) also provides that: “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.”

And subsection (10) states that: “For the purpose of subsection (1) of this section, “revenue” means any income or return accruing to or derived by the Government of the Federation from any source.....” Indeed, applying the literal canon of interpretation on the above provisions, it is manifestly lucid that there shall be a Federation Account into which “all revenues” must be paid into.

The exceptions as stated above are: (a) Proceeds from the personal income tax of the personnel of the armed forces of the Federation; (b) The Nigeria Police Force; (c) The Ministry or department of government charged with responsibility for Foreign Affairs; and (d) The residents of the Federal Capital Territory, Abuja. It must be pointed out straightaway that there is clearly nothing like Excess Crude Oil Proceeds in the above exceptions! If the lawmakers had intended to include it, they could have expressly said so in Section 162(1) above.

The above literal interpretation as hitherto sequenced subject to Section 163 thereof, has been upheld by the Supreme Court in the case of Attorney-General of Ogun State Vs. Attorney-General of the Federation [2002] 18 NWLR (pt.798) 232. At page 283 paras. E-H, the prolific Uwais, CJN had this to say: “It seems to me that the provisions of section 162 subsections (1) and (10) of the 1999 Constitution are general in nature while those of section 163(b) of the Constitution, which deal in particular with capital gains tax and stamp duties, are specific.

Therefore, the latter provisions override the former for generalibus specialia derogant (i.e. special things derogate from general things). Therefore, it follows that there is no basis on which capital gains tax and stamp duties collected by the Government of the Federation could for the time being be paid ... into the Federation Account...”

Consequently, based on the above authority, there is no provision in our Constitution for the amorphous contraption of the executive called “Excess Crude Oil Account.” There is no name or nomenclature of that nature throughout the 320 Sections of the 1999 Constitution. Thus, the creation of so-called “Excess Crude Oil Account” is an attempt to enlarge the provisions of the Constitution which is therefore null, void and illegal.

The Federal Government personified by Mr. President must realize that he is bound to obey the Constitution. In *Attorney-General of Abia State Vs. Attorney-General of the Federation* (2002)6 NWLR (pt. 764) 264 at 479 paras D-F, the sagacious Kalgo, JSC made the apposite remarks that: “...the Supremacy of the Constitution has made it abundantly clear and in no uncertain terms that the provisions of the Constitution are superior ... and are binding and must be observed and respected by all persons and authorities in Nigeria.”

There is no scintilla of doubt, therefore, that the Excess Crude Oil Account is overtly unconstitutional. Accordingly, the President should pay all the proceeds in that illegal Account into the Federation Account as lucidly provided for under Section 162(1) of the Constitution, for sharing in compliance with Section 162(2) thereof with the National Assembly participating.

The legal consequence or constitutional implication of the creation of a special account for the Federation under Section 162(1) of the Constitution is to mandatorily empower the National Assembly which ought to be the true representative of the people to supervise and finally authorize the sharing of the Federation Account. That is why Section 162(2) of the Constitution directs the President thus: “The President, upon the receipt of advice 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 per cent of the revenue accruing to the Federation Account directly from any natural resources.” In this connection, the National Assembly itself must have regard to certain considerations before enacting a revenue sharing formula, thus also subjecting it to the Constitution and not given absolute powers. It is therefore regrettable that for almost ten years now, the National Assembly and Mr. President have been

unable to enact a new revenue sharing formula for Nigeria.

It is a shame and a monumental tragedy in the history of this political evolution and our constitutional law history. Quite strangely, the Federation is still relying for the sharing of its revenue on an outdated and severely distorted Military Decree now restyled as Act 106 of 1992 as amended.

### **No revenue allocation formula for ten years**

As a guide, Item N on the Schedule to the 1999 Constitution directs the Revenue Mobilization Allocation and Fiscal Commission (RMAFC) to amongst other things under Section 32(a)-(b) thus:

“32 The Commission shall have power to –(a) monitor the accruals to and disbursement of revenue from the Federation Account; (b) review, from time to time, the revenue allocation formulae and principles in operation to ensure conformity with changing realities; Provided that any revenue formula which has been accepted by an Act of the National Assembly shall remain in force for a period of not less than five years from the date of commencement of the Act; ...”

In effect, a revenue allocation formula enacted by a democratically elected Government ought to prima facie be reviewed every five years. Yet for ten years, we have not enacted even one! We are currently at the doorsteps of the Court to invoke its coercive powers to compel the Revenue Mobilization Allocation and Fiscal Commission (RMAFC) to review upward and present as an advice to the President as provided by Section 162(2) of the 1999 Constitution. At least, the same Revenue Mobilization Allocation and Fiscal Commission (RMAFC) has had cause to review twice now the salaries, remunerations and allowances of the President, Vice-President, Senators, Governors, etc., twice in ten years. In the same vein, why can't it review the derivation percentage upward in the same premise?

The erstwhile President apparently being clever by a half, opened the Excess Crude Oil Account so that he could Unilaterally and without any legal checks by the National Assembly spend the funds in that account by obviating the provisions of Section 162(2) thereof. Even more specifically, Section 80(1)-(4) of the Constitution directs that no moneys are to be spent from any public fund except with the authorization of the National Assembly. For the avoidance of doubt, Section 80(1)-(4) provides thus: “80(1) All revenues or other moneys raised or received by the Federation (not being revenues or other moneys payable under this Constitution or any Act of the National Assembly into any other public

fund of the Federation established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund of the Federation.

(2) No moneys shall be withdrawn from the Consolidated Revenue Fund of the Federation except to meet expenditure that is charged upon the fund by this Constitution or where the issue of those moneys has been authorized by an Appropriation Act, Supplementary Appropriation Act or an Act passed in pursuance of section 81 of this Constitution.(3) No moneys shall be withdrawn from any public fund of the Federation, other than the Consolidated Revenue Fund of the Federation, unless the issue of those moneys has been authorized by an Act of the National Assembly.

(4) No moneys shall be withdrawn from the Consolidated Revenue Fund or any other public fund of the Federation, except in the manner prescribed by the National Assembly.” In spite of the above, the erstwhile President unilaterally withdrew huge sums of money from public funds he classified as Excess Crude Oil Account for the following, to wit: financing the Independent Power Project (IPP) with billions of Naira as well as debt repayment of N18billion to the Paris Club, all unauthorized.

### **Excess crude account reduces 13% derivation**

The irony of this legal and constitutional tragedy is the fact that the Niger Delta from whence the entire crude oil comes remains in pandemic poverty, squalor, degradation, filth, neglect, remiss, and abysmal underdevelopment! All the oil revenue in the “legal Federation Account” and the “illegal Excess Crude Oil Account” come from the Niger Delta, yet they receive only 13% from the legal account, whilst they get NOTHING from the illegal Excess Crude Oil Account, except as dedicated by the Federal Government. Added to this, the erstwhile President in the early life of his administration even attempted to further deplete the paltry 13% derivation from the legal Federation Account, when he started to deduct through a voodoo fiscal system, some items as first line charges from the Federation Account, before paying 13% derivation.

It was as a result of this act of constitutional tyranny by him that the Delta State legal team at that time of which by the grace of God I was the Secretary, counter-claimed against the President of the Federal Republic of Nigeria in the erroneously called resource control case of Attorney-General of the Federation Vs. Attorney-General of Abia State & 35 Ors. (No. 2) [2002] 6 NWLR (pt.764) 542. The erudite Ogundare, JSC of blessed memory, expectedly upheld our counter-claim and declared the act of Mr. President on his first line charges as

brazenly unconstitutional. The eminent jurist held at pages 689-670 in favour of Delta State, the 10th Defendant, that:

“Consequent upon all I have said above, I grant claim (f) and hereby declare that “the underlisted policies and/or practices of the plaintiff are unconstitutional being in conflict with the 1999 Constitution, that is to say:

“(i) Exclusion of natural gas as constituent of derivation for the purposes of the proviso to section 162(2) of the 1999 Constitution.

(ii) Non payment of the shares of the 10th defendant in respect of proceeds from capital gains taxation and stamp duties.

(iii) Funding of the judiciary as a first line charge on the Federation Account. (iv) Servicing of external debts via first line charge on the Federation Account. (v) Funding of Joint Venture Contracts and the Nigerian National Petroleum Corporation (NNPC) Priority Projects as first line charge on the Federation Account.

(vi) Unilaterally allocating 1% of the revenue accruing to the Federation Account to the Federal Capital Territory.”

I also grant an injunction as claimed in claim (h) restraining the plaintiff from further violating the Constitution in the manner declared in claim (f) above.” Federal Government has no powers to withhold sharing of excess crude oil revenue. It is based on the above that we profusely contend that the Federal Government as personified by the Minister of Finance, Dr. Mansoor Mukhtar, lacks the quo warranto or legal powers to stop and/or withhold further payments from the Excess Crude Oil Account. This is all about obedience to the Rule of Law which takes precedence over frugality or economic sense. To protect the nation on rainy days can be arranged and a compromise reached on the issue rather than a unilateral declaration of might by forceful seizure or stoppage of sharing of the excess crude oil funds as brazenly exhibited by the Minister of Finance. I am thus in support and in concord with the legal action taken out by eleven States of the Federation challenging the Federal Government on the illegality of the Excess Crude Oil Account.

Conclusion.

It is in that same spirit and upon the above authorities that we contend with profundity, that the Excess Crude Oil Account opened by the erstwhile President, Chief Olusegun Obasanjo and still being operated by President Alhaji Umaru Musa Yar'Adua, is an act of constitutional tyranny and an unprovoked onslaught on the Rule of Law and Constitutional Order.