



INTERNATIONAL PERSPECTIVE OF FUEL SUBSIDY AND THE LEGALTY OF ITS REMOVAL IN NIGERIA

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1.1 INTRODUCTION

Significance of Fuel Subsidy in World Economics

Why would governments all over the world subsidize energy, giving convincing reasons for doing so, only to turn round and remove same with more convincing and most times contradictory reasons? It is intriguing.

Generally, fossil fuel subsidies are one of many policy instruments used by governments to attain economic, social and environmental objectives worldwide, subsidies exist in social and economic sectors including electricity and energy.

Subsidy is a global phenomenon which suggests that it has international dimension especially for those that produce fossil fuel or energy as is interchangeably referred. Those countries that do not produce fossil fuel are also affected by the issue of subsidy, it therefore involve both the producers and the consumers of fossil fuel or energy. Highly industrialized nations consisting of the United States of America, Britain, France, Germany, Italy, together with other industrialized countries formed the G20 group with the aim of forging a common alliance regarding their economic and trade investments and how to protect and advance same on a common flat form. The European Commission (THE EU), the Organization for Economic Commission and Development (OECD), the Organization of Petroleum Exporting Countries (OPEC), the members of the International Monetary Fund (IMF), the world Bank group (WBG) and the International Energy Agency members (IEA) are all involved directly or indirectly in the issue of subsidy policy framework and its '**phasing out**' through various agreements like the World Trade Organization Agreement.

The rationale for the introduction of fossil fuel subsidy is to advance particular political, economic, social and environmental objectives and to address problems in the way market operates. Governments all over the world tried to justify fossil fuel subsidy in their countries without looking at the social implication on the economy. The purpose for the introduction of the fossil fuel subsidy will be examined from the global perspective of the various government programmes.

Globally, subsidies are difficult to estimate but conservatively, it is put at six hundred billion dollars [\$600 billion] annually including production subsidies (i.e. making the cost of production cheaper)

and consumption subsidies (making the price of fossil fuel cheaper to the customer at the pump stations).¹

A recent report from the Organization for Economic Co-operation and Development (OECD) estimate that between forty five billion dollars [\$45billion] and seventy five billion dollars [\$75 billion] in budgetary support and tax expenditures have been provided to the Oil and Gas industries by the member countries. According to the International Energy Agency, (IEA) consumption subsidies in thirty seven (37) developing countries were worth five hundred and fifty seven billion dollar (\$557) billion annually.²

There has been a global campaign against subsidy since 2009 with the realization that such subsidies often fail in achieving their touted benefits. Secretary General, Organization for Economic Cooperation and Development, [OECD],

*Both developing and developed countries need to phase out inefficient fossil fuel subsidies. As they look for policy responses to the worst economic crisis of our lifetimes, phasing out subsidies is an obvious way to help governments meet their economic, environmental and social goals. The organization of which Nigeria is a member noted that about five hundred dollar (\$500) billion was committed to subsidies worldwide in 2010 alone, and thus urged its members to relieve themselves of the subsidy liability.*³

The Group of Twenty [G-20] countries and the International Monetary Fund, [IMF] are also in the forefront of campaigns against fuel subsidy.

It is generally expected that Governments derived their legitimacy from the people they govern, and the ground norm of every democratic Government is its constitution. Governments all over the world have no justification in presiding over the affairs of its citizens except to cater for the well-being of those citizens.

Legitimacy therefore is not only about coming to power through the people's mandate obtained in a credible and transparent manner, it is also about pursuing the process of development in such a manner that the people still have the trust and affection of those they voted into power.

Would the quest for legitimacy, which every government needs at all times not be helped if Governments began with a determination to bring about economic prosperity instead of adversity?

Wouldn't it be better, if governments start the subsidy removal in stages over a period of time, [if it must be removed at all cost] and by cutting down on frivolous expenditures and avoiding

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1. International Energy Agency (IEA) word Energy Report outlook (2010)
 2. Organization Economic Cooperation and Development (OECD) and International Energy Agency (IEA) Reports (2010)
 3. Angel .G. Secretary General Organization of Economic Cooperation and Development (OECD)2011

non-revenue generating enterprises and expenditures on public offices? The Federal Government's rating in Nigeria would have certainly received a boost if government came out with a sincere directive cutting waste, for instance, pegging the number of cars governors and other top public officials use as convoys, scrapping the office of first ladies [including the state and local government level] and putting a halt to such leakages like we have in the issue of security votes, [in Nigeria] before zeroing on the subsidy removal?

One of the principal functions of government is its responsibility to govern in accordance with the law that will not impact negatively on its citizens, it is also part of good governance for the leaders to take the welfare of its citizens along its policy framework, to create a sound economy, taking cognizance of the social and environmental protection of the citizens through the provisions of basic amenities in life which include, but not limited to subsidizing the critical cost of living especially in the health, education, agriculture and housing sector of the economy. The questions that beg for answers are what is the significance of fuel subsidies in world economics? What are the effects of its phasing out especially on the economies of the various countries of the world? The answers to these questions will provide an insight into various governments thinking on fossil fuel subsidy. The second aspect of the question is the removal or phasing out of the fuel subsidy. If governments should take the trouble of explaining the introduction of fuel subsidy in the oil and gas industries, why remove same? In other words what is the rationale for removing the fuel subsidy that government all over the world introduced in the first place? This indeed is intriguing.

1.2 DEFINITION AND MEANING OF FOSSIL FUEL SUBSIDIES

The International Community has so many definitions of Fossil fuel subsidy:

The world trade organization provides a legal definition of subsidy within the Agreement on Subsidy and Countervailing Measures (ASCM). Article 1 Uruguay Round Table Agreement,⁴ International Monetary Fund⁵ United Nations Statistics Department (UNSD)⁶, and the European commission (EC) also develop a definition of subsidy within the European Union (EU)

Treaty in article **87(1)**⁷. The International Energy Agency⁸, the Organization of Economic and Co-operative Development (OECD), the Food and Agricultural Organization (FAO) Energy Agency report of defines subsidy⁹.

4. *Uruguay Round Table Agreement of 1994*

5. *International Monetary Fund (IMF) 2001*

6. *United National Statistics Department (UNSD) 2010*

7. *European Commission (EC) 1998*

8. *Article 87(1) European Union Treaty (EUT)*

9. *Food and Agricultural Organization (FAO) agency report 1999*

THE INTERNATIONAL ENERGY AGENCY REPORT OF 1999 DEFINES SUBSIDY

As any government action that concerns primarily the energy sector that lowers the cost of energy production, raises the price received by energy producers or lowers the price paid by energy consumers¹⁰

FOOD AND AGRICULTURE ORGANIZATION (FAO) DEFINE SUBSIDY AS

Government action or inaction that modifies by increasing or decreasing the potential profits by the industry in the short medium or long term periods.¹¹

AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (ASCM) DEFINES SUBSIDY AS SUBSIDY EXISTS IF

- A. There is a financial contribution by a government or public body within the territory of a member (referred to in this agreement as government, where;
 - i. A government practice involves a direct transfer of funds, for instance, grants, loans and equity infusion potential direct transfer of funds or liabilities like Loans & guaranties.
 - ii. Government revenue that is otherwise due is foregone or not collected, for example, fiscal incentives as tax credits.

DEFINITION

Is any government action that lowers the cost of fossil fuel energy production raise the price received by energy producer or lowers the price paid by energy consumers?¹²

SUBSIDY IS ALSO DEFINED

As a short or long term financial payment either in the form of cash or service that is designed to assist a business.¹³

Monthly assistance granted by a government to a person or group in support of an enterprise regarded as being in public interest.

A Sum of Money granted by the government or a public body to assist an industry or business so that the price of a commodity or service will be lower to the end user.¹⁴

THE EUROPEAN ANTI SUBSIDY RULES DEFINES SUBSIDY AS

A financial contribution made by or {on behalf} of a government or public body which confers a benefit to the recipient.¹⁵

10. Oxford Advance Learners Dictionary 6th Edition page 1195

11. Loc Cit

12. GSI 2010 defining of fossil fuel subsidy for G20 countries Ibid

13. Also defined (designed to assist business) G51 of the international institute for sustainable development Geneva (2010)

14. Ibid

15. European Anti Subsidy Rules of 1994

Financial contribution may take the form of money that is paid by a government or an organization to reduce the cost of services or production of goods so that their prices can be kept low. The European anti subsidy rules is based on a **1994** World Trade Organization Agreement which allows remedial action to be taken against subsidies that are considered unfair to trade practices.

ARTICLE ONE, WORLD TRADE ORGANIZATION AGREEMENT

A subsidy exists when there is a financial contribution by a government or public body that confers a benefit¹⁶

A FINANCIAL CONTRIBUTION EXISTS WHEN

- I. A government practice involves a direct transfer of funds (or grants, loans and equity infusion and potential direct transfer of funds or liabilities like loan guaranties.
- II. Government revenue that is otherwise due is foregone or not collected (fiscal incentives and tax credits).
- III. A government provides goods or services other than general infrastructure. or
- IV. A government entrusts or directs a private body to carry out one or more functions.

A benefit on the other hand is conferred when the financial contribution is provided to the recipient on terms that are more favorable than those the recipient could have obtained from the market.

The above definitions of fuel subsidy are not exhaustive but one thing appears to be common in all the definitions that is, government intervention through financial assistance to the oil and gas industry which at the end lower prices to the advantage of the end user of the product.

4.1 LEGAL PERSPECTIVE OF FOSSIL FUEL SUBSIDY AND ITS REMOVAL

The legal questions for determination in this chapter are;

1. Whether the President can suo moto remove fuel subsidy
2. If he can, then, under what authority can he do so?
3. Whether the NNPC can fund joint venture cash calls or pay charges and tax from the proceeds of crude oil sales before remitting same to the Federation account?
4. If the NNPC can do so, then, what is the authority for that?
5. Whether section 7 (4) of the NNPC Act is in conflict with section 80, 91 and 83 of the constitution 1999
6. Whether the National Assembly can veto the president in removing the subsidy by passing resolutions
7. The effects of the National Assembly resolution

16. Article 1 World Trade Agreement 1994

8. Whether the President can proceed to the National Industrial Court (NIC) to challenge the Labor strike
9. Whether the National Industrial Court can stop NLC from going on strike having regard to section 39 of the Constitution of Nigeria
10. If the National Industrial Court can stop the NLC strike, whether such order is not in conflict with the NLC right to peaceful assembly as enshrined in the constitution of Nigeria
11. Whether the creation of the Sovereign Wealth Fund' is Legal

Political science has shown that in a presidential democratic setting, there exist separation of powers among the Executive, Legislature and the Judiciary, each arm has a distinct role to play in governance. The legislature make laws for the country, the executive implement such laws and policies while the judiciary interprets those laws in case of conflicts. Subsidy removal is part of the policy introduced by the Executive to run the countries' oil and gas industry. The government saw the introduction of fuel subsidy as a way of making fuel cheap for its citizens by bearing the cost of production and or giving waivers and tax relief to the producers so that the citizens will not be made to bear the high cost of production, which the oil and gas marketers and producers will impose on the end user.

The removal of the fuel subsidy is equally the prerogative of the Executive which it can exercise through any of its relevant Agencies. The question is, **can the executive arm of government *Suo moto* remove fuel subsidy without the approval of the National Assembly? So also can the National Assembly (both the senate and the House of Representatives) veto the executive in removing the subsidy?** What about the role of the judiciary in the Saga, **can the courts stop the labor union from protesting and going on strike?**

When the President removed subsidy and deregulated the downstream sector of the oil industry, some members of the House of Representatives declared their intention to fight for the reversal of the subsidy to its former position of ₦ 65 per litre. Promises were made to the citizens by the House of Representatives for the reversal of the subsidy. **But the question is, can the National Assembly overrule the act of the President?**

It is instructive to examine whether the President has the powers to remove the subsidy in the first place.

The Federal Government, in determining to achieve its aim and objectives to regulate the supply and distribution of petroleum products among others submitted a bill to the National Assembly of the

Federal Republic Nigeria to enact the **Petroleum Product Pricing and Regulatory Agency (PPPRA) Act**¹⁷.

The PPPRA Act establishes an agency. This agency is a body corporate with perpetual succession and a common seal capable of suing and be sued in its corporate name¹⁸.

The Agency is autonomous, established primarily to determine the pricing policy of petroleum products and to regulate same through supply and distribution¹⁹.

In order to guarantee the Agency's independence the Act provides that the agency-
*Shall not be subject to the direction, control or supervision of any other authority in the performance of its function under this act other than the president.*²⁰

Having regard to the petroleum products and pricing Act PPPRA 2007, the Organization is saddled with the responsibility for regulating the production and pricing of products.

4.2 SECTION (8) PETROLEUM PRODUCT PRICING AND REGULATORY AGENCY (PPPRA) ACT

Programs slated for implementation by the PPPRA

As part of its effort to carry out its powers and functions, some programs were slated for implementations by the Agency, some of them are:

- a) The Nigerian National Petroleum Corporation (NNPC) shall increase the number and undertake a phase rehabilitation of all associated pipeline equipment e.g. Pumps, generators, loading arms and meters, fire trucks, valves etc.
- b) The federal government shall establish a pipeline management authority for the management of the pipeline depots that will charge both private and public user a tariff per thorough put litre of petroleum products.
- c) All coastal supplies of automotive gas oil through companies nominated vessels should be stopped immediately.
- d) The Nigeria National Petroleum Corporation (NNPC) shall expand the loading capability of all marine federal depots such as Mosimi and Calabar
- e) The Nigeria National Petroleum Corporation (NNPC) shall institute a policy of replacement of aged absolute equipment and a programmed and effective preventive maintenance culture.
- f) The Nigeria National Petroleum Corporation (NNPC) shall intensify regular land, sea and aerial surveillance of critical segments of the pipeline system by a task force which shall be established.

17. *Petroleum Product Pricing And Regulatory Act 2007*

18. *section 1(2) Act of 2007*

19. *Section 1(3) establishment Act 2007*

20. *Section 1(2) Petroleum Product Pricing and Regulatory Agency (PPPRA)*

- g) Federal Government shall have all the refineries privatized and shall encourage the establishment of private refineries in any part of the country by any individual, company or association, indigenous or foreign, ensuring that safety and environmental conditions are met²¹.

SECTION 8(1) ESTABLISHMENT OF GOVERNING BOARD

In order to facilitate efficient, effective and smooth running of the affairs of the agency a governing board is established²².

The Petroleum Product Pricing and Regulatory Agency (PPPRA) is a government agency controlled by the executive which has been involved in every subsidy removal from its inception to date. The law requires the board of the agency to meet and approve an appropriate pricing of petroleum products.

SECTION (7) ²³.

- I. To determine the pricing policy of petroleum products
- II. To regulate the supply and distribution of petroleum products
- III. To establish information and data bank through liason with all relevant agencies to facilitate the uniform and realistic decisions on pricing policies
- IV. To moderate volatility in petroleum products, prices by ensuring reasonable returns on operation.
- V. Oversee the implementation of the relevant recommendations and programs of the Federal Government as contained in the white paper on the report of the special committee on the review of petroleum products supply and distribution.
- VI. To establish parameters and codes of conduct for all operators in the downstream petroleum sector.
- VII. To maintain constant surveillance, offer all key indices relevant to pricing policy and periodically approve benchmark prices for all petroleum products.
- VIII. To identify macro economic factors with relationship to prices of petroleum products and advice the federal government on appropriate price strategies for dealing with them.
- IX. To establish firm linkages with key segments of the Nigeria society and ensure that its decision enjoy the widest possible understanding and support
- X. To prevent conclusion and restrictions, trade practices harmful to the sector.
- XI. To exercise mediatory role as necessary for all stakeholders in the sector.

The opponents of the subsidy removal argued that there was no time the board of the Petroleum Product Pricing and Regulatory Agency (PPPRA) sat and decided on the issue. Hence it became illegal.²⁴ However no organization or bodies challenged the powers of the Agency towards its action.

21. *Second schedule to the Act No 8 of 2008*

22. *Section 2(1) Petroleum Product Pricing And Regulatory Act No 8 2003*

23. *Ibid*

4.3 The second issue in contention is, **since the Executive and or the President can remove the subsidy on fuel by virtue of the Petroleum Product Pricing and Regulatory Agency (PPPRA) Act; can the legislature veto the removal?** Again the powers of the legislature come into play.

Section 51

“Government cannot impose taxes, levies or revenue not appropriated for or not backed by law²⁵

Section 80 (1)

All revenues or other moneys raised or received by the federation (not being revenues other than money payable under this constitution or any Act of the National Assembly (NASS) into any other public fund of the federation established for a specific purpose) shall be paid into form one consolidated revenue fund of the federation.²⁶

Section 80 (2)

*No money 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 appropriate act or an act passed in pursuant of **section 81** of this constitution.²⁷*

Section 80 (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 on Act of the National Assembly (NASS).²⁸

Section 80 (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 (NASS)²⁹.

The opponents of the subsidy removal hinged their stand on **section 80(3) and (4)** as the authority that prevent the President from removing subsidy and having access to funds that has not been appropriated by the National Assembly.

24. *Pengassan claimed that the stakeholders were not consulted as provided by the provision of the Act in January 2012 Abuja Nigeria*

25. *Constituiton of the Federal Republic of Nigeria 1999*

26. *Constituiton of 1999*

27. *Ibid 145*

28. *1999 constitutions, Ibid 145*

29. *Supra*

Section 83 (1)

*The National Assembly may by law make provision for the establishment of a contingency fund for the federation and for authorizing the president, if satisfied that there has arisen on unforeseen need for expenditure for which no other provision exist to make advances from the fund to meet the need.*³⁰

From the aforementioned provision of **section 80(3) and section 83(1)** it appears that the provisions refer to *moneys withdrawn from public funds and section 80(3) of the constitution, moneys withdrawn from consolidated revenue funds or any other funds*. The above provisions have opened doors for two main legal issues to be considered.

- a) Fuel subsidy as reflected in every budget for instance, the amount of subsidy the government intends to pay on production subsidy, which has been appropriated in the budget. Whatever amount of money is appropriated as subsidy belongs to the public and hence monies withdrawn from public funds authorised by the National Assembly.
- b) The second issue is government savings accruing from the subsidy removal as extra funds to run the government. Hence the approval of the National Assembly is not required. The Executive see those funds as savings falling in the same category as raising revenue, taxes and incentives for generating surplus cash to run its programs.

This is probably why the Executive President does not see the need to seek legislative approval to remove the fossil fuel subsidy. Government thinking is that, savings from fuel subsidy removal does not fall *within monies withdrawn from consolidated revenue fund*. Since government is not withdrawing money but generating money.

Government also see the Petroleum Product Pricing and Regulatory Agency (PPPRA) as an Act of the National Assembly duly passed into law, therefore the National Assembly cannot turn round to say what they passed into law is an illegal provision . Whatever the PPPRA does is within the provision of the law unless and until the National Assembly amends or abrogate the Act in which case, the National Assembly did not do any of the above. It appears to be a situation where the legislature is challenging what it passed into law following due process of the National Assembly.

If the legislature is contesting what it passed into law as illegal, it should allow the judiciary to interpret the law and not for the legislature to usurp the functions of the judiciary as the interpreter of laws.

30. *Op Cit 138*

The government believed that it acted within the ambit of the law and the fuel subsidy strike was uncalled for. This led to the case filed at the National industrial court by the Federal government challenging the labor Union going on strike.

Having seen the issues from the government perspective, it is pertinent to examine the argument put forward by the legislature.

Section 83(1)

“The National Assembly may by law make provision for the establishment of contingency fund for the federation and for authorising the president...”

From the above provision, the legislature believe that the savings from the fuel subsidy which amounts to ₹ 1.7 trillion in 2011 is a contingency fund which the government needs approval for, the president therefore needs the approval of the National Assembly for such contingency fund.

Anything to the contrary is a breach of the Constitution.

Secondly, the ₹ 1.7 funds to be raised by the President is to be used for unforeseen expenditure for which no other provision exist, like the rail system, the nuclear power for energy of which the former President traveled to Seoul Korea for talks. Section 83(1) of the Constitution is their authority.

Thirdly, the President intended to use part of the ₹ 1.7-trillion to fund infrastructure which have already been appropriated in the 2012 budget as already approved in the government capital expenditure for 2012.

Finally, if the Executive needs money, it would always present a Supplementary Appropriation Bill to that affect or in the alternative, apply for virements to the National Assembly but certainly not fuel subsidy even if the intention is honorable, other avenues for raising money has to be exploited.

Another legal argument is that the savings from subsidy withdrawal comes originally from the money appropriated by the National Assembly, which is a Consolidated amount or any other public funds³¹ therefore whether savings that would accrue comes directly from money initially so appropriated as public money within the provision³² which requires the blessing of the National Assembly.

The legal arguments arising from the two (2) perspectives of the Executive and the Legislature are germane. It is interesting to see how the judiciary will look at the issues for determination.

For now, in the absence of a bill to amend or abrogate the Petroleum Product Pricing and Regulatory Agency (PPRA) Act 2007, and having followed due process, it appears that the only option open to the legislature is to pass a resolution condemning Government action in removing the fuel subsidy.

31. Section 83(3) and (4) 1999 constitution

32. Section 80 (3) and 4

The efficiency of the resolution remains what it is, a resolution, which the executive may ignore because it has no force of law. This is echoed lately.

I recall that in the sixth senate we had a bill to make our resolution binding on the executive we then said we would have two – thirds (2/3) majority so that our motions and bills would become binding like that of the United State of America and Brazil until we do that, we cannot say our resolutions are binding at the moment.³³

The House of Representative also called an emergency meeting with a view to passing a resolution calling on the government to reverse back to the old fuel price of ₦ 65 per litre. This of course did not go down well with the ruling party [PDP] which did all it can to sabotage the meeting of the House including putting pressure on the leadership of the house not to pass any resolution to that effect as it would amount to anti party activities and embarrassing to the government. Some members of parliament believed they ought to be consulted by the Executive.

The government should have consulted the national assembly before removing the subsidy. Any policy change must be discussed in the parliament before implementation³⁴

It appears from the above view that some parliamentarians considered the fuel subsidy removal as a policy change which it ought to have an input on, however this is not necessarily so having regard to the Petroleum Product Pricing and Regulatory Agency (PPPRA) 2007. The policy may not be agreeable to the National Assembly, it may even go further and declare it immoral or insensitive but the law, if duly passed, should override any sentiment as stated by the senate president- *As we are all aware, the decision has not been popularly received by our people who consider it a bitter pill to swallow. Although the economic argument in support of fuel subsidy removal is compelling, the political and social imperatives must also be considered³⁵*

It is erroneous to allow sentiment to compete with the law as further expressed by a lawmaker on the fuel subsidy removal-

The legislature should urgently assume its historical role and use its constitutional power to arrest and halt the avoidable development of a socio political crisis which when started may be difficult to abate and the end of which no body can predict.

The executive should not be allowed to think that it had more powers over the legislature who we all voted for to represent one interest and carry over sight functions on executive recklessness.³⁶

33. David M, Senate President January 2012 in Abuja.

34. Faparosi Bamidele Representing Gbonyin Emore, Ekiti East federal constituency at National Assembly press briefing in Abuja 23 January 2012.

35. David M, Semate President National Assembly Monday 23/1/2012

36. Moshood E, Chairman Transitional Monitoring Group(TMG) 4/1/2012 Abuja

*President Jonathan should have concentrated on how to stop the menace and the activities of Boko Haram and not the removal of fuel subsidy, if the president removes fuel subsidy three million times, if security of life and property is at stake, all the economic terminologies of the removal will not work.*³⁷

The resolution passed by the House of Representative was bi Partisan cutting across party divide which would be difficult to reverse.

*We have taken a position to reject the removal of subsidy and we will not go back on it, it is going to be an interesting battle between the executive and legislature since the president has used executive fiat we will invoke our power as enshrined in the constitution.*³⁸

A faction of the House of Representatives threatened to initiate moves to amend the Petroleum Product Pricing and Regulatory Agency (PPPRA) act following the subsidy removal.

*The Act establishing the PPPRA was the making of the National Assembly (NASS) and we have decided to repeal it so that we can save Nigerians from the agonies foisted on them by this monster agency ... in the alternative amend the section which gives it the unilateral powers to increase prices of petroleum products.*³⁹

The mode of exercising legislative powers regarding money bills could be seen in **section 59** of the Constitution, Federal Republic of Nigeria (FRN) 2004.

The provisions of this section shall apply to.

- a) An appropriation bill or a supplementary appropriation bill, including any other bill for the payment, issue or withdrawal from the consolidated revenue fund or any other public funds of the federation or any money charged thereon or any alteration in the amount of such a payment, issue or withdrawal.

The National Assembly derived its legitimacy from section 47 of the Constitution.

*There shall be a National Assembly for the federation which shall consist of a senate and House of Representatives.*⁴⁰

SECTION 48

The senate shall consist of three (3) senators from each state one are from the Federal Capital Territory.

37. Bolaji Y, *Representing Mushin Constituency 1 Lagos. Interation with journalist January 4, 2012*

38. AbdulRahman Kawu S, *Deputy Minority Leader, House of Representatives reacting to the Fuel Subsidy Removal 4/1/2012 Abuja*

39. *Ibid*

40. *Section 47 constitution of the Federal Republic of Nigeria 2004*

Having seen the provisions of the Petroleum Product Pricing and Regulatory Agency (PPPRA) Act⁴¹ where the Agency can remove and regulate the pricing of petroleum products provided it acted within the law establishing the Board, it is clear and unambiguous.

Is it constitutional for Nigerian National Petroleum Corporation (NNPC) to charge its debt to the federation account? For example the joint venture cash calls where the NNPC is required to pay its joint participation funding on behalf of the Federal Government, including other expenses associated with the joint venture. **Section 7(2)**⁴². The NNPC Act provided that the NNPC does not have to pay all its revenue into the federation account. It is excluded to the extent that deduction of expenses from gross income is legal where such items of expenditure are prospectively included in the budget of Nigerian National Petroleum Corporation (NNPC) as approved by the Federal Executive Council, pursuant to **section 7(2)** NNPC Act or where same is retrospectively included in the auditing account of NNPC. This section of the Nigerian National Petroleum Corporation (NNPC) Act is corroborated in the case of **Attorney General of Federation V Attorney General of Ogun state**.⁴³

Section 162 provides

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 Nigerian police, the ministry or department of government charged with responsibility for foreign affairs and the residents of the Federal Capital Territory Abuja.

By the above provision, the Government of the Federation becomes a trustee and it has a duty to render accounts to the beneficiaries of the trust when called upon to do so.

However section 162 of the Constitution is clear.

*Funding of joint venture contracts and the Nigerian national petroleum corporation (NNPC) priority projects cannot by any stretch of construction come within **section 162(3)** of the constitution which provided for the distribution of the federation account among the three tiers of government that is the federation, states and local governments. All these charges on the federation account are inconsistent with the constitution and are therefore invalid.*

Section 162 (1)

1) *The President upon the receipt of advice from the Revenue Mobilization Allocation and Fiscal Commission shall table before National Assembly (NASS) proposals for revenue allocation from the federation account and in determining the formula, the National Assembly (NAAS) shall take into*

41. Section 7 and 8 Petroleum Products Pricing Regulatory Act 2007

42. Nigerian National Petroleum Corporation Act Laws of the Federation.2004

43. [1982] 1-2 SC 13

account, the allocation principles especially those of population, equality of states, internal revenue generalization, land mass, terrains as well as population density.

The question now is, **can the Federal Government [represented by NNPC] charge its debt on the federation account especially having regards to General Loans and Stock Act⁴⁴ and section 314 of the constitution?**

Section 4 General Loans and Stock Act [cap 161]⁴⁵ maintain that such external debts are charged upon and payable out of the general revenue and assets of the government of the federation that incurred the debt and not the federation account while **section 314** of the constitution, 2004.

Any debt of the federation or of a state which immediately before the date when this section comes into force was charged on the revenue and assets of the federation or on the revenue and assets of the state shall as from the date when this section comes into force, continue to be so charged.

SECTION 4: GENERAL LOANS AND STOCK ACT

The principal moneys and interest represented by the debentures or stock issued under the provision of this act are hereby charged upon and shall be payable out of the general revenue and assets of the government.

SECTION 30: CHARGE UPON GENERAL REVENUE

In case the sinking fund provided for by this act shall be insufficient for the payment of all principal moneys borrowed under the authority of this act at the time the same shall have become due, the president shall make good the deficiency out of the general revenue and assets of the federation.

SECTION 39

The act shall be applicable only to the raising of loans UK and nothing in this act contained shall prevent the raising of loans in Nigeria be specified in any act authorising the raising of such loan.

The above provision reaffirmed the provision of the General Loans and Stock Act. It is for each Government, Federal or State to pay its debt. Neither can it constitutionally charge its debt on the federation account.

Consequently, it is illegal and by extension, unconstitutional for the Nigerian National Petroleum Corporation (NNPC) to service its external debt via a first line charge on the federation account, similarly it is unconstitutional to fund joint venture contracts and the NNPC priority projects as first line charge on the federation account. The direct deduction by the Nigerian National Petroleum

44. Section 3 and 4 Cap 161

45. General Loans and Stock Act as amended

Corporation (NNPC) therefore is a clear breach of **section 162** of the constitution. **Section 7(4)(b)**⁴⁶ provides for defraying expenses incurred in making money for the country. Payment of fuel subsidy cannot be equated with making money for the country and is not covered by this act.

SECTION 7

The Corporation shall keep proper accounts and proper records in relation therefore in a form which shall uniform with the best commercial standards.

7(4) The Corporation shall maintain a fund and which shall consist of,

a. *Such money as may from time to time be provided by the Federal Government for the purposes of the act by way of grants or loans or otherwise how so ever.*

b. Section 7[4]

Such moneys as may be received by the Corporation in the case of its operation or in relation to the exercise by the Corporation of any of its functions under this act and from such fund and there shall be defrayed all expenses incurred by the Corporation.

SECTION 8(1): *subject to the provisions of this section,*

The Corporation may from time to time borrow by Overdraft or otherwise howsoever such sums as it may require in the exercise of its function under this act.

SECTION 14: *Restriction on execution against the property of the Corporation.*

In any action or suit against the Corporation, no execution or attachment or process in the nature, therefore shall be issued against the Corporation. But any sums of money which may, by the judgments of the courts be awarded against the Corporation shall, subject to and direction given by the court, where notice of appeal has been given by the Corporation, be paid from the General Reserve Fund of the Corporation.

It is a general rule of law that where a law is inconsistent with the provision of the Constitution then that law is null and void to the extent of that inconsistency. **Blanket approval for Nigerian National Petroleum Corporation (NNPC) to deduct fossil fuel subsidy payments to itself as a first line charge is illegal as there was neither appropriation by the National Assembly before the deduction or supervision of the expenditure.** The practice of direct deduction without an Act of National Assembly however long it has been practiced has no clear foundation. This probably resulted in the conflicting figures of subsidy payments from the ministry of Petroleum Resources, Nigerian National Petroleum Corporation, Petroleum Products Pricing Regulatory Agency and the Accountant General office.

46. *Nigerian National Petroleum Corporation Act (Cap 123) Laws of the Federation of Nigeria 2004*

4.5 FUEL SUBSIDY REMOVAL AND HUMAN RIGHTS

When the government deregulated the downstream sector of the oil industry,⁴⁷ the Nigerian Labor Congress, Trade Union Congress, Civil Liberties Organization gave the government notice of going on strike on the 6th on January 2012. The labour unions threatened to shut the country if Government refused to go back on the former price of ₦65 per liter against the new price of ₦143 per litre. Government of course did not reverse to the old price insisting that it is for the good of the country and it needed surplus funds to tackle infrastructural decay among other things. the labor unions carried out their threats and embarked on a protest that cost the country a whopping \$1.26 billion.⁴⁸ The withdrawal of fuel subsidy at a time when ordinary Nigerian workers are grossly underpaid and facing extreme poverty will perpetuate inequality and hurt the poor by denying them access to basic necessities of life.

It is the uncontrolled corruption and not fuel subsidy that has continued to slow down sustainable development, economic growth and putting at risk the stability and security of the country.

*Under international human right law, Nigeria is required to demonstrate that the measure being taken are sufficient to realize the citizens economic and social rights, similarly Nigeria has a legal obligation to progressive economic and social right of its citizens and when read together with the maximum available resources, this obligation to achieve progressively means the country is required to ensure the effective use of its resources.*⁴⁹

The Senate urged the President and labor to put the nation first before taking any decision that could dis-stabilize the country.

*The Senate is concerned over the impact of a total shut down of the national economy which the threat of strike action by organized labor will course. The senate is also worried that the Nigerian people especially the ordinary ones would ultimately be at the receiving end of the planned strike and mass protest of utmost worry to the senate is that such protest and total shutdown of the country portends greatest danger to the policy especially in the face of prevailing security situation.*⁵⁰

Two issues are involved.

- a) Government claim legitimacy in withdrawing the subsidy.
- b) Labor union claimed breach of their fundamental right to protest.

On legitimacy, Government has no impediment disallowing it to execute its policy for the deregulation of the downstream sector of the oil industry thereby removing subsidy, especially as it

47. January 1st 2012

48. Another figure, initially the loss was estimated at ₦300 and ₦380 billion

49. Gloria U, the Socio – Economic Right and Accountability Project (SERAP) Abuja

50. Enyinnaya A Senate Chairman committee on media on the Eve of the Labor strike 9/1/2012

was done by its agency which is a creation of the National assembly (NASS), while the labor union action was based on legal grounds also specifically **section 39**.

*Every person shall be entitled to freedom of expression including freedom to hold opinions and to receive and impart ideas and information without interference.*⁵¹

Section 40

*Every person shall be entitled to assemble freely and associate with other persons and” in particular he may form or belong to any political party, trade union or any other association for the protection of his interest.*⁵²

Labor and other trade unions exploited the above constitutional provisions and went on a peaceful strike. Other non-Government Organizations saw the removal of the fuel subsidy as a violation of their fundamental human rights and petitioned the Human Rights council describing the procedure for the removal of the subsidy as a violation of their human rights. The issues raised are.

*“The removal of the subsidy did not follow due process of law as it was done without full consultations with the stake holders including the communities.*⁵³

- The removal was arbitrary as it did not emanate from the board of the PPPRA contrary to the requirements of the law.

The Petroleum and National gas Senior Staff Association of Nigeria (Pengassan) raised a legal challenge;

*The PPPRA executive secretary should tell Nigerians when the board of the agency of which we are statutory member met to decide on this policy knowing very well that the board is yet to be reconstituted.*⁵⁴

The board consists of persons of proven integrity and who possesses the requisites experiences⁵⁵

Similarly all board members are to be appointed by the president of federal government of Nigeria.⁵⁶

The agency consist of a chairman and representative of each of the Nigeria Chambers of Commerce, Industry , Mining and Agriculture, the Manufacturers Association of Nigeria, NLC, major Oil Marketers, the Independent Oil Marketers, Pengassan transport owners (NURTO), Ministry of Petroleum Resources, NNPC, presidency, Nupeng, Deport and Petroleum Products Marketers Association of Nigeria among others⁵⁷.

51. *Constitution of the Federal Republic of Nigeria as amended 2004*

52. *Op Cit*

53. *Op Cit*

54. *Through the PENGASSAN Lorders in January 2012 Abuja Nigeria, claiming that they were not involved in the removal of the subsidy*

55. *section 2(3) PPPRA Act 2007*

56. *Op Cit 166*

57. *Section 2(2) PPPRA Act 2007*

- The subsidy withdrawal will exacerbate prices of consumer products that will increase the level of poverty inevitably leading to the violation of internationally recognized economic socio-cultural rights.
- That subsidy removal is a violation of the country's international human rights Obligation and Commitment to ensure Nigerians full compliance with its international human rights obligation.

The arguments posed above could face legal problems as it would be difficult to prove some of the acts of violation.

Another issue of importance is the Government action of seeking legal redress by going to the National Industrial court on an ex parte motion restraining the labour and other unions from going on strike. The National Industrial court issued an injunction restraining labor from going on strike until all the issues are determined.

The issuance of the court order did not solve the problem as labor went ahead with the strike. The implication of violating the Court order was contempt of the Court as there exist no evidence that labour had appealed against the court order, filing a stay of execution of the order pending the hearing of its appeal. What labour should have done was to file its notice of appeal against the order at the National Industrial Court accompanied with a motion for stay of execution of the courts order pending the hearing of the appeal. it would be interesting to see the direction of the case especially with a view to seeing whether the fundamental rights of the labour and other trade unions as enshrined in the constitution⁵⁸ can be impeached, for instance whether the courts order will not be an infringement of section 39 and 40 allowing trade unions from expressing their opinions, including freedom to assemble freely and associate with other persons for the protection of their interests. Since the matter is still in court, it will be sub judice to speculate on what the court would do or not do in the circumstance, legal challenges have been raised nevertheless.

Another legal challenge associated with the fossil fuel subsidy removal was the establishment of:

- a) Subsidy Reinvestment Empowerment Programme (SURE-P)
- b) Sovereign Wealth Fund (SWF)

The legitimacy of establishing such programs was seriously challenged.

a) Subsidy Reinvestment Empowerment Program (SURE-P) is a Federal Government program designed to invest the freed savings from the subsidy removal in social safety nets and infrastructure. This is the government much talked about palliatives. The concern here is its legality not the palliatives under the program. The mandate of the board of SURE is to oversee the funds in the petroleum subsidy savings.

58. *Section 39 and 40 of the Constitution 2004 as amended*

*Specifically is to improve the quality of life of Nigerians in line with the transformation agency of the present administration.*⁵⁹

The legal issue here is, can a committee or board be established by the executive or specifically by the president to oversee the disbursement of money without the impact of the National Assembly [NASS]?

This is having regard to the constitution.⁶⁰

One school of thought is that the board must have the blessing of National Assembly (NASS) otherwise it is in conflict with the provision of the constitution.

Secondly, any money to be spent by the president through any board must be money appropriated since it is public money.

Thirdly, the projects to be executed by the board are a project already provided in the budget and has since been appropriated.

The other school of thought position is that the money to be managed by the sure board is not money withdrawn from the consolidated revenue fund or any other public fund which must have the blessing of the National Assembly.

Rather than the above, the money is from savings which can be used by the president, the poser here is whether the SURE can be equated with the Petroleum Equalization Fund (PEF), the Petroleum Trust Fund (PTF), and the Petroleum Products Marketing Company (PPMC) which requires an Act of the National Assembly (NASS). With the exception of PTF which was established during the military era in 1998, the Armed Forces ruled by Decrees rather than Acts.

Where the Subsidy Reinvestment Empowerment Program (SURE – P) is equated with public money to be disbursed in accordance with the constitutional provisions then an act of National Assembly (NASS) is required, where however the money to be disbursed is not appropriated and are just savings ,then the government can spend its savings to better the life of its citizens.

b) Sovereign Wealth Fund

This fund is also design to put the savings realized from fuel subsidy removal, custom and excise duties, remittals from the federal Inland Revenue service to absorb the shocks associated with the removal and it also serves as a savings pool of the Federal Government. Most oil producing nations have this SWF in one form of the other.

In Nigeria, the creation of such fund did not go down well with the states and Local Government who view this SWF as a way of trapping excess funds from the Petroleum Savings, Custom, Federal

59. *President GoodLuck Ebele Jonathan (GEJ) while inauguration the board in January 2012 in Abuja the Nation Capital*

60. *Section 80(3) and (4) and section 83(1) Constitution 2004*

Inland Revenue Service [FIRS], by the use of the Federal Government alone, instead of sharing the money from the petroleum sector to the three tiers of government, the Federal Government the State Government and Local Government accordingly.

The creation of such fund became a subject of litigation when the 36 states of the federation sue the federal government, at the Supreme Court of Nigeria, opposing the use of the country's Excess Crude Account to finance the Sovereign Wealth Fund operations pending the determination of the suit. The Federal Government plan to pull \$1billion dollars from the Excess crude account to the sovereign wealth fund, which will be overseen by a governing council, made up of members of the civil society including representatives the media and academics that will review its decision to ensure that the money is transparently invested. The fund is a major component to guard against budget volatility, infrastructural development, and combat unemployment, provide economic growth and above all diversification of the economy.

The former minister of finance⁶¹ declared the government was working towards giving early legal backing to the Sovereign Wealth Fund (SWF).

The Federal Government plans the establishment of the fund to divert more of the country's revenues towards the badly-needed infrastructure development. The government would save part of the nation's income for future generations, and also provide financial reserve for the country to weather any economic downturns in the future. The sincerity of this is doubtful but all the same if it is a prayer – a big Amen.

It is anticipated that the fund would eventually replace the current system by which Nigeria is meant to save oil revenues above a benchmark price into an Excess Crude Account (ECA), which was a product of reforms launched in 2003 and backed by the International Monetary Fund (IMF) at the time.

"The sovereign wealth fund will have three main parts, savings for future generations, an economic stabilization fund and an infrastructure fund for co-investment with other investors, the latter being the largest,⁶²". However the Sovereign Wealth Fund (SWF) is currently constrained by lack of a legal framework or basis for its funding. That is what the bill is meant to address among others.

The current Excess Crude Account (ECA) fund is shared among the Federal, States and Local Governments. But the savings have fallen from \$20 billion in 2007 to about than \$3.2 billion in 2012, amid political wrangling by the authorities over its disbursements.⁶³

61. Olusegun A, Former Finance Minister (2003 - 2011) and now Trade and Investment Minister in Lagos Nigeria

62. *Ibid* pg 168

63. *Loc Cit* pg 169



In 2004 and 2007, money accrued to the Federal government account accumulated a balance which the government transferred to the SWF instead of the federation account.

The Federal Government transferred ~~₹~~₹5.51 trillion from the federation account to the SWF. The legality or the excess crude account and the transfer such amount was challenged in court and the matter is sub judice.