

DEPARTMENT OF PETROLEUM RESOURCES GUIDELINES FOR THE RELEASE OF STAFF IN THE NIGERIAN OIL AND GAS INDUSTRY, 2019: APPLICATION AND CHALLENGES

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Abstract

Subsidiary legislations are laws made pursuant to, and in exercise of, the power vested or conferred by an enabling statute. They enjoy the flavour and potency of the statutory provisions pursuant to which they are issued. By this, the members of judiciary and executive arms of government are empowered to make laws which ordinarily would infringe the principles of separation of powers. The only caveat is that the potency of such authorized subsidiary legislations must be exercised in furtherance of the cause of the enabling statute. Where an arm, other than the legislature, purports to make any law which is not authorized by an enabling statute, or its provisions do not further the cause of its enabling statute, such law, especially if made by the executive arm or its agencies, could be adjudged a government policy. The Minister of Petroleum Resources issued the Department of Petroleum Resources Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry, 2019. Paragraph 3.0 of the Guidelines requires the approval of the Minister before any staff of the oil and gas industry could be released. However, the issue is whether the Minister was empowered by an enabling statute to make such Guidelines. There are legal commentaries on whether the Guidelines, if authorized, could operate to limit the powers of employers in oil and gas industry. This is when juxtaposed with extant statutory and case laws on determination of contract of employment. It is against this backdrop that this paper sets out to appraise legal challenges in application of Department of Petroleum Resources Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry, 2019. The paper adopted doctrinal methodology with analytical approach using statutes and case laws, journals, articles, Internet materials as primary and secondary sources. At the end, it was found that the Guidelines did not meet the requirement of a subsidiary legislation and was ultra vires the powers given to him by the enabling law. Therefore, the Minister could not validly make Guidelines.

KEY WORD: GUIDELINES, DELEGATED LEGISLATION, APPLICATION, CHALLENGES

1.0 Introduction

More than eighty percent of Nigerian earning is from the oil and gas sector. This has made the sector the cynosure of all attention on issue relating to the survival of Nigeria. However, volatility in the prices of oil and gas products in the international market, creates a lot of instability in the sector. The most recent was the year 2020 Covid-19 pandemic which brought about reduction in demand for the petroleum products and attendant decrease in returns to employers in the sector. This volatility would normally bring employers in the oil and gas industry to mull the idea of an overhead cut so they would remain in business. One of the options open to them is reduction of workforce. Overtime, this has caused a lot of job losses in Nigeria and has earned Nigerian government lots of concerns on the way out.

Moreover, there have been consistent federal government policies that seek to encourage participation of Nigerians as major players in the oil and gas sector. This is encouraged through deliberate policies which aim at adequate staff training, providing full, fair and career-rewarding

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employment opportunities to Nigerians, especially individuals from the place of immediate operations (host communities) and the use of made-in Nigeria products for all projects where possible. This was designed to have the ripple effect of encouraging transfer of technology and local content development. Towards this end, the idea of protecting Nigerians who work in the oil and gas industry through legislations was conceived. This is because it is believed that it is safer to have Nigerians as players in the industry than expatriates.

Perhaps, to actualize the objective of encouraging the participation of Nigerians in the oil and gas sector, as well as ensure that volatility in the price of crude does not lead to much loss of jobs in the oil and gas industry, the Federal Government through the Minister of Petroleum Resources¹ issued Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry in 2015 and later revised the Guidelines in 2019 (“Guidelines”). The Guidelines provide for approval of release of any staff of the oil and gas industry by the Minister. The Guidelines were made pursuant to the provisions of the Petroleum (Drilling and Production) Regulations, 1969 (as amended)² which demands that the holder of an oil mining lease, licence or permit issued under the Petroleum Act, 1969³ or under regulations made thereunder or any person registered to provide any services in relation thereto, shall not remove any worker from his employment except in accordance with guidelines that may be specified from time to time by the Minister.⁴

It has been argued that the power of Minister to make the Guidelines was pursuant to section 9 of the Petroleum Act, 1969. The requirement of the provisions of the Guidelines for the approval of the Minister has thus deviated from the settled law that parties in a contract of employment, which has no statutory flavor, are free to determine the terms of their contract. Many players in the oil and gas industry see the requirement of the approval of the Minister as an impairment into the right of parties to determine the terms of their contracts as well as the right of players in the oil and gas sector to pilot the affairs of their companies to suit the economic realities on ground.

What is more, it is equally in issue whether the Minister was ever empowered to make the Guidelines in the first instance, bearing in mind the caveats to his powers to so make, in terms of nature, scope and status of such laws. Assuming the Minister was within the precinct of his powers in issuing the Guidelines, in which case he could make subsidiary legislation, to what extent can such subsidiary legislation apply to override the provisions of the extant laws on the rights of employers in oil and gas industry to release their staff? It is against this backdrop that this paper seeks an appraisal of legal challenges in the application of Department of Petroleum Resources Guidelines 2019 for the Release of Staff in Oil and Gas Industry in Nigerian work force.

2.0 Nature of a Subsidiary Legislation

In Nigeria and under the doctrine of separation of powers, law making function is the exclusive right of the legislature.⁵ Section 4(1) and 4(6) of the 1999 Constitution⁶ vests the legislative powers on the National Assembly and the State Houses of Assembly respectively. The corollary is that where an arm or body other than the legislature purports to make laws, such act is adjudged to have been done in violation of the established doctrine of separation of powers, consequently, *ultra vires*. This is the general position of law. The exception to the rule is that where bodies other than the legislative arm of government is delegated to wield law making powers, the laws made under such circumstances are referred to as subsidiary legislations or delegated legislations or statutory

¹ Hereinafter referred as the “Minister.”

² Hereinafter referred as the Regulations.”

³ Now the Petroleum Industry Act, 2021.

⁴ Regulation 15A of Petroleum (Drilling and Production) Regulations 1969 (as amended).

⁵ States Houses of Assembly and National Assembly.

⁶ Constitution of the Federal Republic of Nigeria, 1999 (as amended).

instruments. Such power may be delegated to an executive arm of government, local authorities, individuals, judges and practically anyone the legislature deems fit for the purpose of administrative convenience.⁷ Subsidiary legislation where made, carries an equal force of law as the enactment under which it was made.⁸

Section 18 of the Interpretation Act⁹ defines subsidiary legislation to mean:

any order, rules, regulation, rules of court, bye laws made either before or after the commencement of this Act in exercise of powers conferred by an Act.

Though section 18 of the Interpretation Act¹⁰ seems clear and definite as to the enumerated items that constitute subsidiary legislation, a closer look would reveal that more is needed to show what an order, rule, regulation, and other non-definite words are. Nonetheless, it appears clear that subsidiary legislation is the detailed rules and regulations, usually made by the government, to provide for technical or procedural details necessary for the exercise of powers conferred by an Act.¹¹ A subsidiary legislation or enactment, therefore, must have been made 'subsequent' and 'consequent' to and pursuant to the authority derived from the principal statute or enactment. It thus derives its force or efficacy from the principal statute to which it is complimentary or subsidiary.¹² It is supposed to support, aid, assist, supplement and be subordinate to an existing legislation and not to repeal it.¹³ As the Supreme Court held in the case of *Edevie v. Orohwedor*,¹⁴ any subsidiary or subordinate legislation which is inconsistent with the principal legislation is a nullity to the extent of its inconsistency. In effect, where the substantive legislation is not complied with, there is no basis to consider the subordinate legislation on the issue.

The necessity of subsidiary legislation may not be a rocket science. It has been validated over time on various grounds which includes time factor and the need to meet the peculiar demand of a particular organization.¹⁵ This is arguably the major reason for delegated legislation. Law making function is an enormous task. Hardly can there be seen an aspect of human relation that does not require law to order the conduct and affairs of the members. If the legislature alone is empowered to make laws, it may not be able to meet up with this responsibility. The fact that the peculiar need of such a body is best known and suited by the body has not been whittled down by the dire need of time to meet its demands. Hence, the essential law making power is retained by the legislature while such body is left with the subsidiary powers to make detailed and specialized laws to regulate the technical aspect of the law for the sole purpose of giving effect to the essential part of the enabling legislation.¹⁶ This would ensure a fast, more efficient, reliable and detailed law that meets the peculiar demands of such body. This is yet another reason for allowing subsidiary legislation. It helps to avert the rigorous stages of law making processes found in principal legislation; yet, such laws go straight to meet the definite problem it was meant to solve. The benefit comes handy during emergency. For the fact that the delegate is familiar with the terrain, it goes straight to make necessary laws as empowered to cure the particular mischief. This would be a different kettle of fish if the legislature alone is allowed to make all laws.

⁷ S O Imhanobe, 'Delegated Legislation', *Fundamentals of Legislative Drafting*, edited by Epiphany Azinge, Vivian Madu, Nigerian Institute of Advanced Legal Studies 2012, 196

⁸ *Ibid. Trade Bank Plc. v. L.I.L.G.C.* [2003] 3 NWLR (Pt. 806) 11 (P.27, paras. E-F) CA.

⁹ Interpretation Act, L.F.N., 2004.

¹⁰ *Ibid*

¹¹ *Ibid*; What is Subsidiary Legislation < <https://www.legco.gov.hk/education/files/pdf/en/Factsheet6.pdf> > assessed 1 November, 2023.

¹² *Access Bank Plc v. Ogoja* [2022] 1 NWLR (Pt. 1812) 547 (P. 576, para. A) SC

¹³ *Conac Optical Nig Ltd v. Akinyede* [1995] 6 NWLR (Pt. 400) 212 (P.222, paras. A-B) CA

¹⁴ [2023] 8 NWLR (Pt. 1886) 219 at 278, paras. E-H.

¹⁵ *R v St Helens Justices ex p Jones* [1999] 2 All ER 73 at 83

¹⁶ *Willington v. PDP* (2023) 10 NWLR (Pt. 1893) 455(Pp. 481-482, paras. H-B) SC

Although it is trite law that all subsidiary legislations must be in furtherance of the cause of the principal legislation, it is often abused by these bodies to introduce their perceived policies, in the pretext of making subsidiary legislation. This has subsisted because beyond an invitation of a court to declare a perceived subsidiary legislation null and void, there is hardly a legislative machinery for reviewing if a document that purports to be a subsidiary legislation is actually one. This is as found in other civilized clime where such documents are mandatorily submitted before the legislature within a specified time for the purpose of confirming if it actually furthered the cause of its principal legislation.¹⁷

3.0 Status of Department of Petroleum Resources Guidelines 2019 for the Release of Staff in Oil and Gas as a Law in Nigeria

On whether Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry, 2019 qualify as a subsidiary legislation, it would be too sweeping to base any conclusion on the nomenclature “Guidelines.” The decisions of the courts are influenced by one factor, *to wit*: the source of the Guidelines. In other words, the nomenclature Guidelines, *per se*, does not determine if it qualifies as a subsidiary legislation, but the authority and provisions sustaining the Guidelines. If the authority is a known statute, then the next step would be, if the provisions seek the furtherance of the cause of the statute.¹⁸ Where a purported subsidiary legislation was authorized by a known statute but the provision does not further the cause of the enabling statute, then such cannot be said to be a subsidiary legislation. It can at best, be a government policy pointing to where the mind of the government tilts. The question would then be, what is the authority and provisions of Department of Petroleum Resources Guidelines?

The Guidelines were issued by the Minister pursuant to the provision of Regulation 15A of the Petroleum (Drilling and Production) Regulations, 1969 (as amended in 1988). It has been argued that the enabling law on the basis and strength of which Regulation 15A of the Regulations required employers to comply with Guidelines, 2019 was Section 9 of the Petroleum Act. Regulation 15A of the Regulations states as follows:

The holder of an oil mining lease, licence or permit issued under the Petroleum Act 1969 or under regulations made thereunder or any person registered to provide any services in relation thereto, shall not remove any worker from his employment except in accordance with guidelines that may be specified from time to time by the Minister.

In line with the above-stated Regulation, the Minister issued the Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry in 2019. Paragraph 4.0 of the Guidelines provides that:

Any Employer who wishes to release a Worker shall apply in writing to the Director¹⁹ for the Minister’s²⁰ approval stating the manner of staff release, the reasons for the proposed release, the compensation due to the Worker, and any proposed replacement for the Worker. The application shall contain a copy of any document relevant to the Worker’s employment including the Employer’s Conditions of Service as defined under these Guidelines.

¹⁷ Legislative Instrument Act 2003 (LIA) Australian, see also Statutory Instrument Act in United Kingdom

¹⁸ This is necessary to know if the body making the law is still within the confines allowed by the enabling legislation.

¹⁹ Director means the Director of Petroleum Resources.

²⁰ Minister means the Minister of Petroleum Resources.

Staff release was defined as the removal of a Worker in a manner that permanently separates the said worker from the Employer.²¹ Instances of staff release included: dismissal, retirement, termination, redundancy, release on medical grounds, resignation, death or abandonment of duty post.²² Persons affected by the Guidelines include organisations, companies, partnerships, or registered business names which hold oil mining lease, licence or permit (or an interest therein) issued under the Petroleum Act or under Regulations made thereunder or any person registered to provide any services in relation thereto.²³

To be able to resolve the issues of the status of Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry, 2019, at least three questions are pertinent, namely:

- a. Was the Minister authorized under the Petroleum Act to issue the Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry, 2019?
- b. Can Regulation 15A of the Petroleum (Drilling and Production) Regulations, 1969 (as amended) validly make provisions empowering the Minister to issue Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry, 2019?
- c. Assuming the Minister was right in issuing the Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry, 2019, are the provisions in furtherance of the cause of the Petroleum Act?

It is when the Guidelines have survived the above issues that it can be referred to as a subsidiary legislation. This is because, a subsidiary legislation can only serve the cause of a known statute. It has been argued that the power of Minister to make the Guideline was primarily derived from Section 9 of the Petroleum Act.²⁴ A look at section 9 of the Petroleum Act would reveal that no such power was conferred on the Minister. The next port of call is Regulation 15A of the Regulations, which provides that holder of an oil mining lease, licence or permit issued under the Petroleum Act 1969 or under regulations made thereunder or any person registered to provide any services in relation thereto, shall not remove any Worker from his employment except in accordance with guidelines that may be specified from time to time by the Minister. It is in furtherance of this provision that Guidelines was issued.

It is admitted that the Regulations was a subsidiary legislation made pursuant to Section 9 of the Petroleum Act. However, it is unclear if the Regulations *qua* subsidiary legislation can by its provisions empower the making of another legislation. This is particularly, where the Minister makes a subsidiary legislation empowering itself without the corroboration of the principal statute which is the Petroleum Act, 1969. In *Bamgboye v. Unilorin*²⁵ it was held as follows:

The person to whom an office or duty is delegated cannot lawfully devolve the duty upon another, unless he be expressly authorised so to do.²⁶

It is based on this authority the authors argue that the Minister lacks the *vires* to make Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry, 2019 based on the power purportedly

²¹ Paragraph 3.0 of the Regulations

²² *Ibid.*

²³ Paragraph 2.0 of the Regulations *Ibid.*

²⁴ Petroleum Act, 2021.

²⁵ [1999] 10 NWLR (Pt. 622) (P. 329, paras. G-H) 290 SC.

²⁶ [1999] 10 NWLR (Pt. 622) 290 SC.

conferred on him by the Regulation.²⁷ It might be argued that the Minister did not delegate to another person but to himself. This hardly makes any difference since the gravamen is that no Act has validly empowered the Minister to issue such Guidelines.

The idea of insisting that the power to make subsidiary legislation must have been consequent upon a statutory provision is based on the law that such subsidiary legislation can only exist to further the cause of the statute authorizing it. A painstaking look at the provisions of the Guidelines shows that the provisions were not only unauthorized by the Petroleum Act, 1969, but they do not further the cause of Petroleum Act. The Act is not concerned with the employment and termination of staff of oil and gas companies. The requirement that a subsidiary legislation can only be made upon being authorized by a statute with the sole mission of furthering the cause of the principal statute is summed up in the case of *Access Bank Plc v. Ogboja*²⁸

A subsidiary legislation or enactment is one that is made subsequent to and pursuant to the authority derived from the principal statute or enactment. It thus derives its force or efficacy from the principal statute to which it is complimentary or subsidiary.

Therefore, this paper submits that the Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry, 2019 do not meet the condition of subsidiary legislation. This is because it does not derive its force or efficacy from any principal statute neither does it compliment or act as subsidiary to any known statute. Flowing from the above premise, it is safer to refer to the Guidelines as a government policy. It is not a law. This is because it does not owe its existence, cause and purpose to any known enabling statute. Otherwise, it violates the already established principle of separation of powers.

4.0 Law and Government Policy

A "policy" means: to regulate by laws; to reduce to order a principle of behaviour, conduct, etc., thought to be desirable or necessary, especially as formally expressed by a government or other authoritative body; a defined course of action adopted for the sake of expediency, facility, etc.; a course of action adopted and pursued by an action or procedure conformed to or considered with reference to prudence or expediency; the general principles by which an administration is guided in its management of public affairs.²⁹ A government policy is therefore, the official principle or plan of official action of government in any given area. It does not arise and exist by virtue of its general acceptance by the community as a value for the general wellbeing of the community. It is made or issued by government in administrative circulars, gazettes of public notices and executive orders. Its existence must be proved to a court by the production of the original copy or the certified true copy of the circular, gazette of the public notice or executive order.³⁰ On the status of

²⁷ See Regulation 15A of the Petroleum (Drilling and Production) (Amendment) Regulations, 1988. The Courts have also held, in the following cases, that the Minister did not have the vires to make the Guidelines: *Mr. Rapahel Obasogie v. Addax Petroleum Dev. (Nig.) Ltd. & Anor.* in unreported Suit No.: NICN/LA/257/2013, of which judgment was delivered by Hon. Justice J.D. Peters on 12 April 2018; *PENGASSAN & Ors. v. Chevron Nig. Ltd.* in unreported Suit No.: NICN/LA/411/2020 of which judgment was delivered on 26 February 2021 by Hon. Justice E.A. Oji, Ph.D., accessed via <chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://www.templars-law.com/app/uploads/2022/08/PDC-v.-Minister-of-Petroleum-Resources-A-New-Labour-Jurisprudence-Beckons.pdf> on 20 November 2023.

²⁸ [2022] 1 NWLR (Pt. 1812) 547 SC.

²⁹ *Abdulkareem v. AG Lagos* [2016] 15 NWLR (Pt. 1535) 177 SC

³⁰ *Statoil Nig. Ltd. v. Inducon Nig. Ltd.* [2021] 1 NWLR (Pt. 1774) 1 SC.

government policy and the extent it operates to order affairs of parties in a contract, the Supreme Court in *Statoil Nig. Ltd. v. Inducon Nig. Ltd.*,³¹ stated that

A government policy is not law and cannot override the autonomy and freedom of contract. The freedom and autonomy of contract is the fundamental principle of contract law. Parties to a contract have the freedom to determine the terms of their contract. No other person, not even the court can determine the terms of the contract between the parties thereto. The duty of the court is to enforce the terms of the agreement.

Therefore, a government policy cannot create contract between parties. Unless parties to a contract make it part of the terms of their contract by incorporation, it cannot create legal rights or obligations in that contract. So, neither party to a contract can rely on a government policy to assert or claim a legal right nor enforce a legal obligation that the parties did not expressly create in their contract.³² It is on the basis of these case laws that the Guidelines for the Release of Staff in the Nigerian Oil and Gas Industry, 2019 cannot be applied as a law with binding force to regulate employment in oil and gas industry. This is because the Guidelines is not a law. The freedom and autonomy of contract is the fundamental principle of contract law. Parties to a contract have the freedom to determine the terms of their contract. No other person, not even the court can determine the terms of the contract between the parties thereto.³³ Thus, the application of the Guidelines cannot override the provision of the Labour Act which is the principal legislation covering the field of termination of contract of employment.

The above rationale was the foothold upon which the National Industrial Court in the unreported case of *Petroleum and Natural Gas Senior Staff Association of Nigeria (PENGASSAN) & Ors. (Claimants) v. Chevron Nigeria Limited*³⁴ was based. While considering the applicability of the Guidelines, one of the issues for determination in the case was whether oil and gas companies must obtain the prior written approval of the Minister of Petroleum Resources before embarking on any staff release on grounds redundancy in compliance with the Guidelines. The National Industrial Court of Nigeria in delivering its judgment on the issue held that it is not mandatory for employers in the Oil and Gas Industry to obtain the consent, or to notify the Minister before embarking on any staff release, on the ground of redundancy. The Court gave its rationale for the decision as follows:

There is no legal justification for the Guidelines to modify, alter or affect any existing employment agreement between holders of the license and their respective employees, the terms of the Guidelines having not been incorporated by reference into their employment agreement.

The National Industrial Court of Nigeria further held that the Petroleum Act does not empower the Minister or the Director, on behalf of the Minister, to make the provisions stated in the Guidelines, hence, the Guidelines cannot create such an obligation on a license holder to that effect.

³¹ *Supra*

³² *Ebhota v. P.I. & P.D. Co. Ltd.* [2005] 15 NWLR (Pt.948) 266 SC.

³³ *Statoil Nig. Ltd. v. Inducon Nig. Ltd.* (supra) at Pp. 124-125, paras. G-A, SC.

³⁴ Unreported Suit No: NICN/LA/411/2020 delivered on 26 February 2021.

5.0 Conclusion

It is believed that the idea of placing restrictions on the powers of employers in Oil and Gas Industry must have been in furtherance of local content law in Nigeria, particularly in the Oil and Gas Sector, to encourage the participation of Nigerians in the Industry. The initiative is a welcome development. Much as the initiative is desirable, it has to be within the confines of the extant law and must be made by the appropriate authority. The principal legislation on employment in Nigeria, is the Labour Act³⁵. Thus, any subsidiary legislation to be enacted, to further regulate employment relationships must conform with the provisions of the principal legislation, and not be inconsistent with it.

³⁵ Cap L1, LFN 2004.