PRICE ADJUSTMENT OF PETROLEUM PRODUCTS AND THE LAW: 1999-2003[*]

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Introduction

Nigeria returned to civil democratic rule in 1999 after about 15 years of military rule that was characterized by disrespect for procedural safeguards in legal instruments and the rule of law. With this, the belief was and remains that governance would be in accordance with the Constitution of the Federal Republic of Nigeria 1999,[1] which came into force on 29th day of May 1999. Government actions were thus to be regulated by laws made or deemed to have been made pursuant to the relevant powers granted by the Constitution.[2]

One of such laws that had been in force prior to 29th May, 1999 is the Petroleum Act[3] which provided for, and regulated the powers to adjust the prices of petroleum products for domestic consumption. These products which are kerosene, diesel and petrol are used either for household cooking or for powering automobiles. If these products are in short supply, the adequate supply of virtually all economic goods would be affected. Similarly, a hike in the prices of these products has a multiplier effect on the prices of goods and services in the country. An indiscriminate, or sudden increase at that, could result in fluctuation in the supply of goods and services. It cannot be gainsaid that the price at which these products are sold affects the standard of living of the citizenry negatively as well as increase the cost of living.

Perhaps, it was in a bid to restrain indiscriminate increase in the prices of these products that the Petroleum Act was enacted.

Price Regime and the Law: 1999 to 2003

On Thursday, June 1, 2000, the Group Managing Director of the Nigerian National Petroleum Corporation (NNPC) announced a 50 percent domestic price increase on petrol, kerosene and diesel to a gathering of major petroleum products marketers in Abuja. Although the Presidency feigned ignorance of plans at the upward price review, indications showed later that price adjustment was a deliberate policy of the administration in actualizing the liberalization of the downstream of the petroleum sector of the economy.[4]

Following the price increase, the Nigerian Labour Congress (NLC) called a nation–wide strike. The President responded by setting up the Petroleum Products Pricing Regulation Agency (PPPRA) which would, amongst other functions, supervise further price adjustments.

On Tuesday, January 1, 2002, the Chairman of PPPRA, announced another upward adjustment in the domestic price of petrol, kerosene, and diesel. As was the case in the first increment the Presidency exonerated the Federal Government from any blame of involvement in the price increase.

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[1] Section 320 of the Constitution of the Federal Republic of Nigeria 1999 (hereafter the Constitution).

[2] Section 315 of the Constitution preserves existing laws that were in force before the Constitution took effect.

[3] Cap. 320 Laws of the Federation of Nigeria (LFN) 1990 as amended by the Petroleum (Amendment) Decree No. 23 of 1996. Also found in Cap P10 LFN 2004 (hereafter Petroleum Act).

[4] *Sunday Vanguard*, December 23, 2001, p.1.

Remarkably, when the first increment was made, the House of Representatives on Tuesday, June 6, 2000 adopted a resolution calling on the executive arm of government to withdraw the new pump price of petroleum products till wider consultation was made.[5] Following the breach of the resolution, some National Assembly members considered this an encroachment into its powers.[6] The presidency however defended the price increase.[7]

The position of the National Assembly is anchored on the following provision of the Constitution:

> … the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Excusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.[8]

The argument that the resolution passed by the House of Representatives completely bars the price hike[9] may not be supportable, in spite of the above Constitutional provision. The powers of the National Assembly[10] can only be exercised through the mode prescribed by the Constitution. The matters that require the joint resolution of both chambers of the National Assembly or that of the Senate only are well spelt out in the Constitution.[11] This does not include management of mineral resources. The power relating to the management of mineral resources therefore can only be exercised through legislation. Each chamber of the National Assembly is at liberty to pass resolution on any issue of national interest. That notwithstanding, any resolution which is not specifically empowered by the Constitution may not be binding on the other arms of government neither would it have the force of law.[12] Besides, the executive is to enforce 'laws' passed by the National Assembly and see to the day to day running of the country.[13]

In constitutional law, legislation involves the laying down of rules in general, whereas administration or administrative power involves applying the general rules contained in the law on a case to case basis. In making the law, it has been the practice of legislatures to delegate authority to some people to act and create rules, regulations and subsidiary legislation on behalf of the lawmakers.[14] This is exactly what the National Assembly is deemed to have done through legislation. Constitutionally speaking, the National Assembly is deemed to have enacted the Petroleum Act which is the subsisting statute on petroleum management in Nigeria. Section 6(1) of the Act provides:

> The Minister may by order published in the Federal Gazette fix the prices at which petroleum products or any particular class or classes thereof may be sold in Nigeria or in any particular part or parts thereof.

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[5] See House of Representatives Votes and Proceedings of Tuesday, June 6, 2000 No. 120.

[6] Laoshe, L. "We Are Misunderstood" *Thisday*, September 7, 2000, p 48

[7] See the interview of *Thisday* with Dr. Doyin Okupe, former Special Adviser to the President on Media and Publicity in Thisday, June 11, 2000 p. 12; comments of late Attorney General, Bola Ige SAN, in Thisday, June 4 2000. It is thus obvious that these price increases were on the instruction of the President.

[8] Section 44(3) of the Constitution.

[9] Owonikoko, A.J. "Between Constitutionality and Fuel Price Increase (2)" *Thisday*, June 11, 2000. p 17.

[10] The National Assembly is empowered to make law on matters in the exclusive and concurrent legislature lists, ratify appointments and approve the declaration of war. See s. 4 of the Constitution.

[11] Nwabueze, B, *Fostering Partnership between the Executive and the Legislature for Sustainable Democracy,* pp 18-20. Paper delivered at a conference organized by the House of Representatives in Abuja, August 14–16, 2000. Professor Nwabueze outlines those provisions.

[12] Ibid.

[13] Section 5 of the Constitution.

[14] Oluyede, P A O, *Constitutional Law in Nigeria,* Ibadan, Evans, 1992, 196.

“The Minister” is defined in the same Act as “Minister of Petroleum Resources”.[15] Having given the function of fixing prices of petroleum products to the Minister of Petroleum Resources, the National Assembly cannot appropriate that function to itself through resolutions. It cannot even curtail the exercise of that power by issuing administrative orders by way of resolution since the delegated power to the Minster does not contain any requirement as to legislative approval before the new price takes effect. The dictum in the case of *Merchant Bank Ltd v Federal Minister of Finance*[16] is quite instructive on this. In that case, the revocation of the licence granted to the appellant bank by an order of the Federal Minister of Finance on the 23rd September 1960 was challenged. Section 3(5)(b) of the Banking Ordinance provided, *inter alia:*

> The Minister may by order revoke any licence:
> (i) If the holder ceases to carry on banking businesses in Nigeria or goes into liquidation or is wound up or otherwise dissolved; or
> (ii) In the circumstances and in the manner provided for in section 14.

While upholding the action of the Minister, Unsworth FJ, said *obiter:*

> The powers under section 14 of the Ordinance are administrative powers which are … vested in the minister, and it is for the minister, and not the courts, to exercise those powers.[17]

Similarly, the power under section 6(1) of the Petroleum Act is an administrative power which is vested in the Minister of Petroleum Resources, and it is for the Minister, and not the legislature, to exercise those powers.

Although the executive powers conferred on the President include the execution of all laws made by the National Assembly,[18] the exercise of that power is made subject to the constitution and to the provisions of any law made by the National Assembly.[19] That being the case, the President cannot by himself[20] or through a public officer purporting to be acting on his instruction validly increase the prices of petroleum products since a law of the National Assembly has expressly assigned that role to another government functionary: the Minister of Petroleum Resources.

The authority for the foregoing proposition is to be found in *Eleso v Government of Ogun State.*[21] That case involved a chieftaincy dispute. Section 22 of the Chiefs Law[22] cap 20 Laws of Ogun State, 1978 empowered the Alake of Egbaland as the appropriate authority to select and approve the Balogun of Ijaiye and Are of Egba, a minor chieftaincy and, if there should arise a problem, the Commissioner for Chieftaincy Affairs is to set up an inquiry. The Governor of Ogun State however selected and appointed the appellant into the minor chieftaincy stool after the Alake had been sent on leave oversees. It was argued by counsel to the government that as the ultimate authority in the State over the maintenance of law and order the Governor had implied

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15 Section 15. There was no substantive Minister of Petroleum Resources at all material time of the price increase and though desirable, the president is not legally compellable, to appoint one, in line with s. 147(1)(2) of the 1999 Constitution. In the Presidential Media Chat aired on Nigerian Television Authority (NTA) on February 26, 2001, President Obasanjo, in a reply to a question on why he had not appointed a substantive minister for petroleum matters said, rightly in this writer’s view, that the Constitution vested all executive powers of the Federal Republic of Nigeria in him. Therefore he could choose not to appoint a substantive Minister for that Ministry. However, the President’s exercise of those powers is subject to the Constitution and the provisions of any law the National Assembly makes: s.5(1)(a)(b) of the Constitution.

16 [1961] All NLR 598.

17 Ibid at 603

18 Section 5(1)(b) the Constitution.

19 Section 5(1)(a) the Constitution.

20 Unlike the parliamentary system, the executive presidential system of government does not permit the president to hold ministerial portfolio, except the constitution so provides. The constitution did not make such provisions.

21 [1990] 2 NWLR (pt 133) 420.

22 Cap 20 Laws of Ogun State 1978.

residuary power, which he could exercise under section 5(2)(a)(b) of the 1979 Constitution[23] to act in place of the Commissioner of Chieftaincy Affairs or the Alake. The Supreme Court rejected this argument and held the appointment to be invalid and unlawful. According to Kayode Eso, JSC,

> In exercise of his powers as a matter of order, peace and good government, the Governor must have recourse to law. The Governor is certainly not there to seize the power of other functionaries nor is he there to rule in dictatorship in disregard of the established laws of the land…[24]

Nnaemeka–Agu JSC on his part said:

> The full implication of our system in which we have opted for a rule of law is that every functionary of government including its Chief Executive must, in the execution of his functions, at all times act under and in accordance with law. *He cannot rightly take over the function which the law allocates to another.* If a Governor, in the execution of the functions of his high office, comes face to face with a situation which is not covered by the law as it is, or in which a particular function is intended to be performed by another functionary, his solution does not lie in his riding roughshod over the problem in the name of expediency. Rather he should seek an amendment of the law - by the competent legislative authority. [25] (Emphasis mine).

The judicial opinions above apply to the action of the president under discussion. Simply put, the president cannot fix or adjust the prices of petroleum products in view of the subsisting law.

Probable Delegation of the Minister's Power

There is another angle to the defence of the regularity of the price increases. This is the argument that there might have been the delegation of the power of the Minister of Petroleum Resources to the Group Managing Director of NNPC or the Chairman of PPPRA. Such argument will not sail through because of two impediments. Firstly, a non–existent Minister cannot delegate. The powers conferred on a Minister in charge of a particular portfolio cannot be carried out by another person when there is no known occupier of the office of such a Minister. This proposition finds support in the case of *Attorney General of Kaduna State v Hassan).*[26] In that case, the authority of the Solicitor General to enter a *nolle prosequi*, a power granted to the Attorney General by section 160 of the 1979 Constitution, when there was no Attorney General in office was successfully challenged by the respondent in the High Court. An appeal by the state against the nullification was disallowed by both the Court of Appeal and the Supreme Court. It was held that before the power of the Attorney General can be donated in this regard there must be an incumbent Attorney General to donate it. And since there was none at the time, the Solicitor General's action by entering a *nolle prosequi*, was unconstitutional and void. At all material time of the price increases under study, Nigeria had no substantive minister of petroleum resources. Only a Senior Special Assistant on Petroleum Matters, who cannot be equated with a Minister,[27] was appointed. Besides, any delegation by the minister must be 'by writing under his hand'.[28] This condition as to

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[23] Equivalent to the powers conferred on the President under S 5(1) (a) (b) of the Constitution.

[24] Supra n. 21 at 437.

[25] Supra n. 21 at 443.

[26] [1985] 2 NWLR (pt. 8) 483.

[27] Unlike that of a special adviser and assistant, by s. 147 (1)(2) of the Constitution, the Senate confirms a ministerial appointment. Ministers are on a higher pedestal and are to be held more accountable than special advisers and senior special assistants.

[28] S. 12 (1).

writing could not have been complied with under these circumstances where there was no substantive minister for petroleum resources.

Secondly, there is an express prohibition of the delegation of the power to make orders by the Minister under the Petroleum Act. The relevant section provides:

> The Minister may by writing under his hand delegate to another person any power conferred on him by or under this Act except the power to make orders and regulations.[29]

The power of the Minister to fix the prices of petroleum products can only be done by "*order* published in the Federal Gazette"[30] Therefore, even if there was a substantive Minister of Petroleum Resources, any delegation of the power to fix price would be unlawful.

The Nigerian National Petroleum Corporation Act[31] allows officers of the Corporation, including the Group Managing Director of NNPC, to exercise some of the powers of the Minister of Petroleum Resources under the same Act. However, the Act contains no provision relating to fixing of prices for petroleum products. The Group Managing Director of NNPC acted without legal backing when he announced price increase on petroleum products.

The Petroleum Products Pricing Regulatory Agency Bill[32] was still pending before the National Assembly at the material time. The Agency and its Chairman lacked legal backing to have announced another price increase in 2002.

Possible Options in the Price Increase Debacle

In spite of the vacuum created by the non-appointment of a Minister of Petroleum Resources and the non-passage of the Petroleum Products Pricing Regulatory Agency (PPPRA) Bill at the material time, prices of petroleum products could have been increased without breaching the laws of the land. This would have been possible if the provisions of the Ministers' Statutory Powers and Duties (Miscellaneous Provisions) Act[33] had been utilised. Section 2(1) of the Act provides:

> Subject to the provisions of this section, the President may, in any law enacted by the National Assembly or having effect as if it had been so enacted, by order make such modifications, whether by means of addition, substitution or deletion, as he may think fit for the purpose of
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> (a) transferring to a Minister any of the powers and duties which are by such law directly or indirectly conferred or imposed on the President, or any public officer or which are conferred upon *any other Minister;* and
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> (b) making provisions consequential or incidental to any such transfer. (Emphasis mine).

Relying on the provision, the President could have substituted the "Minister of Petroleum Resources" with perhaps, the "Minister of Special Duties" or the "Minister of Internal Affairs" or, any Minister in the definition of "the Minister" in the Petroleum Act.[34] With such an alteration, the designated minister could have adjusted the prices of petroleum products lawfully by complying with section 6(1) of the Petroleum Act.

The transfer of statutory functions from one Minister to another Minister by the president has been given judicial notice in the case of *Burma and Hawa v Saki.*[35] This case bothered on the validity of the deportation orders made by the Minister of Internal

[29] Ibid.
[30] Section 6(1).
[31] Cap. 320 LFN 1990; Cap N 123 LFN 2004; s.2(1)(2).
[32] This bill was passed by the National Assembly and assented to by the President and became a law in 2003.
[33] Cap. 228 LFN 1990; Cap. M14 LFN 2004.
[34] Section 15 Petroleum Act.
[35] [1962] 2 All NLR 62.

Affairs because the minister contemplated by the Aliens (Deportation) Act was not specified to be the Minister of Internal Affairs as such. The court held that where an Act of parliament provides for certain powers to be exercised by a Minister but without specifying which particular Minister should exercise such powers, then it is quite competent and lawful for the Governor–General, in the exercise of his constitutional powers under section 84 of the 1960 Constitution, to assign such powers to any Minister, and any such Minister will be quite competent lawfully to exercise such powers. Expatiating further Udo–Udoma J (as he then was) said:

> The position would be otherwise if the Governor-General in the exercise of his powers were to assign powers provided for in an Act of parliament to be exercisable by a specified minister to another minister upon whom such powers are not conferred. In such a case, the Governor–General might be considered to be acting unconstitutionally.[36]

The strong effect of the sound dictum above has been watered down by the general powers given to the President by the legislature to transfer statutory duties conferred on a specified Minister to another minister upon whom such powers are not conferred.[37] If the President acts in this direction, he cannot be considered to be acting unconstitutionally, as he would only be implementing a law passed by the legislature.[38] The petroleum product increases would have been lawful if powers of the President in this respect had been explored.

One fall out of the utilization of the powers contained in the Ministers' Statutory Powers and Duties Act is the provision in section 2 (4) that:

> A law which has been modified in accordance with an order made under this section shall be deemed for all purposes to have been amended in accordance with such modification, and the provisions of section 22 of the Interpretation Act (which relates to the reprinting of Acts and Laws which have been amended) shall apply to any modification so effected as they do to additions, omissions, substitutions and amendments effected by an amending Act or Law.

By this provision, the Petroleum Act would have been amended by the President. It is doubtful whether when a substantive Minister of Petroleum Resources is appointed the power overprice fixing could be reclaimed. The transfer of such a statutory function is thus total and irreversible. A re-transfer of the price fixing power to the Minister of Petroleum Resources (who should ordinarily exercise that power) through a change in the definition of the Minister in section 15 of the Petroleum Act would then require legislative intervention. Going by the snail pace at which bills are passed and laws amended, it may take a long time to secure such an amendment.

Legality of Subsequent Price Increase

There was another price increase in 2004 but this time by the Petroleum Products Pricing Regulatory Agency. A Minister of State for Petroleum Resources was appointed in 2004.[39] It is doubtful whether the status of the current minister meets that referred to in the Petroleum Act.[40] He may not have been competent to lawfully exercise the power under section 6(1). The increase was however neither done by the Minister nor by any official purporting to be acting on the Minister's instruction.

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36 Ibid.

37 Section 2(1) Ministers' Statutory Powers and Duties Act.

38 Section 5 of the Constitution.

39 This was possibly in anticipation of the presidency of the Organization of Petroleum Exporting Countries (OPEC) which Nigeria currently holds.

40 'Ministers of State' are seen as junior ministers in the Federal Executive. Normally, they complement the full ministers in their respective ministries. There is still no Minister of Petroleum Resources.

The Act that gave legal backing to the PPPRA came into effect in 2003.[41] By the provisions of that law, the PPPRA is to fix price regime and determine pricing policy of petroleum products.[42] By section 7 of this Act, it seems section 6 (1) of the Petroleum Act has been impliedly repealed.[43] This is because, the power given by law to the Minister of Petroleum Resources to fix the price at which petroleum products are to be sold has been transferred by a later legislation to another agency, the PPPRA which is saddled with an additional responsibility – that of determining price policy of petroleum products. It follows therefore that the subsequent price increase of petroleum products in Nigeria from 2003 till date is lawful.

Role of Citizens and Judges in Protecting the Law

It is shocking that an illegality that had so much harsh economic effect on the citizenry, both high and low in the society, was allowed to pass unchallenged. While a culture of adherence to legality by rulers in a democratic society is a legitimate expectation by the ruled, the latter must be on guard to protect the law against possible breach by resorting to adjudication whenever the need arises. A placid reluctance to utilize the court system with the belief that litigation against unlawful and illegal acts of government is doomed to failure is an outright relinquishment of constitutional rights and a disdainful refusal to push for good governance, protect democratic values and respect for the rule of law.

The judiciary too must wake up to the challenges of promoting good governance and protecting democratic values and enhancing respect for the rule of law. What is being advocated here is a court system that engages in judicial activism.[44] Rigid rules of *locus standi* that lead to retrograde ruling must be relaxed. Going by the present rules of *locus standi* in Nigeria, probably if a public spirited citizen had challenged the increases

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[41] Petroleum Products Pricing Regulatory Agency (Establishment) Act No, 8 of 2003. The Petroleum Products Pricing Regulatory Agency (Establishment) (Amendment) Bill, 2004, is before the National Assembly to make provisions for the National Assembly to approve any price regime fixed by the agency. The Bill also seeks to make the Agency an autonomous one, free from the entanglements of the presidency.

[42] Section 7 PPPRA Act.

[43] The doctrine of implied repeal of statutory provisions is a common law doctrine as enunciated in *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1 KB 733 and *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590. Both focused on the Acquisition of Land Act 1919. That Act was a slum-clearance measure which laid down levels of compensation for property owners whose houses were demolished. The Housing Acts of 1925 and 1930 made those compensation provisions less generous. The land affected owners looked for some way to have compensation assessed on the basis used in the 1919 Act. In *Vauxhall*, it was held that where two inconsistent provisions are found in two Acts of Parliament, the one passed subsequently to the other, the later provision prevails and is deemed to have impliedly repealed the earlier one. Similarly, in *Ellen* the Court of Appeal held that s.46 of the Housing Act 1925 so far as its provisions are inconsistent with those of the Act of 1919, has repealed by implication the provisions of the earlier Act. See Loveland, I, *Constitutional Law: A Critical Introduction,* London, Butterworths, 1996, 42-43.

[44] Otakpor, N, "The Nigerian Judiciary: Activism or Benign Policy Making," (1995) 2:1 *University of Benin Law Journal,* 1.

in the prices of petroleum products, he would have met with obstacles.[45] Perhaps, this is one of the reasons why reform must be carried on fully in the Nigerian judiciary.[46]

Conclusion

The illegality committed and condoned in the price increases in petroleum products between 1999 and 2002 belie any claim to constitutionalism or adherence to the rule of law. A culture of adherence to legality must be developed to maintain order and imbue confidence in the structure of governance in the citizen.

The citizens must all be guards of the law. A written law remains dead letter; its quickening spirit is the consciousness and readiness of the people it is meant to serve to ensure it is not violated.

The judiciary, described with the cliché - the last hope of the common man – must be prepared more than before to protect the rights of the citizens as embedded in the law. This, of course, demands the protection of existing laws.

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[45] See *Adesanya v President* [1981] 5 SC 112 where the term *locus standi* was defined as the interest a party has in the subject matter of the suit. *Fawehnmi v Akilu* [1987] 4 NWLR (pt 67) 797 relaxed the rigid rules of *locus standi* only in criminal matters. In the other realms of public law, the rigid rules still apply. In *Owodunni v Registered Trustees of Celestial Church of Christ* [2000] 10 NWLR (pt 675) 315, 338 Ogundare JSC explained: "At common law, the position is that in the realm of public right, for a person to invoke judicial power to determine the constitutionality of legislative or executive action, he must show that either his personal interest will immediately be or has been adversely affected by the action or that he has sustained or is in immediate danger of sustaining an injury to himself, and which interest or injury is over and above that of the general public." Similarly, in *Fawehinmi v IGP* [2002] 7 NWLR (pt 767) 606 a case where an order of mandamus was sort to compel the police to investigate criminal allegations against the Governor of Lagos State, Uwaifo JSC said: "… I am not satisfied that it has been shown that the appellant has a specific legal right to enforce or to the enforcement of the police duty to investigate alleged crimes, or that his interest which is above that of the general public has been affected." The requirement that the interest of a litigant or the injury he suffers must be `over and above that of the general public' prevents public spirited citizens who are interested in protecting the law from going to court.

[46] Gadzama, J K, "Challenges of National Socio Economic Reforms to the Judiciary," *The Guardian*, April 25, 2006, p 68.