



Delegated Legislation In Nigeria: Taming the Wilddog While it's Still Early

Kingsley Osinachi N. Onu
Lecturer, Adeleke University

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ABSTRACT

Separation of power is strong pillar of a democratic government in the world. All arms of government are expected to confine themselves to their traditional responsibilities under the law. However, modern day realities have shown that a strict adherence to this sacred principle have the tendency to grid a government to a halt. Delegated legislation is the statutory donation of law making power to a person, organ or institution other than the legislature. This practice eases of huge legislative burden on the legislature, and it is an acceptable practice globally. This paper uses a desk-based approach to examine delegated legislation in Nigeria. The paper considers the concept of power and delegation; origin of delegated legislation; arguments for and against delegated legislation; publication and control of delegated legislation in Nigeria. The paper finds that a challenge associated with the growing pace of delegated legislation in Nigeria is the possible threat to the legitimacy to legislative enactments. It further finds that there is the challenge of control of delegated legislation in Nigeria due to the absence of a formal law on rule making like the Statutory Instruments Act, 1946 of England. It concludes by recommending that a law be enacted which will detail the guideline for the making of delegated legislation with strict provisions on scrutiny by the legislature or its committee.

ABSTRACT

Pemisahan kekuasaan adalah pilar kuat dari pemerintahan demokratis di dunia. Semua badan pemerintah diharapkan untuk membatasi diri pada tanggung jawab tradisional mereka di bawah hukum. Namun, kenyataan zaman modern telah menunjukkan bahwa kepatuhan yang ketat terhadap prinsip suci ini memiliki kecenderungan untuk menghentikan pemerintahan. Perundang-undangan yang didelegasikan adalah sumbangan undang-undang dari pembuatan undang-undang kepada seseorang, organ atau lembaga selain legislatif. Praktik ini meringankan beban legislatif yang besar pada legislatif, dan ini adalah praktik yang dapat diterima secara global. Makalah ini mempertimbangkan konsep kekuasaan dan delegasi; asal undang-undang yang didelegasikan; argumen untuk dan menentang undang-undang yang didelegasikan; publikasi dan kontrol undang-undang yang didelegasikan di Nigeria. Makalah ini menemukan bahwa tantangan yang terkait dengan laju pertumbuhan legislasi yang didelegasikan di Nigeria adalah kemungkinan ancaman terhadap legitimasi untuk pengesahan legislatif. Lebih lanjut ditemukan bahwa ada tantangan untuk mengontrol undang-undang yang didelegasikan di Nigeria karena tidak adanya undang-undang formal tentang pembuatan aturan seperti Statutory Instruments Act, 1946 dari Inggris. Ini diakhiri dengan merekomendasikan agar undang-undang diundangkan yang akan merinci pedoman untuk pembuatan undang-undang yang didelegasikan dengan ketentuan ketat tentang pengawasan oleh legislatif atau komitennya.

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Corresponding Author:

Kingsley Osinachi N. Onu,
Lecturer of Law,
Adeleke University,
Loogun-Ogberin Road, Ede, Osun State
Email: kingsleyonu2020@gmail.com

I. Introduction

As a modern democracy, it is quite impossible for the arms of government (the executive, legislature and judiciary) to carry out their functions effectively as societal, economic and political problems are on the increase daily. To ameliorate the crashing and slow administration of government, powers and functions has to be delegated to agencies and authorities for smooth running of government. This brings us to the question, what is delegated legislation? Delegated legislation is a law or regulation made by an institution, group or person (other than the legislature) authorized by the Constitution or a law made by the legislature to so do. This paper seeks to examine delegated legislation procedure in Nigeria. Delegated legislation which is also referred to as 'subordinate legislation', 'subsidiary legislation', 'administrative legislation' or 'administrative rule making' is now widely accepted as one of the pivotal apparatus for the actualization of modern day governmental goals and aspirations. A delegated legislation cannot stand on its own. It derives its validity and legal authority from its enabling law which could be the constitution, an Act of the National Assembly or a law of the State House of Assembly. For instance, section 46 of the 1999 Constitution of the Federal Republic of Nigeria (As Altered) empowers the Chief Justice of Nigeria to make Rules for fundamental rights enforcement in Nigeria. This paper examines delegated legislation in Nigeria. In order to do justice to the subject, the paper is divide into ten parts. Part is general introduction. Part two discuss the concept of power. Part three focuses on meaning, origin and types of delegated legislation respectively. Part four examines factors that must exist for proper delegation of power. Part five deals on argument for and against delegated legislation; whereas part six and seven deals on publication and control of delegated legislation. Lastly, part eight is on conclusion and recommendation.

II. RESEARCH METHODS

Power is the ability, authority, strength, official or legal right to do something. There are different kinds of power, such as, physical, legal, military, economic, and political and so forth. In this case, it is legal right to make delegated legislation i.e. power to make rules and regulations under a parent statute that gives the administrative authority or public authority to do so. For the purpose of administrative law, however, we should not however note that legislative power is the power is the power to lay down the law for people in general, whereas administrative power is the power to lay down the law for them individually or in some particular case.

In administrative law, power donation or delegation is of dual imperative, to wit: constitutional and administrative imperatives. Constitutionally, the delegator (donor) is the citizens of a nation state, as the sovereign power of the state resides in the people. Thus, in Nigeria, section 14(2)(a) of the 1999 Constitution of the Federal Republic of Nigeria provides that "sovereignty belongs to the people of Nigeria from whom government through the Constitution derives all powers and authority." Elected and appointed government officials are the channels through which the people exercise this sovereignty. The Preamble to the Constitution vigorously explicates the relationship between the people and constitution when it asserts that "WE THE PEOPLE ... make, enact and give to ourselves this Constitution." In a constitutional democracy, the people are the sovereign and power reside in the people. The people, through the constitution usually delegate power out to the three arms of government, and to other organs of government, public institutions and authorities at the three tiers of government. Section 4 of the 1999 constitution delegates legislative powers to the legislature. Section 5 of the 1999 constitution delegates executive powers to the Executive. Section 6 of the 1999 Constitution delegates judicial powers to the Judiciary. The general presumption is that the people are the true donors of all constitutional powers and are also the authors of same, though the Constitution may not pass the autochthonous test.

Administratively, the legislature is the donor of power. In other words, it is the National Assembly of the Federation or the House of Assembly of a State that vests power in administrative

agencies. 'It is in this latter (administrative) sense that we are mainly concerned. But before we proceed, it must be stated – at least for conceptual clarity – that the legislature is the direct donor and the citizens the indirect donors of power exercised by administrative agencies.'

In exercise of power, the legislature may enact laws to establish various public bodies and by such statutes delegate power to such public authorities and bodies. This is how power is delegated from one body to another to do various things. This brings us to the Concept of Delegated Legislation.

III. RESULTS AND DISCUSSION

1. Meaning and Nature of Delegation of Power

Delegation of Power is the conferment of power by one person or body on another to act for him. Delegation of power is the giving of authority, in which such authority is vested to another administrative authority or agency, to do what the person giving the power can do. Therefore, delegation is the transfer of authority by one person to another person to empower that other person to perform a task on behalf of the donor of the power. For instance, a landlord may delegate to his agent such as a caretaker the authority to collect rents, make rules and regulations for the maintenance and cleanliness of the premises and to exercise his other rights and obligation with respect to the tenants occupying his property.

Delegated legislation can be defined as a law or regulation made by an institution, group or person (other than the legislature) authorized by the Constitution or a law made by the legislature to so do. Delegated legislation can also be defined as the conferment of power by an act of parliament or the constitution on a person, institution or authority to make laws. Section 37 of the Interpretation Act, defined subsidiary instrument as '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.' The subsidiary bodies that power can be delegated to includes the president, governors, ministers, commissioners, Administrative agencies, professional bodies etc. Benson noted that: When carrying out these powers, these bodies act every bit like the parliament and make laws that have the same force as laws made by the parliament. These legislations derive their legitimacy from Acts of Parliament and they can only be made where there is express provision in the Primary Legislation to do so.

The president of Nigeria for example is given the power to enact laws pursuant to Section 32 of the 1999 Constitution of the Federal Republic of Nigeria (as Amended) to make laws pertaining to the prescription of special immigrant status with full residential rights to non-Nigerian spouses of citizens of Nigeria who do not wish to acquire Nigerian citizenship. Another example is the right conferred on the Chief Justice of Nigeria to make rules with respect to the practice and procedure of a High Court in accordance with Section 46(3) of the 1999 1999 Constitution of the Federal Republic of Nigeria (as Amended). Delegated legislation is administrative law in action. It is law making by a public authority; other than a parliament. As a general rule, power may be delegated by one person to another person or body to take action, make delegated legislation or to do all that the donor of the power is legally entitled to. The Nigerian court captured the meaning and nature of delegated legislation in Nigeria the case of *Williams v. Majekodunmi* where, Bairamian, F.J. said that:

The volumes of our laws begin with the primary laws passed by the legislature itself, and go onto give the subsidiary legislation made by a person or body authorized by the legislature to supplement its enactments. The convenient method of legislation has been in use over the years, and there are specific provisions in the Interpretation Act, which regulate the making and effect of subsidiary legislation. It is a fair inference that everyone who assisted in the framing of the constitution, and in particular the legal advisers who attended the conference, were all aware of this method of legislation, and there was no intention to require that every bit of legislation made

after independence had to be made by the legislature itself, whether Federal, Regional or else it would be of no effect.

Delegated legislation is also called subsidiary legislation (it is subordinate) i.e. made by a body on which parliament has conferred limited powers to make laws and which laws are always subject to abrogation, amendment or alteration by parliament or other parliamentary control. Whenever parliament delegates power to another person or authority to make laws, the end product or law that is made thereto is known as delegated legislation, or subsidiary legislation, because, they are subordinate or secondary laws to the primary laws, or parent statutes made by the parliament and are subject to the control of parliament, which delegated the power to make them in the first place. Additionally, subsidiary laws are also subject to control and review by the court. Delegated legislation is also referred to as 'subordinate legislation', 'subsidiary legislation', 'administrative legislation' or 'administrative rule making. The court will declare as null and void (as being fundamentally ultra vires) any exercise of power to make a subsidiary legislation that is derived from an enabling law. Therefore, in *Buhari v. Obasanjo*, the court held that the Independent National Electoral Commission is empowered pursuant to section 149 of the Electoral Act, 2002 to make regulations, manuals or guidelines subject to the provisions of the Act, for the purpose of giving effect to the provisions of the Act.

On the contrary, the court in *A.G. Lagos State v. Eko Hotels Ltd* nullified a law made by the Lagos State Government that borders on the regulation of companies incorporated under the Companies and Allied Matters Act, as same is beyond her powers being a matter within the exclusive legislative list. Examples of subsidiary (delegated) legislations include rules and regulations, statutory orders, forms, precedents and so forth.

2. Origin of Delegated Legislation

Delegated legislation is an ancient principle of English legal jurisprudence; it dates back to several centuries such as Statute for Exportation of Wool of 1337 and Statute of Staple of 1388. Administrative provisions made by the Supreme in council consisted the buck of modus operandi of the government of this era. It is imperative to note that there was no delimitation of powers conferred by the above statutes. As time progressed, there emerged statutes that empowered the king in council to make proclamation that potency with an Act of the Parliament. Benson posited that "it was not until parliament asserted their powers as the sole agents responsible for law making that the exercise of government to make laws was seen as being conferred on them by Parliament."

There was a tremendous rise in the volume of delegated legislation in the 19th century, as England alone holds the record of passing about three to four thousand delegated legislation on annual basis. These legislations vary from simple to complex issues of societal importance, but one unique feature of most of them is that they deal with daily life of citizen as they form part of the vast legislative instrument that regulate the conduct of citizens. These legislations have become very important these days because of the enormous legislative responsibilities and the fact that not all matters can be included in primary legislations of the legislators.

The above scenario brought about the dare need for division of law making power between the legislative arm of government and the executive arm of government. Whereas the legislators focused on the form of the law, the executive focused on the details. Henry Thring is of the firm view that the only way the Parliament fulfill its primary function is by restricting itself to the material provisions, while allowing the governmental departments to deal with the deals. Dicey gave credence to the above postulation when he stated that "the substance and form of the law will be improved if the executive could work out the detailed applications of the Act of Parliaments". The above position has also been accepted by our courts. This point was made the Supreme Court of Nigeria through Per Nnaemeka-Agu, JSC (as he then was) in the celebrated case of *Nwosu v. Imo State Environmental Sanitation Authority* thus:

Although the courts are strict in requiring that statutory power shall be exercised by the persons on whom it is conferred and by no one else, they make liberal allowance for the working of the official hierarchy at least so far as it operates within the sphere of responsibility... This is embodied in the Latin maxim: *qui facit per alium facit per se* i.e. he who does an act through another is deemed in law to do it himself.

3. Types of Delegated Legislation

Delegated legislation in Nigeria appears in various forms, classifications, and names as evident in the Laws of the Federation of Nigeria. The validity or ranking of a delegated legislation is not determined its nomenclature but, its enabling law. The various types of delegated legislation include the following :

Regulation- This is the most common name by which delegated legislations are named in statutes and the constitution in Nigeria. They are used for 'matters of wide national importance that require rules of general application'. The president of Nigeria for example is given the power to enact laws pursuant to Section 32 of the 1999 Constitution of the Federal Republic of Nigeria (as Amended) to make regulations pertaining to the prescription of special immigrant status with full residential rights to non-Nigerian spouses of citizens of Nigeria who do not wish to acquire Nigerian citizenship. In practice, the National Assembly and the State House of Assemblies are the major delegators of powers to make regulations. For example, section 25 of the National Housing Fund Act empowers the Minister of Housing to make regulation on terms and conditions for obtaining of National Housing Fund loan.

Rules- This is usually made where the enabling law seeks to prescribe a procedure, for example, the 1999 Constitution empowered heads of courts of record to make rules to regulate practice and procedure of those courts. Another example is the right conferred on the Chief Justice of Nigeria to make rules with respect to the practice and procedure of a High Court in accordance with Section 46(3) of the 1999 Constitution of the Federal Republic of Nigeria (as Amended).

Order- An order is typically used 'to bring into effect some or specific intendment of the law' . An example is the power conferred on the president to make by order necessary modifications to existing laws prior to the advent of Constitution in order to bring them into conformity with the Constitution. Orders are also used in relation to exercise of some judicial and quasi judicial powers.

Statutory Instrument- It is normally employed to signify the exercise of a delegated power emanating from an empowering law in a formal document published as statutory instrument (S.I.) with accompanying serial numbers. Eg. S.I. No. 12 of 2018. The Statutory Instrument may be a formal pronouncement 'that has the force of law deriving from the enabling statute'; a rule; an order ; or a regulation.

Bye-Law- A bye-law or by-law is 'an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers- ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance.' For example, section 58 of the Nigerian Railway Corporation Ordinance of 1955, conferred on the Nigerian Railways the power to make bye-laws. Section 20 of the then Western State Interpretation Law empowers the Local Government Councils to make by-laws.

Directions: - are given by the Minister to a public body by way of legally binding instructions on how it exercises its functions. Example the Electoral Tribunal and Court Practice Direction 2011 were made by the President of the Court of Appeal under the powers conferred by Sections 243 and 285 of the 1999 Constitution and section 245(2) of the Electoral Act.

4. Factors for Proper Delegation of Power

Since the power and right to make laws were constitutionally conferred on the legislature, any delegation i.e. transfer of such rights to another authority must follow certain procedures in order for it to be valid (legal). These procedures include legal principles and certain constitutional adherence. These characteristics or factors for valid and proper delegation include;

a. The Power Must be Delegable

The 1999 constitution of Nigeria in accordance with Sections 4, 5, 6, conferred power on the legislature, executive and judiciary respectively. Some of these powers given to them can be delegated by one branch of government to another. The question arises as to what power can or cannot be delegated for powers to be delegable; it must be in respect of a duty which may be performed by another person, agent or delegate. For example the legislature pursuant to the Dangerous Drug Act No.12 of 1935 gave the executive the right to regulate the importation, exportation, manufacture, sale and use of opium and other dangerous drugs. This act gave the executive the power to create National Agency for Food and Drug Administration and Control (NAFDAC) which created rules to regulate issues involving food and drug administration and control.

Some functions are highly personal to the person or body having the power and which must therefore perform such duties. As a general rule, powers that cannot be delegated include; Duties that have to be performed personally E.g. the legislative or law making powers of the legislature i.e. powers to declare war, powers to impeach. For example the case of A.G Bendel V A.G Federation and 22 others , the government of Bendel state brought action challenging the passage of the allocation of revenue (Federal Accounts e.c.t.) bills into law by the Joint Finance Committee of both Houses of the Assembly. The supreme court held in favor of the Government of Bendel State Inter Alia, setting aside the Allocation Of Revenue (Federal Accounts etc) ACT 1981 as null and void, that neither the senate nor the House of Representative the National Assembly has power to delegate its legislative function to a committee and as such no committee of either the state or the House of Representatives or a joint committee or both houses can pass a bill into law, consequently ,the Joint Finance Committee has no power to decide whether a bill shall be passed into a law, as is it incompetent to take over the legislative power or the National Assembly. In the case cited Supra, the court held in favor of the legislative power of passing a bill into law is an extremely personal role to be performed by the legislature alone and as such, such powers cannot be delegated which constitutionally must be passed by the National Assembly was left for a committee to perform the function i.e. that is the power was delegated to the Joint Finance Committee to be passed into a law, this delegation was unconstitutional and therefore declared non and void by the court.

b. The Delegation must be Pursuant and Consistent to an Existing Law (The Constitution or Act of Parliament).

This is the most important factor for the validity of delegated legislation. According to section 1 of the 1999 constitution that states; “the constitution is supreme, and its provision shall have binding force on all authorities and persons throughout the federal republic of Nigeria.” The section shows the supremacy of the Nigerian constitution against any legislation decree, order, acts, law etc. Pursuant to section 1 (3), of the same Constitution, any other law in inconsistent with the provision of the constitution shall to the extent of inconsistency be non and void. Also, in accordance to section 4, the legislative arm of government has been given the power to make laws for the maintenance of peace, order and good government of the federation. However, the constitution still remains supreme and any other legislation inconsistent with its provision will be null and void. Therefore, for a delegated legislation to be valid the power must have been delegated pursuant to an existing law and must be consistent with such legislation. The constitution subordinates all actions of persons and authorities or institutions under the law so that any infraction of same can always be declared null and void and of no effect. In *Osadebay v. A.G. Bendel State per Nnaemeka Agu JSC* (as he then was) in his dissenting judgment posited thus:

So, quite apart from the general principle of law that a dependent or subordinate legislation can have no wider binding or effective force than the paramount law which gives it force, to hold that Order No.33 of 1968 could be effective and binding four months before its purported enabling

legislation, i.e. Decree No.37 of 1968, took effect has serious constitutional implications. I do not so hold. Also, ordinary commonsense dictates that a child can never be older than his father.

Also, in *INEC v. Musa* the Supreme Court in asserting the supremacy of the Constitution over all statutory provision applied the ‘doctrine of covering the field’ in declaring certain part of the Electoral Act and Guidelines made pursuant thereto null and void. The said Guideline barred people from forming more political parties. The Supreme Court held that the Constitution has exhaustively provided for freedom of association, and such cannot be legislated upon by the National Assembly or by a subsidiary legislation made by the authority of the afore mentioned. In *NNPC v. Famfa Oil Ltd* the court nullified a regulation made by the Minister of Petroleum for being inconsistent with the First Schedule of the Petroleum Act.

c. There must be Proper Delegation to the Appropriate Authority and It must be Acted on, and Exercised by the Person it is Vested Upon

The general rule of law is that before a delegated power may be exercised, the power must have been delegated by the appropriate authority. However, where the power was not delegated, and then if the act is one that is capable of being ratified, then the appropriate authority that should have delegated the power may ratify the action that was taken by the delegate, as may be the case in a principal and agent relationship. Where neither of this is the position, then the action of the delegate stands to be set aside by the court. This was held by the Supreme Court in the case of *A.G Kaduna State .v. Hassan* , where the plaintiff respondent challenged the entry of a “nolle prosequi” which terminated a criminal proceeding in which he had interest as not being validly entered. On appeal the Supreme Court held that the “nolle prosequi” was not validly entered in the said criminal proceedings because, the Attorney General did not delegate power to do so. If a delegated power will be valid, it must be delegated by the appropriate authority and must be acted on and exercised by the person it is vested upon.

This introduces the maxim of “Delegatus Non Protest Delegare” meaning a delegate cannot sub-delegate his power. Whatever power is delegated to a delegate cannot be sub-delegated unless or otherwise authorized e.g. the duties of the Attorney General to enforce laws and prosecute offenders are by the provisions of the constitution delegable. Thus these functions are mainly carried out by the legal officers serving under him in the ministry. This was the position in *Ibrahim .v. State* , where the defendants appellants challenged the constitutionality of the legal notice and consequently of the delegation of the powers of the Attorney General to the legal officers of the ministry. The defendant appellants had been charged and tried on information for Arson and willful damage of property. The Attorney General had delegated his power under section 191 of the 1979 constitution to his subordinate staff in the state Ministry of Justice. On appeal, the Supreme Court held; that the delegation of powers by the A.G of Ondo state in Ondo state legal Notice No 4 of 1980 though wide, was valid and constitutional and the information with which the appellants charged were constitutional and valid.

Every delegate must exercise the power vested in him according to the law which conferred the power on him. The person exercising the delegated power must be “appropriate authority” to delegate the power to a “fit and proper person (authority)” who is to act on it personally unless authorized to sub-delegate. A delegated power cannot be further delegated , the principle of law is that a person to whom an office or duty is delegated cannot lawfully devolve the duty upon another, unless he is expressly authorized so to do.

5. Arguments for and Against Delegated Legislation

a. Arguments for Delegation of Legislative Power

It has been contended that the legislation must share its law making powers with the executive arm of government in order to attain the modern day expectations demanded of her. No wonder Henry Jenkins argued in favour of delegated legislation in the 19th century when he said that:

“statutory rules are in themselves great public advantage because the details can thus be regulated after the bill passes into an Act with greater care and minuteness and with great

adaptation to local and other special circumstances than they can possibly be in the passage of a Bill through parliament”

Some of the arguments that have been canvassed in favour of delegated legislation are inter alia:

b. Legislative Time Constraint

Modern legislation is strug with demanding exigencies and as such calls for more legislative time being that the legislative grounds to cover are vast and problems which need laws keep evolving every day. Delegated legislation reduces the work load of the legislature, thereby allowing the legislature to concentrate on pressing national issues, and leaving administrative deals of laws to the governmental agencies charged with their implementation. Hence, under the modern legislative dispensation, the legislature focuses on the essentials of the law, while it delegates the details to the corresponding agency of government responsible for its implementation. Thring supporting the above postulation opined that ‘parliament will have more time for the consideration of more serious questions involved in legislation, if subordinate matters can be withdrawn from its cognizance’.

c. Emergency Powers

Delegated legislations is entangled with rigorous making procedures like primary legislations, hence they are timeously made. Delegated law making powers are expedient in emergency times. Delegated legislation enables the legislature to provide ready-made or customized and prompt response to future emergencies or contingencies such as natural disasters, drought, strikes, religious strife, socio-economic and political crises, etc. Benson wrote and we agree with her that:

‘These laws are easy to amend and revoke so as to make them up to date and meet up with the needs of the society. They allow for quick changes without government having to push through a completely new Act and they can be used for those schemes involving economic control that require high level of flexibility for their implementation.’

Former President Olusegun Obasanjo acting pursuant to the power conferred on the president by section 305 of the 1999 Constitution of the Federal Republic of Nigeria (as Altered) suspended the office of the Governor of Plateau State and the Plateau State House of Assembly with effect from the 18th of May, 2004, and appointed a sole Administrator in the person of retired Major-General M.C. Alli in their stead; by making a the State of Emergency (Plateau State) proclamation, 2004, Statutory Instrument No. 4 of 2004, and the Emergency Powers (General) Regulations, 2004, Statutory Instrument No. 7 of 2004, respectively. In 2013, former President Goodluck Jonathan acting pursuant to the same power declared state of emergency in some States in the North Earthen part of Nigeria ravaged by Boko Haram insurgency.

d. The Need for Experts to Handle Technical Matters

Sometimes, the subject matter of legislation may be of technical nature. The legislators may not be equipped with the requisite needed for such laws. Sometimes when they have professionals in such a felid in the legislature, they may not be able to carry their colleagues along. More so, technical matters require discretion in implementation, hence the need for experts to deal with the deals of such legislation.

It is, therefore, sensible to relinquish regulation of these technical felids to seasoned experts in the ministries or parastatals from which the bills emanate. This in turn encourages effective service delivery and accelerates efficiency in law enforcement, aside from promoting professionalism in the given felid. The British Committee on Ministers’ Powers in 1932 opined inter alia that:

“The truth is that if Parliament were not willing to delegate law-making power, parliament would be unable to pass the kind and quality of legislation which modern public opinion requires.”

6. Publication

Publication is bringing a proposed law or action thereon to the notice of the public usually by publication in the Government Gazette or in the other mass media. There is no general statutory requirement for the publication of delegated legislation in Nigeria, not even the Interpretation Act.

This is unlike the position under the English Statutory Instrument Act, 1946 and the American Administrative Procedure Act, 1946, where there is a detailed requirement for antecedent and subsequent publication of rule-making before they have operation of law. However, there are some specific laws that provides for publication of delegated legislation made under them. For instance, section 10 of the Nigerian Citizenship Act, 1961 requires the President to publish in the Gazette any addition, alteration, amendment or replacement in the Act. Section 6(1) of the Petroleum Act requires the minister to publish Orders made pursuant to the Act in the Federal Gazette.

Mandatory Publication: Where an enabling or primary statute makes the publication of an enactment or delegated legislation mandatory, the effect of non-publications is that the enactment or delegated legislation will be ineffective and will not be binding. In the case of *Cookey v. Fombo* the Supreme Court delivered a delegated legislation null and void for not been published as required by law. Also in the case of *Poopola v. Adeyemo*, a law was enacted in 1957 with a mandatory requirement for publication. The publication was done in 1976. Nevertheless, this law has been in operation since 1971 without the knowledge of the public; the court examined the issue of publication of laws. *Kabri-Whyte JSC* said:

“A statutory order takes effect when it becomes or is made known. In the instant case, although the chieftaincy declaration in dispute, Exhibit A was registered in 1957, it was not published in the Gazette until 1976. It was thus not brought to the notice of those who would be affected. Therefore, it cannot be said that the respondent who instituted the action in 1977 challenging the said declaration were guilty of delays and laches.”

Directory Publication: However, where provision for publication is only directory, failure to publish the delegated legislation for notice of the people will not render it invalid, though action taken under and by virtue of such law or subsidiary legislation may be unconstitutional, or otherwise unlawful by reason of other factors and maybe liable to be set aside on such grounds.

7. Control of Delegated Legislation and Its Pressing Challenges in Nigeria

Being that one of the biggest criticisms of delegated legislation is the fact that it lacks adequate supervision, there is a need for control of same so that it does not amount to abdication of legislative functions. Therefore, delegated legislation can be controlled internally and/or externally. Internal Control (Executive Control), delegated legislation is controlled internally by the executive. Statutory created agencies of government are part of the executive arm of government owing to the definition of their functions. The executive control delegated legislation through the creation of administrative ministries, departments and agencies; and recruitment, queries, transfer, and dismissal of the officers involved in the drafting and/or implementation of regulations (subsidiary legislation) in those administrative ministries, departments and agencies.

The administrative hierarchy within the executive steaming from the President to the least ranked staff within an agency constitutes control mechanism for the purposes of administrative rule making. The President or minister may also veto a regulation drafted by the agency if it does not favour his political agenda or allied, and not necessarily on the ground of public interest. The President or the minister may also dissolve the committee or board, or restructure same. The executive control over delegated legislations also comes in the form of administrative adjudication through the establishment of internal tribunals and investigative bodies to consider the exercise of delegated powers and complaints emanating from same. The Public Complaints Commission also functions as an independent body which investigates complaints against maladministration by governmental bodies and agencies. We submit that this internal control of administrative rulemaking has not dealt with the challenges faced by delegation and delegated powers in Nigeria. External Control, This is the control of delegated legislation by other bodies or institutions other than the executive arm of government. They include legislative, judicial, constitutional, media (press) and others.

Legislative Control, the legislature is the law making organ of the state, hence, delegated powers are either donated by the legislature or the constitution. The legislature being the donor of the

power has the authority to supervise such power. The legislature can repeal or amend the enabling law for such delegated power. The legislation is conferred with the constitutional function of appropriating funds for different governmental organs through the fiscal budget for the federal or state. The various governmental agencies reports back to the legislature on annual basis to defend their annual budget before same can be appropriated by the legislature. The legislature can downsize or upgrade funds allocated to such agencies.

Also, the oversight functions of the legislature over governmental agencies and institutions which are empowered to make regulations constitute a form control over them. It is pertinent to posit that legislative control of delegated legislation is shrouded with attendant challenges, even in developed democracies like United Kingdom (U.K) and United States of America. In U.K., the British Parliament has Joint Committee on Statutory Instrument and Common Select Committee on Statutory Instrument armed with duty of scrutinizing Statutory Instruments (Sis). The job description is to dissect the SIs to ascertain if such SIs is ultra vires its enabling law, defective in drafting, or delayed in presentation to the parliament. Where an SIs is found wanting, the Committee will notify the house of such deficit. This procedure, according to Benson has been adjudged to be empty been that the parliament rarely debate on SIs.

There is no gainsaying that the procedure stipulated for the making a delegated legislation will determine to a large extent, the level of control the legislature can have on such delegated legislation. Often time, it is the governmental agencies that usually determine the particular procedure that will be adopted for a given instrument. Basically the three major procedure in U.K. are affirmative , negative and laying down.

The overriding need for the exercise caution in the making delegated legislation is self-evident. Just as earlier noted, a delegated legislation must be make in accordance with the enabling law and must executed under proper authority. This the guiding principle or bedrock of delegated legislation, in addition to the fact that legislature must furnish the delegate with a guide or lay down framework for the delivery of the vested power. When these guidelines are in place, it is used as a criteria and easy to see when regulators step out of the line. In Nigeria, there is no central laid down procedure for administrative rule making. Sometimes, the enabling prescribes the guideline, and most times, it is left in the hand of the delegates to decide. These delegates are majorly technocrats who may not be schooled in the art of law making, hence, giving rule to arbitrariness. Some selected Nigerian enabling laws and delegated legislation shall hereunder be scrutinized in order to ascertain how the law makers prescribed the making of their subsidiary laws, the making of such delegated legislations and obvious challenges with some of them.

Pursuant to Section 12 Tribunal of Enquiry Law , the Lagos State government made Lagos State Legal Notice No 10 of 1999 which is to the effect that exercise of power under the notice is tantamount to a judgment of a court, and same cannot be reviewed or challenged before a court. This provision is obviously an ouster clause and runs against the letters of the Constitution, which is the grundnorm of the country. More so, such powers cannot even be found in the enabling law. Also, section 43 (d) of the now repealed Electric Power Authority Act 1990 gave the minister power to prescribe any fee or anything which is to be prescribed generally for the better carrying out of the purpose and provision of the Act. We submit that this power is too wide, and may not be limited. It also failed to lay standards or guideline for such increment.

Despite the fact that section 107 of the Stamp Duties Act 1990 empowers the President or the Governor to make regulations to increase, diminish or repeal chargeable duty under the Act subject to the approval of the National Assembly or State Houses of Assembly; there is no record known record of such approval by the legislature. The law has been honoured more in breach.

Again, Section 9(2) of the Nigerian Civil Aviation Training Center Act of 1964 is to the effect that an order made under the Act shall be laid before the legislature within fourteen days of its making. In the vein, section 12(1) of the Yellow Fever and Infectious Disease (Immunisation) Act empowers the President or the Governor of a state to declare by order, any disease to be infectious; and such

declaration must be laid before the legislature at its next sitting or approval or disapprove. We submit that these provisions have seemingly been followed by the executive in the execution of the above responsibilities.

From the foregoing, it is crystal clear that the legislature need to supervise and monitor the powers that it delegates in order to circumvent the issues observed in the reviewed enactments above. Delegated legislation affect the core facets of life of the common citizens in Nigeria, and as such ought to be properly made and implemented. However, some critics are of the opinion that the process of delegated legislation in Nigeria is inadequate. They have contended that there is an urgent need for a general legislation on the guideline for the exercise of delegated power to legislate in Nigeria.

Just as discussed above, there is a statutory requirement for laying of delegated legislation before the Parliament in England. The English Statutory Instrument Act, 1946 and the American Administrative Procedure Act, 1946, 'contain specific rule-making procedures that have enhanced the control by the legislature over the administration in the exercise of rule-making powers in those countries.' The delegated legislation is laid before the parliament or a committee set up for such purpose before it can come into operation. The essence of the requirement of laying a delegated legislation is to subject same to scrutiny by the legislature in order to ascertain that it conforms with the enabling law. This practice is not been carried out in Nigeria, being that there is no requirement for laying of delegated legislation before the legislature, hence, must delegated legislations made in Nigeria go unchecked. Delegates carry out this function of rulemaking in Nigeria with little or no control.

The legislature in Nigeria sometimes sets out in the schedule of enabling law the subjects for administrative rule making. For example, the Fire Arms Act of 1958 outlined in its schedule twelve items which regulations may be made on. The essence for this is so that the areas that the executive is permitted to legislate upon are clearly defined by the enabling law, so that they are confined to such areas. In a situation where there are no checks to ensure that the subject areas are strictly followed, there is a possibility that the regulators may offshoot their bounds. In India, just like in Nigeria, there is no statutory requirement for laying of delegated legislation before the legislature. However, the Scrutiny Committee of India made the following suggestions in the absence of a general law on laying procedure, to wit: All Acts of Parliament should uniformly require that rules be laid on the table of the legislative house 'as soon as possible, the laying period should uniformly be thirty days from the date of final publication of rules.

The rule will be subject to such modification(s) as the legislative house may like to make. We humbly submit that the existence of the process of scrutiny are not in themselves conclusive proof that the delegated legislations are adequately controlled, being that the legislature most times is interested in the political merits of a legislation. As such, the control is usually on the general aspect of the delegated legislation, and not in details. There is a need for procedural requirement in the making of subsidiary legislation. The delegates should be compelled by the enabling law to consult relevant stakeholders before coming up with the delegated legislation. From the above discussion, it very clear that legislative control over delegated legislation is enormous on paper, but very slim in practice, hence, the executive have a lot space to overshoot her bounds. It is imperative that a balance struck to cure this lacuna within our law making process.

IV. CONCLUSION

Despite the challenges observed on delegated legislation above, there is no gainsaying that delegated legislation is paramount in a modern dispensation. On this background, we recommend a law be enacted in Nigeria like in England on the general guideline for the making of delegated legislation. The law should require that all delegated legislations must be laid before the legislature or better still a committee set up for such purpose for approval before it can come into operation. The essence of the requirement of laying a delegated legislation is to subject same to scrutiny by the

legislature in order to ascertain that it conforms with its enabling law. The law should also make it mandatory for the delegates to consult with relevant stakeholders and the general public in the course making the delegated legislation. The law should also contain a mandatory provision for publication of all delegated legislations.

In the alternative, since in India, just like in Nigeria, there is no statutory requirement for laying of delegated legislation before the legislature. Nigeria may adopt the Indian approach as laid down by the Indian Scrutiny Committee of India, which is to the effect that in the absence of a general law on laying procedure made; the following suggestions are adhered to, to with. All Acts of Parliament should uniformly require that rules be laid on the table of the legislative house 'as soon as possible, The laying period should uniformly be thirty days from the date of final publication of rules. The rule will be subject to such modification(s) as the legislative house may like to make.

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