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Control of Delegated Legislation in Nigeria: a myth or a reality?

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ABSTRACT

It is a common saying that power corrupts and absolute power corrupts absolutely, so is the case with delegated legislation. The legislature sometimes delegates its law making power(s) statutorily to the other arms of governments/institution or person to aide ease of governance. The delegate therefore handles the deals of the power delegated with a touch of expertise and skill. This paper uses an arm chair research approach to examine the control of delegated legislation in Nigeria. The paper 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

Ini adalah pepatah umum bahwa kekuasaan korup dan kekuasaan mutlak korup secara mutlak, demikian halnya dengan undang-undang yang didelegasikan. Badan legislatif kadang-kadang mendelegasikan kekuasaan pembuatan undang-undangnya secara undang-undang kepada pihak lain dari pemerintah/lembaga atau orang untuk membantu kemudahan pemerintahan. Oleh karena itu, delegasi menangani kesepakatan kekuasaan yang didelegasikan dengan sentuhan keahlian dan keterampilan. Makalah ini menggunakan pendekatan penelitian kursi lengan untuk menguji kontrol undang-undang yang didelegasikan di Nigeria. Makalah ini menemukan 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 di 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 komitenya.

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I. Introduction

Delegated legislation or referred to as subsidiary legislation is a legislation "that was subsequently made or enacted under and pursuant to the power conferred by the principal legislation or enactment. It derives its force or efficacy from the principal legislation to which it is therefore secondary and complimentary." Delegated legislation derives its validity from the enabling law, that is, either the constitution or a law made by the legislature. It is therefore trite to submit that subsidiary legislation generally has the force of law.

Delegated legislation is important because of the busy schedule of the legislature. Most often, the laws are made in skeletal form, and the details are left in hands of the agencies or institutions responsible for its implementation. Another reason is that some legislations are technical nature and the technicalities are usually beyond the grasp of the law makers. The legislature in such a case seems it expedient to handover the details of such technical legislatures to the experts. Delegated legislature is needed to cater for unforeseen circumstances that may arise in the cause of implementing a law without necessarily passing through the rigors of legislative amendment of laws. It is also needed to take of care emergency situations such as wars, epidemic, natural disaster, etc. Since delegated legislation is an extension of the legislative powers of the legislature being exercise by an institution or person other than the legislature, it is imperative that such delegated powers are checked to erode arbitrariness and ultra vires of the delegated power.

This paper examines the control of delegated legislation in Nigeria. In order to do justice to the subject, the paper is divide into 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.

Nature of Delegated Legislation, delegated legislation emanates from entrusting of legislative power tosubordinate executive bodies by the legislative arm of government. It is also known as executive law-making. Delegated Legislation is a secondary level legislation made pursuant to enabling Acts of ordinances. 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.

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.

II. RESEARCH METHODS

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 Nigeri.

III. RESULTS AND DISCUSSION

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.

1. 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 enchanced 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.

2. Judicial Control and Constitutional Control

The judiciary through it's judicial review power can also control delegated legislation. The 1999 Constitution has empowered every person in Nigeria to seek for judicial redress whenever their right(s) is infringed upon. See section 6(6)(b) of the 1999 Constitution. More so, the judiciary will also intervene where the delegated legislation is inconsistent with the Constitution.

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. The Supreme Court held per EMMANUEL OLAYINKA AYOOLA , JSC that:

"Section 1(3) of the Constitution provided that: "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void." I take as my starting point some interrelated propositions which flow from the acknowledged supremacy of the Constitution and by which the validity of the impugned provisions will be tested. First, all powers, legislative, executive and judicial must ultimately be traced to the Constitution. Secondly, the legislative powers of the legislature cannot be exercised inconsistently with the Constitution. Where it is so exercised it is invalid to the extent of such inconsistency. Thirdly, where the Constitution has enacted exhaustively in respect of any situation, conduct or subject, a body that claims to legislate in addition to what the Constitution had enacted must show that it has derived the legislative authority to do so from the Constitution. Fourthly, where the Constitution sets the condition for doing a thing, no legislation of the National Assembly or of a State House of Assembly can alter those Constitution in any way, directly or indirectly, unless, of course the Constitution itself as an attribute of its supremacy expressly so authorised."

Delegated powers must be exercised in conformity with the enable law and the grundnorm (the constitution). Where a delegated legislation is inconsistent with the enabling law, the judiciary shall declare such a delegated legislation void to the extent of its inconsistency. In the case of Shell (NIG) Exploration and Production CO. LTD V. NOSDRA, in this case the appellant challenged Regulations 25, 26 and 27 of Oil Spill Recovery, Clean Up Remediation and Damage Assessment Regulations 2011 (OSDAR) promulgated pursuant to the National Oil Spill Detection And Response Agency Act (NOSDRA) 2005. The grouse of the appellant was that the NOSDRA Act which is the principal or enabling law for OSDAR did not make provision for levy, fines or damages but the above regulations of OSDAR that provisions for such. The contended that regulations 25, 26 and 27 of OSDAR being inconsistent with the enabling law (NOSDRA Act) is void. Per JOSEPH EYO EKANEM ,JCA held that:

"The NOSDRA Act does not vest the agency with the power to impose penalties, fine, levies etc for oil spillage. The most that it does is to grant it the power to conduct the assessment of damages caused by a spill. See Section 19(3) of the Act. Assessment of damages is different from the power to impose penalties, fine, levies etc. Section 26(1) of the Act provides that the agency may with the approval of the Governing Board make such regulations as in its opinion are necessary or expedient for giving effect to the provisions of the Act and for due administration of its provisions. This cannot by any stretch of imagination be construed to include the power to make regulations to impose penalties, fines, levy etc. A subsidiary legislation must be consistent with the principal legislation from which it derives its life otherwise such subsidiary legislation is a nullity to the extent of the inconsistency. See Din V Attorney-General of The Federation (1988) 4 NWLR (Pt. 87) 147 and Mobil Producing (Nig.) Unlimited v Johnson (2018) 14 NWLR (Pt. 1633) 329. Furthermore, the power to make regulations under any Act does not include the power to make regulations to extend the frontiers of the principal Act. See Securities and Exchange Commission V Kasunmu (2009) 10 NWLR (Pt. 1150) 509. Therefore the Oil Spill Recovery, Clean-up, Remediation and Damage Assessment Regulations cannot be used as an instrument to expand the boundaries of the powers given to NOSDRA to include the power to impose penalties, levies, fines etc. Respondent's counsel sought refuge under Sections 13(3) and 35 of the Interpretation Act, Section 13(3) reads: "Where in any Act or Law, power is given to any authority to impose any fine or make any order or give any directions whatever and it is stated that such fine, order or direction shall be imposed, be recoverable or in manner have effect as if same were a fine, order or direction imposed, made or given by a Court or by a judicial or other officer having jurisdiction in the place where such fine, order or direction was imposed, made or given, or where the person who was ordered to pay the fine or who is required to obey the order or direction resides or may happen to be, may take the necessary steps to enforce the payment of the fine or the carrying out of the order or direction, as the case be, in all respects as if the fine, order or direction had in fact been imposed, made or given by such Court or judicial or other officer." The same provision is contained in Section 35 of the Interpretation Act. Since the NOSDRA Act does not give power to the agency to impose fine, the said sections offer no help to respondent's counsel."

3. Control -Trial

The press (mass media) also serve as a control over delegated legislation. Pursuant to section 22 of the 1999 Constitution, the Press is supposed to report to the general public the inconsistencies and maladministration of government. By this way, the function as the fourth tie of government, which plays the role of a watchdog over organs of government. When things are not properly done, it is the function of the press to report same to the public so that they can fight for right.

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 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..

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