



DELEGATED LEGISLATION AND DELEGATION OF POWERS IN THE NIGERIA ADMINISTRATIVE LAW CONTEXT

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ABSTRACT

This paper examines the concepts of *Delegated Legislation* and *Delegation of Powers* under Nigeria Administrative Law with reference being made to the 1999 Constitution of the Federal Republic of Nigeria. The two concepts are closely related and are no doubt often misunderstood by those who read the Works of some great Text Writers on this area of Law. This paper has clearly distinguished both concepts, discussed their relevance and usefulness to modern day governance because the fact is that the Government at the Federal, State and Local Government Levels have got to delegate its functions if its impact must positively affect the people, especially in a massively populated country like Nigeria where majority of the populace are rural dwellers. Arguments against the exercise of delegated Legislation and delegation of powers abound, but the need to go ahead and exercise them supersede arguments against their use, as anarchy will be inevitable if delegation of power and delegated legislation are not in many cases exercised. It is never an easy task to control human beings, and it is far worse when we are talking about millions of people. No one person alone can control an entire Nation so peacefully, devoid of any crisis anywhere in the World. Therefore, it becomes indispensable that powers and legislation must be delegated to certain Persons or Administrative Authorities/Bodies subject to certain conditions. This paper lastly discusses the different methods of control of delegated legislation, tells us the stages when Judicial Review may apply, and while elaborating on delegation of Power, it goes on to highlight the factors necessary for a proper delegation of power and talks about the Rule against Sub – Delegation.

Keywords : Delegation of Power, Delegated Legislation, 1999 Constitution of the Federal Republic of Nigeria, Legislative Control, Executive Control, Judicial Control, Judicial Review

INTRODUCTION

Delegation is the transfer of power by one Body or person to another to act for him. It empowers that other person to perform a task on behalf the donor of the power. A delegate is therefore a person who is appointed, authorised, empowered or commissioned to act in place of the person giving him the authority to act. Powers delegated to people are of three types namely: *Legislative, Executive & Judicial*.

Under the 1999 CFRN, the power of Government is delegated to the three branches via sections 4-6. *Section 4 - Legislative powers, Section 5 - Executive powers and Section 6 -Judicial powers.*

Going by the preamble of the 1999 Constitution, the people delegate powers to the Government. It reads thus:

'WE THE PEOPLE of the Federal Republic of Nigeria : HAVING firmly and solemnly resolved : TO LIVE in unity and harmony as one indivisible and indissoluble Sovereign Nation under God, dedicated to the promotion of inter-African solidarity, World peace, International co-operation and understanding: AND TO PROVIDE for a Constitution for the purpose of promoting the good Government and welfare of all persons in our country on the principles of freedom, equality and justice, and for the purpose of consolidating the unity of our people: DO HEREBY MAKE AND GIVE OURSELVES the following Constitution ... '.

By the Constitution, the people also empower the Press as a Watchman of Government and its actions. See s.22 CFRN 1999¹.

REASONS FOR DELEGATED LEGISLATION

1. It reduces Parliamentary Workload
2. It enables Experts to legislate on technical Matters
3. It saves the time of the Parliament/National Assembly
4. It saves cost for the National Assembly
5. It allows for flexibility in Administration
6. It brings Government nearer to the people
7. It creates room for the making of laws that conform to local needs
8. It enables quick response to a State of Emergency.
See *Tai Solarin v. IGP*² where the Court inquired into the probable reasons for the detention of the Applicant and found that the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984 had not been complied with in making the detention, and therefore issued a writ of habeas corpus for his release.

ARGUMENTS AGAINST DELEGATED LEGISLATION

1. It is contrary to the doctrine of separation of powers, especially when people other than parliament members are empowered to make laws.
2. It reduces the Supremacy of the Legislature/Parliament
3. It is undemocratic and therefore, prone to abuse
4. It is a violation of the Rule of Law
5. Control of delegated legislation is inadequate
6. It encourages arbitrariness and dictatorship
7. There is lack of sufficient consultation
8. Inadequate publicity of delegated legislation
9. Inadequate consideration of the impact of delegated legislation
10. Administrative lawmakers end up having too much power and discretion
11. Emergency Regulations often infringe civil liberties

Whatever be the case, delegation of power is inevitable in modern governance. At this point, it can be said that delegated legislation is very closely related with delegation of powers because a delegate without powers can delegate nothing – whether *law* or *power*. For Public Officers and Administrators to perform with dispatch and creditably, delegation of powers to the relevant experts in the right field may be necessary as occasion demands. Examples of Public Officers who delegate their duties include the President who normally assigns ministerial portfolios to his Cabinet/Ministers. An Attorney – General usually delegates his duties to Officers of his Ministry.

These Public Officers amongst others are constitutionally empowered to delegate duties³.

According to Malemi, 'the above criticisms notwithstanding, delegation of powers and delegated legislation are inevitable if the machinery of modern, effective government and society are not to be over-burdened and come to a halt.... Delegation of power from the top down the administrative leadership structure and administrative law making are inescapable realities and facts of life. It is alright if the Rule of law is observed and if the delegated power

¹ See *Adikwu v. House of Reps* (1982) 3 Nigeria Constitutional Law Reports (NCLR) 394; *Momoh v. The Senate* (1981) 1 NCLR 105; *Amakiri v. Iwofari* (1974) 1 RSLR 5; *Arthur Nwankwo v. The State* (1985) 6 NCLR 228; *Abacha v. Fawehinmi* (2006) 6 NWLR PT 660 @p.228 (SC); *A-G Federation v. Guardian Newspapers Ltd & Ors* (1999) 9 NWLR PT 618 @p.187; *Ese Malemi – Administrative Law* (2012) Princeton Publishing Company, Ikeja, Lagos @p.139

² Unreported Lagos High Court Suit No. M/55/84

³ See *Malemi – Administrative Law* supra @pp155-162, esp p.162

*is properly exercised with a sense of responsibility and within the confines of the Enabling law, and in the best interests of the society*⁴.

However, Judicial Review should be invoked by the Courts on suitable occasions over improper administrative actions. See *A-G Ogun State v. A-G Federation & Ors*⁵.

CONTROL OF DELEGATED LEGISLATION

Delegated Legislation can be controlled via the *Legislative, Executive and Judicial* means.

(a) Legislative Control – legislative control is exercised by the Legislature or Parliament. It is usually exercised by the requirement of law that the proposed delegated legislation be laid before Parliament which may debate it, and nod its approval, reject, amend, limit, expand, suspend its approval or otherwise control or review the delegated power or delegated legislation. Where the done of the power is a sole Administrator, the legislature may enlarge it by setting up a Council or Board to exercise the power to make Rules or to consider and take action. Delegated legislation may also be limited by Parliament or legislature prescribing Rule making Standards for the delegate of power by imposing procedures which a delegate of power or Authority is obliged to observe. An instance is the Administrative Procedure Act 1946 of the USA which prescribes administrative procedures to be observed by Administrative Agencies in Rule making and in the exercise of delegated powers⁶.

(b) Executive Control – this is usually exercised by the executive arm of Government or a higher Administrative Authority. It may be exercised in the below listed ways –

- i. Exercise by Appointor or Donor of power to appoint or to fire the Administrative Law Maker. This is the power to hire and to fire an unbecoming appointee. An Appointor may remove the personnel or done of power and other Appointees as the need arises. This is the power to hire and fire personnel.
- ii. Submission of the proposed Rules or planned line of action to the relevant Supervisory Body or Authority for sighting, perusal, consideration, approval, modification, suspension or outright rejection of same. Local Government Councils, for example, submit Bye-laws to the Ministry of Local Government or to the Governor for approval before they take effect as laws.
- iii. Revocation of delegated power – In *Ondo State University v. Folayan*⁷, the Supreme Court examined at length the issue of delegated legislation of power and held that power to delegate functions includes a power to revoke such delegation.

(c) Judicial Control – delegated legislation are subject to the scrutiny of Court in the exercise of the power of *JUDICIAL REVIEW*. This is in order to see whether or not a particular exercise of delegated power or delegated legislation is ultra vires, inordinate or otherwise. Judicial control is usually exercised by the Courts at the Suit or Application of an aggrieved Party. A Court may grant Relief subject to the following pre-requisites:

- i. The Rule of first having recourse to Administrative Remedies where available;
- ii. The Doctrine of Ripeness
- iii. The Doctrine of Ultra Vires
- iv. Locus Standi – Right to Sue
- v. Right of Action
- vi. Right of Appeal
- vii. Possession of Jurisdiction, etc.

⁴ Administrative Law in Nigeria (2012) @P.162

⁵. (1982) 3 NCLR 166 (SC)

⁶ See s. 32 of 1999 Constitution of the Federal Republic of Nigeria; *Malemi* supra @p.14

⁷ (1994) 7 NWLR PT 354 @p.9

Judicial Review is commonly granted by the Court where delegation of power or delegated legislation is challenged on ground of breach of the Rules of Natural Justice, lack of fair hearing or other failure to observe the Due process of Law, such as lack of substantial evidence for the action that was taken, or administrative determination that was made or inaction.

A Court may hear an Application for Judicial Review of a delegated legislation or other act or omission of an Administrator and exercise its judicial powers to review the Law or action in question by granting such legal remedies as are appropriate, which Remedies include:

- a. Declaration of Rights
- b. Order of Mandamus
- c. Order of Prohibition
- d. Order of Certiorari
- e. Injunction
- f. Writ of Habeas Corpus
- g. Award of Damages
- h. Offer of Apology
- i. Setting aside, reducing or suspending such action, penalty or interdiction that was imposed on the aggrieved Party as the case may be.

A Court may grant any of the above mentioned Orders to review, annul or set aside a delegated legislation or act. On the other hand, the Court may uphold the action of the Delegate and consequently not grant any Relief or make any Order in favour of the Applicant. See *Director of SSS v. Agbakoba*⁸ where the Supreme Court affirming the judgment of the Court of Appeal made an Order for the Defendant/Respondent State Security Service Operatives to release the Applicant's passport to him as they had no power to seize it in the circumstances. The act was beyond the powers delegated to them in the Enabling Statute which established the State Security Service. See also *Labiya v. Anretiola*⁹ where the Supreme Court held that the Constitution (Suspension & Modification) Decree No. 1 of 1984 enacted by the Federal Military Government was the organic Law or grundnorm of Nigeria. In this case, the Military Governor in making an Edict acted ultra vires his legislative powers because a Military Governor of a State is precluded from making Laws with respect to any Matter in the concurrent Legislative list which affects Federal Powers without the prior consent of the Federal Military Government.

STAGES WHEN JUDICIAL REVIEW MAY APPLY

1. **Antecedent** – this is the judicial review which is sought prior to the law coming into force, especially if it has been made in a proposed or draft form. This could be pre-emptory to stop it from coming into force and thus pre-empt any action being taken based on it.
2. **Interlocutory** – this is judicial review which is sought whilst the law is in force or whilst the act is going on.
3. **Subsequent** – this is judicial review after making the delegated legislation or doing of the delegated act.
4. **Collateral** – this is application to set aside an act, or for review because of collateral issues connected with it. It is usually a third party's action to protect his interest¹⁰. See *Okogie & Ors v. Governor of Lagos State*¹¹; *Adewole & Ors v. Jakande & Ors*¹².

⁸ (1999) 3 NWLR PT 595 @p.314 (SC)

⁹ (1992) 8 NWLR PT 258 @p.139 (SC)

¹⁰ *Re Abacha* (2000) 5 NWLR PT 655 @p.50 (CA); *SGBN Ltd v. Afekoro* (1999) 11 NWLR PT 628 @p.521 (SC)

¹¹ (1981) 1 NCLR 218 (HC); (1981) 2 NCLR 337 (CA)

¹² (1981) 1 NCLR 262 (HC); *Malemi – Administrative Law* @p.168

DELEGATION OF POWER

It is necessary at this point to define the term '*power*'. Power is the ability, authority, strength, official or legal right to do something. There are different kinds of power, such as physical power, legal power, political power, military power, economic power, etc.

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 by one Administrative Authority in which such Authority is vested to another administrative Authority to do what the person giving the power can do¹³. This definition has already been given before now.

METHODS OF DELEGATING POWER

Power may be delegated to a subordinate in the below listed ways:

1. By a mere directive (provided it is reasonable and safe for the donor and done in the circumstances).
2. By a circular, letter, minute on a letter or a memorandum
3. By a document or other Instrument under seal
4. By a notice served or published in a Gazette or other media
5. General or simple delegation of powers to make subsidiary legislation – this is a delegation of wide powers to a donee to do an act or to make law, rules and Regulations, or act in his discretion within limits which may have been set for him
6. Specific delegation – a donee or delegate of such powers is restricted to taking action only in respect of specified matters as the case may be.
7. Delegation to make Regulations and obligation to publish them for notice of the Public
8. Delegation to make Regulations and requirement of laying them before the legislature for necessary approval
9. Delegation to propose a line of action, to make Regulations subject to confirmation or approval of or in consultation with the Minister or other persons or Authority who has the power of approval, etc.

EXAMPLES OF ADMINISTRATIVE LAW MAKERS

1. The President, Head of State or Prime Minister
2. The Federal Government, State Government, Local Government Councils
3. Ministers & their Ministries
4. Governors
5. Commissioners & their Ministries
6. Directors – General & Directors
7. CJN & Chief Judges of States
8. Heads of Departments in Parastatals & Ministries
9. Statutory/ Public Agencies and Corporations
10. Commissions, Tribunals & Panels of Inquiry
11. Industrial & Professional Bodies chartered under various Statutes like ICAN, NBA, ICSA, CITN, COREN, NMA, etc
12. Regulatory Agencies such as the Public Service Commission, NAFDAC, SON, NUC, NDIC, CBN, FEPA, NERC, NERDC, INEC, etc.

All these Administrative Persons or Authorities do exercise delegated powers either under the Constitution or some Enabling Statutes.

¹³ *Ese Malemi – The Nigeria Constitutional Law* (2012) 3rd Edition, Princeton Publishing Company, Ikeja @p.218

FACTORS FOR A PROPER DELEGATION OF POWER

1. The power must be delegable – See *A-G Bendel State v. A-G Federation & 22 Ors* (1981) 1 All NLR 85.
2. There must be a delegation of power – See *A-G Kaduna State v. Hassan* (1985) 2 NWLR PT 8 Pg 483.
3. There must be proper delegation – See *Comptroller of Nigeria Prison Service, Ikoyi v. Adekanye & Ors* (2002) 15 NWLR PT 790 @p.362 (SC).
4. Delegation must be to an appropriate Officer or Authority – See *NAF v. Obiosa* (2003) 4 NWLR PT 810 P.233 (SC)

THE RULE AGAINST SUB – DELEGATION

1. The general rule is that a delegate cannot sub-delegate his functions and powers. As a matter of fact, *a delegate cannot delegate*. The latin maxim '*delegatus non potest delegare*' means that a delegate cannot delegate his functions unless he is otherwise authorised or permitted to do so. This is especially where he is required to personally perform the delegated function or exercise the power concerned. See *A.G Bendel State v. A-G Federation & 22 Ors*¹⁴ where the Supreme Court held that the National Assembly cannot delegate its law making function to a Joint Committee of the National Assembly.
2. Power or duties that involve the exercise of discretion cannot be delegated.
3. Judicial or quasi-judicial powers cannot be delegated. See *Barnard & Ors. V. National Dock Labour Boar*¹⁵
4. Power to declare war cannot be delegated
5. Power to impeach cannot be delegated
6. Power to create new States cannot be delegated.

In conclusion, Administrative powers are exercised by Persons/Officers or Administrative Bodies at Federal State or Local Government levels. Delegation of Power talks of power being given to a person or Administrative Authority (usually a sub-ordinate) who already has the status to use such powers as may be given to him/her by the Authority/Boss. Delegated Legislation is laws delegated to another person to make it authoritative, enforce and interpret such laws. It could involve the process of reviewing a law already in place, thereby removing the lapses and making that law to be perfect enough to be called *law*, getting that perfect law executed, enforced and interpreted, the three functions being performed by one person or Authority/Agency. Every care must be taken to distinguish all the different concepts defined and explained in this paper. People should also not misunderstand the concepts of *delegation of power* and *delegated legislation* because they are a bit confusing. The only thing is that *power* is key in the use of both terms. While delegation of power talks directly about delegating and giving power to another, delegated legislation is the power passed on to another to take charge of certain laws already made or about to be made¹⁶.

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¹⁴ (1982) 3 NCLR 1 (SC); *NAF v. James* (2002) 18 NWLR PT 798@p.295

¹⁵ (1953) 1 All ER 1113

¹⁶ This is my humble opinion