

Delegated Legislation and Delegation of Powers in the Nigeria Administrative Law Context

¹Abubakar Liman Enagi (Esq), ²Wachin Alfa Kutigi, ³Salihu Ibrahim Dere & ⁴Usman Abubakar Kutigi

¹Department of General and Liberal Studies
Niger State Polytechnic, Zungeru
E-mail meetabusadiqumar@gmail.com
08065310559

²Social Welfare Department
Niger State Polytechnic Zungeru
08033697173

³Department of Banking and Finance
Niger State Polytechnic Zungeru

⁴Department of General Studies
Federal Training Centre Kaduna,
Nigeria

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 (as amended). 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 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. This paper lastly discusses the different methods of control of delegated legislation, tell 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: Legislation, Delegated Legislation, Delegation of Power and Administrative Law

Introduction

The legislative branch of government is the body charged with the responsibility of making laws. But occasionally the power of making law is transferred or delegated to the executive branch or other institutions of the government. Any law made as a result of this transfer is known as a delegated legislation or subordinate legislation (Ujo 2002). Thus, all acts of delegated legislation are made under the authority of and with reference to the condition laid down in the Parental Act. (Bairamial, 1962).

This point was emphasized in the case of *F.R.A. Williams vs Dr. M. A. Majekodunmi* when he said “the fact is that the laws of Nigeria begin with Primary Laws passed by the legislative itself and then go to give the subsidiary legislation made by persons or bodies authorized by the legislation supplement its enactment”. (Bairamial, 1962).

Where an Act of Parliament provides that “government department, local authority, the crown or any individual body shall have the power to make regulations, orders etc. that shall have the force of law that statute is regarded as laying down a method of making delegated legislation (Yardey, 1969).

The above statement is very important because it point out the essential nature of delegated legislation. Delegated legislation is a law made under the authority of an Act of the National Assembly by such bodies as government department, local government, the president, ministers or any other individuals or body (Yardey, 1969). Delegated legislation is known by various other names, such as subsidiary laws, subordinate legislation or secondary legislation. The name is carefully chosen as to distinguish every such law from primary legislation made by the constitutionally established legislature under clear and direct constitutional powers (Okany, 2007).

But delegated legislation does not imply a denudation of power and authority. The word delegation implies that powers are committed to another person or body which areas a rule, always subject to resumption by the power legislating and many examples of this might be given, unless, therefore, it is control by statute, the delegating power can at any time resume its authority (Lord, 1966).

Reasons for delegated legislation and delegation of power

Delegation of power was adumbrated by (Corner 1963) as follows:

1. It reduces Parliamentary Workload
2. It enables Experts to legislate on technical matters
3. It brings government nearer to the people.
4. It gives quick responses to a State of emergency.
5. It creates room for the making of laws that conform with local needs

Another reason for delegated legislation and delegation of power was formulated by (Iluyomede, 1980).

1. Extensive executive discretion
2. It saves time of the National Assembly
3. It allowed flexibility in administration. (Garner 1963)

Aim of delegated legislation and delegation of powers

The following are the aims of delegated legislation by the legislature.

1. It is to reduce the workloads of the parliament. As a matter of fact parliament does not have all the time and capacity required to deal with volume of legislation required by a modern government or state (Garner, 1968).
2. Another aim is to give executive discretion. Many laws required today in social and economic field demand extensive executive discretion because there is need to deal with issues as they arise (Iluyomode & Eko, 1980)
3. It is delegated for the purpose of unforeseen contingency, such as wars, economic crisis or natural disaster example the Ogunkpa flood disaster in Oyo State and Corona Virus (COVID -19).

Delegated legislation in Nigeria

Law making in Nigeria is constitutionally the function of the legislature and the law making powers of the legislature derives from the Nigeria Constitution as a grant of authority direct from the people by whom the constitution is framed.

For example, Section 4 of the 1999 Constitution vested the legislative powers of the Federal Republic of Nigeria on the National Assembly and the legislative powers of the State House of Assembly. Section 4 (1) “the legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly of the Federation which shall consist of Senate and a House of Representatives”.

Also by Section 4(6) “The legislative powers of a State of the Federation shall be vested in the House of Assembly of the State”.

“The power to execute or administer laws is vested in the President at the centre and the Governors in the States whilst judicial powers are vested in the courts established by the Constitution” (Section 4 & 5) of Constitution.

Law making involves the determination and delegation of policies in the form of legislative enactments whereas executive functions call for the application or implementation of the policies contained in the laws made by the legislature (Okany, 2007).

Modern conditions, according to it, have made it absolutely necessary for it to delegate the powers, because it can no longer bear the burden of law making alone. The practice of delegating legislative powers to the executive is justified, not necessarily by any constitutional provision but by necessity.

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 (Okany, 2007)

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.

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 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 right if the Rule of law is observed and if the delegated powers is properly exercised with a sense of responsibility and within the confines of the enabling law, and in the best interest of society (Eze, 2008).

Judicial Review should be invoked by the courts on suitable occasions over improper administrative actions. (A.G. Ogun State vs A.G. Federation 1982)

Control of delegated legislation

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

(a) **Legislative Control** –legislative control of delegated legislation takes various forms and operates at various stages in the life and history of a subsidiary law (Okany, 2005). The bill for the parent statute is going through the legislature and take the form of the standards (procedural and substantive) prescribed by the enabling law to guide and control the making of the subsidiary law and stop the subsidiary law – maker from running wild with the power vested in him (Okany, 2006) words, when the bill for the parent statute is being discussed by the National Assembly opportunity is usually offered to members to express their views on whether the power to make the law should be delegated. What safeguards should be written into the parent statute for the protection of the public or to ensure that the power being delegated is not abused. (Iluyomade & Eka, 1980). With delegated legislation is expected to be prescribed before parliament which would decide either to accept or reject it. The laying requirement is one of the means of controlling delegated legislation (Ujo, 2002).

(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 the 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 powers. 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 (*Ondo State University V. Folayan 1994*).

(c) Judicial Control –delegated legislation is 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 Role 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.

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 (*Labiya VS Antetiola 1992*).

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 make or any Order in favour of the Applicant (Director of SSS V. Agbakoba 1999) 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. Also (Labiya V. Anretiola 1992) 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 interest. (Okogie & Ors V. Governor of Lagos State, Adewole&Ors v. Jakande & Ors 1981 and Malemi 2012).

Methods of delegation of power

Power may be delegated to a subordinate in the following 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 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 regulation 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 and 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, ICOSA, CITN, COREN, NMA etc.
12. Regulatory Agencies such as 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.

Factors for a proper delegation of power

1. The power must be delegate (A-G Bendel State v. A-G Federation & 22 Ors 1981).
2. There must be a delegation of power (Comptroller of Nigeria Prison Service Ikoyi v. Adekanye & Ors 2002)
3. Delegation must be to an appropriate Officer or Authority (NAF v. Obiosa (2003).

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 delegation cannot delegate. The latin maxim ‘delegatus non protest delegare’ means that a delegate cannot delegate his functions unless he is otherwise authorized or permitted to do so. This is especially where he is required to personally perform the delegated function or exercise the power concerned. (A. G. Bendel State

v. A-G Federation & 22 Ors1982) 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.
4. Power to declare war cannot be delegated
5. Power to impeach cannot be delegated
6. Power to create new States cannot be delegated

Types of delegated legislation

1. **Statutory Instruments:** These are ministerial or departmental orders or rules made or issued by ministers, commissioners and senior civil servants under the authority of acts of parliament.
2. **Provisional Orders:** These are temporary general rules or orders made by individuals or bodies authorized by the minister to make such rules, until the parliament could endorse or confirm them.
3. **Bylaws:** These are rules and regulations made by local governments or such a statutory body as the Nigerian Railway Corporation for the smooth running of their operations. Such rules and regulations apply only within the area of authority of the statutory body or local government.
4. **Order-In-Council:** This refers to the power delegated to British monarch to make a 'royal proclamation' when there is need to exercise unusual legislative powers in the country. For instance, the monarch can declare war when the territorial integrity of the state is threatened by external enemies.
5. **Special or Emergency Orders:** These refer to government orders that are limited in scope especially during emergency periods.
6. **Court Decisions:** The decisions of a judge that are binding as if they are an act of parliament, also constitute delegated legislation.

Advantages

1. It is much easier for bodies with delegated legislation to make rules or bylaws, and to revoke such rules when they are no longer necessary or relevant.
2. It makes it possible for rules, regulations or bylaws on highly technical subjects to be made by experts in such fields.
3. Delegated legislation allows adequate time for the legislature to consider and make laws on policies, while matters of detail are dealt with by non-legislative bodies and individuals.
4. Delegated legislation allows for quick action in national emergency periods, such as war, strikes and demonstrations.
5. It is often said that laws made by the legislature are in many cases too technical for the average citizen to comprehend. Laws passed under delegated legislation, however, are easy to understand due to their precision and thoroughness.

6. Delegated legislation gives the local people a greater sense of belonging in the political system, in that way are able to make bylaws to suit their local needs.

Disadvantages

1. Delegated legislation violates the principle of separation of powers, especially as the individuals or organizations that make the bylaws always try and sanction offenders.
2. It violates the principle of the rule of law, for there is the tendency for some of the rules of bylaws to curtail the liberties of citizens.
3. The misuse of delegated legislation by the state in periods of emergency could lead to dictatorship (Okany, 2007).
4. The level of control of delegated legislation by the judiciary and legislature may be ineffective.

Limits to delegated legislation

1. Parliament usually has the constitutional responsibility of controlling delegated legislation by considering, approving or rejecting any rules, byelaws under delegated legislation.
2. The court has a duty to protect the rights and liberties of the citizens (Constitution, 1999).
3. All the courts do is to see that the power which is claimed to be exercised is one which falls within the four corners of the powers of the powers given by the legislature and to see that those powers are exercised in good faith. The courts also have the power to inquire into reasonableness, the policy, the sense or any other aspect of the transactions (Lord, 1948).
4. Ministers or Commissioners are empowered to control the rule or byelaws passed by department and public corporations being supervised by their ministries. The limitation of powers of executives is a Constitutional Powers (Constitution, 1999).
5. Public outcry or protest serves as a serious check on the bodies empowered to enact delegated legislation of members of the public such a body as the Public Complaint Commission for a repeal or amendment of the law. The Ombudsman fills the gap by seeking redress for such complaints and others (Commissioner E.L Oshun Kunle 1978 – 1979)

Conclusion

In conclusion, the making and enforcement of delegated legislation are not left uncontrolled in the hands of the donees of the powers in question. A system of control operates to ensure that the subsidiary laws made and enforced are in letter and spirit of what legislature intended. (Okany, 2007).

Every executive arm of government as well as every ministry, department or bureau and every administrative agency are expected to have some internal system of control to ensure that outside criticisms of their activities are reduced to the barest minimum (Ewalukwa, 1946).

Also the requirement of delegated legislation should be laying before the legislature or an executive superior (Barley V. Williamson 1973).

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 the 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 made.

Reference

- Abdulrahameed A. O., (2002). Understanding administrative law in Nigeria
A.G. Ogun State Vs A.G. Federation &Ors (1982)3 NWLR 166 SC
A.G. Bendel State v. A.G. Federation & 22 Ors (1981)11 ALL NLR 85
B.O. Iloyumade & B.V Eka (1980). Cases and materials administrative law in Nigeria.
Barley and will liar son (1978) 84 BD 118.
Chigozie Nwagbara (2015) International Journal of Business & Law
Comptroller of Nigeria Prison Service Ikoyi vs Kanye &Ors (2002)15 NWLR Pt 790 at p. 362 SC.
Commissioner E.L Oshunkunle Report of the public complaints (1998-99) commission.
Director of SSS vs Agbakoba (1999)3 NWLR Pt 595 at page 314 SC
DC.N Yardley (1969) introduction to Briton constitutional law 3rd edition.
Ese Melami (2004). Administrative law published by Princeton Publishing Company Ikeja Lagos
Ese Melami (2004) Administrative Law published by Princeton Publishing Company Ikeja Lagos
Ese Melami (2012) The Nigeria Constitutional Law 3rd Edition, Princeton Publishing Company Ikeja Lagos
Ese Melami (2018) Administrative Law 3rd Edition Published by Princeton Publishing Co. Ikeja Lagos.
Foulkes D. (1976) Introduction to Administrative Law 4th& 6th Editions pages 18 – 19.
F. J. Braimain (1962) in F.R.A. Williams vs Dr. M A Majekodumi WRN 5
F. J. Brairamain (1962) in F.R.A. Williams vs Dr. M A Majekodumi WRN 174 at page 178.
Iluyomode and B. U. Eko (1980) Cases and Materials on Administrative Law in Nigeria. Published Princeton Publishers Ikeja – Lagos Nigeria.
Lord Coleridge (1966) in Hurt Vs Clarke 25 QBD at 391.
Lord Greene (1948) in Caltiona Itd Vs commissioner of works and other 2 All ER 560 M. 5614.
J. F. Garner (1963) Administrative Law pages 48 – 49.
Labiya V. Anretiola (1992)8 NWLR Pt. 258 at page 139 SC.
MC Okany (2007) Nigerian Administrative Law 1st Edition African First Publishers Limited Onitsha Nigeria.
MC Okany (2007) Nigerian Administrative Law Publishers Africana First
M.C. Okany (2007) Nigerian Administrative law Publishers Limited Book House Trust Onitsha, Nigeria.

Edo Polytechnic Journal of Administration and Development Vol. 2, No 1, January, 2021

NAF vs Obiosa (2003) 4 NWLR Pt 810 page 233 SC

OjoAbiola (1970) "Constitutionality of Delegated Legislation" a Nigeria Journal page 99.

Ondo State University vs Folayan (1994) 7 NWLR PT 354 at page 9.

Okogie & Ors v. Governor of Lagos State (1981)1 NCLR 262

Research. Faculty of Law, Nigeria Police Academy Wudil, Kano State.

Section 32 of 1999 Constitution of Federal Republic of Nigeria.

Section 4 (1999) constitution of the constitution federal republic of Niger is Section 4.

Tai Solarin Vs IGP (1984) unreported case Lagos High Court Suit No. M/55