

**INSTITUTE OF ADVANCED LEGAL STUDIES
SCHOOL OF ADVANCED STUDY
UNIVERSITY OF LONDON**

1441604

**DELEGATED LEGISLATION IN NIGERIA: THE
CHALLENGES OF CONTROL**

**LLM IN ADVANCED LEGISLATIVE STUDIES
2013-2014**

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DELEGATED LEGISLATION IN NIGERIA: THE CHALLENGES OF
CONTROL

LLM 2013-2014
LLM in Advanced Legislative Studies

DECLARATION

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Course Title: LLM in Advanced Legislative Studies 2013/2014

Dissertation Title: Delegated Legislation in Nigeria: the Challenges of Control.

Date Due: 1st September 2014

Word Count: 15067

I declare that the dissertation is my own work and that all sources quoted, paraphrased or otherwise referred to are acknowledged in the text, as well as in the list of works cited.

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Acknowledgement

I want to acknowledge God Almighty for giving me this opportunity and granting me the grace to undertake and complete this LLM. programme. Also, my thanks goes to my father in the Lord, Pastor David Ibiyeomie for his prophetic declarations that has found fulfilment in my life.

To Dr Constantine Stefanou and Professor Helen Xanthaki, for their impartation and constructive criticism.

I specially acknowledge my classmates Shahida, Stephanie, Asmah, Laila and Denny for making the year a memorable one.

Lastly, to the Rivers State House of Assembly for their nomination.

Dedication

I dedicate this work to my beloved husband Raphael Benson and my lovely children Vanessa, Mapuye and Tamunosaki Benson. You all contributed one way or the other to my success. I thank you for your immense support. May God bless you all.

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CHAPTER ONE

1.1 Introduction

In considering how society generally is regulated, most times focus is always on Acts of Parliament that are passed by the legislative arm of government. However, there is another aspect of law making that is of immense importance for the regulation of any given society. This is especially so with the fact that Acts of Parliament are becoming less detailed and relying more on delegated legislation to make them comprehensive enough to be workable pieces of legislation. Delegated legislation which are laws made by the executive or other administrative bodies is a huge part of any legal system as it forms part of the wider legislative process that is used for the regulation of any given society.

Modern society imposes on government social, cultural and economic matters of human endeavours ¹ and the government needs to provide legislations to regulate these activities, but legislation in these areas is so enormous that it is impossible for the legislature to legislate in details to cover all these matters. Thus the grant of rule-making power by the legislature to the executive became a necessity and a permanent feature in modern society.² Though considered as an infringement on the doctrine of separation of power,³ the need for such legislation is obvious because parliament lacks the time and the resources to legislate comprehensively.⁴ Therefore, broad areas of laws which require significant amount of details are left to this form of law making, in order to make their principles workable⁵ and this could include any aspect of the society.

¹ Joel Olanokanmi Anwo & Lawal Bosede Sabitiyu, 'Principles of Administrative Law', Nigerian Open University, (2012), 41.

² K C Wheare, 'Controlling Delegated Legislation: A British Experiment, The Journal of Politics Vol. 11 No 4 1949 748.

³ H W R Wade, Administrative Law (Oxford Clarendon Press 1967, 291.

⁴ Beatson, Matthews and Elliot's, Administrative Law Text & Materials, Third edn, Oxford University Press 2005, 633.

⁵ Ian McLeod, Principles of Legislative and Regulatory Drafting, Oxford and Portland Oregon, 2009, 159

This means that the collective force of matters that are dealt with under delegated legislation, impacts on all areas of our daily life.⁶ Therefore, the extent to which these powers are delegated and how they are exercised requires careful consideration.⁷ This is because the authority to make rules having statutory effect is a power that has its consequences. These rules are no less than statutes and they guide the conduct of the citizens and must be obeyed. They have equal force of law as the empowering Act.⁸ Consequently, the need to ensure that they respect the limitations in the enabling Act and are subject to the instrument of control of both the Parliament and the Judiciary is a necessity.⁹

Writers have argued that this power should not extend to matters of principle on which a decision of parliament ought to be taken.¹⁰ Also, the discretion of such powers should not be left unchecked. According to Gwyer, an unfettered exercise of power is no good for any society.¹¹ Society needs to be focused on how these powers are being exercised because these are issues that easily makes the regulator a despot.¹²

At the same time, delegated legislation is considered as a useful process that contributes to the overall legislative and regulatory quality. In order to serve its purpose and to prevent it from harbouring bad quality legislation, certain safeguards need to be put in place especially by the parliament to ensure that these laws when passed will fulfil the purpose for which they are enacted and be able to produce the regulatory result by the policy maker.¹³

⁶ E C Page, *Governing by Numbers: Delegated Legislation and Everyday Policy Making*, Portland Hart Publishing, 2001, 141

⁷ Helen Xanthaki, *Thornton's Legislative Drafting*, fifth edn, Bloomsbury Professional, 2013, 403

⁸ D R Miers and A C Page, *Legislation*, London Sweet and Maxwell 1982, 140

⁹ Helen Xanthaki, written evidence to the House of Lords, *Delegated Powers and Regulatory Reform Committee, Inquiry into delegated Powers Memorandum*, 2014, 62

¹⁰ Xanthaki, *Thornton's Legislative Drafting*, (n 7), 403

¹¹ Gwyer, 'The Power of Public Departments to Make Rules Having the Force of Law', 1927, 5 J of Pub 404-409

¹² Ojo, *Delegated Legislation*, (1964), 200 Thesis Submitted to Institute of Advanced Legal Studies, London for the Award of Doctorate Degree, VLE, accessed 15th July 2014

¹³ Helen Xanthaki, *The Problem of Quality in EU Legislation: What on Earth is Really Wrong*, (2001) VLE

They should be laws that enjoy the support and co-operation of all actors in the legislative process¹⁴ and be able to command the wilful compliance of the citizens whose lives they are to regulate. In order for this to happen they have to meet the procedural conditions of consultation and publication. Also, they must meet general drafting conventions that promote clarity, precision and unambiguity.¹⁵ These are all issues that will promote effectiveness and serve as a criteria for quality in parliamentary scrutiny.

This dissertation will examine delegated legislation in Nigeria and the challenges of its control. The forms of delegated legislation that will be looked at here, are those rules, orders, regulations that are made by persons or administrative agencies under the legislative authority of the parliament. The study is focused on Nigeria, but will reflect on some British analysis for the sole purpose of helping us to have a clearer understanding of the concept of delegated legislation and how to effectively control this type of legislation. This approach will enable us see the gap in the Nigerian system and suggest ways that could improve the system in Nigeria. Another reason for this approach is that most of the laws in Nigeria are tailored towards the Common law system applicable in the United Kingdom as such a discussion of delegated legislation in Nigeria cannot be done effectively without a mention of the British common law system.

1.2 Aims and Objectives

The hypothesis of this dissertation is that adequate parliamentary scrutiny prevents the harbouring of bad quality delegated legislation. To prove this hypothesis, analysis will be done on the system of delegated legislation in Nigeria to establish whether these instruments are made under proper authority. Secondly, whether the exercise of these powers are in line with the powers conferred by the Primary Act and thirdly, whether the mechanism if any that has been put in place

¹⁴ Xanthaki, Quality of Legislation (n 13)

¹⁵ Xanthaki, Written evidence (n 9), 64

are enough to safeguard them against abuse and prevent the harbouring of bad quality legislation, if not, what measures can be taken.

The basis of this research is that Nigeria like most other countries have a mass of their laws being exercised by Administrative authorities. The standard is that laws should emanate from those who are elected to make them, but in reality, this may not always be possible thus the reliance on delegated legislation. Having in mind that this type of law making has its own pitfalls, there is need for adequate measures to be put in place to prevent the abuse of this exercise of power and to ensure that there are certain conditions that can be used as criteria for effective control by the parliament. This will serve as a check and safeguard against bad quality legislation.

1.3 Methodology

This dissertation examines available literature on delegated legislation and considers why it so easily harbours bad quality legislation. It identifies the root cause to be the lack of adequate parliamentary scrutiny. The paper proposes that the parliament who are the donors of these powers ought to provide adequate scrutiny for delegated legislation and this will be able to safeguard it from harbouring poor quality of legislation.

In examining the measures that are put in place it considers the enabling clause in the primary Act as a starting point in the parliamentary scrutiny by pointing out that it has the role of conveying clearly the policy aim of the Ministerial power¹⁶ and the narrow limits of the delegation for which the Parliament can ensure that the delegation is in compliance with. These can serve as quality criteria for effective scrutiny.

¹⁶ V.R.A.C. Crabbe, 'Legislative Precedent, Vol. II, London Cavendish Publishing Ltd 1998, 48

1.4 Structure

This dissertation is divided into six chapters with the following breakdown:

Chapter One deals with the introduction, aims and objective, methodology and the structure.

Chapter Two deals with the definition, overview and what subsidiary legislation is about. It looks at the origin, importance and reasons why powers are delegated. Finally, the types of subsidiary legislation will be considered.

Chapter Three is on the justification of delegated legislation looking at time pressures on the parliament, the flexibility of the legislative process and the technicalities of the subject matter.

Chapter Four looks at the criticisms of delegated legislation and concludes on how lack of scrutiny affects subsidiary legislation and even the primary legislation.

Chapter Five analyses control of subsidiary legislation and the problems associated with this type of legislation. Parliamentary scrutiny and its effect on subsidiary legislation will be examined. Also, the chapter will consider the effects of parliamentary scrutiny on the quality of the legislation. The model in the United Kingdom will be considered to draw lessons from it. Furthermore, the chapter will talk about the enabling clause as a system of control but its limitations will also be pointed out. Finally, other means of control like control by the courts and the Executive will be considered.

Chapter Six is the conclusion and recommendation.

CHAPTER TWO

Definition and Description of Delegated Legislation

2.1 What is Delegated Legislation?

Delegated legislation also called subsidiary legislation or statutory instrument is that legislation which is made under a delegated authority.¹⁷ It is the exercise of power to legislate conferred by or under an Act of Parliament to the Executives or other Administrative authorities.¹⁸ In the Nigerian context, it may not be easy to give a concise definition of what the term delegated legislation means, but Section 18 of the Interpretation Act, which gave various definitions of which statutory instrument is one, defines it to mean:

“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.”¹⁹

From the above definition, it is clear what amounts to delegated legislation in Nigeria. The definition states clearly, the various forms that delegated legislation may take. The subsidiary bodies that power can be delegated to includes the president, governors, ministers, commissioners, Administrative agencies, professional bodies etc.²⁰ 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.²¹ 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.

¹⁷ Xanthaki, Thornton's Legislative Drafting(n 7) 523

¹⁸ Report on Joint Committee on Delegated Legislation ,1972 HL 184HC 475 par 6

¹⁹ Interpretation Act 1964 LFN

²⁰ S O Imhanobe, 'Delegated Legislation', Fundamentals of Legislative Drafting, edited by Epiphany Azingo, Vivian Madu, Nigerian Institute of Advanced Legal Studies 2012, 196

²¹ *ibid*

2.2 Origin of Delegated Legislation

Delegated legislation is not new, it dates back many centuries.²² An example could be seen as far as 1337 in England.²³ A substantive part of government during this period was run by way of administrative provisions made by Sovereign in Council.²⁴ The limits to which their powers can be exercised were never defined.²⁵ Later periods saw the emergence of Statutes that gave the King in Council the powers to make proclamations which were to have the same force as Acts of Parliament.²⁶ However, 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.²⁷

By the 19th century there was an increase in the volume of delegated legislations that was made. In England alone, there is the record that about three to four thousand delegated legislations are passed yearly.²⁸ These legislations, deal with several matters ranging from trivial to those which were of supreme importance but one thing about most of these kinds of legislation is that they affect the everyday life of the citizens as it now forms the bulk of the legislative instrument that regulate citizens activities.²⁹ These legislations became necessary in modern societies as a result of increased legislative responsibilities of the parliament and the consequent impossibility of deciding all issues in primary legislation.³⁰

This situation saw the need for parliament to divide the law making powers with the government. In response to this, the principle was formulated that

²² Daniel Greenberg, *Craie on Legislation*, London Sweet and Maxwell, 2012, 116

²³ Statute for Exportation of Wool, see also Statute of Staple of 1388

²⁴ Miers and Page (n 8) 143

²⁵ Cecil Carr, *Delegated Legislation 1921*, 51-53

²⁶ Henry VIII Statute of Proclamation in 1539

²⁷ Miers and Page (n 8) 143

²⁸ Greenberg, *Craie on Legislation* (n 22) 116

²⁹ Xanthaki, *written evidence* (n 9)

³⁰ Miers and Page (n 8)143

parliament's responsibility was to deal with the form while the government has to deal with the details. Amongst the proponents of this was Henry Thring, who was of the opinion that parliament's attention should be confined to material provisions only, leaving the details to be settled departmentally by government as that is the only way they can carry out their functions effectively.³¹ Dicey also supports this by stating that "the substance and form of law will be improved if the executive could work out the detailed applications of Acts of Parliaments."³²

Writers see this as what would help in the drafting of legislation on the whole as matters of details will not be included in the legislation and this would lead to the improvement in the drafting of legislative text.

2.3 Overview of Delegated Legislation in Nigeria

Delegated legislation has become a part of the legal system in Nigeria. The legislature like in other countries see the need to delegate powers to the executive but, there are hardly opportunity for the scrutiny of these legislations by the parliament before or after they are passed. Also, unlike other jurisdictions, there are no general pattern or procedure that are laid down that can be followed for the making of these legislations.³³ The procedure to be followed in each particular case largely depends on the enabling law and this causes a lot of variations between the different regulations that are made and as such the safeguards in place are far too meagre to constitute an adequate control of delegated legislation.

Generally, the delegation of law making powers can be traced to the Constitution. Section 4(1) and 4(6) vests the legislative powers on the National Assembly and the State Houses of Assembly respectively.³⁴ This power to make laws that reside with the legislative arm can however be delegated to another body but the

³¹ Henry Thring, Practical Legislation 1818 ,13

³² Dicey, An Introduction to the Study of Law of Constitution 10th edn 1959 52-53

³³ Legislative Instrument Act 2003 (LIA) Australian, see also Statutory Instrument Act in United Kingdom

³⁴ Constitution FRN 1999 as Amended

legislature must first lay down the legislative policy and principle and must afford guidance for carrying out the policy before it delegates it to a subsidiary body.³⁵ Section 27(1) of the Interpretation Act underscores this fact.³⁶

Compared to the British system, delegated legislation is also made under an enabling Act. However, the British system have various procedures to which rule making can be subjected. This could be either be affirmative procedure, negative procedure or to no express procedure,³⁷ in which case they come into force if no objection is made. The type of procedure that the instrument is subjected to determine the level of scrutiny that parliament can exercise on it. As such, for more significant instrument the affirmative procedure is used.³⁸ Here also, emphasis is placed on laying of such instrument before parliament or its committee for it to come into force. These methods serve as a check on delegated legislation.

2.4 Why is Delegated Legislation Needed?

The need for delegated legislation in modern society is not farfetched. Due to the increasing complexities of modern societies and the impossibility of regulating all activities in primary legislation delegated legislation has become inevitable.³⁹ Government rely on it as public general Acts to give legal effect to its policies⁴⁰ and as legislative machinery in relation to matters of commencement, duration or application of an Act and to modify existing laws.⁴¹ It has been used as reserve power to make consequential amendment on matters that may not have been foreseen at the time when the enabling Act was enacted. In such instances such a delegated legislation amends the enabling Act which is known as the Henry VIII

³⁵ Ihmanobe (n 20)196

³⁶ Cap 192 LFN 1990

³⁷ Greenberg, Craise on Legislation (n 22) 337

³⁸ Ibid 339

³⁹ Muktar A, Etudaiye, ‘ The Status of Tax, Duties, Fees and Legislative Powers’, Unilorin.edu.ng assessed August 4th 2014

⁴⁰ McLeod (n 5) 147

⁴¹ Carr (n 25)

Clause.⁴² Some Acts wholly depend on the enactment of delegated legislation. These Acts are described as “Skeleton Acts” They have the general structure of an intended law but leave all the details to be provided in a delegated legislation.⁴³ Others rely on delegated legislation not merely to administer their provisions but also to give them substance.⁴⁴

Consequently, through delegated legislation immense legislative powers have been delegated to the executives and other administrative bodies without adequate measures put in place to check how these powers are exercised. This has been the problem from its origin. It was against this backdrop that the Donoughmore Scott Committee was set up in 1929 to consider the powers exercised by the Ministers of the crown through delegated legislation and decide what safeguards can be put in place for the constitutional principles of the sovereignty of the Parliament and the Supremacy of the rule of law.⁴⁵ This committee however affirmed the necessity and desirability of delegated legislation because they felt if parliament does not delegate its powers to legislate, it would not be able to pass the quality of legislation that society expects.⁴⁶

However, the desirability and the inevitability of this form of law making should not be allowed to obscure the limitation of the authority to legislate if our constitutional sanctity is to be maintained.⁴⁷ As such we should be able to make a distinction between those delegation that are normal and made under clear defined powers that are confined to details and those that are exceptional which confers powers and delegate on matters of principle, or amend the Acts of parliament, or exclude the jurisdiction of the court and are so wide that one is not

⁴² C Forsyth & E Kong, ‘The Constitution and Prospective Henry VIII Clauses’, 2004 Judicial Review 17

⁴³ Greenberg, *Craze on Legislation* (n 22) 117

⁴⁴ National Migration and Asylum Act 2002 in the United Kingdom

⁴⁵ Miers and Page (n 8)145

⁴⁶ Donoughmore Committee report on Ministers Powers, 1929,23

⁴⁷ Etudiaye (n 39) 257

able to know the limits that parliament intends to impose on them.⁴⁸ Though in practice, it may not be easy to make this distinction because at the end of the day it is the government through its majority that decides what the Act should contain and what should be left to be delegated to it. Also, because delegated legislation derogates from the principle of separation of powers,⁴⁹ it is required that Parliament should be able to keep a watch on the exercise of these powers.

2.5 Types of Delegated Legislation

Delegated legislation has many forms. It could be by way of orders in council, statutory instrument, regulations, rules, orders schemes, warrants and directions.⁵⁰ It should be noted that the boundaries between the different types of subsidiary legislation are not fixed. It generally depends on the wordings of the Primary Act. A brief explanation of each will be necessary at this point.

- I. Orders in Council: - In England, these legislations are made by the Queen on the advice of the Privy Council. They are generally used where it would be inappropriate for a Minister to make the order. It is mainly used for constitutional matters such as the transfer of powers from one minister to another or to bring into force an emergency power that is to be exercised by ministers. A distinctive feature to note about this type of subsidiary legislation is that they are primary legislation if made in the exercise of royal prerogative but subsidiary legislation if made in the exercise of statutory power.⁵¹
- II. Orders of Council: - these are made by the Lord of the Privy Council in their own right and it relates to the regulation of professional bodies over which the Privy Council exercises supervisory authority.
- III. Ministerial Orders: - these are orders made by Ministers of the Crown.

⁴⁸ Miers and Page (n 8)146

⁴⁹ Etudiaye (n 39) 257

⁵⁰ Miers and Page (n 8)140

⁵¹ McLeod (n 5) 160

- IV. Orders: - are also made by Ministers in exercise of executive power.
- V. Rules: - these prescribe procedural matters. For example rules governing court procedure. The Fundamental Rights (Enforcement Procedure) Rules 2009 were made pursuant to the powers conferred on the Chief Justice of Nigeria.⁵²
- VI. Regulations: - here the Ministers actually makes the substantive law. It sets out in details how an Act is to be implemented, for example in Nigeria, the terms and conditions to obtain loan from the National Housing Fund were made by the Minister of Housing under the powers conferred by Section 25 of the National Housing Fund Act.⁵³
- VII Byelaws: - these are laws of local application made by Local Authority and are restricted to certain areas only. They are mainly to control the activities of people in public places such as parks, public transport etc.
- VIII 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 Constitution and section 245(2) of the Electoral Act.

Having seen the reasons that have been given for the donation of law making power, it is obvious that it is a necessity for every modern society to delegate some of its law making powers to the executive. Parliament has limited time and therefore cannot be engaged in the full details of the law as is required by the society today. Society has become more complex in its approach and the only

⁵² Section 46(3) of the Constitution FRN 1999

⁵³ Cap N 45, Laws of the Federation of Nigeria 2004

way that Parliament can keep up with this trend is to delegate some of its law making power to the government. In the same vein, parliament possesses the power to controls its exercise as the delegation of these law making powers does not mean a denudation of such powers. These powers can be withdrawn by the Parliament. Therefore Government should be made to justify the powers which they intend should be delegated to them. This will enable the Parliament or its committee to ascertain by itself the level of scrutiny it should exercise over a particular piece of legislation. This would make regulators think carefully about delegated powers and serve as a safeguard to prevent bad quality legislation.

CHAPTER THREE

Justification for Delegated Legislation

The changing nature of the society requires that state would regulate more the activities of its citizens and the way to go about this is through delegated legislation. Therefore its importance cannot be over emphasised. As it is argued “if parliament were not willing to delegate law making powers, it would be unable to pass the quality of law which modern society require.”⁵⁴ In this regard, several writers have seen the need for delegated legislation.

As far back as 1893 Sir Henry Jenkins in support of the delegation of legislation wrote:

“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.”⁵⁵

Smith is also of the view that complex reforms will prove abortive unless parliament after laying down the general principle were to entrust the responsible Ministers with their detailed implementation.⁵⁶ What this shows is the inevitability of delegated legislation. Succinctly, some reasons have been given why delegated legislation is regarded as a normal feature in most modern societies. An analysis of these reasons given are treated below.

⁵⁴ Report of the Committee on Ministers p 23

⁵⁵ Greenberg, Craise on Legislation, (n 22) quoting Sir Henry Jenkins First Parliamentary Counsel, 291

⁵⁶ S.A De Smith, Delegated Legislation in England, the Western Political Quarterly Vol. 2 ,No 4 Dec 1949, 514-526 at 516

3.1 Reasons for Delegated Legislation

3.1.1 Pressure on Parliamentary Time

One of the first arguments that was put in support of delegated legislation was the pressure on parliamentary time. Modern legislation requires more time and details than Parliament has the time or inclination to handle.⁵⁷ With this shortage of parliamentary time, requiring them to enact the minute details of every legislation will be impossible. Therefore, its concentration on the essentials⁵⁸ while leaving details to be worked out by the departments is a welcome development. Henry Thring in support of this is of the view that, parliament will have more time for the consideration of more serious questions involved in legislation, if subordinate matters can be withdrawn from its cognisance.⁵⁹

3.1.2 Emergency Powers

The relative speed with which delegated legislations are usually made is also an advantage to it.⁶⁰ This is very necessary in times of emergency. An example is the Emergency Power Act of Nigeria 1961, which confers on the President the power to make regulations that are necessary or expedient for the purpose of maintaining order in the country. Subsequent upon that, the President has made regulations declaring some states in the federation under Emergency rule.⁶¹ 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.⁶²

⁵⁷ R v St Helens Justices ex p Jones [1999] 2 All ER 73 at 83.

⁵⁸ S G G Edger, Craise on Statute Law, Seventh edn, London Sweet and Maxwell, 1971, 291

⁵⁹ Thring (n 31)

⁶⁰ McLeod, (n 5) 160

⁶¹ State of Emergency (Certain States of the Federation) Proclamation 2013

⁶² Xanthaki, Thornton's Legislative Drafting (n 7) 404

3.1.3 Technical Character of Modern Legislation

Legislators do not most times have the expertise and the knowledge that is required for certain legislations. An example of this are laws concerning safety and technology. These laws require experts that are knowledgeable in the particular area. In such a situation, Parliament will be required to deliberate on the main issues thoroughly and leave out the details to be field in by the experts. In connection with that, Parliament may not be the best institution to recognise and deal with local issues as it affects local people. As such Councillors that have been elected by the local people who are more aware of their needs tend to pass bye laws that will take care of the needs of their local communities.

3.1.4 Need for Flexibility

Another justification for delegated legislation could be seen with regards to the relative speed with which it can be made.⁶³ Delegated legislation is capable of changing rapidly and adjusting to situations.⁶⁴ This makes it suitable to be used for certain types of regulations like those whose details have not been fully worked out at the time when the Act is being passed. Others are those statutes which are likely to change frequently example fees payable for the application of a licence.

The foregoing, has made it clear that the conditions and situations that require for the use of delegated legislation may be weighty but this does not mean that the traditional role of the legislature being the body that is responsible for law making should be ignored. This rule is still very prevalent in our legal system only that it should be relaxed when necessary.⁶⁵ Also, there is no dispute that the primary use of delegated legislation is to allow statutory authorities to fill in the details of a statutory scheme. The question that may arise at this point is whether delegated

⁶³ McLeod, (n 5) 160

⁶⁴ Edger, (n 58) 291

⁶⁵ Xanthaki, (n 7)Thornton's Legislative Drafting, 405

legislation is actually used for this purpose? Considering the extent to which some of these legislations go.

Despite this fact, delegated legislation is bound to remain part of our politics. It is seen that in recent times, parliament has tended to delegate more of their powers than they have done in the past. Without this, the administration of modern public services would be at best slow and at worst impossible.⁶⁶ Thus, the concept of delegated legislation is not only seen as desirable, but highly convenient.⁶⁷ Parliament after making the law can entrust the responsible Minister with the details of implementation.⁶⁸ So there is no reducing the amount of delegated legislation that can be made. The only issue for discussion is what are the present safeguards and how far are they adequate? In answering this question certain points have to be borne in mind. The issue of who may make the legislation, the grant of powers, its scope of application, the criteria for its exercise and the procedure to be followed. These are all issues that needs to be clearly defined. These issues needs to be settled before subsidiary legislation can be said to satisfy the criteria of quality. Also, in the course of delegation, care should be taken not to delegate power for the wrong reasons. The identity of the delegate and the extent to which powers can be delegated are all matters that are very important. To this end, provision needs to be in place which will ensure that administrative bodies while making delegated legislation, do not use their powers in a way that is not contemplated by the parliament. To ensure that they do not go outside their given authority they should be watched by parliament.⁶⁹

Every society is sceptical about abusive executive power.⁷⁰ Therefore these powers to legislate should not be left unchecked otherwise this trend rather than

⁶⁶ E C Page, *Governing by Numbers: Delegated Legislation and Everyday Policy Making*, Portland Hart Publishing, 2001, 22

⁶⁷ *R v Burah*, 1878 App Cas 899, 906

⁶⁸ J A G Griffith, *Delegated Legislation: Some Recent Development*, *Modern Law Review* vol. 123 1949, 297-318, accessed 10th June 2014.

⁶⁹ *ibid* 300

⁷⁰ Cheng 480

fulfil its purpose can pose a danger to democracy. In the exercise of this power, authority must flow from the primary Act. Vague enabling laws can open the floodgates to dictatorship as such should be used sparingly. Primary Acts should specify the content, purpose and extent of the legislative authority as a means of preventing legislative abdication.⁷¹ This is because misapplied power is not only dangerous it is wasteful.

The significance of delegated legislation can be seen in terms of the number of people that is affected by it generally. Therefore, a theory that proposes that the law making power should be left only in the hands of the elected officials may not be sound at this point. In its exercise, it should be confined to the normal type of delegated legislation where powers are open and confined to details rather than those that are vague and their limits cannot be defined. This will prevent authorities from doing whatever they please in delegated legislation or even go to the extent that the primary legislation has not envisaged.⁷²

Confined within its limits delegated legislation is not incompatible with good administration. The fact that powers are delegated to other authorities does not impair the superior power of law making conferred on the legislature. But, the situation in Nigeria still leaves a lot to be desired. There are no general pattern or procedure that must be followed in the making of these legislation. The procedure to be followed in a particular case largely depends on the enabling law itself.⁷³ This leaves every case to be adjudged on its own merit. Government officials are seen to give any reason they deem fit for regulations that are made. The point as to whether these regulations that are made are used to fill in details rather than make substantive laws are not been checked by anyone. Statues empowering executives to make regulations may include powers to alter the enabling statute

⁷¹ Ibid 466

⁷² A F Benette M P, *Uses and Abuse of Delegated Power*, Stat LR (1990)11(1) 23-27, 24

⁷³ P A Oluyede, *Nigerian Administrative Law*, Ibadan University Press (1988) 333

that confers the power.⁷⁴ In other words, the law makers' control of delegated legislation is not as effective as it should be. Judicial control which is mostly relied on is not satisfactory because often times it is belated if not crippled by the sheer indifference of people. Several other problems could be pointed out but suffice it to say that a situation where delegated legislation do not fall within clearly defined details of the primary Act or where the powers conferred are so wide that one cannot tell what the actual limits are is to say the least not justifiable.

⁷⁴ Emergency Power Act of Nigeria 1961

CHAPTER 4

Criticism of Delegated Legislation

Having realised the need for delegated legislation, the argument that law making power should be concentrated only in the hands of the elected officials is an argument that does not appear to be sound. This is why the criticisms against delegated legislation does not seem to be based on the volume or the cumbersomeness⁷⁵ of the legislation, rather it is based on other matters such as the lack of adequate control and the tendency of it being abused. An analysis of the criticisms that has been put up against delegated legislation will be made to see the extent to which such critics are justified. It is only when we fully understand some of the challenges that this form of law brings that we will be able to respond properly with solutions that can effectively address the problem.

4.1 Deals with Matters to be in Primary Legislation

A major criticism of delegated legislation as put by Daintith and Page is that, there has been an increasing tendency for government to use it as a means to deal with matters of principles and policy rather than with details.⁷⁶ There is the argument that measures that are supposed to be in primary legislation are sometimes slipped into delegated legislation. The general presumption is that delegated legislation is meant to take care of the details of the law after the legislature has laid down its structure and in doing this, it should be in line with what has been stipulated in the enabling Act. Anything to the contrary, is an aberration.

This position does not even go down well with some critics who are of the view that, allowing the delegate to fill in the details while making the law only in a skeleton form is not fair to the citizens because such details are expected to be

⁷⁵ A Toriola Olewo, *Administrative Law in Nigeria*, Jator Publishing Company (1997) 66

⁷⁶ Terance Daintith and Alen Page, *The Executive in the Constitution*, Oxford University Press, 1999

filled in by the elected representatives of the people.⁷⁷ Ojo argues that most times the enabling Acts merely state the subject on which the regulations is to be made without further indication as to what kind of legislation is intended to be authorised.⁷⁸ In this way, very crucial matters are left to be handled by the rule making agency.

4.2 Makes Executives too Powerful

There is also the criticism that, the executives are becoming too powerful as a result of the over reliance of government on delegated legislation.⁷⁹ Executives could make laws without passing it to the Parliament for scrutiny.⁸⁰ Page points out that the use of emergency power highlighted a more general tendency for the amount of delegated legislation to increase.⁸¹ Most prominent among the critics was Lord Chief Justice Hewart who in his *New Despotism* alleged “administrative lawlessness and an over mighty executive.”⁸² Concerns here were mainly on the use of Henry VIII Clause which has the effect of amending or repealing primary legislation.⁸³ Beatson described this form of law making as tipping the balance too far in favour of administrative branch at the expense of the Parliament.⁸⁴ Rippon alleged that they are used at an alarming high rate⁸⁵ This creates the fear that they may even be used to modify what parliament has already laid down or better still be used in a radical manner that is not envisaged by the parliament which is not far from what is happening today. This obviously transcends the classical functions of simply empowering the administrative authority to supplement statutory schemes.⁸⁶

⁷⁷ Oluyede, (n 73) 327

⁷⁸ Ojo, (n 12)

⁷⁹ Miers and Page (n 8) 22

⁸⁰ *ibid*

⁸¹ *ibid*

⁸² Lord Chief Justice Hewart, ‘The New Despotism’, 1929

⁸³ Beatson, Matthews and Elliott’s, *Administrative Law text and Materials*, third edn, Oxford University Press 2005 635.

⁸⁴ *ibid*

⁸⁵ Rippon 10 *Statute Law Review* 205 1989

⁸⁶ Beatson, (n 83) 636

All these concerns led to the setup of the Donoughmore committee who later came to stress the significance and the desirability of delegated legislation as a system of law-making. Although the Donoughmore committee unequivocally affirmed the desirability and constitutionality of delegated legislation, a line has to be drawn between what is proper and what is improper delegation.

4.3 No Limits in Enabling Clauses

Other criticism that is made against the concept of delegated legislation is that delegated authorities are given the power to make laws most times without limitations. This goes to the extent that, the powers of the courts to control them are even ousted.⁸⁷ As a result of this, they may make laws that are unreasonable since they are not been scrutinised by any authority.

This criticism however raises a lot of debate, as the criteria that can be used by the courts to determine what amounts to unreasonableness is very subjective. It is true that the issue of unreasonableness is a grounds under which a delegated legislation may be struck down as being ultra vires. However, the powers of the court to decide what is unreasonable is determined by what is contained in the enabling Act. The court can only consider an act to be unreasonable if it exceeds the scope of the statutory authority and thus declare it as ultra vires.⁸⁸ Acts may seem unreasonable on the face of it but the court may still not be able to set such Acts aside as they may still fall well within the scope of the discretion given by the enabling Act. This goes to show that an Act that is taken within the framework of a legislation will only be set aside if it can be shown that in its exercise the delegate has gone outside the framework of the authority. See the case of *Associated Provincial Picture House v Wednesbury Corporation*.⁸⁹ However, it should be noted that courts can also look at the intention behind the parent

⁸⁷ Toriola, (n 75) 66

⁸⁸ P Layland and G Anthony, Textbook on Administrative Law, Oxford University Press, 2013, 316

⁸⁹ (1948) 1 KB 223)

legislation to decide whether the government is acting lawfully in making the subsidiary legislation or not and if it is not, the court will declare it ultra vires.⁹⁰

4.4 Inadequate Control by the Parliament

Control over delegated legislation by the Parliament, has been a major source of criticism.⁹¹ Parliament do not have the time or the expertise to keep some of these legislations under check as such delegates carry out this function the way it pleases them with little or no form of surveillance on them. In most cases one finds that Parliament delegate powers on the subjective discretion of the delegate⁹² by the use of such loosely worded phrase like “if the Minister is satisfied”, “in the opinion of the Minister”, “as he deems fit.” The use of these type of phrases are dangerous⁹³ and may lead to arbitrariness. The extent of these powers are so wide that it is difficult to know the limits of the delegate. Ojo describes it as making the delegate a judge in his own matter.⁹⁴ In Nigeria, many of these delegates use these powers as a past time as such they make and amend other legislations by implication without thinking of the consequences of their actions.⁹⁵

Also, most of these regulations are made subject to the approval of a higher body. This approval is usually sought after the regulation has been made but before it comes into force. The question that arises here is, what happens when the rulemaking body does not get the necessary approval which is what happens often in Nigeria. The law does not in this instance give an alternative of what should be done and this may occasion injustice to the people. One way to go about this

⁹⁰ R v Secretary of State for the Environment Transport and Regions ex parte Spath Holme Ltd ([2000] 1 All ER 884

⁹¹ Toriola, (n 75) 66

⁹² Sir. Carleton Allen, Law in the Making, Clarendon Press, 7th edn, (1964) 551.

⁹³ Oluyede (n 73) 328

⁹⁴ Ojo (n 12) 200

⁹⁵ Oluyede (n 73) 328

is to make it a condition precedent for the operation of the Act. In this way the regulation does not take effect if all the conditions are not met.

4.5. Cumbersomeness and Non-compliance with Procedural Rules

The sheer volume of delegated legislation is another matter that has attracted criticism. Coupled with that, there is sometimes noncompliance with publication and consultation. Several of these laws are made without people being able to find them as a result of non-publication. Most often, people are hardly aware when these laws are made as there is no consultation. In Nigeria, even when they are published, they do so in different places and this makes it impossible for the citizens to know what the present law is.

Regulators can get away with this because, in many cases, the enabling law does not impose a duty on the delegate to give notice of the proposed rulemaking. This creates a lot of unfairness as the people who are bound by these laws sometimes have no idea of these laws and where publication is required, failure to publish does not invalidate the Act.⁹⁶ Consequently, citizens remain in complete ignorance of what rights and their property has been secretly conferred by the Minister on some authority and to what residual rights they may be entitled to under the Act.⁹⁷ This makes the law to be inaccessible and to be bugged down with some of the problems that are associated with primary legislation whereby citizens find it difficult to understand.

4.6 Undemocratic

Furthermore, the fact that delegated legislation takes law-making away from the democratically elected persons to persons who are not elected is a criticism against delegated legislation. This situation though acceptable as a result of the demands on the parliamentary time, but the fact that Parliament is not able to provide sufficient control is a problem. To crown it all, neither of the Houses of

⁹⁶ Lord Scott *Blackpool Corporation v Locke* (1948) PL 395

⁹⁷ *ibid*

Parliament even in the course of scrutiny can make amendment to these legislation.⁹⁸ They either accept the whole or they reject the whole of it without any form of amendment. In Britain, the possibility of amending delegated legislation has been considered at some point, but when it was thought that an amendment of the standing orders will be able to effect this change, it was however realised that, this will not be sufficient. What will be required will be a change of all the enabling clauses. This will cause a lot of complications and invariably go contrary to the intention of the parliament and frustrate the purpose for which these powers were given.⁹⁹ However, not all types of delegated legislation has this problem. Bye laws that are made by the Local Government Authorities do not fall under this class because they are definitely made by democratically elected persons.

Other issues that have been raise are those that have to do with sub delegation. In this case, law making is handed down a second level. This has raised the criticism that delegated legislations are laws that are being made by civil servants and they argue that the legislature is just a rubber stamps that do the biddings of the executive.

Despite the criticisms against delegated legislation, the fact is that this type of legislation is here to stay in so far as it promotes the effectiveness of the overall law making system. To achieve this purpose, mere delegation is not enough, there has to be the proper framework and procedure that must be followed for it to achieve its desired aim. For every power that is given, there should be some way for the recipient to be accountable to some sort of authority as to how that power is used or exercised. When these powers are used arbitrarily against individuals they should be able to access the courts to enforce their basic liberties on a basis of equality and fairness since they have been more or less subjected to an adhoc

⁹⁸ Greenberg, Craise on Legislation (n 22) 338

⁹⁹ Ibid 338

system of law-making. This is most times not easy as the citizens themselves may compromise. There is also the need for the parliament's powers to delegate to be properly defined and streamlined. This is to ensure that in the delegation of these powers the parliament does not abdicate its powers.¹⁰⁰

The foregoing issues raised has shown how easily bad delegated legislation can be harboured in our legal system in the course of making delegated legislation. The process of sub delegation is something that can lead to legislative interference and this is even worse when such powers are based on the subjective discretion of the delegate. As such great care is to be taken as to how these powers are being extended.¹⁰¹ These powers most times are exercised without a reflection of some of the implication it can have on other laws and the society at large because they are done with no formality whatsoever.

Considering the fact that, legislation is the way through which a government can truly govern its people, and achieve its social and economic policies,¹⁰² delegated legislation is obviously a very important tool for this to be achieved.¹⁰³ How these powers are controlled will determine whether they will effectively carry out the intention of the government or harbour bad legislation. The scope of the powers that are given must be expressly defined in the enabling Act and it must be exercised within that bounds. Contrary to this the Parliament should be able to exercise its powers against it.

¹⁰⁰ Etudaiye, (n 39) 259

¹⁰¹ Toriola, (n 78) 67

¹⁰² Oluyede, (n 73) 326

¹⁰³ Miers and Page, (n 8) 31

CHAPTER 5

Control of Delegated Legislation

As said earlier in previous chapters, the essential theory of delegated legislation is that, while parliament deals directly with the general principle, the executives or other body that are empowered to make delegated legislation deals with the details.¹⁰⁴ This division of law making powers between the Parliament and the executive raises the question of control¹⁰⁵ which though familiar is still far from resolved.¹⁰⁶ Most of the criticisms of delegated legislation borders on lack of control. This is because there is the realisation that if there was no effective control, regulators may want to do as they please and this will be detrimental to the society at large.

There are various kinds of control that have been put in place to safeguard the exercise of these powers. Some put in place by the Parliament while others are put in place by external bodies. However, it has been argued that, Parliament who is the giver of these powers should be able to exercise the most control of delegated legislation.¹⁰⁷ Since the granting of these powers require the consent of Parliament, it has the opportunity to consider the powers sought at the time when the parent Act is before it as a bill.¹⁰⁸ Also, through its committees, Parliament can be able to exercise some level of scrutiny to ensure that legislative measures are in line with its intentions.

It has been argued that the involvement of parliament in delegated legislation defeats the conferment of these powers to make delegated legislation. This argument in itself cannot be taken very far because delegated legislation is at the very core of society since laws that emanate from it touches on most aspects of

¹⁰⁴ Chapter 15, Legislation and Disallowance Department of Parliamentary Services 325

¹⁰⁵ Miers and Page (n 8) 155

¹⁰⁶ K C Wheare Controlling Delegated Legislation: A British Experiment, The Journal of Politics, Vol.11, No 4 , Nov 1949

¹⁰⁷ Oleyami T.O, The Challenges of Controlling Administrative Legislation in Nigeria, www.nials.nigeria.org assessed July 12th 2014.

¹⁰⁸ Miers and Page (n 8) 156.

the society even more than the primary legislation.¹⁰⁹ Therefore a call for more attention on how these powers are exercised is what is more appropriate.

The fact that, this type of legislation is given by persons other than those who are elected for that purpose makes it necessary that measures be put in place for its control. Parliament should be able to ensure proper exercise of these powers by developing adequate procedure and laying standards that should be followed in the formulation of rules and regulations.¹¹⁰ This can be done by looking at the enabling clause and prescribing several control features like tabling, disallowance, and prescribing some procedural requirements like consultation and publication and the affirmation by both Houses of Parliament.¹¹¹ These conditions ought to be met before regulations can be said to be in force.

The question however is, how effective have these measures been in the prevention of bad quality of delegated legislation. This will be addressed in this chapter in the light of all the shortcomings that exist in Nigeria, as the country does not really have in place an adequate system of legislative scrutiny of delegated legislation. What seems to be relied on here is judicial control which is not enough¹¹² because, decisions that are made under judicial review seems to affect only parties to it as against Parliamentary scrutiny that cuts across the whole society.

5.1 Control of Delegated Legislation and Its Problems

The control of delegated legislation is not without its own problems even in well-established democracies like the United Kingdom. The British system has certain committees that are in charge of the scrutiny of Statutory Instruments (SIs). These are the Joint Committee on Statutory Instrument and the Commons Select

¹⁰⁹ Helen Xanthaki, written evidence (n 9) 62

¹¹⁰ Bernard Schwartz, Delegated Legislation in America: Procedure and Safeguards, *The Modern Law Review* Vol 11 No 4 Oct 1948, 444-465, 449

¹¹¹ Chapter 15 (n 104) 326

¹¹² Beatson (n 83) 648

Committee on Statutory Instrument. These committees scrutinize SIs to see where they are defective in terms of drafting, unauthorised use of power, ultra vires or to see if they have been unduly delayed to be brought before Parliament.¹¹³ Where there are defects, they bring this to the notice of the House. This process has been described as being an empty form as most times, no further action is taken by the House by way of debate since most of the SIs are really not debated.¹¹⁴

Also, the procedure that is adopted for the making of these SIs determine the level of scrutiny that Parliament can have on it. Government departments who are responsible for the instruments determines the choice of procedure that will apply to a particular instrument.¹¹⁵ Affirmative procedure is not often used, rather, the negative procedure whereby the regulation takes effect in the absence of disapproval or annulment is what is mostly used for the simple reason that it places less pressure on parliamentary time.

The scrutiny of these instrument are mostly done by a standing committee and this is when they are affirmative instruments. They may only be debated on the floor of the House where there is an agreement with the government or where the negative procedure is used and they are prayed against which rarely happens. This makes scrutiny on the floor of the House seem to be rarely possible.

Although, these Committees seem to exercise some degree of scrutiny over delegated legislation, the dominance of the executive makes it almost impossible for a disapproval of an instrument that the committee is against. Also, the fact that approval cannot be subject to amendment¹¹⁶ and Parliament not being free to determine those instruments that should be subject to scrutiny on their merit and those which should not are all matters that have made it difficult to have proper scrutiny of these legislations.

¹¹³ Miers and Page (n 8) 26

¹¹⁴ Hayhurst and Wallington 1988, 564

¹¹⁵Greenberg (n 22) 347

¹¹⁶ Ibid 338

The decision as to whether a particular instrument requires parliamentary debate is a decision that the parliament itself should make and not the executives. Using the availability of time as the distinction between those instruments that should be given affirmative resolution and those that should be given negative resolution makes it impossible for instruments to receive the scrutiny in proportion to their merit. Instruments that are considered under the affirmative resolution may not always be more important than those that are considered under the negative resolution.

With regards to the requirement of laying, it is deemed satisfied once the document has been submitted to the votes and proceedings office of the Parliament or the office of the Clerk of the House is notified of it. This exercise is seen as a mere procedure and does not give the Parliament the opportunity to have formal discussion on it. Page has argued that the procedure was clearly in response to the pressure of when instruments come into force and it is taken that by laying of the instrument before the parliament, it brings such an instrument into operation.¹¹⁷

It is easy to see the overriding need for caution in the exercise of delegated legislation. One of the things we set out to consider in this paper is whether delegated legislation is done under proper authority and in line with the powers conferred. This is what forms the guiding principle of delegated legislation coupled with fact that the legislature must be able to lay down the policy in respect of a given measure which will serve as a guideline to delegates to whom this responsibility is vested. When these guidelines are in place, it is used as a criteria and easy to see when regulators step out of the line. At this juncture, there is need to scrutinise selected enactments in Nigeria, in order to consider how they have fared under this criteria.

¹¹⁷ Page 156

Section 35 of the Fire Arms Act Cap 69 (1958) empowers the Inspector General of Police to delegate all or any of his powers or duties conferred on him under the Act to any Police Officer. The observation that could be made with regards to this is that, this may be the wordings of the enabling clause but is that really the intent of the Law? Can any Police Officer really carry out all the duties that are conferred on the Inspector General?

Secondly, Lagos State Legal Notice No 10 of 1999 made pursuant to powers conferred under Section 12 Tribunal of Enquiry Law Cap 190 Laws of Lagos State of Nigeria 1994. Makes provision to the effect that powers exercised under it has the effect of judgement of a court and cannot be reviewed by a court or shall any appeal lie to it. This obviously cannot be in line with the powers conferred to make this regulation.

Thirdly, Section 43 (d) of the Electric Power Authority Act 1990 empowers the Minister 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. This is a wide-ranging power that does not seem to have any clear limit.

Fourthly, 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. Since there is no scrutiny in any of the parliaments this exercise is carried out purely on violation of the intent of the law.

Section 9(2) of the Nigerian Civil Aviation Training Center Act of 1964 provides that an order made under the Act shall be laid before the legislature within fourteen days of its making. Also, Section 12(1) of the Yellow Fever and Infectious Disease (Immunisation) Act (Laws of the Federation 1991) provides that the President or the Governor of a state may declare by order, any disease to be infectious and such an order must be laid before the legislature at the next

meeting after the making of the order and if the legislature disapproves, it shall cease to have effect but without prejudice to anything previously done under it. These powers are exercised in violation since the approval of the House is not sought.

There are also cases with regards to how delegated power is exercised in Nigeria a few will be considered here. *Attorney General of Abia State v Attorney General of the Federation*,¹¹⁸ where a bad piece of subsidiary legislation was declared invalid. Also, in *Attorney General of Bendel State v Attorney General of the Federation*,¹¹⁹ where it was held that it was unlawful for the Bendel State House of Assembly to pass into law the Revenue Allocation Bill on ground that it was not the proper authority to exercise this power.¹²⁰ Other cases involving delegated legislation were on the ground that it violated the constitution or the enabling legislation.¹²¹

From the above discussions, it is clear that parliament needs to be alert to prevent the exercise of delegated legislation as enumerated above. This is necessary because these rules affect the core of the existence of the citizens. Critics are of the view that the process of delegated legislation in Nigeria is inadequate.¹²² They have argued that, it is important that general statutory provisions relating to the exercise of delegated legislation be introduced as early as possible so that they can be placed before the Federal Parliament.¹²³

The laying requirement as applicable in Britain is not carried out in the Parliament in Nigeria. The object of laying is for the legislature to be able to scrutinise these

¹¹⁸ (2000) Vol. 17 WRN 1 at 140-141

¹¹⁹ (1982) All NLR 85

¹²⁰ See also *PHMB v Ejitagba* (2000) 11 NWLR pt. 677 p 154 SC and *Nigerian Air force v Obiosa* (2003) 4 NWLR pt. 810 p 233 SC)

¹²¹ *Phoenix Motors Ltd. N.P.F.M.B* (1993) 1 NWLR, Pt. 272at 728; see also *Bamgboye v University of Ilorin* (1991) 8 NWLR [Pt 207] 1 at 30.

¹²² Ben Nwabueze, *Constitutional Law of the Nigerian Republic* 1964, 205

¹²³ Report of the Elias Commission of Inquiry into the Administration, Economic and Industrial Relations of the Nigerian railway Corporation in 1960, 20

instruments either before or after they are made to ensure that they are in line with the stated requirements, but unlike the British system, in Nigeria, there are no committees that are put in charge of this processes. Instruments that are laid do not go through any further legislative process by the House or a committee of the House, as such, most of the instruments that are made go unchecked since the mechanisms to check it is hardly in place. Departments and regulators carry on this duty with little or no control.

There are situations where the enabling statute states in the schedule the subject of which a regulation or rule might be made.¹²⁴ For instance the Emergency Power Act 1964¹²⁵ enumerates nine items upon which regulations can be made by the President. Also, the Fire Arms Act of 1958¹²⁶ makes provision in the schedule for about twelve items upon which regulations can be made. The reason for this is so that there is a clear field upon which the executives can legislate and to ensure that they are confined to that field. In a situation where there are no checks to ensure that these guideline are strictly followed, there is the tendency that regulators could step out of the line and the citizens will be made to suffer.

The wordings used to draft the enabling clauses also pose a problem in delegated legislation. They usually provide that “the President in Council may make regulations...” or where the powers are not to be exercised by the President, but by some other person, it is usually at the approval of a higher body. Some writers have argued that this will be able to provide a criteria for adequate parliamentary scrutiny and to ensure ministerial responsibility.¹²⁷ The question is, to what extent is this kind of control effective, giving the fact that where the government commands majority the possibility of the laws that are desired to be passed by the government failing is very slim.

¹²⁴ Oluyede,(n 73) 343

¹²⁵ Cap Laws of the Federation of Nigeria

¹²⁶ Cap 87 Laws of the Federation of Nigeria

¹²⁷ Deny C Holland and John P McGowan, *Delegated Legislation in Canada*, Carswell Co Ltd, 1989, 51

Even where scrutiny is done, Parliament is more interested in the political merits of these legislations.¹²⁸ As a result of this, the controls that are exercised seems to be on the general aspect of the delegated legislation rather than on the details of such legislations because at the end of the day instruments are either approved or rejected in their entirety since there are no rules for their amendment.

From the forgoing, it is clear that too little control gives the executives an opportunity to over step their bounds and too much control means that the value of delegating is lost.¹²⁹ Against this backdrop it is clear that for society to prevent bad quality of delegated legislation there has to be a balance. Rule-making power should be carried out within certain clear limits and under the watchful control of the Parliament in order to prevent the harbouring of bad quality legislation.

5.2 Effects of Parliamentary Scrutiny on Delegated Legislation

Despite these shortcomings, as states become increasingly regulated and legislative powers more frequently delegated, parliament is continually being called upon to devise control measures over delegated legislation. There is the need to analyse some of the procedures that can be adopted by the Parliament.

In determining the extent of parliamentary scrutiny and its effects on delegated legislation, the starting point is for Parliament to look at the enabling clause in the primary legislation.¹³⁰ It is from the enabling clause that the permitted content and the nature of the subsequent delegated legislation will be determined.¹³¹ Question relating to the granting or restricting of powers to make delegated legislation or the form that it should take will arise here.¹³² Parliament before the passing of the primary Act should ensure that the Powers that are conferred in the enabling clause should be both substantial and clear. When it is found that the enabling clause has not been followed in the making of delegated legislation,

¹²⁸ Miers and Page (n 8) 159

¹²⁹ Holland and McGowan, (n 126) 49

¹³⁰ Beatson (n 83) 638

¹³¹ *ibid* 634

¹³² D J Whalan, *Scrutiny of Delegated Legislation by the Australian Senate*, *Stat L R* (1991) 12 (2) 87-108

members have the right to bring private member bills against it. Parliament can also amend the enabling statute, to restrict or withdraw the rule-making powers.¹³³

If the approach in Canada is taken at the time when they were also developing their own system of delegated legislation, Parliament had to in most cases use normal procedure to discuss issues of power that it had delegated to the executives. This at some point became necessary in order to prevent the abuse of these powers.¹³⁴

Another means of control that can be put in place is that, the bills proposing to delegate legislative powers should be accompanied by a memorandum explaining the scope and the nature of the delegation. This memorandum should go as far as explaining why these matters are to be treated under delegated legislation rather than under the primary Act. This will enable the Parliament to decide whether the delegation is appropriate¹³⁵ and whether the level of parliamentary control as chosen by the departments¹³⁶ are adequate.

It should be noted that, the care with which this job can be done diminishes proportionally with the increasing number of regulations that are required to be scrutinised. Therefore, the answer to the situation would be to appoint standing committees in the various Houses of Parliament to be in charge of scrutiny of these instruments. These committees, having clear terms of reference are most suited to perform this function of scrutiny as the House cannot really do this on its floor as a result of the pressure on its time.

¹³³ The Indian Law Institute New Delhi, *Delegated Legislation in India* 1964 163

¹³⁴ Kersell, John E, *Parliamentary Supervision of Delegated Legislation: the United Kingdom, Australia, New Zealand and Canada*, London Stevens, 1960, 111

¹³⁵ House of Lords, *Delegated Powers and Regulatory Reform Committee, Special Report: Quality of Delegated Powers Memoranda*, 2014)

¹³⁶ Greenberg (n 22) 347

These committees, though may not have the powers to amend the bill, they can scrutinise the conferral powers to ensure that the delegated legislation falls within the ambit of the enabling law. Also, it can consider whether there has been an unusual or unexpected use of the statutory power.¹³⁷ This means that scrutiny will on the long run be focusing on not only the political merit but also the technical merits of these legislations.

The committee will have to expose those legislations that are verbose and unintelligible, it will also report on those delegated legislations that impose taxes and raise the issue of sub delegation. The vigilance of these committees have been effective in Britain in the sense that it brings to the attention of the House those instrument that are defective in form and substance. Where such instruments are found to be grossly inappropriate, they may be annulled on the motion of a member of the House.

To buttress this further, Mallory has argued that the practice of tabling will be more effective if referred to committees for consideration.¹³⁸ This will not only help in the aspect of scrutiny by checkmating the executives from ventilating their grievances through legislation but also preserve the principles of parliamentary supremacy at least in the area of law making. Also, it will help in the drafting of the legislative text as drafters who are attached to these committees, will have a chance to look at these legislation to ensure that they meet drafting requirements.

However, with parliamentarians voting along party lines and the dominance of the government, how all this is to be achieved is another question. Having said that, this does not mean that it is impossible. Scrutiny has the effect of making the government and the civil servants that make these delegated legislation to be careful in the exercise of these powers. If applicable in Nigeria, it will go a long way to prevent the harbouring of bad delegated legislation.

¹³⁷ Carr (n 25) 244

¹³⁸ J R Mallory, Public Law (1972) , 30

5.3 Procedural Requirements

There are some procedural requirements that ought to be met before the exercise of delegated legislation. These are also used by Parliament to put a check on the exercise of delegated legislation. In Nigeria, the enabling Act rarely impose any duty on the delegate to give notice of proposed measures, or to consult certain interest that are likely to be affected.¹³⁹ Some jurisdiction like in the United States have statutory provisions with regards to this and it is a condition precedent for delegated legislation to be made. There is need to consider how this is used as a check on delegated legislation.

5.3.1 Publication

In Nigeria, some Acts provide specifically for the publication of regulations that are made. An example of this can be seen in Section 10 of the Nigerian Citizenship Act 1961 which provides for the President to publish in the Gazette any addition, alteration, amendment or replacement in the Act. Also, Section 18(3) of the Extradition Act¹⁴⁰ requires the Attorney General of the Federation to publish in the Gazette the amendment of the second schedule of the Act. Ordinarily, by the publication in the Gazette or in a newspaper that is in circulation within the area¹⁴¹ judicial notice is taken of it.

In United Kingdom, this requirement is always complied with, though it has been argued that, where there is a failure to comply with it, it does not render the Act invalid.¹⁴² If one considers the legitimate expectation of people, coupled with the fact that ignorance of the law is not an excuse to those who contravene it. Then one would argue that there is need for adequate publicity to be given to all

¹³⁹ Oluyede (n 73)327

¹⁴⁰ No 87 1966

¹⁴¹ Oluyede (n 73) 334

¹⁴² Beatson (n 83) 640

instrument that affects the rights of people.¹⁴³ These laws make rule by which individuals in the society are to conduct themselves. It is only fair that these rules be made open so that citizens will have the opportunity to know what the law is and conduct themselves accordingly.

5.3.2 Consultation

This is a process whereby steps are taken to inform those who will be affected by the proposed subordinate legislation of the intention to make such legislation and to give them the opportunity to comment on it.¹⁴⁴ Depending on the statute that is being dealt with, it may require certain persons to be consulted or consultation can be open to the general public. In Nigeria, a situation where the interest of the public may be effected there is always a requirement that consultation should be with the Council of Ministers example Section 33(1) of the Fire Arms Act provides that the President after consulting with the Council of Ministers is empowered to make regulations for the carrying out of the general purpose of the Act.¹⁴⁵

It is, the role of Parliament to ensure that these procedure are followed in all delegated legislation for the sake of good administration because where these procedural elements of publication and consultation are lacking, it would seem unfair to the public who will be affected by the legislation for this may be the one chance they have in having a say in the regulation that would determine their conduct in the society.

According to Schwartz, an essential safeguard for those whose interest are to be affected by the exercise of delegated legislation must lie in the procedure which

¹⁴³ S A De Smith, Delegated Legislation in England, the Western Political Quarterly Vol 2 No 4 Dec 1949 514-526, 525

¹⁴⁴ Gregory Craven, Consultation and the Making of Subordinate Legislation- A Victorian Initiative, 15 Monash U L Rev. 95, 1989) heinonline.org assessed 4th June 2014

¹⁴⁵ Cap 69 LFN 1990

is adopted in arriving at the final settlement of rules by which they are to be bound.¹⁴⁶ This is because, these rule will sometimes be made by government officials who will face little or no public criticism unlike the legislature in the making of these rules. These decisions are made in the departments and subject to no direct political control. The knowledge of such persons are rarely complete as such it is necessary for interested persons to always present their views and the facts that are within their knowledge and probably give an alternative course if need be.¹⁴⁷ This will ensure that government officials do not just make rules that come out of their heads, but rules that adapt to the circumstances for which they are intended. The technical knowledge that could be brought in before any delegated legislation is made can be of immense benefit to the system as a whole because the essence of this consultation is to give advice. Therefore the powers so conferred should be made subject to the prior satisfaction of this condition of consultation.¹⁴⁸

In Nigeria, this requirement is only provided for in some Acts, both at the federal and the state levels, the importance of the affected persons in the rule making process is not realised. The inclusion of this requirement usually depends on the importance of the subject matter at hand. As such, the procedure to consult persons that are likely to be affected by proposed measures are not fully utilised. As a result of this people are not even aware that these rules are in place.

The development of these requirement is in furtherance of the need to reduce as much as possible the arbitrariness in the law making process.¹⁴⁹ The system of consultation makes for democratisation as it gives the citizens the feeling that they are not left out in the law making process.¹⁵⁰ Therefore it is suggested that

¹⁴⁶ Schwartz B, An Introduction to American Administrative Law (1962) 2nd Edn American Administrative Law 1948, 37

¹⁴⁷ Ojo (n 78) 233

¹⁴⁸ Greenberg (n 22) 332

¹⁴⁹ Oleyami T O, The Challenges of Controlling Administrative Legislation in Nigeria, 202

¹⁵⁰ Ojo (n 78) 269

this is a matter that should not be left at the discretion of the government rather it should be a statutory requirement for rule making. A general statute to this effect would be a step in the right direction.

5.4 How Scrutiny Affects Quality of Legislation

If Parliament or its committee is able to put in place these checks, delegated legislations when made will conform to general drafting rules. Issues of clarity, unambiguity, precision and accessibility would be complied with. Such legislations would be made in clear and lucid form, the language to be used would be plain and the words precise.¹⁵¹ On the whole, such an instrument will promote the effectiveness of the overall legislative system. Powers would be transferred at the proper time and from trust worthy authorities.¹⁵² The manner of the transfer would be checked. Parliament will also be able to asses these legislation using clearer criteria to ensure that the instrument adheres to drafting convention which includes having simpler wordings and being consistent with existing legislations. It will comply with procedural rules and take into account the views of interested parties who must be consulted before these laws are made.¹⁵³ This will lead to certainty and security in the law and on the long run effective judicial protection.¹⁵⁴

Bad quality of delegated legislation leads to vague and conflicting provisions and over regulations of the citizens which results in the loss of interest on the part of the citizens. When citizens loose interest in the law, compliance with it becomes a matter of fear of sanction rather than wilful compliance. Such laws impose excessive burden on citizens and possess a challenge on the enforcers of the law. For a system to prevent the harbouring of bad quality legislation, there is the need

¹⁵¹ Toriola (n75) 68

¹⁵² Edger (n 58) 293

¹⁵³ ibid

¹⁵⁴ Xanthaki, Quality of Legislation(n 13)

that the parliament as an institution should be committed in imposing standards that must be met by the delegates before the exercise of rulemaking.

5.5 Other means of Control

5.5.1 Judicial Review

The most frequently used method for controlling delegated legislation in Nigeria is judicial review.¹⁵⁵ Here courts apply settled judicial principle for the interpretation of statutes.¹⁵⁶ This power of the court was tested in 1962 when the Emergency Power Act was passed under which the President was able to make several regulations. That Act empowered the President in council to amend, suspend or modify a law enacted by any legislature in the country and a regulation made by him had the effect notwithstanding anything inconsistent with it that was contained in any law and any provision of any law which was inconsistent with it shall to the extent of such inconsistency have no effect so long as the regulation remained in force. This is the Henry VIII Clause that has its origin from the United Kingdom.

Several cases came up challenging both the reasonableness and the validity of this powers as exercised by the President. Prominent among them was *FRA Williams v Majekodunmi*.¹⁵⁷ This case was against a restriction order which was one of the regulations that was made under that Act. The court was only able to exercise its power of judicial review to set aside the restriction order on the grounds of unreasonableness. This has to do with how such powers fall within the four corners of the enabling Act and to ensure that such powers are carried out in good faith and nothing else. The courts have no power to inquire into the policy or any other scene of the transaction.¹⁵⁸ What this shows is that courts will have the power to set aside a regulation based on the fact that proper procedure

¹⁵⁵ Oluyede (n 73) 343

¹⁵⁶ *ibid* 344

¹⁵⁷ (1662) 1 All NLR 413

¹⁵⁸ Oluyede (n 73) 346

has not been followed. The courts in doing this will have to follow whatever has been laid down in the enabling Act. Thus bringing us back to the foremost argument that parliament as the giver of this power is better placed to exercise adequate control of delegated legislation. There are however other grounds by which the courts can set aside a regulation.

5.5.1.1 Review on Grounds of Ultra Vires.

One other condition that delegated legislation has to comply with is the ultra vires rule. This rule states that delegated legislation cannot exceed the limits of the principal legislation.¹⁵⁹ Here the court is to ensure that the powers that are exercised has not been broader than the terms of the delegation.¹⁶⁰ According to Seidman, an agency may be in contravention of that rule when it exercises powers that are not delegated to it or matters that are not authorised by the delegated legislation or does this without taking into account the consideration that are prescribed in the delegated legislation or without following the procedures that are laid down in the principal Act.¹⁶¹ The court in the exercise of this power, can declare ultra vires any act that is not authorised by the enabling Act.¹⁶² This was seen in the case of *Akingbade v Lagos Town Council*.¹⁶³

5.5.1.2 Review on Grounds of Sub-Delegation

This is the Latin rule of *delegatus non potest delegare* which means that when powers are delegated to a person, such a person cannot delegate the powers delegated to another person except by express authorisation from the conferring authority.¹⁶⁴ In the interpretation of this principle a distinction needs to be made between administrative matters and legislative matters. Most times we see that

¹⁵⁹ Ann Seidman, Robert Seidman and Nalin Abeyesekere, *Legislative Drafting for Democratic Change*, A Manual for Drafters, Kluwer Law International, 2001, 297

¹⁶⁰ Bernard Schwartz, *Delegated Legislation in America: Procedure and Safeguards*, *The Modern Law Review* Vol 11 No 4 October 1948 449-465, 462 (accessed 7th August 2014)

¹⁶¹ Seidman, Seidman and Abeyesekere, (n 158) 297

¹⁶² Oluyede (n 73) 348)

¹⁶³ 1955 2 NLR 12, 90

¹⁶⁴ Oluyede, 350 (n 73)

when powers are conferred on the Minister or the Commissioner, officers of their department tend to act on their behalf. If such powers are legislative in nature, we can hardly say that such legislative powers are also to be exercised by officers of their department going by this maxim. This is more so when a discretion has been given to a superior authority such a discretion cannot be exercised by a delegate. See case of *Majiyagbe v A G and Ors*¹⁶⁵ where the court held that a revocation was not proper on the ground that being a statutory Act it cannot be delegated by the Governor.

There are several cases where there has been a departure from this rule in Nigeria. This can be seen in the Fire Arms Act¹⁶⁶ where it was provided that the Inspector General of Police may by notice published in the Gazette delegate all or any of his powers to a police officer.¹⁶⁷ However, a distinction has to be made between administrative issues and legislative issues.

Suffice it to say that, all the methods that are used to make delegated legislation can be reviewed by the courts in the case where there is abuse or in a situation where it has not been laid before the parliament where that is a requirement. Similarly, where there is non-approval or the delegate simply exceeds the powers that are conferred to it the court can declare delegated legislation to be null and void and of no effect.

5.5.2 Executive Control

Executive Control is another form of control that exist in Nigeria. The executives are always conscious of the fact that the law makers can always withdraw the delegated powers that they have conferred as such there are some level of control that it imposes on itself in the exercise of these powers in order not to be embarrassed by the exercise of parliamentary powers over its regulations.

¹⁶⁵ (1957) N.R.N.L.R, 158)

¹⁶⁶ (Cap 69 LFN1958)

¹⁶⁷ *Toriola (n 75)69-70* , see also English Case of *Goddard v Minister of Housing & Local Government* 1058) 3 All ER 482

5.6 Drafters Responsibility

Delegated legislation most times are not drafted by the Parliamentary Counsel even in the United Kingdom. They are usually drafted by the departmental lawyers and there is likely to be less formality in terms of process than in the primary legislation.¹⁶⁸ The problem with this trend is that the departmental lawyer though they may be versed in the technicalities of the particular area of law, they may not be so experienced in the drafting of legislation. The British model however, takes certain precautions in this regard as statutory instrument that amend primary legislation are by rule shown to the Parliamentary Counsel in draft form. Also a few statutory instrument that tend to be problematic are given to the Parliamentary Counsel to draft on the instruction of the department.¹⁶⁹

In the same vain, when instruments are considered at the committee, drafters can have access and check that they are in line with drafting rules. In the Nigerian system, drafters are part of the committee system as such will be availed this opportunity if delegated legislations are considered by Parliamentary committees following the British model.

It is obvious from the foregoing that the practice and experiences that are founded in some jurisdictions like the United Kingdom with regards to the control of delegated legislation are inapplicable in Nigeria. The kind of control that exist in Nigeria can be said to be more of political control because regulations are usually made by the President or the Governor in Council or if the powers are to be exercised by some other persons, on the approval of a higher authority.¹⁷⁰ It has been argued that this is to some extent a kind of scrutiny in itself but the position in this paper is that such level of scrutiny is not enough.¹⁷¹

¹⁶⁸ Greenberg (n 22) 333

¹⁶⁹ *ibid* (Transfer of Function Order)

¹⁷⁰ Toriola (n 75) 89

¹⁷¹ Imhanobe (n 20) 204.

In Nigeria, there are no procedural rules that are followed or is much use made of the procedure whereby the enabling law will require consultation or publication as a condition precedent to the making of any delegated legislation. There are no general statute that requires that subsidiary legislation be laid before the parliament. Each bill is dealt with on its own merit. The form of laying that is done in Nigeria that is when it is done at all is simply laying without any further direction or control. An example of this is the Pensions Act 1958. Usually the clause for the laying reads thus

“The Minister shall lay a copy of the regulations before the National Assembly as soon as possible after the regulations are made.”

Also it should be noted that individual Acts that are made provides that these instruments that are made be published in the Gazette as soon as practicable. The meaning of the phrase “as soon as possible” and “as soon as practicable” are somewhat ambiguous and does not tell at what time this actions should be carried out.

The truth is that Parliament cannot effectively control the exercise of delegated legislation in a mass. It can only do this if delegated legislation is laid before it and with proper parliamentary procedure for challenging unsatisfactory regulation. Parliament will be able to fulfil a supervisory function in delegated legislation if provisions can be made for detailed scrutiny of certain instrument in small parliamentary committees with narrow but clearly defined terms of reference. This will reduce the risk of constitutionally undesirable features being imported into delegated legislation.¹⁷²

¹⁷² Kersell (n 133)

CHAPTER SIX

Conclusion and Recommendation

The focus of this dissertation is to bring to the fore the main reasons why bad quality delegated legislation is harboured in the Nigerian legal system. It attributes it mainly to the lack of adequate parliamentary scrutiny. This might not be the only reason but the fact that parliament is the giver of these powers, places an onus on them to ensure that these powers when exercised would be to the utmost benefit of the society and not to its detriment.

Delegated legislation has been shown to be both legitimate and constitutionally desirable.¹⁷³ Due to the exigencies of modern society, the parliament after laying the policy of the legislation, donates some of its law making powers to the executive to fill in the details in order to get the kind of laws that society deserves. The reasons for this is stated as mainly lack of time on the part of the parliament and the exigencies of modern society. Parliament lacks the expertise to legislate in details on every aspect of the society and the flexibility with which delegated legislation can be used to make laws especially in times of emergency are reasons that have been used to justify the delegation of law making power.

However, the role of delegated legislation is to fill in the details after parliament has laid the policy in the primary legislation, but we have seen that making a distinction between those aspects that should be in the primary Act and those details to be left to government has caused its own controversy as government have been accused of using these delegated legislation to pull through their policies without recourse to the rigors of adequate law making process in the parliament. Also regulators tend to exercise these power in a manner that is not in line with the primary Act and does not follow the policy and intent of the Parliament.

¹⁷³ Bailey, Jones and Mowbray, Cases Material and Commentary on administrative Law, forth edn , Sweet and Maxwell Ltd 2005,200

Consequently, delegated legislation has been criticised as making the government too powerful and contravening the principles of separation of powers. Several other criticisms are made against delegated legislation. This is further heightened by the fact that there are no adequate measures in Nigeria that will serve as safeguard to prevent the exercise of this law making power from harbouring bad quality legislation.

Various form of control were analysed such as parliamentary control, judicial control and executive control but the contention is that, parliamentary control is the most effective of them all though obviously lacking in Nigeria. In carrying out this function, the focus of parliament should be on the enabling clause and other procedural requirement such as consultation and publication which ought to be complied with and to ensure that the regulation is within the line of the parent legislation.

Due to the cumbersomeness of the task and their sheer number, parliament has to rely on its committee who perform this function and report back to it. Parliament has the final authority to stop a delegated legislation that does not fulfil the requirement to further the overall objective of the law.

The dissertation has been able to prove from the given examples that adequate parliamentary scrutiny is lacking in Nigeria and that is the reason why the system harbours bad quality delegated legislation. Parliament has not been able to provide any guidelines for the making of delegated legislation and after these powers are exercised, there is no form of scrutiny on it to ensure that it is within the limits of the powers conferred.

The analysis also shows that most of the powers that are exercised are not in line either with the powers conferred or the general intention of the Act, as such, there is need for safeguard. In order to prevent the harbouring of bad quality delegated legislation, Parliament should set standards and laydown certain requirement that regulators must comply with before delegated legislation can be made. Procedural

rules of publication and consultation should be made condition precedent for the exercise of this powers. This will go a long way to make regulators cautious

Consequently, the following recommendations are made:

- I. That draft from proposed instrument as a matter of requirement should be laid in parliament and receive approval before they are made.
- II. That provision should be made in the enabling Act for the revocation and amendment of instruments that does not comply with the enabling Act.
- III. That laying requirement should be complied with as it serves as a check upon the powers that are conferred.¹⁷⁴ It invariably raises the interest to ensure that adequate scrutiny is given to those measures that are laid before it.
- IV. That legislative committees to scrutinise delegated legislation is a system that should be transplanted to Nigeria. The importance of this cannot be over emphasised as an effective control measure for delegated legislation.
- V. That a general statute be made that will regulate the making of delegated legislation.

¹⁷⁴ Schwartz (n 110) 460

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