

**CHALLENGES AND PROSPECTS OF LEGISLATIVE CONTROL OVER  
SUBSIDIARY LEGISLATION IN NIGERIA**

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## **CERTIFICATION**

I certify that this dissertation is a product of my own research efforts, undertaken under the supervision of Dr. Mohammed Etudaiye. It is an original work and no part of it has ever been presented for the award of any degree. All sources of information used have been duly acknowledged through references.

.....

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## **DEDICATION**

This work is dedicated to my family, benefactors, lecturers and friends for their unquantifiable love.

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*Balogun & Ors v. A.G Lagos State*, (1981) 1 NCLR 3.

*Brig Aurora case*, 7 Cranch (382) (1813).

*Chairman of the Board of Inland Revenue v. Joseph Rezcallah & Sons Ltd* (1961) NRNLR 32.

*Comptroller-General of Customs & Ors v. Comptroller Abdullahi B Gusua*, (2017) 18 NWLR (Part 1598)353

*Dec Oil & Gas Limited v. Shell Nig. Gas Limited* (2019) 14 NWLR (Part 1692)272

*FGN v. Zebra Energy Ltd.* (2002) 18 NWLR (Pt. 798) 114 - 119

*Goldmark Nig Ltd v. Ibafo Co. Ltd.* (2012) 10 NWLR (Pt. 1308) 291

*Governor of Ekiti State & Ors v. Olayemi* (2016) 4 NWLR (pt. 1501) 1.

*Hutch v. Clarke* 25 QBD 391.

*Korea National Oil Corporation & Ors v. Owel Petroleum Services Nigeria Limited & Ors* (2018) 2NWLR (Part 1604) 394

*Marwa v. Nyako* (2012) 6 NWLR (Pt. 1296) 199 at 360.

*Military Governor of Lagos State v. Ojukwu* (1986) 1 NWLR (Pt. 22) 621.

*Muhammed v. ABU, Zaria* (2014) 7 NWLR (Pt. 1407) 500 at 535.

*NNPC v. Famfa* (2012) 17 NWLR (Pt 1328) 148.

*R v St Helens Justices ex p Jones* (1999) 2 All ER 73.

*Shugaba v. Minister of Internal Affairs* (1981) 2 NCLR 459.

*Tijani Musa v. FRN* (2018) 17 NWLR (1648) 238

*U.S v Grimaud* 220 U.S. 506 (1911).

*Williams v Majekodunmi* (1962) 1 All NLR 413.

## **TABLE OF STATUTES**

### **NIGERIAN STATUTES**

Constitution of the Federal Republic of Nigeria 1999 (as altered).

Emergency Powers Act 2012 Cap. E10 LFN 2004.

Interpretation Act, Cap. I23 LFN 2004.

Official Secrets Act, Cap. 03 LFN, 2004.

### **FOREIGN STATUTES**

Statutory Instruments Act 1956, 9 & 10 GEO. CH 36 (UK)

Statutory Instruments Act 1985 Federal Laws of Canada R.S.C 22 1985

## LIST OF ABBREVIATIONS AND ACRONYMS

AG	-	Attorney General
All NLR	-	All Nigeria Law Reports
CA	-	Court of Appeal
CFRN	-	Constitution of the Federal Republic of Nigeria
ERN	-	English Law Reports
FRN	-	Federal Republic of Nigeria
IGP	-	Inspector General of Police
INEC	-	Independent National Electoral Commission
KB	-	King's Bench
LFN	-	Laws of the Federation
MJSC	-	Monthly Judgements of the Supreme Court
NCLR	-	Nigerian Constitutional Law Report
NLR	-	Nigeria Law Report
NILDS	-	National Institute for Legislative and Democratic Studies
NSCC	-	Nigerian Supreme Court Cases
NWLR	-	Nigerian Weekly Law Report
Paras	-	Paragraphs
QB	-	Queen's Bench
UK	-	United Kingdom
US	-	United States
USA	-	United States of America
WRN	-	Weekly Law Report

## **Abstract**

The topic of this dissertation was chosen because of the frequent abuse of subsidiary powers by the executive arm of government in the making of subsidiary legislation. The research problem was focused on the challenges on those challenges faced by the legislature in the control of subsidiary legislation. In solving this problem, the research had three core objectives which were first, to examine the problems associated with the practice of subsidiary legislation, secondly to look at the challenges facing the control of subsidiary legislation and finally the ways a better control of subsidiary legislation will reduce further abuse of delegated powers to make subsidiary legislation. This research is important because there is the need for proper regulation and monitoring of subsidiary legislation by the legislative arm of government, to avoid a total breakdown of law and order.

The methodology employed in this research to achieve the three major objectives of the research is the doctrinal approach. This approach was adopted in achieving the research objectives by aiding the sourcing of legal and other resources on the current practice of subsidiary legislation in Nigeria. The doctrinal method also helped to examine the already existing legislative frameworks for the control of subsidiary legislation.

The research found amongst others that: there are several challenges facing the control of subsidiary legislation in Nigeria; there are no standardized legislative framework currently in place and effective for the control of subsidiary legislation in Nigeria and finally that there are things to be done in order to enhance the effective control of subsidiary legislation in Nigeria.

The research has brought to light to importance of legislative control over subsidiary legislation and made recommendations that the legislature must overcome the various challenges facing the effective control of subsidiary legislation in Nigeria. The research further recommended that there is a need to

establish an independent body to ensure the monitoring of subsidiary legislation and finally that there is a need to introduce technology and other scientific method in this control of subsidiary legislation.

## CHAPTER ONE

### INTRODUCTION

Laws are primarily made by the legislative arm of government in any given democracy. 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 subsidiary legislation to make them comprehensive enough to be workable pieces of legislation. This chapter is generally the introductory chapter as it contains the background to this study, statement of research problem, aims and objective of the research, scope of the research, significance of the study, methodology, literature review and the structure

#### 1.0 Background to the study

The economic growth and social security of every society is largely dependent on the laws in force in the said society and how the said laws are obeyed.. Subsidiary legislation also called delegated or subordinate legislation are laws made by the executive or other administrative bodies. These laws form 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. Subsidiary legislation is the law made by a person or body of persons other than the legislators although through the delegation of legislative authority. Subsidiary instrument includes rules, orders, regulations, rules of court or bye-laws.<sup>1</sup>

The history of subsidiary legislation in Nigeria can readily be traced to the practice in Britain; this is usually because of the fact that the entire legal system in Nigeria is an offshoot of the British system of governance. The farthest trace of delegation of power in the British system dates back to 1359.<sup>2</sup> In 1359, the Statute of Proclamation came into effect by way of a subsidiary legislation and was widely accepted and enforced as though it was an Act of Parliament.

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<sup>1</sup> Section 37 (1) (4) of the Interpretation Act, Cap I23, LFN 2004.

<sup>2</sup> K. C Wheare 'Controlling Delegated Legislation: A British Experiment' (1949) *The Journal of Politics*, 11.

Executive exercise of legislative powers to enact laws gained more prominence in the 20<sup>th</sup> Century in Britain.<sup>3</sup>

Subsidiary legislation made by the executive on the authority of Acts of Parliament in the United Kingdom dates from the 16th century but did not become common until the 19th century.<sup>4</sup> The system was regularized in the 1890s. Annual editions of what was then known as Statutory Rules and Orders (SR&Os) date from 1890.<sup>5</sup> A numbered series was launched in 1894 following the Rules Publication Act 1893. With some redefinition, these became Statutory Instruments (SIs) from 1948 following the Statutory Instruments Act 1946.<sup>6</sup> Three collected editions of instruments exist, published in 1896 (covering pre-1890 instruments), 1903 and 1948. These include all instruments in force at the relevant time as amended at that date. No official compilations have been published in print since then, but Halsbury's Statutory Instruments is kept up to date and offers instruments as amended. However this collection is selective and excludes Scotland.<sup>7</sup>

Subsidiary legislation promotes the efficiency of detailed laws and helps in making the laws more practical and workable instruments. Modern society imposes on government the social, cultural and economic matters of human endeavors and the government needs to provide legislation to regulate these activities. Legislation in these areas are so enormous that it is impossible for the legislature to legislate to cover all these matters in the detail they ordinarily would require. Thus the grant of rule-making power by the legislature to the executive became a necessity and a permanent feature in modern society.<sup>8</sup> In some corners however, they have been arguments that the making of subsidiary legislation by the executive arm of government is against a strict compliance with the doctrines of separation of powers,<sup>9</sup> however, the need for subsidiary legislation is obvious because subsidiary legislations serve to fill in the details on a day to day basis on subject matters where the legislature has enacted an enabling Statute. Therefore, broad areas of laws which require significant amount of details are left to this form of

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<sup>3</sup> Ibid.

<sup>4</sup> S.A Smith 'Delegated Legislation in England' [1949] *The Western Political Quarterly Journal*, 514 available online at <<https://www.jstor.org/stable/44297>> accessed on 17<sup>th</sup> January, 2022.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> K. C Wheare (n2) 48.

<sup>9</sup> M. Ese, *Administrative Law* (4<sup>th</sup> edn, Lagos Princeton Publishing Company 2012) 39.

law making, in order to make their principles workable and this could include any aspect of the society.<sup>10</sup> This means that the collective force of matters that are dealt with under subsidiary legislation impacts on all areas of daily life. Therefore, the extent to which these powers are delegated and how they are exercised requires careful consideration. 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. Consequently, the need to ensure that they respect the limitations in the enabling Statute and are subject to the instrument of control of both the Parliament and the Judiciary is a necessity.<sup>11</sup> They should be laws that enjoy the support and co-operation of all actors in the legislative process and be able to command the willful 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.<sup>12</sup> These are all issues that will promote effectiveness and serve as criteria for quality in parliamentary scrutiny.

### **1.1 Statement of the research problem**

Under the Nigerian Constitution, the legislative powers of the Federal Republic of Nigeria are vested in the National Assembly (hereinafter referred to as either ‘the Parliament’ or ‘the Legislature’), which is made up of the Senate and the Federal House of Representatives and they are both empowered to make laws with respect to any matter included on the Exclusive Legislative List set out in Part 1 of the Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999 (as amended). It is no longer considered an issue that the Legislature can delegate its law making powers to administrative or executive agencies. By convention, it can. On account of this, many subsidiary instruments have been issued by executive agencies on a wide range of subject matters including taxation, duty, fees, charges, procedural requirements and the like. In the process of making these legislation, administrative and executive bodies tend to abuse the powers delegated to them. This often results in unconstitutional and arbitrary rules.

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<sup>10</sup> Ibid.

<sup>11</sup> E. C Page, *Governing by Numbers: Delegated Legislation and Everyday Policy Making* (Portland Hart Publishing, 2001) 141.

<sup>12</sup> Ibid.

These abuse of the delegated powers has necessitated for proper control of the making of subsidiary legislation in Nigeria. The Legislature is in turn charged with the duties to ensure that there minimal or no abuse of delegated powers to make subsidiary legislations. This research work exposes the various challenges the legislature faces in trying to control and monitor the exercise of delegated powers to make subsidiary legislations.

Flowing from the above, the research evaluates the current legislative framework in existence for the effective monitoring and control of subsidiary legislation in Nigeria with a view to determining the effectiveness of any such framework for the control of subsidiary legislation.

Flowing from the foregoing statement, the following research questions are formulated to guide the conduct of the study:

- i. Are there challenges being faced by the legislature in their attempt to control subsidiary legislation in Nigeria?
- ii. Is there currently a legislative framework in place in Nigeria to monitor subsidiary legislation and if there is, how effective is it?
- iii. What are the ways by which subsidiary legislation can be better monitored by the legislature to avoid abuse by the executive arm of government and administrative bodies?

## **1.2 Aim and Objectives of the study**

This research aims to analyse the challenges to legislative control of subsidiary legislation in Nigeria and the prospects of subsidiary legislation as an effective tool for development. The objectives of this study, therefore, are:

1. To critically examine the challenges associated with the practice of subsidiary legislation in Nigeria;
2. To examine the legislative framework in place to monitor subsidiary legislation in Nigeria with a view to determining its strengths and weaknesses;

3. To examine the ways by which legislative control of subsidiary legislation can help reduce incidences of unconstitutional and arbitrary exercise of subsidiary powers by the executive arm of government and administrative agencies.

### **1.3 Scope of the study**

The scope of this study is limited to Nigeria. The work focuses on subsidiary legislation emanating from the Nigeria constitution and primary legislation made by the Nigeria National Assembly. The study is confined to delegation of legislative authority by the Constitution and the National Assembly of Nigeria to federal executive bodies and agencies of the Federal Republic of Nigeria. The study is limited to the effectiveness or otherwise of the control of the National Assembly over the legislation made by the executive at the federal level. However, in appropriate cases, illustrations and lessons will be drawn from states in the Federal Republic of Nigeria as well as other common law jurisdictions.

### **1.4 Significance of the study**

The significance of this study cannot be over emphasized. It is true that the legislature has the onerous duty to enact laws for the peace, security, smooth running and economy of the state. The legislature cannot however, envisage every single detail or data in any and all branches and departments of governance thus the glaring importance of subsidiary legislation. The study is significant because due to the many problems hindering the legislature from effective law making to cover all conceivable areas of human endeavor in Nigeria, the legislature has delegated powers to the executive to make laws. The executive being in constant interactions with the people is expected to make rules almost on a daily basis, which accounts for the high number of rules and regulations that guides the activities of Nigerians on a daily basis. It is safe to state therefore that rules and regulations made by the executive has enormous effect on the lives of Nigerians. This is also so when abuse or recklessness permeates the making of this subsidiary legislation. This work becomes important because in as much as our society cannot do

without subsidiary legislation, the executive cannot also be allowed to abuse the powers so delegated. The need for effective control and monitoring of the executive arm of government in the making of subsidiary legislation is without question. This research is one which raises questions as to why the legislature is not living up to her duties of monitoring and control and goes further to bring to light to various challenges hindering the legislature from carrying out this very important duty.

### **1.5 Research methodology**

The researcher employed the doctrinal methodology for the study. This work adopts the following method in sourcing materials and coming to the findings of this research: The research work employs both the primary and secondary methods of collating data. Information for this research work will be drawn from the Constitution of the Federal Republic of Nigeria 1999 (as Amended) and primary Statutes in the form of Acts of the National Assembly while journal and online articles, textbooks, reports, magazines, case law, internet publications etc. constitute the secondary sources analyzed.

This research adopts the descriptive and comparative techniques in order to ensure that the researcher examines already existing literature on legislative control of subsidiary legislation. The researcher conducted qualitative and comparative analysis of the data collated from secondary sources and arranged them based on the research objectives of the study in order to find answers to the research questions.

### **1.6 Literature review**

Parliamentary scrutiny of subsidiary legislation tends to adopt many of the standards and approaches which have been established in the judicial review and interpretation of such legislation. Parliaments are faced with the challenge of constraint of time, which are perhaps more acute for parliamentary scrutiny than they usually are for judicial scrutiny or review.

According to Schwartz,<sup>13</sup> an essential safeguard for those whose interests are to be affected by the exercise of subsidiary legislation must lie in the procedure which is adopted in arriving at the final settlement of rules by which they are to be bound. The position of the erudite author is enlightening because on most occasions there are no consultations with the populace whom the subsidiary legislation is targeted at unlike what is obtainable in parliament during public hearing. This literature is focused on the means of controlling subsidiary legislation through its formulation. The author opines that the only means that subsidiary legislation can be controlled is through the involvement of members of the public in the formulation process. In as much as the facilities of public hearing in drafting and enacting subsidiary legislation is important. This author failed to explore other ways through which subsidiary legislations can be put in check. This study will go further to bring to the light the various means through which subsidiary legislation can be controlled aside through public hearing at formation stage of the legislation. More so, this study focuses on the challenges and ways through which the legislature itself can control the exercise of subsidiary legislations.

Puttick<sup>14</sup> considers subsidiary legislation as laws made under the authority of an enabling parliamentary Act. After the examinations of the evolutionary system, the context and history of subsidiary legislation, he concluded that subsidiary legislations have become an essential feature of modern government and the legal system, his work further discusses the way that subsidiary legislations is made and takes effect but most importantly it examined the system of regulatory control by the use of statutory instruments. His work did not deal with the challenges faced in the control of this subsidiary legislation which will be the focus of this study

David Schoenbrod<sup>15</sup> shows that Congress and the president, instead of making the laws that govern the society, generally give bureaucrats the power to make laws through agency regulations. The elected "lawmakers" then take credit for proclaiming popular but inconsistent statutory goals and later blame the inevitable burdens and disappointments on the unelected bureaucrats. This study will expose further how the legislature has abandoned the duty of law

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<sup>13</sup> B. Schwartz, *An Introduction to American Administrative Law* (2<sup>nd</sup> edn, American Administrative Law Press, 1962), 37.

<sup>14</sup> Keith Puttick, *Challenging Delegated Legislation* (London: Waterloo Publishers, 1988), 32.

<sup>15</sup> David Schoenbrod, *Power without Responsibilities* (Yale University Press, 1995), 24.

making to the executive arm through the instrumentality of subsidiary legislation. Whereas this research work agrees with the erudite scholar on the premise that much of the laws today are made through the instrumentality of subsidiary legislation, the study will further explain the need for the control of this type of laws and the challenges faced in this control

According to J. N Bates, parliamentary scrutiny is usually broader than judicial review. Whereas judicial review largely but not exclusively addresses issue of procedural or substantive vires, the orders of many parliamentary scrutinizing panels or committees contain instructions on questions of law (for example, aspects of procedural and substantial vires), questions of fact (for example whether the subsidiary legislation imposes a charge on the public revenue, independent of whether it is ultra vires).<sup>16</sup> The work of Bates largely argues that parliamentary scrutiny is more persuasive rather than punitive. However, this study further shows that parliamentary scrutiny is not a mere persuasive instrument in terms of control over subsidiary legislation. Whereas, Bates argues that legislative control over subsidiary legislation is a mere guidelines for the exercise of the powers delegated, this research focuses on the effectiveness of legislative control over subsidiary legislation especially if the challenges facing this legislative control are tackled. This research also noted that when a delegating authority usually retains the power to revoke the power so delegated as a punitive measure where the delegated power is abused.

Another relevant piece of literature was written by Edward C. Page.<sup>17</sup> In his view, governing by numbers is a jargon-free account of how subsidiary legislation - laws that do not pass through the full legislative scrutiny to which Acts of parliament are subjected - is made. It is based on new research involving an analysis of nearly 30,000 pieces of delegated legislation; detailed investigation of 46 recent regulations based on in-depth interviews with those involved in developing, writing and scrutinizing them and a major survey of nearly 400 interest groups.<sup>18</sup> He further posited that subsidiary legislation is examined as a form of "everyday policy-making". It deals with important issues, from the level of welfare benefits to weapons exports, animal health and the prevention of air pollution, yet has been largely ignored in studies of the political and

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<sup>16</sup>J. N. Bates, 'The Future of Parliamentary Scrutiny of delegated Legislation, (1998) *Statutes Law Review: Statutes Law Review Journals*, 25 <<https://doi.org/10.1093/slr/19.3.155>> accessed 10<sup>th</sup> January, 2022.

<sup>17</sup> E. C Page, *Delegated Legislations and Everyday Policy making* (Hart Publishing, 2001), 65.

<sup>18</sup> Ibid

administrative system. His work analyses the distinctive character of everyday policy making and the implications of how it works for our understanding of democracy. *Governing by numbers* is an interesting and significant examination of policy-making and law-making at the operating level. Overall, his work makes a valuable contribution to our understanding of an important venue of policy-making. The study benefits from systematic work like this because it focused on the adoption of regulations that constitute the bulk of law that really impacts most people. The study will go further to explain how the policies can be regulated to avoid abuse of the powers to make them.

Okany<sup>19</sup> holds the position that under the 1999 Constitution, administrative law enhances and encourages the ease of modern day governance, in that the federal, state and local governments can delegate their functions in order to see to the efficient running of the political system. He argues that the only way the impact of government policies can be readily felt by the masses in Nigeria is by delegating the powers to make this policy to some of the key players that actually executes the policy and has the first contact with the populace. Okany's work did not show the challenges faced by the administration of subsidiary legislation which is the major focus of this research.

According to Oluyede,<sup>20</sup> subsidiary legislation evolved out of the need for effective governance. As the responsibility of government increased, coupled with the increase in population, it became inevitable to evolve an expeditious and effective means<sup>21</sup> of law making in such a way that the legislature is not required to produce every legal instrument needed to run a government. He posited that another reason for the evolution of subsidiary legislation is the technicality of the subject matter. Where a subject matter requiring legislation is too technical as to exhaust the competence of the legislature, such matters are referred to a department or agency of government having competence and technical resources regarding the subject matter.<sup>22</sup> Subsidiary legislation bothering on technical areas are also more difficult to be controlled by parliament. This work focuses more on the importance and the need for subsidiary legislation without doing much on the need to control the delegation of these powers. In this study, the ways and challenges facing the control of subsidiary legislations will be examined.

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<sup>19</sup> M. C. Okany, *Nigerian Administrative Law*, (Onitsha: Africana First Publishers, 2005), 48 – 49.

<sup>20</sup> P. A. Oluyede, *Nigerian Administrative Law* (Ibadan: University Press Plc, 2007), 326 – 327.

<sup>21</sup> Ibid

<sup>22</sup> Ibid.

Jemina Benson<sup>23</sup> argues in favour of the need to regulate subsidiary legislation when he posited that 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. He further noted that there is another aspect of law making that is of immense importance for the regulation of any given society, especially so with the fact that Acts of Parliament are becoming less detailed and relying more on subsidiary legislation to make them comprehensive enough to be workable pieces of legislation. Subsidiary 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. While this research agrees with Benson on the need for the regulation of subsidiary legislation, the study will show that as important as it for the control of subsidiary legislation, the legislature itself are faced with enormous challenges in its attempt to control the exercise of this subsidiary legislations. Modern society imposes on government social, cultural and economic matters of human endeavors and the government needs to provide legislation 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 feature in modern society. Broad areas of laws which require significant amount of details are left to this form of law making, in order to make their principles workable and this could include any aspect of the society. This study undertakes to cover the various areas of legislative control of subsidiary legislation which were not extensively dealt with by Benson in his work. These areas include the challenges faced by the legislature in its attempt to device legislative control mechanisms over subsidiary legislation.

According to Iheabunike,<sup>24</sup> subsidiary (or subordinate or delegated) legislation refers to those laws made by persons or bodies to whom parliament has delegated law-making authority. Where

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<sup>23</sup> Jemina Benson ‘Delegated Legislations in Nigeria: The Challenges of Control’ (2014), [file:///C:/Users/User/Desktop/Jemina%20Fabiawari%20Benson%20LLM%20Dissertation%20\(1\).pdf](file:///C:/Users/User/Desktop/Jemina%20Fabiawari%20Benson%20LLM%20Dissertation%20(1).pdf) accessed on 17<sup>th</sup> February, 2022

<sup>24</sup> Godwin Iheabunike (2018), ‘The Making of Subsidiary Legislation: Rules, Regulations, Orders etc.’; Synopsis of the presentation at the Joint Legislative Drafting Training themed “New Innovation in Legislative Drafting Skills” organized by the Open Government Partnership with the Support of Trust Africa at Bolton White Hotel, Abuja on

Acts are made by parliament, in appropriate cases the principal Act makes provision for subsidiary legislation to be made, and will specify who has the power to do so under that Act. Ordinarily, subsidiary legislation can only exist in relation to an enabling Act. Subsidiary legislation will usually contain the many administrative details necessary to ensure that the provisions of the Act will operate successfully. Regulations are the most common forms of subsidiary legislation. They are made by the executive or a minister and apply to the general population or a section of the society.<sup>25</sup> Iheabunike's work is very restrictive in that it focuses on the subject matter of subsidiary legislation in terms of its essential ingredients with little or no reference at all to other aspects such as an effective control of the making and exercise of subsidiary legislation. This study expands on the scope of legislative control over subsidiary legislations in that Legislative control is exercised by the legislature or parliament

Fatal<sup>26</sup> holds the position that subsidiary legislations exists as a result of the need for Inter-Governmental Relation, their position is that the interaction that take place among the organs of government is imperative and cannot be made away with in any functioning society. Their work majorly argues that subsidiary legislations only exist to forester cooperative relationship between the executive and the legislature. They further held that the political space is awashed with weak institutions struggling with their roles at deferent level. The above work focused on the importance and advantages of subsidiary legislation in Nigeria and did little or no discussion at all on the challenges and effects of its control. This research goes further to examine the various ways by which the legislature can control the exercise of subsidiary legislation in Nigeria.

According to Ruth Fox<sup>27</sup> argues that acceptability of subsidiary legislation is was only acceptable on the grounds on reasonability, applicability couOpked with trust. In his work, he holds the firm view that although the historically basis for the acceptability of subsidiary legislation is without question, recent government has drifted from the use of subsidiary legislation especially in the areas of principle and regulation. He argues that ministers now use subsidiary legislation in areas they were not originally intended, by the parliament, he further buttress that ministers

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<sup>7th</sup> March, 2018 available online at [https://www.academia.edu/37764731/the\\_making\\_of\\_subsidary\\_legislation](https://www.academia.edu/37764731/the_making_of_subsidary_legislation) accessed on 10<sup>th</sup> January, 2022

<sup>25</sup> Ibid

<sup>26</sup> F. Aremu and J. Olaniyi and L. Saka, *Travails of Democratic Politics in Nigeria's Fourth Republic* (College Press; Lead City University Press, 2020), 136.

<sup>27</sup> R. Fox. *The Devil in the Detail: Parliament and Delegated Legislation* (Hansfield Society Press, 2021), 229.

sometime seek and obtain the delegated powers to abuse, amend and sometime repeal primary legislations. In his book, he extensively discussed the various ways in which the executive abuse the powers they obtain through a subsidiary instrument, although little or nothing was said about the control or the challenges faced by the legislature in an attempt to control this abuse of subsidiary legislation.

Mojeed Alabi<sup>28</sup> analysis that one form of control which the legislature has over subsidiary legislation when abuse by the executive is the power of the legislature to impeach the head of the executive arm. He succinctly discussed the impeachment powers of the National Assembly and that of the State Assembly with regards to the President and the Governors respectively. He also argues that legislative control measures over subsidiary legislation includes the powers of confirmation of ministerial nominees and some commissioners of federal agencies ; the requirement of a supportive resolution over a presidential declaration of war; and a supportive resolution over a presidential declaration of a state of emergency among others. The position of this author is not exhaustive in my opinion. Whereas the learned author discusses some of the statutory powers and functions of the legislature, this research focuses on those other ways through which the legislature can control executive abuse of the powers conferred by a subsidiary legislation. These control measures do not necessarily need to be by way of a statutory instrument.

From the totality of all the works reviewed, it can be discerned that it is indeed near impossible to have a work that exhaustively discussed the challenges and control of subsidiary legislation in Nigeria. Although some scholars hold the view that the disadvantages of subsidiary of powers outweighs the advantages, others lent their voice to the position that without subsidiary of powers, it is impracticable to run a government. In other words, the importance of subsidiary legislation has been largely in the center of several discussions, there are few literatures that deals on the topic of its control. The control of subsidiary legislation is as important as the making itself, if not more important. Subsidiary legislation has been criticized because it is wide open to abuse since there is a recurring tendency for administrative agencies to exceed their

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<sup>28</sup> M. O. Alabi., *Constitutionalism in Nigeria* (John Archers Publishers Ltd, 2022) 44

powers in promulgating rules. This has given rise to the requirement of accountability in the formulation of governmental policies. In order to fulfill this sacred obligation of accountability, many jurisdictions have evolved different mechanisms for controlling, monitoring and reviewing the contents of subsidiary legislations. This research will extensively and exhaustively discuss the topic on the challenges and prospects of legislative control of subsidiary legislation in Nigeria and how the challenges may be resolved especially with regard to post-enactment parliamentary scrutiny in Nigeria. The area of this challenge contains the gap in knowledge which the research work covers up.

### **1.7 Organisation of chapters**

This dissertation is divided into five chapters. Chapter one deals with the background to the study, statement of research problem, aims and objective of the research, scope of the research, significance of the study, methodology, literature review and the structure. Chapter Two deals with conceptual clarifications and theoretical framework. Chapter Three examines the various ways by which the legislature can control subsidiary legislations and the effect of such control. Chapter Four analyses the challenges faced by the legislature in this control in the way of a more legal and constitutional operation of subsidiary legislation as well as the prospects of legislative control. Chapter Five, being the concluding chapter, summarizes the findings and recommendations of the study as well as highlights the contribution to knowledge of the study.

## CHAPTER TWO

### CONCEPTUAL CLARIFICATIONS AND THEORETICAL FRAMEWORK

In order to ensure that certain reoccurring concepts and terms which forms some of the core of this research does not appear vague or difficult to understand by the reader, this chapter was focused on conceptual clarification and the exposition of the theoretical framework on which this research was based.

#### 2.0 The Legislature

The legislature is an arm of government charged with the responsibility of enacting laws for the smooth running of any society. In Nigeria, the 1999 Constitution<sup>29</sup> established the legislative arm of government with powers to make laws. Nigeria operates a Bi-cameral legislature; made up of two independent but co-habitative Chambers; the Senate and the House of Representatives.<sup>30</sup>

The Senate, referred to as the Red Chamber, comprises of 109 Senators representing three Senatorial Districts of each of the 36 States of the Federation and one for the Federal Capital Territory, Abuja. Membership of the Chamber is based on equal representation. It is led by the Senate President and his Deputy (President of the Senate and Deputy President of the Senate) as well as eight Principal Officers namely Senate Leader and his Deputy, Minority Leader and his Deputy, Chief Whip and his Deputy as well as Minority Whip and his Deputy.<sup>31</sup>

The House of Representatives, also known as the Green Chamber, is made up of 360 Federal Representatives. Each Member represents one Federal Constituency of Nigeria. The number of

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<sup>29</sup> Section 4 of 1999 CFRN (as altered).

<sup>30</sup> Ibid.

<sup>31</sup> Office of the Clerk of the Nigeria National Assembly, 'Know your Senate' <<https://nass.gov.ng/about/item/1548>> accessed on 12<sup>th</sup> February, 2022.

Constituencies per State varies since population strength is the criteria used to determine the number of each State's Federal Constituencies.<sup>32</sup>

The Green Chamber is led by the Speaker and assisted by the Deputy Speaker along with eight Principal Officers that include Majority Leader, Deputy Majority Leader, Minority Leader, Deputy Minority Leader, Chief Whip, Deputy Chief Whip, Minority Whip and Deputy Minority Whip. The National Assembly is constitutionally vested with several functions. Prominent among them are lawmaking, representation, oversight and a host of others. Most activities of the National Assembly are done through the Committees. The Committees are populated by Distinguished Senators and Honourable Members of both Chambers based on professionalism and vast experiences in life. These experiences prepare them to be able to scrutinize Bills, Motions, and other Legislative proposals. The Legislators also intervene in the conduct of public institutions and officials.<sup>33</sup>

Accordingly, the apex Parliament operates the Committee system. Both chambers of the national assembly appoint members into its Special and Standing Committees. The committees have the role of studying and researching Bills, Motions and other Legislative proposals referred to it and report its findings to the Whole Chamber.<sup>34</sup>

## **2.0.2 Legislative Process**

The legislative process comprises the process of law making in the Nigeria national assembly. Proposals for legislative input usually come in the form of bills, which when passed become laws of parliament. Bills are read three times before passage by the National Assembly (although a number of procedures take places within these three stages of the Bill process). Specifically, the Constitution<sup>35</sup> expressly provides that the law making powers of the National Assembly can be exercised by bills passed by National Assembly and assented by the President. Likewise, section 9 of the Constitution empowers the National Assembly to alter any part of the 1999 Constitution. This however requires the support, by way of resolution, of the Houses of Assembly of two-third

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> S. 4(2) of the 1999 CFRN (as altered).

of all the states of the Federation. The stages involved in our legislative process in Nigeria include the following:

At the First Reading, the Clerk of the Senate/House usually does the reading of Bills i.e. the Clerk reads the short title of the bill and then proceeds to ‘table’ it before the Speaker of the House of Representatives or the President of the Senate as the case may be. There is no debate or discussion of the bill on the floor of the Senate or House of Representatives as the stage is to simply inform legislators that a particular Bill has been introduced for legislative consideration.<sup>36</sup>

The second reading<sup>37</sup> marks the beginning of the debate on the general principles of the Bill. For a Bill to be read the second time, it must be moved by a motion. The legislator moving the motion is expected to highlight the subject matter, objectives, benefits, and general principles of the bill if it is eventually passed into law. Other members may also signify their intention to speak on the bill. If it is an Executive bill, the debate commences with a motion by the Senate or House Leader that the bill be read the second time. The motion must be seconded (supported) by any of the other parties’ leaders.<sup>38</sup> However, if the bill is one initiated by a legislator, the sponsor of the bill will move the motion that the bill be read the second time, which must be seconded (i.e. supported) by another legislator in the chamber where it is being read. If the motion is not seconded, the bill cannot proceed to second reading and therefore will be rejected. After the bill is debated, it is put to a vote on whether it moves to Committee stage. If the bill has the support of the majority, it moves to the Committee Stage; if it does not, it cannot be discussed again until it is reintroduced at a later stage.<sup>39</sup> If it is referred to the Committee stage, the Senate President/Speaker of the House is empowered by the relevant rules of either the Senate or the House to determine the relevant Committee(s) to which the Bill is referred. A Bill referred to a Committee at the second reading stage is geared towards value addition and further input by critical stakeholders and the public who can make useful contributions on the Bill (e.g. public hearing). The House and the Senate have different types of Committees. The first one is the

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<sup>36</sup> S. Osagie, ‘National Assembly Oversight Functions: Constitutional Provisions and Implications for National Development’ <<https://www.orderpaper.ng/national-assembly-oversight-functions-constitutional-provisionsimplications-national-development/>> accessed on 20<sup>th</sup> February, 2022.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup>Y. Dogara, ‘High Turnover Rate Affects the Quality of legislation At NASS – Dogara’ <<http://www.nta.ng/news/20170420-turnover-nationalassembly-legislation-dogara/>> accessed on 17<sup>th</sup> January, 2022.

Committee of the Whole House (made up of all legislators during the plenary) and the second is the Standing Committees on specific subject areas (e.g. Committee on Health, Committee on Education, etc.).<sup>40</sup> The Committees are to make input on a Bill after its referral at the second reading stage. Nonetheless, all amendments made on the Bill must be in line with the general principles of the Bill.

After the Committee has concluded its work, it will report back to the Whole Senate/House in plenary with or without amendments. The Chairperson of the Committee is expected to report progress on the bill through a motion. After the report of the Committee and the deliberation of the Committee of the Whole House, a motion may be moved that the bill be read the third time either immediately or at a later date. Generally, once the bill has passed the third reading stage, no amendment can be made to it. However, in certain circumstances if a legislator wishes to suggest an amendment, s/he must move a motion that the bill be 're-committed' to the Committee stage for the purposes of including the amendment. If the motion is agreed upon, the Senate/House will dissolve at plenary to discuss the amendment(s). Where there is any disagreement or there are different provisions between the two Chambers on a Bill, a Conference Committee is constituted to harmonize their positions and reconcile the differences in an agreed copy.

The Presidential assent is another legislative requirement when a bill has been duly passed by the national assembly, a clean copy of the Bill is sent to the Clerk of the National Assembly for enrolment and onward transmission to the President for his/her assent. The President has thirty (30) days to sign a Bill sent to him/her by the National Assembly. A Bill does not become law until the President signs it. The President may veto the Bill if s/he disagrees with its provisions or some aspects of it, by withholding his/her signature. When this happens, the President can state the areas s/he wants amended before s/he signs the Bill. If the National Assembly agrees with the President the Bill can be withdrawn for deliberation on the amendments suggested by the President. If the amendments are agreed to, it is forwarded to the President who then assents to it. The President is also empowered under the Constitution to veto the Bill. If the National Assembly does not agree with the veto, it is empowered to overrule the President's veto.<sup>41</sup> This

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<sup>40</sup> Ibid.

<sup>41</sup> S. 58 (5) 1999 CFRN (as altered).

states that if the Bill is again passed by each House by two-thirds majority, the Bill shall become law and the assent of the President is not needed.

### **2.0.3 Subsidiary legislation**

Subsidiary Legislation is a practice that involves law making by the Executive Arm of Government or other key administrative offices. They are legislation other than those that are made by the Legislators. These laws that are made by the Executive, are eventually included in the general legislative process and ultimately, are used for the regulation of a society.

Subsidiary legislation has also been defined as “...legislation that consists of orders or regulations made by ministers under powers granted by an Act of parliament, and published in a number of series of documents called ‘statutory instruments.’”<sup>42</sup>

Though this definition can be commended for an attempt at simplifying the concept, it ends up watering down the full essence of subsidiary legislation as a concept of administrative law. First, it assumes that subsidiary legislation is restricted to just orders and regulations when in actual fact it could also include rules, schemes and much more. Again, it restricts subsidiary legislation to powers granted by an Act to a Minister. It must be pointed out that power may be delegated to executives, local authorities, individuals, judges and practically anyone the legislature deems fit. Also not all documents containing subsidiary legislation are designated as “statutory instruments”. For example the rules of practice and procedure made by the Chief Justice of Nigeria pursuant to powers granted under Section 236 of the Constitution qualify at best as administrative regulations.<sup>43</sup>

The reason why the Government opted for this system of legislation can however be justified, because on a daily basis the Legislative arm is faced with countless economic, social and cultural human activities to oversee, and the Government needs to provide laws in order to effectively regulate these activities. If this is left for the Legislative arm of Government alone, the areas are far too vast to be solely handled hence, the need for subsidiary legislation. The following are some of the types of subsidiary legislation;

#### **a. Rules and Regulations**

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<sup>42</sup> M. Ese (n9) Ibid

<sup>43</sup> Section 236 of the 1999 CFRN, as altered.

Rules and Regulations under this subhead refer to statutory instruments made by government ministries.<sup>44</sup> They are given authority to make regulations for areas under their particular responsibility. A good example of what this means is that the minister for transport is able to deal with necessary road traffic regulations. The use of statutory instruments is a major method of law-making as there are several statutory instruments brought into force each year. There are many acts which give a minister of state, power to make subsidiary legislation. Some examples can be seen under the Banks and Other Financial Institutions Act, wherein the Central bank of Nigeria is empowered to make rules and regulations for regulating banking activities within the Nigeria banking sector. Another example can be seen under Section 25 of the National Fund Act, where the minister for Housing is empowered to make regulations concerning the conditions for obtaining a loan from the National Housing Fund.

#### b. Bylaws

Bylaws can be made by the local authorities to cover matters within their own area for example Abuja Municipal Area Council (AMAC) can pass laws affecting the whole AMAC province. Local bylaws can involve traffic control, such as parking restrictions. Bylaws can also be made by public corporations and certain companies for matters within their jurisdiction which involve the public. This means that bodies such as the airports authority and the railways can enforce rules about public behavior on their premises. An example of this can be seen in several parking restrictions at public roads within the airport railways premises.

#### c. Provisional orders:

These are temporary general rules or orders made by individuals or bodies authorized by the minister to make such rules, until the parliament could endorse or confirm them.<sup>45</sup>

#### d. Order-in-council:

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<sup>44</sup> A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law* (13<sup>th</sup> Edn. Edinburgh: Pearson Education Limited, 2013), 654-655.

<sup>45</sup> N. N Scholar, 'Delegated Legislations in View' <<https://nigerianscholars.com/tutorials/arms-of-government/delegated-legislation/>> accessed on 18<sup>th</sup> December, 2021.

This refers to the power delegated to the British monarch to make a ‘royal proclamation’ when there is need to exercise unusual legislative powers in the country. For instance, the monarch can declare war when the territorial integrity of the state is threatened by external enemies.<sup>46</sup>

e. Special or emergency orders:

These refer to government orders that are limited in scope especially during emergency periods.<sup>47</sup>

f. Court decisions:

The decisions of a judge that are binding as if they are an act of parliament also constitute subsidiary legislation.<sup>48</sup>

### **Reasons for Subsidiary legislation**

Time factor in relation to the busy schedule of the Legislature is one of the main arguments in support of the need for legislative delegation of powers. Legislation in this century require time, attention and details and parliaments generally seem not to have such resources to meet these requirements.<sup>49</sup> With this shortage of parliamentary time, requiring them to enact the minute details of every legislation is impossible. Therefore, that it concentrates on the essentials<sup>50</sup> while leaving the details to be worked out by the departments is a welcome development. The position has been maintained that with parliament being able to leave the details of a legislation to the executive, parliament will have more time for the consideration of more serious questions involved in legislation, if subordinate matters can be withdrawn from its parliamentary business.

In addition, subsidiary legislation can be enacted faster than conventional or principal legislation made by parliament. This is due to the fact that laws from parliament pass through stages of law making unlike in the case of subsidiary legislation the procedures of which are not as onerous and time consuming. This is very necessary in times of emergency. An example is the Emergency Powers Act of Nigeria 1961, which confers on the President the power to make

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<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> *R v St Helens Justices ex p Jones* [1999] 2 All ER 73 at 83.

<sup>50</sup> S.G.G. Edger, *Craie on Statute Law*, (7<sup>th</sup> edn, London: Sweet and Maxwell, 1971) 291.

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.<sup>51</sup> These regulations 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.

Thirdly, legislators do not most times have the expertise and the knowledge that is required for certain types of legislation. An example of this is 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 filled in by the experts. In connection with that, Parliament may not be the best institution to recognize and deal with local issues as it affects local people. As such, councilors that have been elected by the local people who are more aware of their needs tend to pass bylaws that will take care of the needs of their local communities.

Another reason for subsidiary legislation could be seen with regard to the relative speed with which it can be made. Subsidiary legislation is capable of changing rapidly and adjusting to situations. 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 – for example fees payable for the application of a licence.

## **2.1 Theoretical framework**

The 1999 Constitution separates the three functions of government. The legislative power is given to the legislature;<sup>52</sup> the executive power to the executive;<sup>53</sup> and the judicial power to the

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<sup>51</sup> Emergency Powers Act 2012, Cap E10 LFN 2004.

<sup>52</sup> S. 4 CFRN (as altered).

<sup>53</sup> Ibid, s. 5.

judiciary.<sup>54</sup> These powers are delegated to those organs by the people of Nigeria operating through the constitution.<sup>55</sup> In practice the executive carries out a good deal of legislative and judicial functions as strict adherence to the principle of separation of powers is impossible. The germane issue is how the present practice of delegation of powers can be reconciled with the theory of separation of powers which has constitutional sanction. This is more so as there is a well-known constitutional principle that a delegate cannot sub-delegate the powers delegated to him i.e. *delegatus non potest delegare*.

In the United States of America, the constitutional validity of delegation of legislative powers to the executive has been tested in a number of cases. In the *Brig Aurora* case,<sup>56</sup> a statute provided that some of its provisions would come into force and have full effect whenever the President by proclamation declared that Great Britain and France had ceased to violate the neutral commerce of the United States. It was argued that congress had no constitutional power to delegate its legislative authority to the President. The court held that it was wrong to argue that congress could not exercise its powers expressly or conditionally as by making a law which can come into force upon the occurrence of an event. In this case, the event being the cessation of the violation of the neutral commerce of the United States by the Great Britain or France. The court agreed that rather than enact another law when the cessation occurs, the precedent can declare that the already enacted law has come into force immediately the said countries ceases to violate the neutral commerce of the United States.

In *U.S v Grimaud*<sup>57</sup> a statutory provision authorized the secretary of agriculture to make provisions for protection against destruction by fire and depredation upon public forest and forest reservation. The court accepted the validity of the delegation of power and held that congress did not authorize the secretary to make laws but to merely fill in the details as may be required by the Act. In Nigeria, it would appear that the courts have followed the American examples and tactically accepted the validity of delegation of powers. In *Balogun & Ors v. A.G Lagos State*,<sup>58</sup> the plaintiff sought a declaration that the Local Government Law 1980 which vested in the

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<sup>54</sup>Ibid, s. 6.

<sup>55</sup>*Military Governor of Lagos State v. Ojukwu* (1986) 1 NWLR 22. 621. See also Section 14 (2)(a) of the 1999 CFRN (as altered).

<sup>56</sup> 7 Cranch (382) (1813).

<sup>57</sup> 220 U.S. 506 (1911).

<sup>58</sup> (1981)1 NCLR 3.

Governor of Lagos State the power to redefine the areas of authority of existing local government councils in Lagos State was ultra vires the constitution. The court found that the legislature can validly delegate authority to the executive in as much as those powers will not be exercised without the sanction of the legislature. More so, the Nigeria courts are more interested in compliance with procedures for the exercise of subsidiary legislation, thus in the case of *NNPC v. Famfa*,<sup>59</sup> the Supreme Court held that the Federal Minister of Petroleum, having failed to follow the procedure laid out by the Petroleum Act, did not legitimately acquire an Oil Mining Lease which he purportedly acquired under a subsidiary regulation. In that case, the Minister of Petroleum had granted an Oil Prospecting License to the Respondent, titled OPL 126. Having found oil, the appellant purportedly acquired 40 % of the OPL 216. The respondent filed a suit to attack the purported acquisition and was successful. The trial court, however, pointed out that the respondent had the right to participate in an Oil Mining Lease (OML), a lease usually granted after the expiration of an OPL. When it got to the stage of obtaining the OML, the respondent, pursuant to a regulation made under the Petroleum Act, purportedly acquired 50 % of the OML, via a procedure outside the contemplation of the Petroleum Act but in compliance with a subsidiary legislation titled the Back-in-Right Regulation of 2003. The Supreme Court held that the subsidiary law sources its existence from the principal legislation and as such, in the event of any inconsistency, the provisions of the principal Act shall prevail and that of the subsidiary legislation shall be void to the extent of the inconsistency.<sup>60</sup> An act carried out, outside the ambit of the delegated power may be regarded as abuse of power and as such *ultra vires* and void. Accordingly, in the case of *Chairman of the Board of Inland Revenue v. Joseph Rezcallah & Sons Ltd*,<sup>61</sup> it was held that where there is breach of statutory procedure, the act purported to have been completed would be regarded as void and ineffective. Similarly, where statute provides for a procedure for carrying out a certain action, that procedure set out, must be complied with otherwise the action would be voided by the court.<sup>62</sup> The Supreme Court has reiterated this point in the case of *Marwa v. Nyako*<sup>63</sup> when it said that where the law prescribes a mode for doing a thing, only that method and no other should be followed. Furthermore, the Supreme Court, in the

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<sup>59</sup> (2012) 17 NWLR (Pt 1328) 148.

<sup>60</sup> *NNPC v. Famfa* (supra) at 174 – 175, paras H – B. See also *FGN v. Zebra Energy Ltd.* (2002) 18 NWLR (Pt. 798) 114 - 119.

<sup>61</sup> (1961) NRNLR 32 at 38.

<sup>62</sup> See *Goldmark Nig ltd v. Ibafo Co. ltd.* (2012) 10 NWLR (Pt. 1308) 291 at 356 para E – H.

<sup>63</sup> (2012) 6 NWLR (Pt. 1296) 199 at 360.

case of *Muhammed v. ABU, Zaria*,<sup>64</sup> made it clear that an exercise of delegated power not contemplated by law constitutes an abuse of power.

Another area worth brainstorming is the possibility that when a legislature delegates authority to an agency that allows that agency to promulgate policies (rather than the legislature itself promulgating the policies), this is done in clear violation of the doctrine of separation of powers. Under the separation of powers doctrine, three powers (executive, legislative and judicial) need to be separated in order to restrain governmental overreach and the abuse of power. Agencies are part of the executive branch. If the legislature delegates power to an agency to promulgate laws, the separation-of-powers argument says that this is wrong because under the separation of powers, only the legislature can or should make laws rather than surrendering any of that power to executive branch agencies. On this line of thinking, agencies and the executive branch in general can only implement laws and policies, not create laws and policies on their own.

A number of scholars and jurists have made separation-of-powers arguments against delegation. Their arguments typically go beyond saying “delegation is wrong because it violates the separation of powers” but, rather, extend into describing what it is about the separation of powers or delegation that creates this incompatibility.

There are two main lines of argument to the effect that it is the doctrine of separation of powers that undergirds the non-delegation doctrine. They are:

- a. Each of the three governmental powers (judicial, executive and legislative) can and ought to be considered and exercised separately.<sup>65</sup>
- b. It was the goal of the Constitution to restrain governmental abuse and promote liberty; one key way it attempted to do this was by separating the three governmental powers. If the legislative branch then delegates its power to the executive branch to come up with rules, it violates the separation of powers arrangement.<sup>66</sup>

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<sup>64</sup> (2014) 7 NWLR (Pt. 1407) 500 at 535.

<sup>65</sup> Jeremy Waldron, ‘Separation of Powers in Thought and Practice’, *Boston College Law Review*, Volume 54, (2013) 2.

<sup>66</sup> Travis Mallen, ‘Rediscovering the Non delegation Doctrine Through a Unified Separation of Powers Theory’, *81 Notre Dame Law Review* (2001) 419.

This appears to be a misconception because in its contemporary understanding, the powers in the tripartite system of government fashioned by the doctrine of separation of powers are not separated but are shared amongst them. It is for this reason that, for instance, in the law making process the executive may propose bills,<sup>67</sup> which are processed and passed by the legislative houses<sup>68</sup> although they may not become operative as laws until assented to by the President.<sup>69</sup> If the President vetoes the Bill, the veto may be overridden by a stipulated number of members of the legislature.<sup>70</sup> This example brings to fore the main purpose of the separation of powers arrangement – the idea of checks and balances such that if the exercise of power by an arm is beyond the check of another arm, then arbitrariness and authoritarianism would result. The principle of checks and balances ensure that separate arms of government are empowered to prevent actions by other branches and are induced to share power. Each government branch acts as a watchdog over the next branch. It ensures that none of the branches exercises arbitrary powers to the detriment of the other arm of government or the economy at large.

This theoretical examination establishes, therefore, that delegation of legislative power by the legislature to the executive is an established practice within the framework of separation of powers. In other words, the different theories and positions held by scholars have created a framework upon which this research rests. It is the position of this study that delegation of legislative powers has come to stay and as such compliance and control mechanism should be the focus of any democratic society. As such, there must be mechanisms in place for checking the exercise of delegated powers to stave off authoritarianism in that the purpose of the doctrine of separation of powers is to establish a system of checks and balances. The measures and guidelines which must be complied with for the executive to validly exercise a delegated power become important. The legislatures must therefore devise means of control to avoid the abuse of these delegated powers.

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<sup>67</sup> For instance, the annual Appropriation Bill under section 81 of the 1999 CFRN (as altered).

<sup>68</sup> Section 59(2) and (3) 1999 CFRN (as altered).

<sup>69</sup> Section 58(4) Ibid.

<sup>70</sup> Section 59(4) Ibid.

## **CHAPTER THREE**

### **CONTROL OF SUBSIDIARY LEGISLATION**

It is the primary function of the legislative arm of government to make laws for the good of the society. This function of law making has been established and accepted globally. However, since the practice of delegating these law making powers has become inevitable in the law making process, the need for the legislature to control and curtail the abuse of executive powers to make law is without question more important than the delegation of the powers itself. In order to maintain some level of control over the making of subsidiary legislation, the practice in Nigeria is that the legislature sometimes create certain conditions in the principal statute so as to ensure that the rule-making procedure, at some point, undergoes legislative scrutiny. In this chapter, the objective of legislative control and the various ways by which the legislature controls the exercise of subsidiary legislation was discussed. The chapter further discussed the other forms of control which exist over the exercise of subsidiary power and the criticisms over this control mechanisms.

#### **3.1 Objectives of Legislative control over Subsidiary legislation**

Generally, subsidiary legislation can be controlled on the three levels of government. There is legislative control, executive control and judicial control of subsidiary legislation.<sup>71</sup> However, it has been argued that Parliament which is the giver of these powers should be able to exercise the

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<sup>71</sup> P. O Okoyomoh, 'An Examination of Delegated Legislation In Nigeria and Canada' [Academia.edu/examination-of-delegated-legislation-in-nigeria-and-canada](https://www.academia.edu/examination-of-delegated-legislation-in-nigeria-and-canada) accessed on 7<sup>th</sup> June, 2022.

most control over subsidiary legislation. 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.<sup>72</sup> 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 subsidiary legislation defeats the conferment of these powers to make subsidiary legislation.<sup>73</sup>

The underlying objective of legislative control is to keep watch over the rule making authorities and ensure there is no exercise of excess power or abuse of power. It provides an opportunity to parliament to criticize and check the executive. This mechanism is described as “legislative veto”.<sup>74</sup> It becomes very important for the legislature to keep a close watch on the functions and powers of the executive since the risk of abuse of power by the executive is inherent in the process of subsidiary legislation. The fact appears to be that judicial control over subsidiary legislation is not sufficient enough to keep administrative agencies within the boundaries of delegation and there is an urgent need and necessity for additional mechanisms, which parliament may be able to exercise efficiently.

### **3.2 Legislative control measures over Subsidiary legislation**

The legislature has devised several means by which they can control executive law making and some of these measures are discussed below:

- i) Mere laying without further direction;
- ii) Laying subject to annulment, amendment or disallowance;
- iii) Laying subject to affirmative resolution.<sup>75</sup>

#### **3.2.1 Mere laying without further direction:**

Under this heading, the principal Act that empowers the executive to make legislations usually mandates that any legislation emanating from the principal Act must be laid before the

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<sup>72</sup>T.O. Olayemi, ‘The Challenges of Controlling Administrative Legislation in Nigeria’, <[www.nials.nigeria.org](http://www.nials.nigeria.org)> accessed on 12<sup>th</sup> January, 2022.

<sup>73</sup> P. O Okoyomoh, Ibid

<sup>74</sup> I. Loveland, *Constitutional law, Administrative Law and Human Rights; A critical Introduction*, (Oxford University Press 2009) 241

<sup>75</sup> O. Iluyomade and B. U. Eka, *Cases and Materials in Administrative Law in Nigeria*, (Ile-Ife, Obafemi Awolowo University Press, 2007), 94.

legislature. However, this procedure is considered weak in that it does not make further directions on the role the legislatures will play in the process of enacting the legislation.

Laying requirement is just a mechanism to inform the parliament of the legislation, it does not attract any parliamentary procedure for control or scrutiny. The problem with the laying provisions is that it does not give room for parliament to critically scrutinize the subordinate legislation. The parliament is only permitted to ask questions but no direct attack upon such legislation is possible.<sup>76</sup>

With regards to the requirement of laying, it is deemed satisfied once the document has been submitted to the office of the Clerk of the National Assembly. This exercise is seen as a mere procedure and does not give the Parliament the opportunity to have formal discussion on it. Some writers have 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<sup>77</sup>

### **3.2.2 Laying subject to annulment, amendment or disallowance**

Under this heading, the instrument that empowers the executive to make legislations usually mandates that such subsidiary legislations must be laid before the legislature for annulment, amendment or disallowance. Here, the legislature while delegating legislative powers mandates that any instrument made thereof must be presented before the legislature for the legislative assembly to vote whether to annul, amend or disallow such legislations.

The principal statute may recommend the Negative Procedure for legislative control of subsidiary legislation. Under this procedure, the subsidiary legislation is laid before the house and criticized by members, after which it is subjected to a prayer for annulment. Where the prayer for annulment is adopted, it dies naturally. However if it survives the resolution for annulment, the subordinate legislation takes full effect and becomes operative forthwith. The Negative procedure is well incorporated into Canadian law by Section 19.1(1) of the Statutory Instruments Act provides that a committee of both houses of parliament may make a

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<sup>76</sup> L. Atsegbua, *Administrative law: An Introductory text* (Fifers Lane Publishers 2012) 48

<sup>77</sup> E. C Page, *Governing by Numbers: Delegated Legislation and Everyday Policy Making* (Portland Hart Publishing, 2001) 156.

report to the Senate or House of Commons containing only a resolution that all or any portion of a regulation that stands permanently referred to the committee be revoked.<sup>78</sup>

Unlike Canada, Nigeria does not have an adequate system for legislative control of subsidiary legislation by means of this aforementioned procedure.

### **3.2.3 Laying subject to affirmative resolution**

Here legislations are brought before the legislature for affirmative consent. One of the strongest instrument of legislative control over subsidiary legislation is the fact that sometimes, the legislature merely allows the executive to draft the dictates of the law without more. This is so in that the delegation mandates that the assent of the legislature must be obtained before any instrument arising from its delegation of power can come into force.

It is worthy of note that sometimes, these legislative controls do not exist in statutes and this therefore gives rise to a subsidiary legislation being passed without the inputs of elected representatives of the people. It is to these chunks of legislations which do not require legislative inputs that this research is concerned with. For instance, Section 305 of the Nigerian constitution which vests emergency powers on the president adopts the Affirmative Procedure for legislative control. The President is by the said Section in its subsection 1 to make any proclamations of state of emergency by instruments to be published in the Official Gazette.

Subsection 2 further provides that the President shall immediately after publication transmit copies of the Official Gazette including details of the emergency to the President of the Senate and the Speaker House of Representatives, each of which shall convene or arrange for a meeting to consider the situation and decide whether or not to pass a resolution approving the proclamation.<sup>79</sup> The powers conferred by this Section of the Constitution was exercised by the then President Goodluck Ebele Jonathan on the 13<sup>th</sup> day of May 2013 when he declared a State of Emergency in Yobe, Adamawa and Borno Staes over the high rate of insurgency and insecurity in those States at the time.

Notwithstanding the foregoing, enough has not be done in the control of subsidiary legislation in Nigeria. In the area of criminal justice, none of the criminal procedure laws prescribes regulation

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<sup>78</sup> Canadian Statutory Instruments Act 1985

<sup>79</sup> Section 305 of the 1999 CFRN as altered.

on the use of force which is regulated by Police Force Order 237 (a delegated legislation made by the Inspector General of Police). Force Order 237, in its paragraph 3 provides that a police officer may use firearms in the following circumstances:

- a. when attacked and his life is in danger and there is no other way of saving his life;
- b. when defending a person who is attacked and he believes on reasonable grounds that he cannot otherwise protect that person attacked from death;
- c. when necessary to disperse rioters or to prevent them from committing serious offences
- d. against life and property; However, twelve or more persons must remain riotously assembled beyond a reasonable time after the reading of the proclamation before the use of firearms can be justified;
- e. if he cannot by any other means arrest a person who being in lawful custody escapes;
- f. and takes to flight in order to avoid re-arrest; providing the offence with which he is charged or has been convicted of is a felony or misdemeanor;
- g. if he cannot by any other means arrest a person who takes to flight in order to avoid;
- h. arrest provided the offence is such that the accused may be punished with death or imprisoned for seven years or more.<sup>80</sup>

This provision is open to abuse, justifies ill treatment, torture, extra-judicial killings by the police and is contrary to section 33 of the CFRN and the International Bills of Rights. Thus it is possible for the police to kill a suspect and justify same by merely stating that the deceased was suspected to have committed a capital offence and that he tried to escape.

It is easy to see the overriding need for caution in the exercise of subsidiary legislation. One of the things we set out to consider in this research is whether subsidiary legislation is done under proper authority and in line with the powers conferred. This is what forms the guiding principle of legislative control of subsidiary 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

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<sup>80</sup> Network on Police Reform in Nigeria and Open Society Justice Initiative, *Criminal Force: Torture, Abuse and Extrajudicial Killings by the Nigeria Police Force*(New York: Open Society Institute, 2010), 51; see also Amnesty International, ‘Nigeria: You have Signed Your Death Warrant (Torture and other Ill Treatment in the Special Anti-Robbery Squad (SARS))’ <[https://www.amnestyusa.org/files/nigeria\\_sars\\_report.pdf](https://www.amnestyusa.org/files/nigeria_sars_report.pdf)> accessed on 6 October, 2021.

to whom this responsibility is vested. When these guidelines are in place, it is used as criteria and easy to see when regulators step out of the line.

In view of the above, it is clear that delegated power need to be regulated and it is hereby submitted that the Nigerian legislature, the elected representatives of the people, has to do more in this regard and one way of doing so is to adopt the practice in the United Kingdom whereby a scrutinizing committee is put in place to assess, regulate and control subsidiary legislations.<sup>81</sup> Without a scrutinizing committee for subsidiary legislation in place, the possibility of blatant abuse of powers becomes inevitable. In Nigeria, the legislature's power to oversight the executive arm of government at the federal and state levels, and by extension check the activities of the executive, which power is inextricably linked to the power to make laws, is directly or indirectly expressed in Section. 88, 89, 128 and 129 of the CFRN respectively. It has also been noted in the case of *Governor of Ekiti State & Ors v. Olayemi*<sup>82</sup> that the CFRN, despite its recognition of the doctrine of separation of powers, has expressly made provisions for the legislature to exercise limited oversight functions in relation to the executive arm of government. In scrutinizing subsidiary legislations, it is to be noted that it is within the prerogative of the legislature as representatives of the people, to determine what yardstick it wishes to adopt in determining the reasonableness or validity of a subsidiary legislation. Most likely, the legislature would consider whether the subsidiary legislation is within the contemplation of the principal statute enabling the subsidiary legislation. If the subsidiary legislation complies, it is likely that it would be considered to be good law. But if the delegated power is so wide as to be open to arbitrariness, the legislature is duty bound to cut down the excesses by reviewing the law. Other criteria which the legislature might consider when scrutinizing subsidiary legislation are: the rule of law, tenets of democracy and the principle of accountability.

### **3.3 Legislative Procedural Requirements for Subsidiary Legislation**

The extent of legislative control over subsidiary legislation in any enabling Act is usually dependent on either of the procedural requirement for the making of such subsidiary legislation or requirement as to publication or consultation before the making of such legislation. There are

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<sup>81</sup>P. Layland and G. Anthony, *Textbook on Administrative Law* (Oxford University Press, 2013) 316

<sup>82</sup>(2016) 4 NWLR (pt. 1501) 1.



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.<sup>88</sup> 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 affected, there is always a requirement that consultation should be made with the Council of Ministers. For 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.

### 3.4 Judicial control of Subsidiary legislation

The most frequently used method for controlling subsidiary legislation in Nigeria is judicial review. Here courts apply settled judicial principles for the interpretation of statutes. Several cases came up challenging both the reasonableness and the validity of powers as exercised by executive bodies. Prominent among them was *Williams v Majekodunmi*.<sup>89</sup> This case was against a restriction order which was one of the regulations that was made under the then president under a delegated power. The court was 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. What this shows is that courts will have the power to set aside a regulation based on the fact that proper procedure has not been followed to the letter. This is described as procedural ultra vires. The position has been maintained severally by the court. See the cases of *Korea National Oil Corporation & Ors v. Owel Petroleum Services Nigeria Limited & Ors*,<sup>90</sup> see also *Dec Oil & Gas Limited v. Shell Nig. Gas Limited*,<sup>91</sup>

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<sup>88</sup>Gregory Craven, 'Consultation and the Making of Subordinate Legislation- A Victorian Initiative', available online <https://www.bing.com/ck/a?!&&p=2e739d680a19e57f2563d9f366ceef47f169f37183bdc5e641b6ed09b279980eJmlt dHM9MTY1NDgxOTIwMCZpZ3VpZD0xMzViNGE1NC11YjNhLTlyzODQtMDkxNy01YmUwZWYzYTY1Yzk maW5zaWQ9NTEyNQ&ptn=3&fclid=135b4a54-eb3a-6384-0917-5be0ef3a65c9&u=a1aHR0cDovL2NsYXNzaWMuYXVzdGxpaS5lZHUuYXUvYXUvam91cm5hbHMvTW9uYXN oVUxhd1J3LzE5ODkvNi5wZGY&ntb=1> accessed on 19<sup>th</sup> May, 2022.

<sup>89</sup> (1962) 1 All NLR 413.

<sup>90</sup> (2018) 2NWLJ (Part 1604) 394

<sup>91</sup> (2019) 14 NWLR (Part 1692)272

In addition, subsidiary legislation can neither exceed the limits of the principal legislation<sup>92</sup> or of the Constitution. Here the court is to ensure that the powers that are exercised has not been broader than the terms of the delegation.<sup>93</sup>

Subsidiary legislation may also be reviewed on the grounds of invalid sub-delegation. This refers to 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 authorization from the conferring authority.<sup>94</sup>

### **3.5 Executive control of Subsidiary legislation**

Executive Control is another form of control that exists in Nigeria. Executive agencies are always conscious of the fact that the law makers can always revoke the delegated powers that they have conferred. As such, there are some levels 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. In Nigeria, there are no procedural rules that are followed in ensuring such executive control over its own legislation. The level of control to be exercised by the executive is totally dependent on the discretion of such executive or administrative body. The office of the President and that of the Ministers in charge of the various sectors are also responsible and discharge some level of control over subsidiary legislations. A minister is appointed to ensure that all government actions are in conformity with existing laws, they do this by monitoring how different agencies raise and spend money. The use of periodic auditing is also another means of control employed to ensure that different departments of government are not conforming with laid out procedures.<sup>95</sup>

### **3.6 The Role of Ombudsmen in Legislative Control of Subsidiary Legislation**

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<sup>92</sup>Ann Seidman, Robert Seidman and Nalin Abeyesekere, *Legislative Drafting for Democratic Change, A Manual for Drafters*, (Kluwer Law International, 2001) 297.

<sup>93</sup>Bernard Schwartz, 'Delegated Legislation in America: Procedure and Safeguards', *The Modern Law Review* Vol 11 No 4 October 1948 449-465, 462.

<sup>94</sup>Ibid.

<sup>95</sup>Ralph Nyadz, '5 ways to Control Delegated Legislation' available online at [Top 5 Ways to Control Delegated Legislation - Cegast Academy](#) accessed on 5th May, 2022

The vastly increased scope and complexity of government administration and its impact on the public have meant that the legislature cannot possibly resolve all the conflicts between the public and the executive as a result of delegated powers. The parliaments have traditionally been seen as the protectors of the rights of their constituents, to see that they receive their entitlements and are not unfairly treated. Countries like the United Kingdom are beginning to adopt the process of legislative Ombudsman to control the exercise of subsidiary legislation.<sup>96</sup> Members of parliaments are provided with staff to assist with research and in discharging their duties, but the task has grown far beyond the capacity of the old system. In Nigeria, a member of parliament is entitled to five legislative aids<sup>97</sup>, in Britain a member of parliament is given an allowance to provide for a secretary and a part-time research assistant.<sup>98</sup> In Canada and Australia a member of parliament has a staff of three<sup>99</sup> and in New Zealand two.<sup>100</sup> A typical member of the United States House of Representatives has a staff of fifteen.<sup>101</sup>

Notwithstanding the man power involved in law making, there is still the problem of lack of adequate control over subsidiary legislation. One answer to the problem is to appoint an ombudsman, who investigates complaints from individuals about administrative actions of the bureaucracies. A Legislative Ombudsman is a part of the legislative branch of a government entity and addresses issues raised by the general public or internally, usually concerning the actions or policies of government entities, individuals or contractors with respect to holding agencies accountable to the public.

In Nigeria, there is no legislative ombudsman to the knowledge of this researcher on legislative control over subsidiary legislation. However, the importance of such legislative ombudsman cannot be underscored. If the Nigeria parliament appoints a legislative ombudsman or empowers a body with such powers over the control of subsidiary legislation, the workload on the parliament will be made lighter and more results achieved in the battle to control subsidiary

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<sup>96</sup> J. Irwin, Administrative Law: Ombudsman and Delegated Legislation, accessed online at [www.linkedin.com](http://www.linkedin.com) on 6<sup>th</sup> June 2022.

<sup>97</sup> Policy and Legal Advocacy Centre, *A guide to the National Assembly*, accessed online at <https://placng.org> on 8<sup>th</sup> June, 2022.

<sup>98</sup> G. Power and R. A Shoot, '*Global Parliamentary Report: the Changing Nature of Parliamentary Representation*', [www.undp.org](http://www.undp.org) accessed on 5<sup>th</sup> May, 2022.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

legislations in Nigeria. Some of the following are the roles an Ombudsman can play in the control of subsidiary legislations in Nigeria:

- a. Investigate and prosecute on its own or on complaint by any person, any act or omission of any public office or agency, when such act or omission appears to be an abuse of power or improper or inefficient. It has primary jurisdiction over cases cognizable in the exercise of his primary jurisdiction, it may take over, at any stage, from any investigatory agency of Government, the investigation of such cases bothering an abuse of a subsidiary legislation;
- b. Direct, upon complaint or at its own instance, any officer or employee of the Government, or of any subdivision, agency or instrumentality thereof, as well as any government-owned or controlled corporations, to perform and expedite any act or duty required by a subsidiary legislation, or to stop, prevent, and correct any abuse or impropriety in the performance of duties;
- c. Direct that appropriate action against a public officer or employee at fault or who neglects to perform an act or discharge a duty required by subsidiary legislation, and recommend his removal, suspension, demotion, fine, censure, or prosecution, and ensure compliance therewith; or enforce its disciplinary action against such person or body;
- d. Determine the causes of abuse, inefficiency, and corruption in the exercise of a subsidiary legislation and make recommendations for their elimination and the observance of high standards of ethics and efficiency;
- e. Publicize subsidiary legislations and investigatory reports emanating from the conducts of its investigatory duties.

### **3.7 Criticisms of Subsidiary legislation**

The abuse of power by the executive is a worry for every society. Thus, legislative power delegated to the executive cannot to be left unchecked if it is not to 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 use. Primary Acts should specify the content, purpose and extent of the legislative authority as a means of

preventing legislative abdication This is because misapplied power is not only dangerous, it is wasteful. This has led to the so many criticisms of subsidiary legislation as discussed below.

Most times, rather than deal with the powers conferred by primary legislation, which are mainly powers to spell out the details of a legislation, the executive goes further to remake policies which were already taken care of by the primary legislation.

A major criticism of subsidiary 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.<sup>102</sup> There is the argument that measures that are supposed to be in primary legislation are sometimes slipped into subsidiary legislation. The general presumption is that subsidiary 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.<sup>103</sup>

One of the foremost criticisms of subsidiary legislation is that it reduces the parliament into a place where only skeletal legislation is made. Parliament becomes more redundant while the executive makes both the laws and executes them. Skeletal legislation refers to primary legislation passed by the parliament that only sets out the ‘bare bones’ of a legislative scheme, with the details set out later in subsidiary legislation.<sup>104</sup> Aronson discussed skeletal legislation in the context of occupational health and safety laws, noting that until the 1970s this kind of legislation was “both highly prescriptive and extraordinarily piecemeal”.<sup>105</sup> Since then, this legislation has been reduced to generalized statements of principle, with the details included in subsidiary legislation.<sup>106</sup> Aronson raised a number of concerns with skeletal legislation and outlined the challenges posed by this type of legislation in that the whole point of skeleton acts is that they do indeed leave for subordinate legislation many rules that fundamentally change the

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<sup>102</sup> Terence Daintith and Allen Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford Scholarship Online Publications 1999) 23.

<<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso>> accessed on 13<sup>th</sup> February, 2022

<sup>103</sup> G. Appleby and J. Howe, *Scrutinizing Parliament's Scrutiny of Delegated Legislative Power*, (Oxford University Commonwealth Law Journal, 2015) 4-5.

<sup>104</sup> Ibid.

<sup>105</sup> M. Aronson, ‘Subordinate Legislation: Lively Scrutiny or Politics in Seclusion’, *Australasian Parliamentary Review*, 2011, 26(2),7.

<sup>106</sup> Ibid.

law, or which are lengthy and complex, or which are designed to affect radical attitudinal or relationship changes.<sup>107</sup>

There is also the criticism that the executive is becoming too powerful as a result of the over reliance of government on subsidiary legislation.<sup>108</sup> Executive agencies could make laws without passing it to Parliament for scrutiny.<sup>109</sup> Page points out that the use of emergency powers highlighted a more general tendency for the amount of subsidiary legislation to increase.<sup>110</sup> Most prominent among the critics was Lord Chief Justice Hewart who in his *New Despotism* alleged “administrative lawlessness and an over mighty executive.”<sup>111</sup> Concerns here were mainly on the use of Henry VIII Clause which has the effect of amending or repealing primary legislation.<sup>112</sup>

### **3.8 Effects of Legislative control on Subsidiary legislation**

If Parliament or its committee is able to put in place checks, subsidiary legislations when made will conform to general drafting rules. Rules on 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.<sup>113</sup> 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. The manner of the transfer would be checked. Parliament will also be able to assess 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. This will lead to certainty and security in the law and on the long run effective judicial protection.

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<sup>107</sup> Ibid.

<sup>108</sup> Jack Beatson and Maritn Mathewa and Marks Elliot, *Administrative, Law Text and Materials* (4<sup>th</sup> Edn Oxford University Press 2011) 635.

<sup>109</sup> Ibid.

<sup>110</sup> Terence Daintith and Allen Page (n54).

<sup>111</sup> Lord Chief Justice Hewart, *The New Despotism*, (Ernest Benn Limited 1929) 56.

<sup>112</sup> Ibid.

<sup>113</sup> Ann Seidman, Robert Seidman and Nalin Abeyesekere, *Legislative Drafting for Democratic Change; A Manual for Drafters* (Kluwer Law International, 2001) 297.

Bad quality of subsidiary 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.

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 subsidiary 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 subsidiary legislation, the starting point is for Parliament to look at the enabling clause in the primary legislation.<sup>114</sup> It is from the enabling clause that the permitted content and the nature of the subsequent subsidiary legislation will be determined. 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.

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<sup>114</sup>D J Whelan, (n 90) Ibid.

## **CHAPTER FOUR**

### **EFFECTIVE LEGISLATIVE CONTROL OF SUBSIDIARY LEGISLATION: CHALLENGES AND PROSPECTS**

The lack of an effective control over subsidiary legislation by the legislature has been a major reason for the abuse of delegated powers. Parliaments generally do not have the time or the expertise to keep some of these legislation under check, as such delegates carry out this function the way it pleases them with little or no form of surveillance on them. In this chapter, the various methods by which the legislature can control the exercise of subsidiary legislation was discussed. The chapter also discussed the various challenges which made the control of subsidiary legislature ineffective, while discussing the prospects of a controlled subsidiary legislation and finally made a cross country comparison of what is obtainable in Nigeria and some other countries.

#### **4.0 Effective Legislative Control Over Delegated Legislation**

In most cases one finds that Parliament delegates powers on the subjective discretion of the delegate by the use of such loosely worded phrase like “if the Minister is satisfied”, “in the opinion of the Minister”, “as he deems fit.”<sup>115</sup> The use of these types of phrases is dangerous and may lead to arbitrariness. The extent of these powers is so wide that it is difficult to know the limits of the delegate. It is akin to making the delegate a judge in his own matter. In Nigeria, many of these delegates misuse these powers routinely and as such make and amend other legislation by implication without thinking of the consequences of their actions. In *Tijani Musa v. FRN*<sup>116</sup> where the President of the Federal Republic of Nigeria set up a Special Presidential Investigative Panel on Recovery of Public Property, with powers to investigate and report its

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<sup>115</sup>Carleton Allen, *Law in the Making*, (7<sup>th</sup> Edn Clarendon Press, 1964) 551.

<sup>116</sup> (2018) 17 NWLR (1648) 238

findings and conclusion to the President who will then decide the next line of action to take. The Chairman of the panel conducted the said investigations and went ahead to apply to court for an order of forfeiture against certain assets of the appellant in that case. The trial court granted the reliefs sought but on appeal, the court held that;

A public authority vested with powers must act within the limits of its authority. In this case, the power to apply for an interim forfeiture order and freezing under Section 29 and 34 of the Economic and Financial Crimes Commissions Act respectively enures on the Chairman of the EFCC, an office created under Section 2(1) of the EFCC Act. The chairman, SPIP is not the Chairman of the EFCC provided for under the Act

Similarly, in the case of *Comptroller-General of Customs & Ors v. Comptroller Abdullahi B Gusua*,<sup>117</sup> the Nigeria custom service relied on powers allegedly granted to the Board by the Public Service Rule to compulsorily retire the respondent in this case, the court held that the effect of arbitrary termination of contract governed by regulations, rules or statutory instrument is that such arbitrary or unilateral termination is invalid and ineffectual. See also *Fakuade v. Obafemi Awolowo University Teaching Hospital*.<sup>118</sup>

The courts are always able to rise up to nullify arbitrary exercise of subsidiary legislations by administrative body whereas the legislative control over subsidiary legislation in Nigeria is not as effective.

#### **4.1 Challenges of Legislative Control over Subsidiary Legislation**

The reasons for the ineffectiveness of such parliamentary control over subsidiary legislation are either because the parliament has neither time nor expertise to control the administration which has grown with the growth of the dynamics of the nation's political and socio-economic activities in relation to volume and complexity. The size of the parliament is also too large and unmanageable to be effective. Some of the challenges affecting the effectiveness of parliamentary control over subsidiary legislation are discussed below:

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<sup>117</sup> (2017) 18 NWLR (Part 1598) 353.

<sup>118</sup> (1993) 3NWLR (Part 291) 47.

#### **4.1.1 Busy Schedule of the Legislature**

One of the major problems of legislative control over subsidiary legislation is lack of adequate time on the part of the legislature. Modern legislation requires more time and details than Parliament has the time or inclination to handle.<sup>119</sup> With this shortage of parliamentary time, requiring them to monitor and control every piece of subsidiary legislation will be impossible. There are many other functions that take the time of Parliament including oversight functions, appointive functions, removal functions, law making functions, committee proceedings, etc. and each of these come with onerous procedures. Thus, its concentration on the essentials,<sup>120</sup> which is law making while invariably leaving uncontrolled powers in the hands of executive departments. In other words, because Parliaments give more time for the consideration of more serious questions involved in legislation, they are blinded from cognizance of subordinate as a result of which parliament is left with little or no time to monitor and control the exercise of subsidiary legislation.

#### **4.1.2 Lack of Technical Capacity**

Legislators do not, most times, have the expertise and the knowledge that are required for certain legislation. 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 filled in by the experts. In connection with that, when the delegated powers are exercised by the department with the requisite technical capacity, it becomes very difficult for parliament to control the exercise of such power since they know very little or nothing about the field in question.

#### **4.1.3 Ineffective Administrative remedies**

Another challenge facing the control of the exercise of powers under subsidiary legislation is the fact that there are little or ineffective administrative remedies for abuse of powers emanating

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<sup>119</sup>*R v St Helens Justices ex p Jones* [1999] 2 All ER 73 at 83.

<sup>120</sup>S.G.G Edger (n53) 291.

from a subsidiary legislation. On most occasions, the administrative remedies put in place are usually more theoretical than practical. Parliament does not usually go further to activate these remedies where any abuse of power is reported to have occurs. The executive arm of government being aware that the parliament will always do little or nothing flagrantly abuse its powers allows itself to swell in the powers emanating from such abuse.

#### **4.1.4 Absence of Legislative Accountability**

The absence of legislative accountability is also another problem facing the control of subsidiary legislature in Nigeria. The Nigeria national assembly itself is an umpire of demigods. The members of the national Assembly see themselves as the watchdogs of the nation, thus nobody watches over the watchdog. In Nigeria, there is no legal framework in place under which the National Assembly can be held accountable for failing to monitor or control the exercise of a subsidiary legislation. This is to the effect that when the legislature decides to do nothing about an abuse of a delegated power, nobody can call it to question.

#### **4.1.5 Illiteracy**

Illiteracy is another problem facing the control of subsidiary legislation in Nigeria. The members of parliament see themselves as already made politicians without a need to further develop and broaden their knowledge of various areas of life. More so, the Nigerian Constitution does not require an academic degree before a person can be elected Member of Parliament. Most legislators are primary school certificate holders who contested and won elections without more. But that is on a narrow plain. More importantly, as at 2018, the illiteracy rate in Nigeria stood at about 62%,<sup>121</sup> leaving the rest of the populace as illiterates, the high rate of illiteracy in the Nigerian society means that citizens are hardly aware of their rights as well as unaware of the procedures for pursuing remedies where injustice has been done. This has limited the development of the jurisprudence of subsidiary legislation in Nigeria. The illiteracy level means also that the citizens cannot demand that the law makers rise up to their duties and ensure the effectiveness of the control of subsidiary legislations in Nigeria.

#### **4.1.6 Docility**

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<sup>121</sup> Doris Dokua, 'Literacy Rate in Nigeria 1991-2018' <<https://www.statista.com/statistics/1268372/literacy-rate-in-nigeria/>>accessed on 17<sup>th</sup> February, 2021.

Another challenge of legislative control over subsidiary legislation, which has also limited the development of the jurisprudence of subsidiary legislation in Nigeria, is the fact of the docility of both the law makers and the citizens. In all democracy, the parliament is the direct representation of the people, they act to check the tyrannical tendencies of the executive. To this function, the legislature is expected at all-time to be alive to its statutory duties of scrutinizing the activities of the executive. It is not expected to behave as an appendage of the executive arm, always affirming and approving its decisions without questions. In Nigeria, the executive since 1999 has been largely overbearing and reckless while the legislature appear not to be sure of their place and relevance in the democracy. The implication of this is the rapid decline in citizens' confidence in the government, rising discontent and disenchantment.<sup>122</sup> The tenure of legislative control of subsidiary legislation in Nigeria has been faced by recklessness and abuse by the executive and accentuated by a docile and pliant legislative arm of the government.

## **4.2 Cross country analysis of Legislative control over Subsidiary legislation**

There is no doubt that legislative control of subsidiary legislation is a burning issue in the world of law making. Many legislative houses in the world are not even aware of the need for control over subsidiary legislation. As such, it is an issue that is easily glossed over much to the detriment of the citizenry. Nevertheless, it is of great importance, for uncontrolled subsidiary legislation offers a fertile field for government despotism and overbearing interference by bureaucrats. Subsidiary legislation sometimes have much more impact on the lives of ordinary citizens than do most Acts of parliament. For this reason, the research shall bring to bear, some of the methods jurisdictions like the UK, Canada and Australia have employed to control subsidiary legislation.

### **4.2.1 The United Kingdom**

In the UK, much subsidiary legislation takes the form of 'statutory instruments'.<sup>123</sup> There is a drafting manual, and annual volumes of statutory instruments are published.<sup>124</sup> The parent Act

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<sup>122</sup> Joel Nwokeoma, 'Executive Profligacy and Legislative Docility in Nigeria' <https://www.thenigeriavoices.com/amp/news/48989/of-executive-profligacy-and-legislative-docility-in-nigeria.html> accessed on 24th February, 2022.

<sup>123</sup> Ian McLeod, *Principles of Legislative and Regulatory Drafting* (Oxford and Portland Oregon 2009) 160.

may give either house the power to disallow a statutory instrument. There is no formal procedure in the House of Commons for scrutiny of bills to see that any subsidiary power is necessary and appropriately defined and controlled, but the House of Lords set up a committee to deal with these matters in 1994.<sup>125</sup> Quasi-legislation and sub-delegation are virtually uncontrolled, and control of Henry VIII clauses is patchy.<sup>126</sup> There are something like fifteen Acts a year which delegate power to the government to amend acts of parliament, and it is not uncommon for the government to be permitted to exercise the power without an affirmative resolution of the parliament.<sup>127</sup>

The Deregulation and Contracting Out Act gave ministers the power to make orders to repeal or amend any Act passed up to the end of the 1993-94 session. The aim is to remove a statutory burden on a trade, business, profession or individual provided that the minister was satisfied that this would not remove any necessary protection.<sup>128</sup>

The arrangements for the control of these orders are much more thorough than those for statutory instruments. The minister must consult interested parties about a draft order, and then lay before Parliament a proposal for the order, accompanied by a detailed explanatory memorandum. Each house has set up a committee to consider proposed deregulation orders, and the committees have to support the draft order, propose amendments, or recommend rejection. The minister, if he wishes to proceed with the order, is required to take into account the reports by the deregulation committees, and the draft order is voted upon by both houses. It is a very tight procedure, with time limits for the various stages.<sup>129</sup>

The government required that, after April 1993, bills introduced, and secondary legislation laid before Parliament, must be accompanied by a compliance cost assessment where there was an impact on business. The aim was to ensure that a proper balance was achieved between

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<sup>124</sup> Ibid.

<sup>125</sup> Carleton Allen (n105) 551.

<sup>126</sup> According to Allen, *ibid*, the Henry VII clause in a bill enables the executive to amend or repeal the provisions in the primary Act of parliament using a secondary pr subsidiary legislation which is subject to some degrees of parliamentary control.

<sup>127</sup> M. Fraser, 'Responsibility in Government', *Australian Journal of Public Administration*, available online at <https://onlinelibrary.wiley.com/doi/10.1111/j.1467-8500.1978.tb00407> accessed on 13<sup>th</sup> May 2022.

<sup>128</sup> Ibid.

<sup>129</sup> Nicholas Winterton, 'Procedural Reform', *The Parliamentarian*, available online at <https://www.parallelparliament.co.uk/mp/nicholas-winterton> accessed on 13<sup>th</sup> May 2022.

protecting people at work, consumers and the environment without imposing unnecessary burdens on business or stifling growth, but the procedure did not work very well. In 2001 the Blair Government passed an Act extending the deregulation procedure to all acts, providing the act is at least two years old when the order is made.<sup>130</sup>

The UK also occasionally uses an unusual type of affirmative resolution, under which a delegated instrument comes into immediate effect but must be approved by an affirmative resolution of each house within 40 days. The procedure of the House of Commons for handling such affirmative resolutions is hardly satisfactory. The debate is brief, not more than one and a half hours. It often takes place before the statutory instruments committee has made its report, and the committee chair sometimes does not even have the opportunity to speak. The system in the House of Lords is better, for at least it is awaited the committee report before the debate is held.<sup>131</sup>

#### **4.2.2 Canada**

In Ottawa the disallowance procedure is weak, being based on parliamentary standing orders rather than a statute, and can be used only by the House of Commons.<sup>132</sup> The Senate is powerless. The use of subsidiary legislation is widespread. At the end of 1988 only 400 acts were in force but there were over 3000 current instruments of subsidiary legislation, and new ones are being produced at a rate of over 1000 a year. There is no act requiring all subsidiary legislation to be tabled in the Parliament, but a particular act may provide that delegated laws made under that act be tabled.<sup>133</sup>

There is mandatory public participation in the preparation of most regulations, though the authority is a government administrative order, not an Act of Parliament. The draft regulations must be published in the *Canada Gazette*, and there is a set period for comment. There must also

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<sup>130</sup> D.R Miers and A. C Page, *Legislation* (London: Sweet and Macwell 1982) 26.

<sup>131</sup> *Ibid.*

<sup>132</sup> The disallowance procedure are historical constitutional powers of the federal legislature to delay or overrule legislations enacted by any other arm or branch of the government see; Robert Charles, *Perjury, Contempt and Privilege: The Coercive Powers of Parliamentary Committees* (Canadian Parliamentary Press) 29-30.

<sup>133</sup> J.R Malloy, *Delegated Legislation in Canada: Recent Changes in Machinery* (Cambridge University Press 2014) 19.

be an impact analysis statement accompanying each such regulation.<sup>134</sup> Interestingly, the name attached to the impact statement is that of the bureaucrat who proposed the idea not that of the responsible minister who, as a Canadian bureaucrat has pointed out, often has no idea what his bureaucrats are doing.

There are Cabinet directions to departments and agencies on how to prepare regulations, and Cabinet approval is required for unusual powers. There is a standing joint committee for the scrutiny of statutory instruments, consisting of seven members of parliament and eight senators. There are two joint chairs, one from the government party and one from the opposition. The Statutory Instruments Act empowers the committee to examine all instruments for which the government is directly responsible, though some instruments may be accepted: those dealing with international affairs and federal-provincial relations, the prevention and suppression of subversive or hostile activities, and those whose disclosure would result in an injustice or undue hardship to an individual.<sup>135</sup>

If the committee objects to a statutory instrument, it reports to the House of Commons that the instrument, or a part of it, should be revoked. If the report is not brought on for debate and decision within fifteen sitting days, the recommendation of the committee is treated as an order of the House of Commons that the government revoke the instrument.<sup>136</sup> In the great majority of cases, the committee is successful in having remedial action taken. The committee also has a useful weapon if it is meeting departmental obstruction and obfuscation. Like other standing committees, it may at any time make a report to both houses on any matter within its jurisdiction. The committee may describe the problems it is having and request the government to table a comprehensive response in the House of Commons within 150 days. It has been found that the necessity to make a public report to the House of Commons concentrates the minds of bureaucrats wonderfully.<sup>137</sup>

### **4.2.3 Australia**

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<sup>134</sup> Ibid.

<sup>135</sup> S.G.G. Edger (n52) 321.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

In the Australian Parliament, either the Senate or the House of Representatives may disallow regulations. The power was given in the early days of the federation, when the concept was that the lower house represented the people and the Senate represented the states, and it was logical to give the two houses separate powers. It is inconceivable that any modern government would initiate such a restraint on its power. The House of Representatives, controlled as it is by the government, has never taken any perceptible interest in subsidiary legislation.<sup>138</sup>

All regulations have to be published in the *Commonwealth Gazette* and be laid before each house within fifteen sitting days of making the regulation, and any regulations not so handled cease to have effect. These provisions are of no effect for delegated laws or quasi-laws which are not regulations, unless the principal act specifically provides that they are to be handled in the same way as regulations.<sup>139</sup>

The Senate Scrutiny of Bills Committee, set up in 1981, potentially has a crucial role here. Among the terms of reference of this committee are instructions to report whether any bills inappropriately delegate legislative power, or do not subject the use of such power to parliamentary scrutiny. The committee chairman does not move amendments on behalf of the committee when the bills are considered in the Senate, but at least the comments of the committee are available to senators when they debate the bill. Unfortunately, in that forum amendments tend to be dealt with on party lines, and some inappropriate powers escape. The committee does do some useful work negotiating with ministers to improve the delegation arrangements in the bills.<sup>140</sup> Affirmative resolutions are almost unheard of, but then so are Henry VIII clauses. This is almost certainly because of the effectiveness of the Scrutiny of Bills Committee and more particularly the Senate committee on subsidiary legislation (called the Standing Committee on Regulations and Ordinances), which would undoubtedly detect and successfully move to disallow any such actions. The Senate has had this committee since 1932. The standing committee's terms of reference are to scrutinise each regulation and ordinance to ensure that it is in accordance with the principal Act; that it does not trespass unduly on personal

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<sup>138</sup> Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (Paperback Publication 2017), 132 <<https://store.lexisnexis.com>> accessed on 12<sup>th</sup> March, 2022.

<sup>139</sup> Ibid.

<sup>140</sup> The Australian Parliament Education Office publication on 'Delegated Legislation' available online at <<https://peo.gov.au/understand-our-parliament/how-parliament-works/bills-and-laws/delegated-laws/>> accessed 20<sup>th</sup> March, 2022.

rights and liberties; that it does not make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal.<sup>141</sup>

#### **4.2.4 Lessons learned**

Flowing from the cross country analysis in this work, the following are some of the lesson learnt from what is obtainable in other countries, as opposed to have in Nigeria:

1. One of the most important lessons to be learnt from what is obtainable in the UK, Canada or Australia is the consistency with which rules are made for the regulation and control of subsidiary legislation. In Nigeria, rules are scarcely made for the regulation of how subsidiary legislations are to be exercised;
2. The need for governments to be accountable to the elected representatives of the people and ultimately the people is one that must be given priority and as such, measures have been taken in the United Kingdom to ensure accountability. In Nigeria however, the legislative check on subsidiary legislation is manifestly porous and leaves the gap for arbitrariness, corruption and waste;
3. The mechanisms put in place for the control of subsidiary legislation in the jurisdictions examined are straightforward and easy to adhere to. There is also freedom and access to information and materials to all players in the system of control of subsidiary legislation; and
4. In Nigeria, unlike in the countries analysed, the delegating instrument usually grants absolute discretion to the executive with regards to the powers to make subsidiary legislations. It is important that delegating instruments be made in the most restrictive manner, so as to check abuse.

#### **4.3 Prospects**

After analyzing the role of subsidiary legislation it can be said that subsidiary legislation has come to stay and the reality of its existence and continuance in the present legal system cannot be ignored. With the growth in political and socio-economic activities and the consequent

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<sup>141</sup> Ibid.

increasing functions to be performed by the legislature, it is even more important today to engage in a critical assessment of delegation of legislative functions to executive agencies. It is of utmost importance that there should be proper control on exercise of legislative power by the executive. There are certain safeguards which are laid down to be followed which operate at two levels: firstly, when legislature is delegating such powers in favour of executive; and secondly, there should be 'control mechanism' so that the power is not abused by the executive. Further, it can be said that the safeguards which are laid down can be efficiently followed when the legislature lays down certain policies and performs essential legislative functions. If this is not done, then the consequences will be dire. But as stated, even where the delegation is legal and lawful, there should be 'control mechanism' to ensure proper exercise of power by the executive. The parliamentary control over subsidiary legislation can be considered to be weak and undeveloped in its present state in Nigeria. The reasons for this varies from over-dependence on the courts for remedies when in fact the courts can only give remedies that are clearly provided for in law; the parliamentarians' lack of legal skills, etc.

Nigeria with a quasi-federal structure and the separation of powers failed to realize the significance and effectiveness of parliamentary control as a check on excessive delegation. The parliamentary controls in England are most effectively utilized and have great functioning throughout the system because it is done in a nonpolitical atmosphere with the uniform law which scrutinizes it. Many recommendations which are made in the statutory instruments are being followed in countries like the UK, Canada and Australia. Nigeria should learn from this and strive to move away from dreams of individual power to realizing the value of true democracy.

If the parliamentary control of subsidiary legislation is to be made a living continuity and be strengthened in Nigeria, it is necessary that the role of committees of parliament and a separate law should be made regarding how subsidiary legislations are to be made and exercised. The court on which the executive rascality and parliamentary powers to check such rascality must be quick to do away with the lack of uniform decisions and judicial precedents, as this will continue to mean that each such will decide cases differently on different principles. In the midst of all this, it is parliament which should take active interest and control in order to reduce pressure on the judiciary.

## **CHAPTER FIVE**

### **SUMMARY, RECOMMENDATIONS AND CONCLUSION**

After a thorough research on the topic, several findings and recommendations were made in order to further enhance the growth of knowledge. This chapter contains a summary of the research findings, the recommendations made after the research and conclusion.

#### **5.1 Summary of findings**

As a result of the development of world politics, economy and the increase in technological advancement alongside its antecedent vices, the modern parliament is expected to be on its toes to meet up with the daily demand of law making. In as much as the duty to make law and the task of ensuring that laws turn out beautiful enough to meet the need for which they are made. Parliament is faced with a lot of challenges preventing them from meeting the herculean task of making laws for the everyday activity of man. Apart from the impossibility of members of parliament to have the level of experience to cover every aspect of human life, there is also the problem of inadequate time to legislate among several other challenges. In sum, this study comes to the following findings:

The many problems hindering parliament from carrying out their legislative mandate necessitated the delegation of some of its legislative powers to the executive arm of government. The delegation of this power however, came with its own problems. It led to executive arbitrariness and abuse of legislative power. The concept of subsidiary legislation has seen the executive become more powerful than any other arm of government; The same problems, such as the busy schedule of the legislature and its lack of expertise on certain subject matters, that necessitated delegation of powers from the onset are also hindering the control of the said subsidiary legislation;

The legal framework and legislative instruments currently in place in relation to subsidiary legislation (particularly with respect to monitoring them) are almost nonexistent and, where existent at all, are weak and ineffective. There is no statute that lays down the procedure for

making subsidiary legislation. The individual statutes that make provisions regarding procedures for making subsidiary legislation pursuant to them are generally vague. In the same vein, very few statutes make provision for laying subsidiary legislation before the Legislature in Nigeria. Where there exist such provisions, they are easily glossed over by executive agencies and are never enforced. As such, there is no parliamentary scrutiny at all of subsidiary legislation in Nigeria; and

The absence of an effective and adequate legal and/or legislative framework for regulating the practice of subsidiary legislation in Nigeria has generally resulted in the infringement of the rights of the citizenry. If the legislature is better equipped to control the exercise of subsidiary legislation, there will be little or no abuse of these subsidiary powers.

## **5.2 Recommendations**

Flowing from the above findings, the following recommendations are made towards resolving the issues associated with the practice of subsidiary legislation in Nigeria:

- (a) That drafts of proposed instruments must, as a requirement, be laid in parliament and receive approval before they come into effect. This requirement should be complied with as it serves as a check upon the powers that are conferred. It invariably raises the interest to ensure that adequate scrutiny is given to those measures that are laid before it;
- (b) That the system of legislative committees charged with the responsibility to scrutinize subsidiary legislation is a system that should be transplanted to Nigeria. The importance of this cannot be over emphasized as an effective control measure for subsidiary legislation;
- (c) That an independent parliamentary committee be established by parliament to monitor and report abuse of subsidiary powers.

## **5.3 Contribution to knowledge**

This research work is centered mostly on the challenges to and prospects of the legislative control of subsidiary legislation. The research made a critical analysis of how the legislature can

effectively monitor and control subsidiary legislation. The strength of legislatures in the control, and monitoring of delegated instrument is not in doubt and in many other jurisdictions, this has been established. In Nigeria, however, this has not been the case. Although there have been a few writings on subsidiary legislation, little or no attention has been brought to bear on its control, particularly in the form of parliamentary scrutiny. The writings on this subject matter in Nigeria are not totally exhaustive. In this regard, this research fills a gap in that it not only isolates the fact that there enough has not been said or written on the subject of post-enactment legislative control of subsidiary legislation, it makes far-reaching recommendations in favour of parliamentary scrutiny and generally firming up the practice of subsidiary legislation.

This research has brought to light the strength and weakness of the legislature in the control of subsidiary legislation -the strength in that, among the other arms of government, legislatures being the originators is the most powerful arm of government for the control of subsidiary legislation. The weakness, in that the legislature has failed in their duty to control and monitor the abuse of subsidiary legislation in Nigeria. The legislature has not put in adequate guidelines and mechanisms in the enabling statutes for the control of the exercise of delegated powers neither has it enacted a legal or legislative framework for this purpose.

#### **5.4 Suggested areas for further research**

The practice of delegation of powers for the making of subsidiary legislation are always subject to improvement. This study examined the challenges facing the control of subsidiary legislation in Nigeria and observed several constraints mitigating against effective legislative control over subsidiary legislations and resulting in avoidable poor and abuse of subsidiary legislation. Given the high level of sophistication and intricacies in the modern, political, economic and social cultural interrelationships, one of the key areas that is worthy to venture into in the regulation of subsidiary legislation is the making of the legislation itself. The draftsman by virtue of his job and training is better positioned to ensure that both the Enabling Statute and the Subsidiary legislation are drafted in such a way that too much power is neither given to the delegates, nor that the subsidiary legislation itself offends the enabling statute. To this end, the employment of drafting software for subsidiary legislation to minimize errors in conferment of powers under a subsidiary legislation is an area that is worth researching into. This area is novel, but it is hoped

that subject to the availability of fund, a future research should be conducted with a view to identifying how best to harness technology in the control of subsidiary legislation.

## **5.5 Conclusion**

The duty of the legislature to control the excesses of the executive is a tedious one. Parliament can only effectively control the exercise of subsidiary legislation by employing individual preventive measure at the point of each delegation of its power. Parliament is to ensure that each legislation is laid before it and with proper parliamentary procedures for challenging unsatisfactory regulations. Parliament will be able to fulfill its supervisory function in subsidiary legislation if provisions can be made for detailed scrutiny of certain instruments in small parliamentary committees with narrow but clearly defined terms of reference. This will reduce the risk of constitutionally undesirable features being imported into subsidiary legislation.

Consequently, subsidiary legislation has been criticised as making the government too powerful and contravening the principles of separation of powers. Several other criticisms are made against subsidiary 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 forms 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 although obviously lacking in Nigeria. In carrying out this function, the focus of parliament should be on the enabling clause and other procedural requirements 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 committees which perform this function and report back to it. Parliament has the final authority to stop a subsidiary legislation that does not fulfill the requirements to further the overall objective of the law. This dissertation has been able to establish from the given examples that adequate parliamentary scrutiny is lacking in Nigeria and that is the reason why the system harbours bad quality subsidiary legislation. Parliament has not been able to provide any guidelines for the making of subsidiary legislation and after these powers are exercised, there is no form of scrutiny on it to ensure that they are within the limits of the powers conferred.

In order to prevent the harboring of bad quality subsidiary legislation, Parliament should set standards and laydown certain requirements that executive agencies must comply with before subsidiary legislation can be made. Procedural rules of publication and consultation should be made condition precedent for the exercise of this powers while there must be scrutiny after they are made. This will go a long way to address the challenges of *ultra vires* and arbitrariness that come with them.

## BIBLIOGRAPHY

### BOOKS

- Alabi. M. O, *Constitutionalism in Nigeria* (John Archers Publishers Ltd, 2022).
- Allen C., *Law in the Making*, (Clarendon Press, 7<sup>th</sup> edn.1964).
- Anwo J. O. and Sabitiyu L. B, '*Principles of Administrative Law*', (National Open University 2012).
- Aremu. F. A and Olaniyi, J and Saka, L, *Travails of Democratic Politics in Nigeria's Fourth Republic* (College Press; Lead City University Press, 2020).
- Beatson J. and Matthew M. and Elliot M. *Administrative Law Text and Materials*, (4<sup>th</sup> edn Oxford University Press 2011).
- Bradley A. W and Ewing K. D, *Constitutional and Administrative Law* (Edinburgh: Pearson Education Limited, 2011).
- Bradley A. W and Ewing K, D, '*Constitutional and Administrative Law*' (13<sup>th</sup> edn. Edinburgh: Pearson Education Limited, 2013).
- Carleton Allen, *Law in the Making*, (Clarendon Press, 7<sup>th</sup> edn. 1964)
- Charles R., *Perjury, Contempt and Privilege: The Coercive Powers of Parliamentary Committees* (Canadian Parliamentary Press).
- Daintith T. and Page A., *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford Scholarship Online Publications, 1999).
- Edger S. G. G, *Craize on Statute Law* (7<sup>th</sup>edn, London Sweet and Maxwell, 1971)
- Fox. R *The Devil in the Detail: Parliament and Delegated Legislation* (Hansfield Society Press 2021).
- Hewart G., *The New Despotism* (Ernest Benn Limited 1929).
- Ian Loveland, *Constitutional law, Administrative Law and Human Rights; A critical Introduction*, (Oxford University Press 2009)
- Iluoyomade O. and Eka B. U, *Cases and Materials in Administrative Law in Nigeria* (Ile-Ife, ObafemiAwolowo University Press, 2007).

- Lawrence. Atsegbua, *Administrative law: An Introductory text* (Fifers Lane Publishers 2012)
- Malloy J.R , *Delegated Legislation in Canada: Recent Changes in Machinery* (Cambridge University Press 2014).
- Miers D. R and Page A.C., *Legislation* (London Sweet and Maxwell 1982).
- Okany M. C, *Nigerian Administrative Law*, (Onitsha: Africana First Publishers, 2005).
- Oluyede P. A, *Nigerian Administrative Law* (Ibadan: University Press Plc, 2007).
- Oyewole O., *Modern Administrative Law and Practice in Nigeria* (Lagos: University of Lagos Press & Books Ltd, 2016).
- Page E. C, *Delegated Legislations and Everyday Policy Making* (Hart Publishing, 2001).
- Page E. C. ‘*Governing by Numbers: Delegated Legislation and Everyday Policy Making*, (Portland Hart Publishing, 2001).
- Pearce D. and Argument S., *Delegated Legislation in Australia* (Paperback Publication 2017).
- Puttick K., *Challenging Delegated Legislation* (London Waterloo Publishers, 1988).
- Salmond J., *Jurisprudence* (9th ed., London: Sweet and Maxwell Ltd, 1937).
- Schwartz B., *An Introduction to American Administrative Law* (2<sup>nd</sup>Edn American Administrative Law Press 1962).
- Schoebrod D, *Power Without Responsibilities* (Yale University Press, 1995).
- Seidman A., Seidman R. and Abeyesekere N., *Legislative Drafting for Democratic Change, A Manual for Drafters*, (Kluwer Law International, 2001).
- Wade H. W, *Administrative Law* (Oxford Clarendon Press 1967), 291.

### **ARTICLES IN JOURNALS**

- Appleby G, Howe J, ‘Scrutinising Parliament’s Scrutiny of Delegated Legislative Power’, (*Oxford University Commonwealth Law Journal*, 2015).
- Aronson M, ‘Subordinate Legislation: Lively Scrutiny or Politics in Seclusion’, *Australasian Parliamentary Review*, 2011.
- Bates J. N, ‘The Future of Parliamentary Scrutiny of delegated Legislation, (1998) *Statutes Law*

*Review: Statutes Law Review Journals*; <<https://doi.org/10.1093/slr/19.3.155>>.

Craven G., 'Consultation and the Making of Subordinate Legislation- A Victorian Initiative', 15 *Monash U L Rev.* 1989, 95.

Fraser M., 'Responsibility in Government', *Australian Journal of Public Administration*, vol. 37,

Mallen T, 'Rediscovering the Non delegation Doctrine Through a Unified Separation of Powers Theory', 81 *Notre Dame Law Review* (2001).

Schwartz B., 'Delegated Legislation in America: Procedure and Safeguards', *The Modern Law Review*.

Smith S.A 'Delegated Legislation in England' [1949] *The Western Political Quarterly Journal*; 514-526 <<https://www.jstor.org/stable/44297>>.

Waldron J., 'Separation of Powers in Thought and Practice', *Boston College Law Review*, Volume 54, (2013)

Whalan D. J, 'Scrutiny of Delegated Legislation by the Australian Senate', *Stat L R* 1991, 87

Where K. C 'Controlling Delegated Legislation: A British Experiment'[1949] *The Journal of Politics*; 11.

Winterton N., 'Procedural Reform', *The Parliamentarian*, vol. 81

## ONLINE RESOURCES

Benson J. '*Delegated Legislations in Nigeria: The Challenges of Control*' (2014) <[file:///C:/Users/User/Desktop/Jemina%20Fabiawari%20Benson%20LLM%20Dissertation%20\(1\).pdf](file:///C:/Users/User/Desktop/Jemina%20Fabiawari%20Benson%20LLM%20Dissertation%20(1).pdf)>.

D J Whalan, 'Scrutiny of Delegated Legislation by the Australian Senate', <https://www.bing.com/ck/a?!&p=cbc564220510010b9749caa6fde3dfb6748e329276c2411f447d63b63045be8eJmldtHM9MTY1NDgxOTIwMCZpZ3VpZD0xMzViNGE1NC11YjNhLTZyODQ0MDkxNy01YmUwZWYzYTY1YzkmaW5zaWQ9NTEzMA&ptn=3&fclid=135b4a54-eb3a-6384-0917-5be0ef3a65c9&u=a1aHR0cHM6Ly9hY2FkZW1pYy5vdXAuY29tL3Nsci9hcnRpY2xlLzEyLzlvODcvMTYzMTFwOA&ntb=1>

Dogara Y., 'High Turnover Rate Affects the Quality of legislation At NASS –' <<http://www.nta.ng/news/20170420-turnover-nationalassembly-legislation-dogara/>>.

Gregory Craven, 'Consultation and the Making of Subordinate Legislation- A Victorian Initiative'

<https://www.bing.com/ck/a?!&&p=2e739d680a19e57f2563d9f366ceef47f169f37183bdc5e641b6ed09b279980eJmltdHM9MTY1NDgxOTIwMCZpZ3VpZD0xMzViNGE1NC11YjNhLTlyZODQtMDkxNy01YmUwZWYzYTY1YzkmaW5zaWQ9NTEyNQ&p=3&fclid=135b4a54-eb3a-6384-0917-5be0ef3a65c9&u=a1aHR0cDovL2NsYXNzaWMuYXVzdGxpaS5lZHUuYXUvYXUvam91cm5hbHMvTW9uYXNoVUxhd1J3LzE5ODkvNi5wZGY&ntb=1>

Iheabunike G., ‘The Making of Subsidiary Legislation: Rules, Regulations, Orders etc.’; Synopsis of the presentation at the Joint Legislative Drafting Training themed “New Innovation in Legislative Drafting Skills” organized by the Open Government Partnership with the Support of Trust Africa at Bolton White Hotel, Abuja on 7<sup>th</sup> March, 2018 available online at [https://www.academia.edu/37764731/the\\_making\\_of\\_subsidiary\\_legislation](https://www.academia.edu/37764731/the_making_of_subsidiary_legislation).

J. Irwin, Administrative Law: *Ombudsman and Delegated Legislation*, accessed online at [www.linkedin.com](http://www.linkedin.com)

Kazeem Y., ‘The Most Fascinating Details in United States 54-Paged Case Against Nigeria’s Corrupt Ex-Oil Minister,’ *Quartz Africa* <<https://qz.com/africa/1032997/nigeria-oil-corruption-diezani-alison-madueke-and-kola-alukos-one57-manhattan-condo-luxury-yachts-and-ferrari-racing/>>.

Nwokeoma J, ‘Executive Profligacy and Legislative Docility in Nigeria’ <<https://www.thenigeriavoice.com/amp/news/48989/of-executive-profligacy-and-legislative-docility-in-nigeria.html>>.

Okoeguale H., ‘Strengthening Legislative Control over Delegated Legislation in Nigeria’ <[file:///C:/Users/User/Downloads/183682-Article%20Text-467601-1-10-20190219%20\(2\).pdf](file:///C:/Users/User/Downloads/183682-Article%20Text-467601-1-10-20190219%20(2).pdf)>.

Osagie S., ‘National Assembly Oversight Functions: Constitutional Provisions and Implications for National Development’ <https://www.orderpaper.ng/national-assembly-oversight-functions-constitutional-provisionsimplications-national-development/>.

Ralph Nyadz, ‘5 ways to control Delegated Legislation’ [Top 5 Ways to Control Delegated Legislation - Cegast Academy](http://www.legislation.gov.uk/ukpga/2015/11/section/11)

Scholar N. N, ‘Delegated Legislations in View’ <<https://nigerianscholars.com/tutorials/arms-of-government/delegated-legislation/>>.

T.O. Olayemi, ‘The Challenges of Controlling Administrative Legislation in Nigeria’, <[www.nials.nigeria.org](http://www.nials.nigeria.org)>.