CONTROL OF ADMINISTRATIVE LEGISLATIONS: WHAT NIGERIA IS NOT DOING

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Abstract
In any country practicing constitutional democracy, there is a division of governmental powers and functions between the various arms or tiers of Government. The legislature as one of the arms of Government in Nigeria is assigned the role of law making, but sometimes lacks the time, expertise or skill to carry out this function. In such circumstances, it may authorise the president, ministers, departments and bodies other than the legislature to make rules or regulations in the form of delegated, administrative or subsidiary legislations. Administrative or subsidiary legislation is entrenched in Nigeria save that there is either poor or no control of same. However, many enabling Acts authorising administrative legislations give wide discretionary powers to those who are delegated to carry out such powers. The control measures adopted by the legislature in Nigeria to monitor and control administrative legislations are few and ineffective unlike in advanced democracies like U.S.A and Britain, where serious control measures are adopted which include mandatory requirement for publication, consultation and laying of the subsidiary legislation or its draft before legislature amongst others. The control - gap in Nigeria has resulted in emergence of powerful subordinate lawmakers, abuse of discretion by subordinate lawmakers, loss of revenue by government, exposure of citizens to obnoxious laws and sub-delegation of function by delegates of power and affected the legislative powers of the National Assembly in Nigeria amongst others. These shortcomings need to be tamed by adopting mandatory requirement for publication, consultation and laying of the subsidiary legislation or its draft before legislature, amending the relevant laws along that line and giving life span to administrative legislation amongst others.

Keywords: Legislation, Subsidiary, Administration, Consultation, Publication, Discretion.

1. Introduction

A modern constitutional government has three branches or arms namely: Legislature, Executive and Judiciary. The three departments of government are made equal, coordinate and independent.[1]

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[1]*Alabi v National Assembly* (2016) ALL FWLR (Pt.803) 1830 p. 1908-1909.

In the traditional sense,[2] the essence of having different arms of government is to ensure that each arm exercises its role without the interference or encroachment of any other arm. In *Nganjiwa v FRN*[3] the Court of Appeal held *inter alia*:

> The Constitution of this country being the *grundnorm* and fundamental legal order of the state clearly recognizes and guarantees the doctrine of separation of powers and checks and balances. Sections 4, 5 and 6 thereof contain provisions relating to the legislative, executive and judicial arms of the Government.[4]

It was further held that, there is no doubt that under the Constitution, the three arms of government in both the Federation and the States are distinct and separate, and each has its functions and powers clearly set out.[5]
However, modern and contemporary governmental practices have shown interrelationship and interdependence as imperative. Every state has also developed its own degree of fusion or separation of power based on its constitutional framework or administrative convenience. Besides, the exigencies of government make it important that delegation of functions cannot be ruled out in order to achieve the aims and objectives of government and run same with ease.[6]

The constitution creates, distributes and limits powers of each arm of government and its notable feature in Nigeria is the distribution of governmental functions among the three arms of government.[7] The Constitutions also prescribes the scope and limits for each arm and its jurisdiction and supersedes any Act of the National Assembly[8]and is the supreme law of the land.[9]

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[2]As encapsulated in the theory of separation of powers postulated by the great French philosopher, Baron Montesquieu in *Espirit des lois (The spirit of the Laws)* p. 1748.
[3](2018) 4 NWLR (Pt. 1609) 343 – 344; *Kayili v Yilbuk* (2015) 7 NWLR (Pt. 1457) 26
[4]*Saraki v FRN* (2016) ALL FWLR (Pt. 836) p. 488, Where the Supreme Court described the constitution as the embodiment of what the people desire to be their guiding light in governance. It is the supreme law; the fountain of all laws.
[5]*Inuwa v. Gov, Gombe State* (2020) 5 NWLR (Pt. 1716) 32 @ pp. 55 – 56, paras. G – A.
[6]In *Sani v President, FRN* (2020) 15 NWLR (Pt. 1746) 151@ p. 179, the Court held that under section 5 of the Constitution of the Federal Republic of Nigeria, 1999 as amended, the President has the powers to delegate to the Attorney General of the Federation, powers to recover monies due to the Federal Government of Nigeria.
[7]The Legislature, Executive and Judiciary.
[8]Constitution of the Federal Republic of Nigeria (CFRN), 1999 (as amended), s. 1; *Gov, Ekiti State v Olubunmo* (2017) 3 NWLR (Pt. 1551) 1 p. 34.
[9]*Nganjiwa v FRN* (Supra) p. 351, paras.E-F; *Boko v Nungwa* (2019) 1 NWLR (Pt. 1654) 395 pp. 423-424.

In Nigeria, the Constitution confers legislative powers of the Federation on the National Assembly and the said powers are exercisable by the Senate and the House of Representatives of the Federal Republic of Nigeria.[10]The constitution also creates and provides for the duties of the legislature at the state.[11]
However, because of factors relating to time, skill, expertise and other exigencies the legislature may sometimes delegate some of its legislative powers of law making to other bodies, individuals, officers or groups to make subsidiary laws.[12] These subsidiary laws or rules when made, enjoy the force of the law.

A look at the enabling provisions[13] empowering bodies, officers and individuals to make subsidiary legislations under the Constitution and other enabling statute shows that the provisions are couched in a wide and sweeping manner. Section 38 of Value Added Tax Act[14] and section 107 of Stamp Duties Act[15]are clear examples. It is evident that from our enabling statutes there is also paucity of in-built mechanisms or processes to check those individuals and bodies who exercise subsidiary law making functions on behalf of the National Assembly in Nigeria. Even where it exists, it is obeyed in breach, contrary to what obtains in the United Kingdom and United States of America where there areserious control measures. The end result in Nigeria being erosion of legislative powers of the National Assembly, abuse, arbitrariness and excess of powers by the delegates of powers, loss of revenue by government amongst others.

Administrative or subsidiary legislation has come to stay in Nigeria. The number of administrative legislations being made by the Federal Government, States, Local Governments, Ministries, Departments or Government Agencies (MDAs) are increasing by the day. Some of the authorities making administrative legislation do not possess the necessary competence to make such binding Rules and sometimes overstep their bounds and overreach the provisions of the enabling legislation authorising them to make

[10]*CFRN, op cit*, s. 4 (1) which provides, 'the legislative powers of the Federal Republic of Nigeria shall be vested in the National Assembly for the Federation which shall consist of the Senate and House of Representatives; See also s. 47 of *CFRN*.
[11]*CFRN, Ibid.*
[12]*Gov, Ekiti State v Olubunmo* (2017) 3 NWLR (Pt. 1551) 1, where the Court held that, section 4 (6) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), vests the legislative powers of a State of the Federation in the House of Assembly of the State.
[13]*CFRN, op cit*; There are Fifteen enabling provisions in the 1999 Constitution namely (sections 32, 60, 101, 160, 204, 216, 236, 248, 254, 259, 264, 269, 274, 279 and 284) and only section 32 has the requirement of Laying before the National Assembly while sections 160, 204 and 216 are made subject to the approval of the President or Governor (as the case may be) without recourse to the National Assembly except that INEC Rules are excluded from such approval.
[14]Cap VI Laws of the Federation of Nigeria (LFN) 2004 as amended. It provides which provides, 'the Minister may by Order published in the Gazette, amend the rate of tax chargeable and amend, vary or modify the list set out in the first schedule to this Act'.
[15]CAP S8, LFN, 2004 as amended.

administrative legislations. Besides, COVID – 19 pandemic period witnessed massive increase in making of administrative legislations as both the Federal and State Governments made Executive Orders in the form of Infectious Diseases (Emergency Prevention) Regulations, 2020.[16]

The legislature is still grappling with its traditional roles of law making and yet to come to terms with ways to effectively carry out all her constitutional responsibilities including the need to monitor and effectively check administrative or subsidiary legislations. Worse still, most of our laws and legislations (including the Constitution of the Federal Republic of Nigeria, 1999 (as amended) were made by the military governments or the colonial masters. It thus becomes obvious that there are little or no provisions to effectively check and monitor administrative or subsidiary legislations in Nigeria.

2. Definition of Key Terms

Parliament/Legislature

The word 'Parliament or Legislature' has become a household word especially in countries practicing constitutional democracy. It is the arm of government consisting of a body of officially elected or otherwise selected people vested with the responsibility and power to make laws for a political unit, such as a state or nation.[17]

According to Garner,[18] the word "Parliament" means, 'the supreme legislative body of some nations'. The legislature is forum for representation of the electorates, group of persons, a unit, constituency or interest or an institution, that is responsible for law making, delegating the powers to do so to other bodies and performing other roles constitutionally assigned to it, articulating and expressing the interest and will of the people and playing oversight role on other arms of government. The legislature has been given different names across nations of the world. In Britain it is called, 'the Parliament' and consists of the Monarch, the House of Lords and the House of Commons.[19] United States of America calls it 'the Congress' and it is composed of the 'Senate' and 'House of Representatives'. Nigeria calls it 'the National Assembly' and it is composed of the

[16]https://www.pwc.com/ng/en/covid-19/government-covid-19-response-measures.html< accessed 5 February, 2021>

17The Free Dictionary, 'Meaning of legislature'<https://www.thefreedictionary.com/legislature > accessed 5 February, 2021.

[18]BA Garner, *op cit*. p. 1225.

[19]Garner, *Ibid*, p. 18.

'Senate' and 'House of Representatives'.[20] Other countries call it by various names.[21]It is either bicameral[22] or unicameral.[23]

Legislation

The word 'legislation' has been variously defined by different authors, writers, commentators and even jurists. Legislation(or 'statutory law') is law which has been enactedor passed by the legislature or other governing body or the process of making it.[24] The Black's Law Dictionary[25] defines legislation in three ways:

1. The process of making or enacting a positive law in written form, according to some type of formal procedure, by a branch of Government constituted to perform this process also termed lawmaking; statute making;
2. The law so enacted or
3. The whole body of enacted laws.

The Interpretation Act[26] did not define legislation. However, it descriptively defined 'Law'as, 'any law enacted or having effect as if enacted by the legislature of a Region and includes any instrument having the force of law which is made under a law'.[27]

Concept of Administrative Legislation

Administrative/Delegated legislation is as old as constitutional democracy itself. It is a form of legislation made by person (s) or body outside the legislative arm but pursuant to an enabling legislation or statute and authority of the legislature.[28] Administrative legislation can take many forms and shapes which include: Executive Orders, Bye-law,

[20]*CFRN*, 1999, *op cit*, s. 47.
[21]Israel calls it (Knesset), Canada calls it (Parliament comprising of House of Commons and Senate), India calls it (Sansad comprising of House of People and Council of States), Kenya calls it Parliament comprising of National Assembly and Senate, Ghana calls it Parliament while New Zealand calls it (House of Representatives; Wikipedia free dictionary, 'List of legislatures by Country'<https://en.wikipedia.org/wiki/List_of_legislatures_by_country> accessed 5 February, 2021.
[22]A bicameral legislature is a legislative house with two houses or chambers like in Uk, Japan, USA and Nigeria; Bicameral legislature <https://www.investopedia.com/terms/b/bicameral-system.asp> accessed 5 February, 2021.
[23]A unicameral legislature is one that has one legislative house or Chamber like in Sweden, Finland, Israel, Denmark, Greece and Bulgaria; Unicameral legislature <https://www.investopedia.com/terms/u/unicameral-system.asp> accessed 5 February, 2021.
[24]Wikipedia Free Dictionary, 'Legislation' <https://en.wikipedia.org/wiki/Legislation> accessed February, 2021.
[25]BA Garner, *op cit*, p. 962.
[26]*Interpretation Act*, CAP.I23 LFN, 2004.
[27]*Ibid*, ss. 18 and 27; The Interpretation Act at section 27 went on to outline and define other concepts related to legislation. These include 'Regulation', 'Act' and 'Enactment' and 'Subsidiary Instruments'.
[28]HWR Wade & CF Forsyth, op cit, p. 839.

Directions, Rule or Regulation made by Ministers, Departments and other bodies other than the legislature. It exists in many jurisdictions including Nigeria and other constitutional democracies.

Many of the authors wrote for or against the practice of Administrative legislation. John Locke in his Second Treatise of Civil Government quoted by Magnet[29] wrote as follows:

> The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of commonwealth, which is by constituting the legislative and appointing in whose hands that shall be. And when the people have said, we will submit to rules and be governed by laws made by such men and in such forms, nobody else can say other men shall make laws for them nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what the positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it on other hands.

The position of Locke is hard and unrealistic because the legislature does not have the time, fund and expertise to make all the laws. For this reason, while the legislature remains the fountain of law making, sometimes it releases some of its powers to other bodies or officials outside it to make subsidiary legislation without abdicating its responsibility. Consequently, such subsidiary legislation no matter who makes it, remains under the control and supervision of the legislature. The United States of American Supreme Court in *A.L.A Schelecher Poultry Corp. v United States*[30] overruling *Panama Refining Co. v Ryan*[31] Justice Cardozor who dissented in the Panama case stated:

> The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant. Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Herein effect is a roving commission to inquire into evils and upon discovery correct them.

[29]JE Magnet, *Constitutional Law of Canada* (7thedn, vol. 1, Juriliber limited Canada, 1998) pp. 94 -95.
[30]295 U.S 495 (1935).
[31]293 U.S 388 (1935); Justice Cardozor dissented in the judgment.

Oluyede in his book[32] wrote 'it has not been easy to define in one fell swoop what amounts to administrative legislation in this country'. For some authors like Wade & Forsyth, *Administrative Legislation* is simply Delegated Legislation.[33] It is also called subsidiary or subordinate legislation.[34]

Administrative legislation means all the Orders, Regulations made by Ministers, Departments and other bodies which owe their legal force to Acts of Parliament.[35]
It includes statutory rules, by-laws, ordinances, orders in council and various other 'instruments' made by the executive.[36]Michael Allen & Brian Thompson[37] further wrote: 'the Americans refer to legislative activity carried out by administrative bodies as rule-making' and this includes what the British called, 'delegated' and 'quasi-legislation'.[38]

However, the common feature in administrative legislation in Nigeria is that enabling or parent statute under which subsidiary or administrative legislations are made are usually couched in wide and open manner, leaving room for wide discretion by subordinate lawmakers.For example, section 154 of the Electoral Act, 2010 as amended is another example of an enabling provision and it provides as follows: 'The commission may subject to the provisions of this Act, issue regulations guidelines or manuals for the purpose of giving effect to the provisions of this Act and for its administration thereof'.
Section 32 (1) of the Constitution[39] provides:

> The President may make regulations, not inconsistent with this chapter, prescribing all matters which are necessary or convenient to be prescribed for carrying out or giving effect to the provisions of this Chapter and for granting special immigrant status with full residential rights to non-Nigerian spouses or citizens of Nigeria who do not wish to acquire Nigerian Citizenship.

Subsection 2 provides that such regulation shall be laid before the National Assembly.
On the other hand, Section 160 (1) of the Constitution[40] provides that the Independent National Electoral Commission has powers to makes its own rules or otherwise regulate

[32]P Oluyede, *Constitutional Law in Nigeria* (Evans Brothers Publishers, Ibadan 2001) p. 200.
[33] HWR Wade & C F Forsyth, *op cit*, pp. 839-847.
[34]BA Garner (ed), *Black's Law Dictionary* (9thedn, West Publishing Co, USA 2009), p. 962.
[35]HWR Wade & C F Forsyth, *op cit*, p. 839.
[36]M Allen & B Thompson, *Cases and Materials in Constitutional and Administrative Law* (8thedn, Oxford University Press, Oxford, 2006) pp. 90-95
[37]M Allen & B Thompson, *op cit*,p. 331.
[38]BA Garner, *op cit*, p. 1445 defines Rule making as the process used by an administrative agency to formulate, amend or repeal a rule or regulation; Also, termed administrative Rule making.
[39]*CFRN*, 1999, *op cit.*
[40]*CFRN, 1999, Ibid.*

its own procedure and same shall not be subject to the approval or control of the president.[41]

Section 236 of the Constitution provides that the Chief Justice of Nigeria may make rules for regulating the practice and procedure of the Supreme Court'.[42]
It is only Section 32 of the Constitution that has Laying before the National Assembly as a requirement while other enabling provisions are open and not qualified except Sections 160, 204 and 216 which provides for approval of the President or the Governor of the State as the case may be. Section 216 (2) excludes INEC Rules from the approval of the President.
The common denominator in the above provisions is that the provisions are open, without qualification and leaves room for wide discretion to subordinate lawmakers who make administrative legislations subject to their whims and caprices.

3. Effects, Challenges and Control of Administrative Legislation

3.1 The Effects of Administrative Legislation

The effects of administrative legislation on the powers of the National Assembly are varied and can either be negative or positive.

3.1.1. Negative Effects of Administrative Legislation.

i. Administrative Legislation is a violation of the Doctrine of Separation of Powers

First, Administrative legislation having not been made by the National Assembly is an infraction on the doctrine of separation of powers. In the traditional sense,[43] the essence of having different arms of government is to ensure that each arm exercises its role without interference or encroachment of any other arm.[44] Administrative legislation, though a derogation from the traditional role of the legislature is excused under various circumstances ranging from necessity of time, skill, manpower amongst others.[45]

ii. Emergence of Subordinate Lawmakers.

Administrative legislation has led to the emergence of subordinate lawmakers who derive their authority to make Rules or administrative legislation from any authority other than

[41]Section 160 (2) confers on powers to impose duty on any officer or authority of a state subject to the approval of the Governor of the State.
[42]Other provisions empowering other heads of Courts to make Rules for regulating practice and procedure are sections 248, 254, 259, 264, 269, 274, 279 and 284. The substance of the provisions is the same.
[43]As encapsulated in the theory of separation of powers postulated by the great French philosopher, Baron Montesquieu in *Espirit des lois* (The spirit of the Laws) 1748.
[44]*Avinder Singh v. State of Punjab* (1979) 1 SCC 137, where the Supreme Court of India held that administrative legislation must not be taken over by the government as it would lead to '*law making by barrel of secretariat pen*.
[45]*Nganjiwa v FRN* (Supra); *Kayili v Yilbuk* (2015) 7 NWLR (Pt. 1457) 26.

the sovereign power of the State and that therefore depends for its continued existence and validity on some superior or supreme authority.[46]

iii. Exposure of Citizens to Arbitrary and Obnoxious Legislations.

Administrative legislation sometimes exposes the citizens to obnoxious legislations. Obnoxious legislations are legislations or rules that are offensive and objectionable or expose the citizens to unequal protection under the law.[47]

iv. Loss of Revenue by Government.

Administrative legislation can lead to loss of revenue. This could happen in form of granting of waivers or exclusion of an item that could have generated revenue to the Government.[48]

v. Sub-Delegation of function by Delegates of Power.

It is settled that administrative legislation is made by a person or body authorized to so do by the legislature. Thus, 'delegation requires a distinct act by which the power is conferred upon some persons not previously competent to exercise it'.[49] The guiding rule is captured in the latin maxim '*delegatuspotest non delegare*'[50] meaning, 'a delegate should not sub-delegate'. Sub–delegation is against the rules of delegation and has negative effects on the legislative powers of the National Assembly.[51]

3.1.2. Positive Effects of Administrative Legislation

i. Assists the Legislature

Administrative legislation assists the legislature in law making and covering more legislative grounds which paucity of time, expertise, manpower and skill may have deprived it.

ii. It saves the time of the legislature.

It saves the time of the legislature for other legislative businesses.

iii. It saves cost of legislative business.

Administrative legislation helps in reduction of cost of legislative business which the legislature would have incurred in law making processes.

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[46]BA Garner (ed), *Black's Law Dictionary* (9thedn, West Publishing Co, USA, 2009) p. 982.
[47]Garner, *op cit*, p. 1181.
[48]*Daily Sun Newspapers*, Wednesday, May 25, 2016 writing on the above stated under the caption, 'Waivers: Senate uncovers N447bn fraud…House probes tax Scam, loss of $2.9bn'.
[49]HWR Wade & CF Forsyth, *Administrative Law* (8thedn, Oxford University Press, Oxford, 2000) p. 324.
[50]Meaning, a delegate cannot sub-delegate its function unless is otherwise authorized.
[51]In *Nwuka v Nwaechie* (1993) 5 NWLR (Pt. 293) 295, the Court of Appeal held that delegation of the function to arbitrate over a matter by the elders to persons nominated by the parties was against the Rule of delegation and a nullity. In a similar vein, in *Majiyagbe v A.G & Others* (1957) NRNLR 161, the exercise of the power to revoke a certificate of occupancy by another person other than the Governor was held to be a nullity.

3.2 Control Measures in Administrative Legislation.

Under constitutional democracies, some of these control measures can be summed up as Legislative, Judiciary or Executive control.

3.2.1 Legislative Control

This can take the forms hereunder discussed.

i. Laying before the Legislature

Laying of administrative legislation or its draft (simply called, 'Laying') is one of the ways or measures devised by advanced democracies to regulate and scrutinize administrative legislation.

'Laying' could be in relation to the enactment or draft of same and each of them gives the legislature the opportunity to be in the know or have notice of the administrative or budding legislation. 'Laying' can take different shapes or dimensions and are usually provided for in the parent or enabling legislation[52] or statute of general application.[53]

Laying is not common in Nigeria[54] because of all the enabling provisions for administrative legislation under the Constitution of the Federal Republic of Nigeria, 1999 (as amended), it is only section 32 that provides for laying.

Four laying procedures are available for utilization as a legislative tool to control administrative legislation namely: Affirmative Resolution, Negative Resolution, Laying in Draft and MereLaying.

ii. Affirmative Resolution.

This is a situation whereby the enabling law or parent legislation provides that the legislature having regard to a specified number or manner shall by resolution, approve of the subsidiary legislation before it comes into force or if it is already in operation to continue to have effect. In this circumstance, Affirmative resolution is required to give validity to the law.[55]

iii. Negative Resolution

Negative Resolution of the legislature can also be used to control or annul administrative

[52] An enabling Act (also known as the parent Act or empowering Act) confers a power to make delegated legislation on Minister or another person or body<https://en.wikipedia.org/wiki/Delegated_legislation_in_the_United_Kingdom>accessed 5 February, 2021

[53]Like Statutory Instrument Act of United Kingdom, 1946 and Federal Register Act in the United States of America, 1946.

[54]Laying is provided for in Section 5 of the Emergency Act, 1961 and Section 10 (3) of the Nigerian Citizenship Act, 1961. Only section of 32 of the Constitution of the Federal Republic of Nigeria, 1999 as amended provides for laying.

[55]P Oluyede, *Constitutional Law in Nigeria* (Evans Brothers Publishers, 2001) p. 208.

legislation. Negative Resolution occurs when the enabling statute provides that the Legislature may by resolution annul a particular subsidiary legislation either within a particular time limit or at any time.[56]

iv. Approval in Draft

This is another way of achieving Laying before the legislature and controlling administrative legislation. As earlier pointed out, 'Laying of an enactment can be done when the enactment or the draft is laid before the legislature depending on which is provided for by the enabling statute.

Thus, if the enabling statute provides, a subsidiary legislation can be laid and approved in draft form by the legislature before the proposal reaches the final stage or matures into administrative legislation.[57]

v. Mere Laying before the Legislature

In 'Laying', there are also times, when the parent statute will require that a subsidiary legislation be laid without more. In this kind of situation, the existence of the legislation laid is brought to the attention of the legislature.[58] The reason being that, 'Laying' an enactment or draft of it before the legislature, gives her the opportunity to scrutinize and track the legislation. Furthermore, when the legislature beams its searchlight on the administrative legislation, it may come up with any of the following decisions as captured by Malemi[59] namely:

i) It may require that the proposed line of policy, action, Rules and Regulations, proposed appointees or proposed budget be laid before the Parliament either before the full house or relevant committee.
ii) The Parliament may also go ahead and amend the Law. The amendment may take various forms including providing for condition precedent.
iii) The Parliament can also repeal the Law.
iv) It may also invite the relevant member of the administrative body or official for interrogation.
v) It may also pass the law or administrative legislation.

vi. Amending Administrative Legislation

As part of the control of administrative legislation by the legislature, it may control administrative legislation by amending the parent or enabling statute. This can be done by repeal, amendment or enactment of a new law with a view to discarding or modifying an existing administrative legislation or parent legislation.

[56]*Ibid*, p. 208.
[57]*Ibid*, p. 208.
[58]P Oluyede, *op cit*, p. 208.
[59]E Malemi*Administrative Law, op cit*, pp. 205-206

3.2.2 Judicial Control.

Judiciary as often said is the last hope of the common man. This is not an exemption in checking abuses and excesses of administrative legislation. The duty of the judiciary is to interpret the laws and dispense justice. As part of this duty, the judiciary can competently review administrative legislation so made.

Overtime, the judiciary has performed the above task. In *Korea Nat. Oil Corp. (Nig) v O.P.S (Nig.) Ltd*[60] the Court eloquently held *inter alia* that:

> Judicial review is based on the basic principle that powers can only be validly exercised within their true limits. Thus, it is a mechanism for keeping public authorities within due bounds and for upholding the rule of law. In effect, instead of substituting its decision for that of some other body, as happens on appeal, the court on reviewing the decision, is concerned only with the question whether the act or order being challenged should be allowed to stand or not. In other words, the court is concerned with the legality and not the merits of the decision or the acts of the public authority.

Some of these baselines usually considered by Courts in review of administrative legislative include grounds of: Unreasonableness,[61] Sub-delegation,[62] Retrospective legislation,[63] Pre-enforcement review (Doctrine of ripeness)[64]and Post- enforcement

[60](2018) 2 NWLR (PT. 1604) 394 p. 454-460, paras.E-D.

[61]The word, 'unreasonableness' means 'not supported by a valid exception to the warrant requirement'. In *Chief F.R.A Williams v Majekodunmi*(1969) Suit No. CA/81/69 of August, 27; 1969 1 NMLR, the Court declared that the Restriction Order of 29 May, 1962 which the Defendant made ordering the Plaintiff to be and remain within a distance of three miles from No. 193 Abeokuta Road in the township of Abeokuta was not reasonably justified and it was ordered that the said Restriction Order be set aside. *Munro v Watson* (1887) 57 LT. 366, the Court in UK declared as plainly arbitrary and unreasonable, a bye-law which forbade playing music, singing or preaching in any street except under the express license from the Mayor.

[62]This Rule is also known as '*delegatus non potestdelegare*' meaning, 'when power is conferred on a person, the person cannot as a general rule, delegate the power conferred on him unless otherwise authorized by the conferring authority; HWR Wade & CF Forsyth, *op cit,* p. 325. Exception to the Rule exists during emergency. See *CFRN,* 1999, *op cit,* ss. 45 and 305.

[63]Retroactive law implies a legislation that looks backward or contemplates the past or affects acts or facts that existed before the Act came into effect; B A Garner, *op cit*, p. 1432. Section 36 (8) of CFRN, provides, 'No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed'.

[64]'Ripeness' implies that the state of a dispute has reached, but has not passed the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made; BA Garner, *op cit*, p. 1442. The doctrine of ripeness is otherwise called 'Justice HarlausCalcus' and was formulated and defined by him in *Abbot Laboratries v Gardiner* (1967) 387, US, 137; 528. The opposite is "Moot, hypothetical or academic Cases" that is Cases in which there is no longer any actual or live controversy.

review (Doctrine of *Ultra vires*).[65]

3.2.3 Executive or Administrative Control

The powers of the Executive to control administrative legislations lies in its ability to appoint or remove appointees, principal officers or heads of statutory bodies. Thus, it the Executive reserves the right to hire and fire its appointees and change relevant policies of Government including administrative legislation. In Nigeria, Executive control of administrative legislation is not an effective tool in the control of administrative legislation because most often the executive is reluctant to control its own, especially when the affected person is the crony or associate of the executive or the person who has the discretion to exercise disciplinary powers in that regard. A case in point was the insistence of President Buhari, in having Ibrahim Magu as the Chairman of the Economic and Financial Crimes Commission (EFCC) despite not being cleared by the 8th Senate.

3.2.4 Public Control

Public control of administrative legislation occurs when the legislation is controlled by the Court of public opinion. Public control of administrative legislation is a powerful instrument of control in the hands of the populace and the electorate and this is best harness when there is prior publication of administrative legislation or its draft. It is usually through public opinion that Government understands the mindset of the people with a view to effecting policy changes or modifications. The people can also use public opinion to influence or secure shutting down of an administrative legislation or even secure change of Government that will subsequently make serious policy changes or repeal of administrative legislation which public opinion does not favour. Sadly, this control-tool is under-utilised in Nigeria.

3.2.5 Prior Consultation Control

Prior Consultation Control in relation to administration legislation whereby the enabling statute for administrative legislation has a requirement the public officer or the person or body who is authorized to make administrative legislation shall "consult" with certain bodies, either those named specifically or those described in general terms, before the exercise of power to make subordinate legislation. Most advance democracies insert the above provision to ensure that consultation is made before making of administrative legislation with a view to seeking opinion and thought on a budding administrative

See Garner, *op cit*, p.1100; *Ardo v INEC* (2017) 13 NWLR (Pt.1583) 474, paras. F; 475, paras, A-B; 475-476, paras.H-B.

[65]It occurs when the subordinate lawmaker has gone outside or beyond the powers conferred on him by the enabling statute. See *Akingbade v Lagos Town Council*(1955) 21 NLR 90, where the Court declared Paragraph 3 of the Public Health Rule No. 55 (as amended), 1954 as being *ultra vires* and void in that it provided for registration of business premises with a fee of $5 instead of a lesser amount permitted by the enabling Act. It can also occur when the procedure laid down in the enabling Act for the making of an instrument is not observed; *Rayner v Stepney Corporation* (1911) 2 CH. 312.

legislation. Sometimes, the body to be consulted may be an advisory committee specially constituted for the purpose, before issuing regulations.

Under the Constitution of the Federal Republic of Nigeria, it is only section 216 (2) that provides for consultation. It provides that the President shall before the appointment and removal from office of the Inspector-General of Police consult with the Nigerian Police Council.[66]

However, it must be pointed that the opinion of the body or public officer being consulted is usually advisory and not binding on the person or body consulting it. Despite the above, such instrument is still useful as a control –tool in administrative legislation.

4. Administrative Legislations in Nigeria vis-à-vis the Practice in Other Jurisdictions

4.1 Nigerian Experience.

Administrative legislation has become a part of the legal system in Nigeria. The need exists for adequate control of same but the National Assembly is doing so like about it. Also, there are no general patterns or procedures that are laid down that can be followed for the making of these legislations. The procedure to be followed in each particular case largely depends on the enabling law. Generally, the delegation of law making powers can be traced to the Constitution.[67]

Under the Constitution laying of the administrative legislation or its draft before the National Assembly is not common in Nigeria[68]and there is no provision for mandatory publication of administrative legislation. The 8th National Assembly that the House of Representatives under Yakubu Dogara made direct attempt to monitor administrative legislation by creating House Committee on delegated legislation. However, there is no such Committee in the Senate or a joint Committee of same in both Chambers.

4.2 The Practice in the United Kingdom.

In the United Kingdom, administrative legislation is deeply entrenched. The Rules Publication Act, 1893, provided for publication of subordinate legislation and at least forty days' notice should be given in the London Gazette of the proposed rules along with the information as to the place, where copies of the draft rules could be obtained before it would be laid before the Parliament. The Act, however, made some exceptions[69] to the above provisions and did not apply to certain named departments such as the Ministry of

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[66] The section provides, 'Before making any appointment to the office of the Inspector- General of Police or removing him from office the President shall consult the Nigeria Police Council.

[67] *CFRN*, 1999, *op cit*, *ss.* 4 (1) and 4 (6).

[68] Only section of 32 of the Constitution of the Federal Republic of Nigeria, 1999 as amended provides for laying; Section 5 of the Emergency Act, 1961 and Section 10 (3) of the Nigerian Citizenship Act, 1961 provided for Laying.

[69] It did not cover bye-laws of local authorities and public corporations or Government statements of policy, departmental circular etc. although these are usually published, they are not published as statutory instrument; See SP Sathe, *Administrative Law* (6thedn, Butterworths, New Delhi, 1998) pp. 59-60.

Health, the Board of Trade, the revenue department, the Post Office and the ministry of Agriculture and in cases of emergency.

The Act was succeeded by Statutory Instrument Act of 1946 which provides for publication, printing and sale of copies of Statutory Instruments (SIs). The publication from time to time of 'Statutory Instrument Issue List' is required to show the serial number and short title of each statutory instrument and the date of the first issue by that Officer. At the end of each calendar year, the statutory officer publishes an annual volume containing the text of the general regulations. The contents of the annual volume are arranged subject-wise in alphabetical sequence with an index and a classified list of local instruments. An index called 'Guide to Government Orders' is published at the end of every third year.

In the course of the operations of administrative legislation in the United Kingdom, the Scrutiny Committee also known as the Secondary Legislation Scrutiny Committee (SLSC), the Joint Committee on Statutory Instruments (JCSI) and Select Committees had played key roles. The Secondary Legislation Scrutiny Committee[70] was formerly known as Merits of Statutory Instruments Committee and is a select committee of the House of Lords. Its role is to examine the policy merits of statutory instruments and other types of secondary legislation that are subject to parliamentary procedure.[71] The Delegated Powers and Regulatory Committee is also a select Committee of the House of Lords and scrutinizes the proposals in Bills that give Ministers the powers to make statutory Instruments.[72]The Joint Committee on Statutory Instruments comprised of members of both the Commons and the Lords – to assess every SI laid before the Committee against a checklist relating to the Act of Parliament that delegated the power for the drafting of the SI. It scrutinizes all statutory Instruments made in the exercise of powers granted by Act of Parliament.[73]

4.3 The Practice in the United States of America.

In the United States, administrative legislation exists and it is regulated by a statute of general application. Provisions for publication of rule have been made in the Federal Register Act, 1935 which established the Federal Register and provided for publication daily of all documents having general applicability and legal effect. It has been replaced by Administrative Procedure Act, 1946. Under it, general notice of not less than thirty

[70]Secondary Legislation Scrutiny Committee <https://en.wikipedia.org/wiki/Secondary_Legislation_Scrutiny_Committee> accessed 5 February, 2021.
[71]Scrutiny Committee <https://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/role/> accessed 5 February, 2021.
[72]Delegated and Regulatory Committee <https://en.wikipedia.org/wiki/Delegated_Powers_and_Regulatory_Reform_Select_Committee> accessed 5 February, 2021.
[73]Joint Committee on Statutory Instruments <https://en.wikipedia.org/wiki/Joint_Committee_on_Statutory_Instruments> accessed 5 February, 2021.

days of the proposed rule-making has to be published in the Federal Register[74] which must include: a statement of the time, place and nature of public rule-making proceedings; a reference to the authority under which the rules are proposed and the terms or the substance of the proposed rules or a description of the subjects and issues involved. Exception to the requirement of notice include interpretative rules, general statements of policy, rules of agency organisation, procedure or practice or in a situation in which an agency finds, for good cause, that such notice and public procedure thereon are impracticable, unnecessary, or contrary to public interest. The publication is overseen by the Administrative Committee of the Federal Register (ACFR).[75]

At the end of each year, the publications are bound and indexed, and there is, in addition, the Code of Federal Regulations, which is a codification of these slime documents. Under the provisions of the Federal Register Act, it is expressly provided that no document required to be published under the Act shall be valid as against any person who has not had actual knowledge thereof until it has actually been filed for publication.[76]

4.4 Lessons learnt from other jurisdictions.

In jurisdictions like United Kingdom and United States of America, there is mandatory requirement for publication of administrative legislation.[77]Statutes of general application also exist in relation to regulate and control of administrative legislation.

In India, there is no instrument or statute of general application that makes publication of administrative legislation mandatory. However, every enabling statute or legislation has provision for publication of administrative legislation when made and the Supreme Court of India has held publication of administrative legislation in the official Gazette mandatory.[78]

The system of the Uk and USA shows that a well managed administrative legislation regime is possible and can create employment by creation of a body to manage same.

5. Conclusion

Administrative legislation exists in Nigeria and is indispensable because of its obvious advantages.

The provisions of enabling legislations for administrative legislation are open, without qualification and leave room for wide discretion by subordinate lawmakers who make administrative legislation.

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[74]*Administrative Procedure Act*, s. 4 (c); S P Sathe*op cit*, 31.

[75]Federal Register <https://www.archives.gov/federal-register/laws/federal-register> accessed 5 February, 2021.

[76]American Delegated Legislation < https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1948.tb00101.x > accessed 5 February, 2021.

[77]Like Statutory Instrument Act of United Kingdom, 1946 and Federal Register Act in the United States of America, 1946.

[78]*Haria v State of Rajashan*, AIR, 1951 SC 467; 1952 SCR 110; *Narendra Kumar v Union of India*, AIR, 1960 SC 430; 1960 SCJ 214.

It is also evident from this work that provisions enabling legislation in Nigeria are not coupled with the requirement of laying of administrative legislation or its draft before the legislature, consultation and publication requirements as practiced in the advanced democracies.

It is also part of the findings of this work that there are inadequate measures or provisions to monitor and check administrative legislation and no joint committee of the National Assembly to monitor or control administrative legislation in Nigeria.

There is no comprehensive or national record of all administrative legations in Nigeria.

6. Recommendations

From the foregoing, the following are recommended:

(a) There is need to continuously use subordinate lawmakers in making administrative legislation because of the obvious advantages.

(b) Urgent review/amendment of the enabling statute and the Constitution to provide for compulsory laying, consultation and publication of all administrative legislations.

(c) Statute of general application for compulsory laying, consultation and mandatory publication of all administrative legislation.

(d) There should be created a National Register of administrative legislation and a body to centrally manage publication of administrative legislation like the Administrative Committee of the Federal Register (ACFR).

(e) Life span of administrative legislation should be limited to Six (6) months unless layingand publication is complied with.

(f) Creation of Committee on Delegated Legislation in the Senate of the National Assembly and a joint committee of National Assembly onadministrative legislation.

(g) Periodic review of the Legislative Agenda of the two Chambers of the National Assembly in Nigeria to align it with the need to monitor, scrutinize and check administrative legislation in Nigeria.

(h) Oversight function of the National Assembly should be encouraged and Oversight calendar or time table drawn up for all Ministries, Departments or Agencies (MDAs).

(i) Nigerian Institute of Legislative Studies should be strengthened to effectively discharge her mandate and help in capacity building of legislators and subordinate lawmakers.