

Readings **in Law and Contemporary Issues**

A Publication of
Faculty of Law,
Rivers State University



Edited by:
Dr Chris C. Wigwe

© Faculty of Law,
Rivers State University, Port Harcourt (2018)

First Published, March 2018

All rights are reserved. Apart from any fair dealing for the purpose of private study, research, criticism or review, as permitted under the Copyright Act, no part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, photocopying, recording or otherwise, without the prior permission of the copyright owner and the publisher.

ISBN: 978-978-964-773-6

Printed in Nigeria:
Zubic Infinity Concept
#66 Oparanozie Str., Owerri
Imo State Nigeria
Tel: 08034351298
Email: themantony@yahoo.com
themantony@gmail.com

Editorial Note

It is a great pleasure for me at this time of my career to engage meaningfully as editor of this timeless publication. The Book covers Ten (10) broad areas of the law with considered legal and intellectual perspectives to the issues raised and discussed. It is a must have for anyone who must be at par with the law considering its dynamic nature. It is indeed my pleasure.

Dr. C. C. Wigwe

Editor,

Readings in Law and Contemporary Issues

Associate Professor of Law

HOD Private and Property Law

Rivers State University.

March, 2018

Chapter 19:	Right to Die In The Light Of Narayan Lavate and Iravatis' Request to Die: Lessons for Nigeria <i>Omididan, B.A.</i> <i>& Omidoyin, Taiye Joshua</i>	-	-	-	358
Chapter 20:	An Appraisal of the Concept of Delegation of Power within the Ambit of the Doctrine of Separation of Power: The Constitutionality of the Alteration of Sections 145 and 190 of the 1999 Constitution of the Federal Republic of Nigeria. <i>Abdulazeez, Hamza Okene,</i> <i>Emmanuel O. Sawyerr</i> <i>& Mohammed A. Galadima</i>	-	-	-	374
PART Eight:	Environmental Law				
Chapter 21:	Checking the Extinction of Biological Resources and Genetic Resources in the Niger Delta through International Law <i>C. T. Emejuru</i> <i>& C. A. Nwanyanwu</i>	-	-	-	385
PART Nine:	Criminal Law				
Chapter 22:	E-Crimes Legislation: A Comparative Examination of Nigeria, United Kingdom, United States, China, and South Africa <i>Perekedou James Fawel</i>	-	-	-	396
PART Ten:	Social Justice & Good Governance				
Chapter 23:	The Relationship between Sustainable Development Goals and Human Rights Standards <i>Ojiaka Chiguziri</i>	-	-	-	422

Chapter 20

An Appraisal of the Concept of Delegation of Power within the Ambit of the Doctrine of Separation of Power: The Constitutionality of the Alteration of Sections 145 and 190 of the 1999 Constitution of the Federal Republic of Nigeria.

*Abdulazeez, Hamza Okene,**

*Emmanuel O. Sawyer***

*& Mohammed A. Galadima****

Abstract

The principle of law is that one cannot give that which he does not legally possess. It is upon this threshold that modern state constitutions acknowledges and embodies the doctrine of separation of powers in the delineation of governmental powers to institutions and functionaries of government in such a manner that each circuit of governmental powers are administered by separate and distinct individuals and institutions. Thus, legislative powers which include powers to make, amend or even repeal laws, are vested on the legislative organ of government; the executive powers which include the power to execute the constitution (laws), formulate policies and maintain law and order is equally vested in the executive organ of government; while the judicial powers of government are vested in courts of law duly established or recognized by the constitution and the powers vested in these courts are exercised by judges duly appointed in that capacity. Thus, the beacon upon which these powers are delineated is to safeguard against over concentration of power in an organ to which may lead to abuse of power; hence, governmental powers are delineated in such a

*Abdulazeez, Hamza Okene, LL.B, BL, LL.M., is a Lecturer with the Department of Public Law, Faculty of Law, University of Ilorin. +2348036303166, hamzaokene@yahoo.com

**Emmanuel O. Sawyer, LL.B, BL, LL.M., is a legal Practitioner at A.S.G. Law Consultancy & Co, Abuja. +2348039294453, dutifykaiser@yahoo.com

***Mohammed A. Galadima, LL.B, BL, LL.M., is a Federal Prosecutor with the office of the DPP, Federal Ministry of Justice, Abuja. +2348039729448 dodgemoha@gmail.com

manner that accommodates checks and balances of the use of these powers by organs of government and each organ is constitutionally barred from encroaching the boundaries of another organ. The purport of the amended sections 145 and 190 of the 1999 constitution (as amended) sets the basis upon which this article examines the constitutionality or otherwise of the powers conferred on the National Assembly by the newly added subsection (2) of the above sections in line with the doctrine of separation of power.

Introduction

Modern State constitutions acknowledges and embodies the principle of separation of powers in the delineation of governmental powers to institutions and functionaries of government in such a manner the each circuit of governmental powers are administered by separate and distinct individuals and institutions. Thus, legislative powers which include powers to make, amend or to even repeal laws, are vested on the legislative organ of government and these powers are exercised by duly elected legislators; the executive powers which include the power to execute the laws, formulate policies and maintain law and order is equally vested in the executive organ of government and these powers are exercised by duly elected or appointed functionaries of the executives; while the judicial powers of are vested in courts of law duly established or recognized by the constitution and the powers vested in these courts are exercised by judges duly appointed in that capacity.

The beacon upon which these powers are delineated is to safeguard against over concentration of power in an organ to which may lead to abuse of power, hence, governmental powers are delineated in such a manner that accommodates checks and balances of the use of these powers to which an organ is constitutionally barred from encroaching the boundaries of another organ.¹ The purport of the amended sections 145 and 190 of the 1999 constitution (as amended) sets the basis upon which this article set examines the

¹M. A. Etudaiye, M. E. Etudaiye and H. D. Abdulazees, 'An Assessment of Judicial Independence, Responsibility and Integrity in Nigeria', *Judicial independence in Africa* (Wiley, Simmonds & Hill Publishing) 41-43, *Governor of Kaduna State v Kaduna State House of Assembly* (1982) 3 NCLR, 635.

legality or otherwise of the powers conferred on the National Assembly by the newly added subsection (2) of the above sections.

What is delegation Power?

According to Malemi,² delegation of power is the conferment of power by one person or body on another to act for him. Delegation of power is the giving of authority by one administrative authority, in which such authority is vested to another administrative or agency, to do what the person giving the power can do.³ Delegation of power may also be understood to imply the granting of authority to an individual or institution to do certain things which the donor of such power is not legally incapacitated to do. The fulcrum upon which delegated power stands is *nemo dat quod non habet*.⁴

Who is a delegate?

A delegate is a person who is appointed, authorized, empowered or commissioned to act instead of another person, usually the person giving him authority to so act. A delegate is a person who is appointed by another to act on his behalf.⁵

From the foregoing, it is quite clear that for a donor of power to validly donate power to another, he the donor must not be legally incapacitated from carrying out such act or duty he has delegated to another. In essence, the scope of the act or duties which a delegate is legally capable of doing is that which his appointor is constitutionally or legally saddled with.

Powers of the Federal Republic of Nigeria

The Constitution under chapter 1 part II, has described the powers of the Federal Republic of Nigeria to include legislative, executive and judicial powers. These powers will be considered in the manner below.

Legislative powers:

²The Nigerian Constitutional Law 3rd Edition, (Princeton Publishing Company) 218.

³Ibid.

⁴Baki Agboto & Hassan Sule & Ors. (1996) 7 NWLR (Pt 451) 479; Kan & Gbure (1997) 2 NWLR (Pt 258) 400.

⁵Malemi, op. cit. 218.

The constitution under section 4⁶ provides for the legislative powers of the Federal Republic of Nigeria. The section provide thus:

Section 4 (1)

The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation, which shall consist of a Senate and a House of Representatives.

Section 4 (6)

The legislative powers of a State of the Federation shall be vested in the House of Assembly of the State.

The basic constitutional function of the legislative organ is to make laws for the peace, order and good governance of the Federation or of a State as the case may be.⁷ This enormous power of law making includes the powers to alter the content of the Constitution.⁸

The Constitution under chapter V⁹ outlines the legislative powers, function, duties and scope of exercise of legislative powers and the manner in which these powers may be exercise and matters which this powers covers.

Executive powers:

The constitution under section 5¹⁰ further provided for the executive powers of the Federal Republic of Nigeria thus:

Section 5 (1)

Subject to the provision of this Constitution, the executive powers of the Federation:

(a) Shall be vested in the President and may subject as aforesaid and to the provision of any Law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the Public service of the Federation

Section 5 (2)

⁶ 1999 Constitution of the Federal Republic of Nigeria, Cap C23, Laws of the Federation of Nigeria, 2011 (as amended) hereinafter referred to as the Constitution.

⁷ Section 4 sub section (2) and (7) of the Constitution

⁸ Section 3 (b)(i).

⁹ Sections 47 to 129 (b)(i).

¹⁰ *ibid*.

Subject to the provision of this Constitution, the executive powers of a State:

(a) Shall be vested in the Governor of a State and may, subject as aforesaid and to the provisions of any Law made by a House of Assembly, be exercised by him either directly or through the Deputy Governor and Commissioners of the Government of that State or officers in the public service of the State

The functions of the executive organ as delineated by the supreme law, extends to the execution and maintenance of the Constitution and all laws made by the National Assembly in the case of the President and all laws made by a State House of Assembly in the case of a Governor of a State. These powers also extend to formulation and execution of policies. The scope, limit and extent of the powers and as well as the exercise of executive powers are duly provided for Chapter VI¹³ of the Constitution.

Judicial powers:

The Constitution under section 6 provided for the judicial powers of the Federal Republic of Nigeria, the section provide thus:

Section (6)

(1) The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.

(2) The judicial powers of a State shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution, for a State.

(4) Nothing in the forgoing provisions of this section shall be construed as precluding:-

(a) The National Assembly or any House of Assembly from establishing courts, other than those to which this section relates, with subordinate jurisdiction to that of a High Court;

The functions of the judicial organ as prescribed by the Constitution include all inherent powers and sanctions of a court of law, which extends to all matter between person, or between

¹³Section 130 to 212 of the Constitution.

government or authority and to any person in Nigeria, for the determination of their civil rights and obligation.¹² The composition, jurisdiction and scope and of the powers courts are duly provided for under Chapter VII¹³ of the Constitution.

The foregoing powers of the Federal Republic of Nigeria as delineated above, forms the bedrock of separation of power as recognised by the Constitution.

Furthermore, the basis for the functions reposed on individual organ of government sets the foundation for independent exercise of power by the individual organs without usurping¹⁴ the power of another organ. Thus, the duties of one organ cannot be the functional subject of another organ except to the extent of checkmating the unconstitutional use of such governmental powers. That is, the legislative organ may not assume the functions or even exercise any powers conferred on the executive or the judiciary, vis-à-vis the executive and the judiciary.

The Politics that led to the amendment of sections 145 and 190

The 2007 general election produced the late President Musa Yar'Adua as the President of the Federal Republic of Nigeria, wherein his candidacy was questioned by many Nigerians within the politically advantaged class as per his health status, whom latter passed on in 2010 with a lot of controversies prior to and after his death as to who takes charge of the nation's affairs.

These issue which generated a lot of controversies¹⁵ especially when the President was on his sick bed outside the country and without complying with the provisions of section 145.¹⁶ The National Assembly in trying to remedy the national mess went ahead through "Doctrine of Necessity" to swear in the then Vice-President in person of Goodluck E. Jonathan as the acting president and was latter sworn in as the President upon the death of Mr. Yar'Adua.

¹² Section 6 (a) and (b).

¹³ Section 230 to 294 of the Constitution.

¹⁴ *Ayogu-Amarie v Federal Electoral Commission* (1985) 6 NCLR 638 HC.

¹⁵ <http://dailypost.ng/2011/12/13/new-president-jonathan-became-acting-president-in-2010-yar%20adua-advised/> accessed 18 January, 2018.

¹⁶ The 1999 Constitution.

The National Assembly in a bid to remedy future occurrence of such situation, amended sections 145 and 190 of the 1999 Constitution, by adding a subsection (2) to the sections. The subsection provides thus;

Section 145

(2) In the event that the President is unable or fails to transmit the written declaration mention in subsection (1) of this section within 21 days, the National Assembly shall, by a resolution made by a simple majority of the vote of each House of the National Assembly, mandate the Vice-President to perform the functions of the office of the President as Acting President until the President transmits a letter to the President of the Senate and Speaker of the House of Representatives that he is now available to resume his functions as President.

Section 190

(2) In the event that the Governor is unable or fails to transmit the written declaration mention in subsection (1) of this section within 21 days, the House of Assembly shall, by a resolution made by a simple majority of the vote of the House, mandate the Deputy Governor to perform the functions of the office of the Governor as Acting Governor until the Governor transmits a letter to the Speaker of the House that he is now available to resume his functions as Governor.

The question that begs for a constitutionally minded answer, is whether in line with the concept of delegation of power under the doctrine of separation of power, the function of the legislature as captured by the above subsection does not in itself amount to an encroachment of the functions and powers of the executives and by implication renders such an act invalid an unconstitutional, as the law should not command an invalid act?

They key constitutional issues posed by the above additional subsection are:

That upon the failure or inability of the President or a Governor of a State to transmit to the legislative organ, the legislature the steps into the shoes of the executives under the disguise of the constitution to perform the functions duly delineated for the executive under chapter VI of the constitution.

Furthermore, the 21 days automation as captured above is not quite exhaustive as to ascertain the determinant factors or indicators to countenance with in such situation. Also, in the event that the legislatures are unable to hold plenaries or unable to get the simple majority votes, what then is the way forward?

Constitutionality or otherwise of sections 145 (2) and 190 (2) of the 1999 Constitution (as amended)

The Constitution is the supreme law¹⁷ and the source of all governmental powers and authority,¹⁸ and it is the mandate of the constitution that each organ of government has its unique power and function¹⁹ distinct from another. Thus, the powers granted under section 9 of the Constitution to the legislative arm to alter any section of the constitution can only be validly exercised if tailored along the structure and intent of the constitution. Thus, for the National Assembly to usurp and assume the function and powers of the executive organ vide the foregoing additional subsections is unconstitutional and by all intent and purposes defeats the constitutionally recognized and entrenched doctrine of separation of power.

Thus, before the National Assembly can validly allot themselves such powers, they must firstly have no legal impediment to delegation²⁰ and exercise of the powers (the function of the President or that of a Governor of a State) they seek to delegate by themselves. Thus, the legislature may to the extent of their legislative powers and function delegate such legislative powers and function to the extent permitted by the constitution. Thus, the legislature cannot delegate their legislative function of law making, creation of a new state or impeachment to any individual functionary or institution of government, not even to a group of legislators.²¹

¹⁷Section 1 (1) of the Constitution.

¹⁸Section 14 (2) (a) *Id.* see the case of *Grain Motors Ltd v Wema Bank Ltd* (1983) 40 NLR 272, 337 SC.

¹⁹Sections 4, 5, and 6, *Id.*

²⁰*NAF v James* (2002) 38 NWLR (Pt. 796) 42.

²¹*AG Bendel State v AG Federation* (1981) 48 NLR 85; *Oyejokun v State* (2000) 12 NWLR (Pt. 681) 256.

For example the Constitution vested the judicial organ with the powers to make subsidiary legislation²² which are subject to the overruling legislative powers of the legislators. Also, the legislative organ may make that vested by the constitution delegate their powers to individual functionaries or institution of government to make subsidiary legislation in order to administer a given Law.²³ Thus, the delegation of powers by the legislature to the judicial or executive organ of government or its functionaries in the quest to administer a given legislation is valid, because the donor of such power is not legally impeded from performing such functions. However, the content of and the purported powers seek to be conferred on the Vice-President or a Deputy Governor of a State by the Legislative organ, is one which neither the National Assembly nor a State House of Assembly can validly exercise. Thus, they are by law impeded from giving that which they do not legally possess.²⁴

Secondly, who has the appropriate power to delegate such authority, is this situation, the authority to delegate executive powers. Thus, it is only the constitution or the executive functionary in question and in line with the constitution that can validly delegate such powers. This was the position of the constitution prior to the first alteration of the Constitution in the year 2010. However, and as rightly acknowledged in the discussion above, this function which is constitutionally saddled on the President and Governor of a State, was abused during the late President Yar'Adua's regime which called for the amendment of the constitutional provision in question, but was dully amended to reflect the quest for more powers on the part of the legislature by encroaching on the powers and functions of the executive organ as against entrenching the true spirit of the constitution and the doctrine of separation of power.

Effect of the amended sections 145 (2) and 190 (2), on the Doctrine of Separation of Power

The effect of the above additional subsections is that loyal legislators in the quest to showcase their loyalty to the executive

²²Sections 236, 248, 254 (f) (3), 258, 278, and 164, *ibid*.

²³Section 10 of the Coastal and Inland Shipping (Cabotage) 2003, Cap 116, (FN 2003).

²⁴*Bali Agbasa v Hunton Soy & Ovi* [1996] 7 NWLR (FSC1) 479; *Kari v Governor* [1997] 2 NWLR (Pt 408) 400.

organ may frustrate the process and render the purpose to which the subsection would be added into a mere gesture that requires validation and thereby undermining the constitution and the doctrine of separation of powers.

It also contends that the legislative organ by the powers vested in them under section 8 of the Constitution, can assume any function or powers of any other organ without recourse to the modified Constitutional functions and powers of individual organ of government as enshrined in the Constitution itself. This attitude have long being condemned by the judiciary in many instances where the legislature seeks to assume executive functions or almost executive powers.²⁹

Conclusion and Recommendations

In conclusion, the doctrine of separation of power is authoritatively enshrined in the constitution in to the extent that the powers vested in a given organ may validly be delegated to a functionary of that organ of government directly by the constitution without creating a need for any further validation by another organ of government as the constitution is the source of powers and authority which no questioning as to its validity may arise. Thus, it is duly recommended that the impending subsections be amended in such a manner that the Vice-President or a Deputy Governor of a State may assume the function of Acting President or Acting Governor respectively, without recourse to the legislative arm when the President or a Governor of a State is unable to discharge his duty and fails or unable to transmit same to the legislative organ without any hindrance of validation from another organ of government.

Furthermore, the 21 days automatic should be more descriptive as to ascertaining the situations that may warrant the Vice-President or a Deputy Governor of a State to be eligible to act on behalf of his principal.

Furthermore, the legislature may even move further to set forth the consequences of such failure on the part of the President or a State Governor to move for an impeachment or pass a vote of no confidence on them.

²⁹ *Minister of Justice v. Attorney-General* (1982) 1 NCLR 44-45, 46 (Kenya CA) (hereinafter *Japev*).