



# A Case for Clear and Standardized Statement of Power in Legislation Creating a Statutory Body in the Nigerian Legal System

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**ABSTRACT:** *When a legislation creates a statutory body, it sets out the functions to be performed by the body so created. Instances exist when the power to carry out the functions is conferred in express terms on the body that is created. The problem is that instances exist of such bodies being created without power being conferred in express terms for such bodies to perform their statutory functions. Invariably, this represents inconsistency in legislative drafting. Bringing this inconsistency to the limelight, making a case for its reversal by way of consistent inclusion in express terms of the power in question when a statutory function is created constitutes the mission of this work. Data for the exercise were appropriated from doctrinal and non-doctrinal sources. It was found that the interpretation by the Constitution of the Federal Republic of Nigeria 1999 as amended, of the function as including power appears to result in the legislative draftsman assuming that a clear statement of the power enables a statutory body to perform its statutory functions is not necessary. It was recommended among other measures that legislative draftsmen should make a clear statement of the power for a statutory body to perform its statutory functions, a feature of every legislation which creates a statutory body with functions to perform.*

**KEYWORDS:** *Case, Clear Standardized, Statement, Power, Legislation, Creating, Statutory, Body, Nigeria, Legal, System.*

## INTRODUCTION

A statutory body is an entity created by statute for the performance of designated functions. Usually, the said functions are public in nature. Being public functions, it is perceptibly necessary to confer power in express terms on the given statutory body to perform them. Anyone who has an eye on this matter does not need much endeavor to find that legislative drafting thereon in Nigeria is characterized by inconsistency. Driven by this phenomenon, this work sets out to probe into the attitude of the legislative draftsmen in Nigeria towards function-power relation in the Nigerian Legal System. The Constitution of the Federal Republic of Nigeria, 1999 as amended (the 1999 Constitution, as amended), statutes judicial decisions, and opinions of learned authors form the sources of data for the work. This mission is accomplished by consideration of the Idea and Nature of Function, the Idea and Nature of

Power, Interplay of Function and Power, Conferment of Power in Express Terms, Absence of any Statement of Power, followed by Conclusion.

### **IDEA AND NATURE OF FUNCTION**

Function is defined to include duty<sup>1</sup>. Duty, in turn, is defined as “A Legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has the corresponding right.”<sup>2</sup> Obligation is “A legal or moral duty to do or not to do something”.<sup>3</sup> By these, the idea of function is rooted in the phenomenon of ‘to do’, i.e. ‘to serve’, or ‘to provide’. Function may, as such, be said to be a contemplation of activity designed by its creator for execution by an agent set aside for the purpose. The agent is shorn of liberty or discretion in terms of the designated activity being undertaken. It is innate to the idea of function that a beneficiary therefrom exists. It is this beneficiary who has the right mentioned in the definition of obligation. From this, it is deduced that a function is like a tool. A tool for the realization of a goal or purpose intended by its creator. When it comes to a statutory body, this tool is what the lawmaker leverages upon, through the intermediary of an agency created for that purpose, to attain set goal(s). Prescribed function is the tool. The result yielded by the performance of the function is the goal.

### **IDEA AND NATURE OF POWER**

Power is interpreted by section 318(1) of the 1999 Constitution, as amended to include function and duty. In-like-manner, it interprets function to include power and duty. Be it observed at this point that the Constitution in question is concerned predominantly with power and functions designated for exercise and performance by public officers. A finding by this work is that instances are prevalent in the said Constitution when power and function are treated in a manner which is invariably inconsistent with its interpretation of the terms. Such instances are featured in the later part of this work. It is the view held here that the simplistic interpretative approach exhibited by the draftsman of the said Constitution in respect of the two terms in focus appear to show a desire or tendency for economy of words. Fewness of the items interpreted by section 318 (1) of the 1999 Constitution, as amended, tend to support this view. Power is defined from a number of perspectives which include its ... being the ability to act or not act ..., the legal right or authorization to act or not to act” ...<sup>4</sup>

Dias expressed a similar view when he wrote that “Power has two connotations. One is physical force, but this, however great, is inert in itself. It can be dangerous only when exercised and juridically its exercise is a matter of liberty to do so or not ... Power has the other connotation of legal capacity to alter jural relations ...<sup>5</sup>

Adaramola’s position is not different. In his words,

Power connotes capacity or authority ...

The person entitled to power may say, I can alter my own or another’s legal position in some way.

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<sup>1</sup> Garner, BA., (ed) Black’s Law Dictionary, (7<sup>th</sup>edn) West Group, 1999) p. 681

<sup>2</sup> *ibid.*, p.521

<sup>3</sup> *ibid.*, p.102

<sup>4</sup> *ibid.* p.1189

<sup>5</sup> Dias R.M.W, Jurisprudence, (5<sup>th</sup> end): Butterworth, 1985) p. 87

Thus, Power denotes the ability of the person entitled to alter existing legal position for better or for worse.<sup>6</sup>

These definitions, in the opinion of this work, contemplate power in its various categories, including those of the constitutional and statutory sources. It is with powers from these sources that this work is concerned.

In human thought and speech, whenever there is 'a to do', there is 'a doer'. The 'doer' is not in any way synonymous with the 'to do'. Implied in this is its being the case that 'function' which is a 'to do' or 'to be done' is not inclusive of or synonymous with 'power' which confers ability, right or authority, each of which attaches to the one who is 'to do' the act. Power may be public or private. In its private sense it connotes that which "... is vested in a person to be exercised for personal ends not as an agent of the state ..."<sup>7</sup>In its public sense, it connotes that which is "... vested in a person as an agent or instrument of the functions of the state."<sup>8</sup> Ability is the noun in the first perspective of Garner's definition of power. In the second perspective, 'right' and 'authorization are the nouns. In effect, power is a noun. It attaches with or to the 'doer'.

### INTERPLAY OF FUNCTION AND POWER

Any legislation which creates function without correspondingly creating or conferring power in express terms for the execution of same may be taken to have assumed that the two terms are synonymous. In the Nigerian legal system, the interpretation by the 1999 Constitution, as amended, of power to include function and vice-versa may be relied upon as an authority for such assumption. This may be supposedly justifiable in a legal system where the constitution is supreme. Arising from this, however, is the issue as to whether section 318(1) of the 1999 Constitution as amended, (which is the interpretation section of the said Constitution) interpreted exclusively for the said Constitution or does its interpretation extend to and have binding effect on every statute enacted in the Nigerian legal system.

The opening statement of the subsection in question stipulates that "In this Constitution unless it is otherwise expressly provided, or the context otherwise requires." For the present purpose, the focus is "In this Constitution". It is the view in this work that the said phrase is clear and harbors no ambiguity. It should be given its ordinary meaning. In effect the interpretations which featured in the whole subsection are of words which occurred in the said Constitution. In other words, there is nothing in the opening and, indeed, governing or operative statement of the subsection to suggest that the interpretations in the subsection have binding effect beyond the 1999 Constitution, as amended.

Inferred from the above is that whenever the circumstances so demand, a legislation is at liberty to interpret an item in terms other than those used by the 1999 Constitution, as amended. This stance, it is submitted, raises no question of inconsistency with the provision of the said Constitution. Logical analysis shows that power and functions are capable of independent existence, each from other. Statutorily, neither function nor power is interpreted by the Nigerian Interpretation Act.<sup>9</sup> However; the provisions of its section 10 (1) represent its being the case that function and power are different items, having the characters of

<sup>6</sup> Adaramola, F., Basic Jurisprudence (3rd end): Raymond Kunz Communications, 2004) p.165

<sup>7</sup> *ibid*, p. 1190

<sup>8</sup> *ibid*.

<sup>9</sup> Cap, I 23 laws of the Federation of Nigeria 2004. As updated up to 31st December, 2010

complementariness in relation to each other. In the words of the said section 10(1) "Where an enactment confers a power or imposes a duty the power may be exercised and the duty shall be performed from time to time as the occasion requires."

Power, in this provision is in, consonance with the ambit of the definition of power, which present power as the ability, to act or not to act....<sup>10</sup> it accords with the position which holds that power implies a measure of discretion. The holder of the authority is authorized or permitted to exercise it, but need not to do so to.<sup>11</sup> Definitely power, in this sense is a reference to that which top officials of government mostly Ministers, are conferred with which is predominantly administrative in nature. It differs from that which is conferred on extra ministerial bodies, which is usually in the nature of service(s).

Usually an extra-ministerial body, which is frequently referred to as an agency, is a creature of statute. A statute which creates such a body designates functions for the body to perform. A statutory body or an agency designates its officials who are individuals to perform the public functions. Since the public functions are not personal or private to the individuals who performs them, the only ground on which the agency can deploy them to perform the functions is that the statutory body has the power to do so. In practice, it is the legislation which created the function that confers the power to perform. This is where the presentation of power as right or authority or ability finds significance. It is common knowledge that the question as to whether an individual who engages in the performance of public function has the power to so perform is a frequently asked question.

Power serves as a yardstick or measuring instrument or tool for the determination of the validity or sustainability of the function performed by a statutory agency in the discharge of its function(s). It is the indispensable force, which empowers a statutory agency to give effect to the function for which the agency is created. It is thus an enabler; it may be denoted as a garb which must be won as a symbol of legitimacy in the cause of performance of a prescribed public function.

### **CONFERMENT OF POWER IN EXPRESS TERMS**

In a statement, which spelt out one of the roles of power in statutory functions, it was written that "A clear statement of the power and how it will be exercised will assist those exercising the power, those subject to it, and those who may be responsible for settling any dispute over the exercise of it."<sup>12</sup> Certainty as to the scope of the power, which is exercisable in the performance of any given function is in itself a function of a clear statement of power. Functioning within the power is a consequence of certainty as to the scope of the power. Functioning within the power, in turn, results in safety from liability. It is common knowledge that one of the risks which are frequently associated with performance of statutory function is that of acting beyond the power. A clear statement of the power is decisive a step towards avoidance of the risks posed by the danger of functioning beyond the power.

In the case of *Alhaji Chief A.R.O. Sanusi v. Alhaji Ibrahim Ayoola and others*,<sup>13</sup> the Supreme Court of Nigeria held that:

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<sup>10</sup> Garner, B.A., op. Cit., p. 218.

<sup>11</sup> Thornton G C, *Legislative Drafting*, (4<sup>th</sup> edn.) Butterworth, p 218.

<sup>12</sup> Guidelines, *Creating New Statutory Power*, New Zealand, Legislation Design and Advisory Committee, <http://www.iat.org.org.nz> Accessed 15/6/2024.

<sup>13</sup> *Alhaji Chief A.R.O. Sanusi v. Alhaji Ibrahim Ayoola and Other* (1992) LPELR-3009 (SC)

It is well settled principle of our jurisprudence and an important requirement of our administration of justice that where the exercise of power is statutory, such power can only be exercised within the limits prescribed by the statute.

A clear statement of the power is known to assist those who are affected by the exercise of power in the sense that the statutory function to which the power relates is prescribed for their benefit. As beneficiaries, the tendency for inquisitiveness as to whether or not the functionary functions within the power conferred would probably manifest. Of course, awareness by the functionary of these tendencies is a factor for efficiency, effectiveness and value addition.

A clear statement of the power is inevitably a dominant factor in the dispensation of justice in disputes arising from the performance of any statutory function. It serves as the determining factor in cases where *ultra vires* is alleged. Whether or not the power to perform the function exists is a question determinable by a clear statement of the power.

A clear statement of the power insulates the public functionary from personal liability over the functions performed. In the case of *Nigerian Engineering Works Limited, V. DENAP NIG. Limited*<sup>14</sup>. Sometime in 1981, the Rivers State Government granted a statutory right of occupancy to the 1<sup>st</sup> respondent over a parcel of land known as plot 51B trans Amadi Industrial Layout, Port-Harcourt. The 1<sup>st</sup> respondent company was subsequently issued with a certificate of occupancy dated 26<sup>th</sup> March, 1982 and registered as No. 61 also by the Rivers State Government over a piece of land including the 1<sup>st</sup> respondent's plot situate at 51B, Trans Amadi Industrial Layout. Consequently, the 1<sup>st</sup> respondent sued the appellant at the High Court, Port-Harcourt claiming, among others, damages for trespass and perpetual injunction. This was in suit No. PHC/121/86. The 1<sup>st</sup> respondent later discovered that the Rivers State Government had purportedly revoked the certificate of occupancy for the plot. This was done without any notice to the 1<sup>st</sup> respondent which then sued the Attorney-General of Rivers State as the sole defendant claiming declaration that the purported revocation was invalid, null and void and that the certificate of occupancy issued to the appellant was a nullity and of no effect. The two actions were consolidated. At the end of trial, the trial court found for the 1<sup>st</sup> respondent and nullified the purported revocation. The court also granted a perpetual injunction against the appellant and the 2<sup>nd</sup> respondent and awarded damages in the sum of #10,000.00 (Ten thousand naira) in favour of the 1<sup>st</sup> respondent. The appellant appealed unsuccessfully to the Court of Appeal. Not satisfied, it further appealed to the Supreme Court.

One of the issues that arose for determination was:

Having regard to the foregoing, that is,  
the non-joinder of proper and indeed necessary parties ..., could it be said,  
regard being had to section 5(2) of the land use Act, that the revocation of the 1<sup>st</sup>  
defendant's title was illegal, null and void and the title in appellant's name invalid?

The Supreme Court considered this issue, anchoring its decision thereon on vital principles of law as reflected in its holding that:

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<sup>14</sup> (2001) 18 NWLR (Pt. 746) 726

The governor is no doubt the chief Executive of the state and all powers exercisable by him under any law for and on behalf of the people are necessarily by virtue of his office and are as such, public acts.

Along the same line, the Supreme Court articulated the principle that:

When a statute confers a power to (sic) the holder of an office it is a public power; and then unless the contrary intention appears from or in the statute, the power may be exercised only *virtute officii* (i.e. by the holder of the office or by his successor-in-office or the holder of the office for the time being).

In a pronouncement which disposed categorically and unambiguously with the issue at hand, the court said:

I entirely agree with the learned counsel for the respondent when he said in his brief at pages 29-30 that:

The act of revocation can quite legitimately be regarded as an act of the State just as the act of the Military Governor can also be considered as act of the state being the Chief Executive of the State. The non-inclusion of the military Governor in any proceedings to challenge the validity of such an act cannot therefore render such proceedings null and void or make the courts incompetent to completely adjudicate on the matters in question, particularly if the attorney-General was made a party in such proceedings.

In effect, the military Governor was held not to be liable for damages over the public function he performed in pursuance of statutory power. The foregoing is a function of a clear statement of the power. Every pronouncement of the court in the case was based on the clarity of a tripod of a public function, public functionary and the public functionary's power to perform the public function. The efficiency displayed by the court in the present case, as shown above, is in itself a clarion manifestation of the efficacy of clear statement of the power. Indeed, there is in the pronouncement' betrayal of innate conviction by the court that clear statement of the power is a factor when it comes to the administration of justice in connection with public function by statutory bodies and/or functionaries.

Clear statements of the power in the written law in Nigeria are seen in Parts I and II of the Third schedule to the 1999 Constitution, as amended. The two Parts are concerned with Federal and States Executive Bodies, which are created by sections 153 and 197 respectively of the 1999 Constitution, as amended. For each of the Executive bodies, functions are created. To enable each of them to carry out its functions, provision is made in express terms stating that the body in question "shall have power" to perform the said functions.

One of the Federal Executive bodies which are created by section 153 of the 1999 Constitutions, as amended, is the Independent National Electoral Commission. Its functions as set out by Part I of the Third Schedule to the same. Constitution include those in item 15 (a) thereof. It states that:

The commission shall have power to:

Organize, undertake and supervise all elections to the offices of the president and vice-president, the governor and Deputy Governor of a state, and to the membership of the Senate, House of Representatives and the House of Assembly of each State of the Federation.



In this case, the Agency to carry out the functions is clearly designated; the functions to be carried out are specified with clarity; the power to perform the functions is conferred in express terms, in consequences of which those to be affected by the power when same is exercised will be able to acknowledge or recognize the legitimacy of the exercise and an adjudicator can determine the question as to the *vires*. It is here that the virtue of clear statement of the power lies. From the pattern shown above, it is manifest that the interpretation by the 1999 Constitution, as amended, of function as including power, and *vice versa* was not adhered to. The matter speaks for itself that in the pattern just considered, power is presented as distinct or different from function.

Section 9(1), of the Nigeria Police Act 2020 presents a statement of power in the following words, “the power and the functions of the Inspector General of Police include ...”. A host of functions are listed as those to which the powers relate. Like that of the 1999 Constitution as amended, the statement of the power in the Nigerian Police Act, 2020 is a clear one.

Another pattern of statements of power is found in section 2 of the Electoral Act 2022. In its opening statement the section provides that “In addition to the functions conferred on it by the Constitution, the Commission shall have power to”, then followed the functions. Section 152 of the same legislation interprets Constitution to mean ... Constitution of the Federal Republic of Nigeria. 1999.<sup>15</sup> It is assumed that in drafting the provision in focus, the draftsman was aware of the clear statement of the power associated with the constitutional function to which reference was made. That very pattern is what is seen to have been replicated in the opening statement of section 2 of Electoral Act 2022. In doing so, however, a vital omission was occasioned, namely, omission of the statement of the power accompanying the constitutional function to which reference was made.

Another pattern of the statement of the power in relation to statutorily articulated functions is found in the Economic and Financial Crimes Commission (Established) Act 2002. It is a pattern in which section 6(1) of the statute provides that ‘The commission has power to ...’ it then proceeded to set out acts to be carried out, which in the opinion of this work, appear to be functions. To attribute clarity to this pattern would be a misstatement.

What is found in section 10 of the Petroleum Industry Act 2021 represent yet another pattern of the statement of power. In that section, power of the Nigerian Upstream Petroleum Regulatory Commission (the Commission), to carry out specified activities differ from the activities which are set out in its sections 7,8, and 9 of the said legislation. Identical pattern is noticed in section 49 of the same statute which provides for what is referred to as special powers of the Authority. Authority here is a reference to Nigerian Midstream and Downstream Petroleum Regulatory Authority which is created by section 29 of the said statute. The special powers in question differ from the authority’s functions as set out by section 32 of the same legislation. It seems beyond doubt that the two preceding instances leave the actual functions of the two statutory bodies mentioned in connection therewith without actual powers enabling their performance. Consequently, the two respective bodies are left vulnerable to attack on the ground of *vires* in the performance of their functions.

In the words of the opening statement of the said section 10 of the Petroleum Industry Act 2021, “The commission shall have power to ...”, then followed a host of activities running

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<sup>15</sup> Without adding ‘as amended’. This happened in 2022

from paragraphs (a)–(k).<sup>16</sup> From the standpoint of this work, what is significant here is that the activities specified in the paragraphs differ materially from the items referred expressly to as functions by section 7, 8, and 9 of the same statute. In the words of the opening statement of the said section 7, “The technical regulatory functions of the commission include to ...”. Several items designated as paragraphs (a)–(k) followed.

Same legislation has in its section 8 an opening statement in the following words – “The commercial regulatory functions of the Commission shall be to ...”. Thereafter followed a number of items referred expressly to as functions, running from paragraphs (a)–(d). Identical pattern is found in section 9(1), yet, of the same legislation wherein it is provided that ... “The functions of the Commission with respect to Frontier Basins shall be to ...”. Again, a number of items referred expressly to as functions in paragraphs (a)–(d) thereof followed. Represented by the provisions of sections 7, 8 and 9(1) of the Petroleum Industry Act 2021, as they are, is its being the case that the functions therein are created without power being conferred for their performance. Realistically, section 10 of the legislation in view features a statement of the power. The power so conferred, however, is specifically in respect of the activities which are clearly set out in the said section. It does not relate to functions which are set out in section 7, 8 and 9(1) respectively of the same legislation.

In relation to sections 32 and 49(1) of the Petroleum Industry Act 2021, the former’s opening statement states that “The functions of the Authority shall be to ...”. What follows is a host of items numbering from (a)–(uu).<sup>17</sup> The functions are not associated with the power to carry them out. However, the latter (section 49(1)) has the following opening statement ...”. The Authority shall have special powers to ...”. Thereafter, a host of activities numbering from (a)–(j) <sup>18</sup> and which differ from the functions prescribed by section 32 of the same statute are set out. From the wordings of the subsection’s opening statement, the activities so set out are to be carried out under or with special powers. It is submitted that the special powers conferred in the context under consideration do not, and cannot be said to relate or extend to functions as set out in section 32 of the same legislation. In consequence, the functions set out in the said section 32 are bare, being bereft of the powers to undertake them. It is immaterial that the special power in section 49(1) is required to be exercised by the Authority in carrying out its function under this Act”.

### **ABSENCE OF ANY STATEMENT OF POWER**

As against the above patterns of statement of power, there are statutes that created functions without the express statement of the power to carry them out. Two instances of such legislation come readily to mind. The National Oil Spill Detection and Response Agency (Establishment) Act 2006, (the NOSDRA Act 2006, as amended), is one of them. The Nigerian Minerals and Mining Act 2007 (the NMM Act 2007) is the other. The NOSDRA Act 2006, as amended, created the functions of the National Oil Spill Detection and Response Agency (the NOSDR Agency) in its section 6(1) and 7. In each of the sections, the corresponding opening statement which is that “The Agency shall ...” is made. Following these statements, a host of functions are set out in each of the two sections. Statement of the power to carry out the functions did not feature in any of the sections.

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<sup>16</sup> So numerous that it is not convenient to reproduce them here

<sup>17</sup> So numerous that it is not convenient to reproduce them here

<sup>18</sup> So numerous that it is not convenient to reproduce them here



No authority to the effect that a statement of the power to carry out statutory function(s) by a statutory body is implyable was found by this work. And this work finds no basis for such impliability.

## CONCLUSION

Considerable light has been shed on the matter of a clear statement of the power enabling statutory bodies to perform statutory functions in the Nigerian legal system. This is done amidst the prevailing situation in which instances exist of a default of a clear statement of the power and/or a deficiency of such a statement. The said default and/or deficiency is seen as attributable to the absence of a standardized method of the statement in question. The need for the establishment of such a standard and the sensitization of legislative draftspersons on the standard is strongly felt. It is, in consequence, recommended that a standard statement of the power be established in the Nigerian legal system. Along the same line, intense sensitization of legislative draftspersons on the matter should be carried out. A standard statement of power is adequate if it states that the body “shall have power to”. The Functions are then specified. Of course, Parts 1 and 2 of the Third Schedule to the 1999 constitution, as amended, followed this pattern. It is also recommended that the interpretation of the function of power, and duty in the same Constitution be amended such that the line of division among the terms be made manifest.



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