

ASSIGNING DUTIES OR FUNCTIONS TO MINISTERS BY BEN NWABUEZE

At last, after a long lapse of five months, President Muhammadu Buhari has now, to the relief of Nigerians, appointed ministers, 36 in all, to help him administer the government of the country in a constitutional manner. But the assignment of duties or functions to the ministers is exciting some controversy among the public owing largely to misunderstanding of the constitutional position on the matter.

1. One minister for each state, as provided by Section 147(3) of the Constitution, does not carry the implication of 36 ministries as a constitutional requirement

There is no constitutional requirement to have 36 ministries or, in the event of the creation of more states, such larger number of ministries as there are states. The controversy that has arisen on this issue is because of the error of equating “minister”, as used in Section 147(3), with ministry, as if they are one and the same thing or as if the one necessarily imports or implies the other as a synonymous or interchangeable term.

A “minister” does not imply a ministry; he (a minister) is only an individual person holding or occupying a public office, i.e. the office of minister, whereas a “ministry” is an institution of government, established and regulated by law, and manned by a multitude of functionaries of whom a minister is just one, and whose “activities are systematised, co-ordinated, machine-like and impersonal”. A minister and a ministry are thus vastly different things, which cannot be equated one with the other. It could not have been the intention of Section 147(3) or of the makers of the constitution that there should be as many ministries as there are states, say, 50, 100 or more than that!! In terms of costs, the total personal emolument of a minister is only a small fraction of the total recurrent expenditure of a ministry, with its multitude of functionaries.

What should be the appropriate number of ministries to have is a function, not of the number of states, but of the needs of the country and its ability to afford the financial costs. The President, as the Executive, is the best judge of this, and he has told us that our economy is in such “battered” state it cannot support 36 ministries. At a time when we are all urging that the ratio of recurrent to capital budget should be kept at 60:40 per cent, it is our duty to back up his judgment that the economy cannot support 36 ministries.

2. The establishment power

- (i) Establishment of the non-political administrative machinery of government

The Constitution does not, in explicit terms, establish ministries or departments of government and offices in them nor does it expressly empower the President to establish them, but a power in the President to do so seems to arise by necessary or reasonable implication from the vesting of executive powers of the Federation in him, taking executive

powers to “extend”, in the words of Section 5(1)(b), “*to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws*”. (emphasis supplied.) A power as extensive as this cannot possibly be exercised by the President alone and unaided. Necessity dictates that he must have the aid of adequate administrative machinery manned by a multitude of staff of various categories and grades.

The existence of ministries or departments, and the offices in them, is further implied by references made in various sections of the constitution to ministries, to the assignment to a minister of responsibility for a department of government, to the permanent secretary or other chief executive in any ministry or department of government, to the ministry or department of government charged with responsibility for external affairs, to the head of a division in a ministry, and to staff of a ministry or department of government.

The establishment power assures to the President a potent source of control over the administrative machinery of the government. It enables him to determine the policy governing the entire civil service and its administration, particularly rules of conduct, terms and conditions of service, staff complements and gradings, salaries and allowances. Every staff member in the ministries and departments is bound by his directive in this respect, and it is within these directives and general orders that the civil service functions.

The executive power vested in the President embraces as a necessary incident the appointment, promotion, removal and disciplinary control of the staff in the ministries and departments, but these incidents of the power are subject to limitations of various kinds contained in the Constitution, a discussion of which is inappropriate here.

(ii) Establishment of offices of ministers, i.e. political offices

The office of minister is, unlike the thousand and one non-political offices in the ministries and departments, established expressly by the constitution, Section 147(1) of which provides that “there shall be such offices of Ministers of the Government of the Federation as may be established by the President”. The provision is, however, not as free from interpretative difficulty as might be wished. The words, “there shall be ...offices of Ministers of the Government of the Federation”, are the form of words appropriate for the establishment of an office or something else, as exemplified in the provision of Section 130 that “there shall be for the Federation a President.”

The interpretative difficulty comes from the words, “such offices of Ministers...as may be established by the President”. The effect of these words is to leave it to the President to establish, not the offices of Ministers in a generic sense which is already done by the subsection, but particular ministerial offices with specific functions or designations, e.g. minister of finance, minister of education or such other functions or designations as he may establish.

It is necessary to reiterate by way of emphasis that the establishment of the office of minister by Section 147(1) relates to the office only in a generic sense, and that no particular ministerial office, e.g. minister of information, is thereby established by name, except in the case of the Attorney-General, who is designated “the Chief Law Officer of the Federation and a Minister of the Government of the Federation”, (Section 150(1) without the words “and Minister of Justice” extra constitutionally super-added to the designation.

The provision in section 147(1) is silent on how the power it vests in the President may be exercised – whether by a formal instrument in writing or by mere word of mouth. The assignment of any part of the President’s executive powers or of any government business under sections 5(1) and 148(1), which is a form of delegation, is an act of state, and must be made by instrument in writing. In practice, a written instrument of delegation is issued by the President from time to time assigning specific responsibilities, with their scope carefully delineated, to the Vice-President, Ministers, Secretary to the Government of the Federation and other relevant officers in the public service in the form of Government Establishment Circulars under the title, Mandates of Ministries, Departments and Agencies and Responsibilities of Honourable Ministers Instrument or the Assignment of Responsibilities to Honourable Ministers, etc – see for example, Instruments of July 1999 and April 2007. The provisions of these Instruments, duly published in the Federal Government Gazette as Establishment Circulars, have the force of law and binding as such; they do not require to be proved by evidence, affidavit evidence or other kinds of evidence.

Much of the controversy generated over this issue is caused by the word “portfolio” being injected into the public discussion on the matter. The word is nowhere used in our constitution, nor is it a term of art with a definite, universally accepted meaning. In any case, it does not, under our constitution, mean or imply the administration of a ministry or department of government. This follows indisputably from Section 148(1) which provides that, “The President may, in his discretion, assign to the Vice-President or any Minister of the Government of the Federation responsibility for any business of the Government, including the administration of any department of government.” (the underlining is for purposes of emphasis). This provision makes it clear that what may be assigned to a minister is “any business” of the Government of the Federation, which may or may not include “the administration of any department of government”. Under Section 148(1), therefore, the office of minister or the appointment of any person to it does not carry with it the right to be assigned responsibility for the administration of a ministry or department of state, which is what is erroneously regarded as “portfolio”.

The discretion of the President under Section 148(1) is an unqualified one, in that it does not oblige him to assign to ministers, responsibility for any business of the government. This flows from the word “may” used in the subsection. He may choose not to assign to ministers, responsibility for any business of the government. His right or power not to do so is derived from, and is affirmed by, Section 5(1), which vests the “executive powers” of the Federation in him, and then goes on to provide that the executive powers so vested in him, i.e. the executive powers in their entirety, may be “exercised by him either directly or [BY HIM] through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation”. (emphasis supplied.) The word “BY HIM” in capital letters are interposed by me in order to bring out the meaning of the provision more clearly.

Under Section 5(1), therefore, the President is within his constitutional right to exercise the entirety of the executive powers of the Federal Government by himself directly, without assigning any part of them or any business of the government to ministers, subject to what is said below about the manner or form for exercising the powers. More explicitly, he can keep all the ministries or departments under his direct responsibility and use the ministers for general duties as ministers “without portfolio”. This accords with the letters of Section 5(1), though not with its spirit.

If he chooses to assign any part of the executive powers or any business of the government to the ministers, he is deemed, in law, to be the one exercising the functions, the ministers being simply agents to exercise in his name and by his authority, functions so assigned or delegated to them by him. As agents, the ministers' official acts, done in the regular course of business, are presumptively the President's. This encapsulates the principle of "a single executive" underlying Section 5(1) and the presidential system; the Vice-President and the ministers are not co-beneficiaries of the executive powers with the President; the powers belong to him alone, not to him, the Vice-President and ministers as joint owners or co-owners. Such is the logic of the principle of the single executive underlying the presidential system. Interestingly, if somewhat inaptly, Section 130(2) designates him (the President), not as the Executive, but as "the Chief Executive". The implications of the designation, "Chief Executive", in relation to the principle of a single executive underlying the presidential system, are examined in my book titled, *Presidentialism* (1974), 442 pages, pp. 18 – 25.

The right of the President under Section 5(1) to exercise by himself directly, the entirety of the executive powers of the Federal Government vested in him must be taken subject to the duty cast on him to appoint ministers (Section 147) and to "hold regular meetings with all of them for the purpose of (a) determining the general direction of domestic and foreign policies of the Government; (b) co-ordinating the activities of the President, the Vice-President and the Ministers...; and (c) advising the President generally in the discharge of his executive functions..." (Section 148(2)).

The distinction involved is between the vesting of power (i.e. the substance or title of power) under Section 5(1) and the manner and form for exercising the power under sections 147 and 148(2). Both are important, and attract the same sanction of nullity for any infractions of them; any violation of the power vested in the President by anyone, e.g. by the National Assembly, is unconstitutional, null and void; equally non-compliance by the President with the manner and form for exercising the power, as by failure to appoint ministers and to hold regular meeting with them for the purposes specified in section 148(2), is unconstitutional, null and void.

It is of no constitutional significance in this connection that some ministers are assigned responsibility for the administration of a ministry, department or agency of government, while others are designated ministers of special duties or ministers of state. The difference in the functions or duties assigned to ministers is no doubt important in terms of the power, prestige and influence they confer, but they do not confer on a minister in charge of the administration of a ministry, department or agency of government, a rank higher than that of other ministers. All ministers are equal in rank irrespective of the nature of the functions assigned to them.

The equal ranking of ministers flows from the fact that they are all full members of the federal executive council or cabinet, whatever it is called, with all the rights and privileges conferred by membership. We may here note in parenthesis the provision in Section 144(5) that the reference to "the executive council of the Federation" in subsection 1 of that section is "a reference to the body of ministers of the Government of the Federation, howsoever called, established by the President and charged with such responsibility for the functions of government as the President may direct."

A minister's membership of the executive council or cabinet derives inferentially from Section 144(1) above, but more directly and specifically from Section 148(2) which requires

the President to “hold regular meetings with the Vice-President and ALL the Ministers of the Government of the Federation for the purposes” therein specified. The word “ALL” in Section 148(2) has the effect or implication of making every minister a full member of the executive council or cabinet, regardless of the type of duties, functions or business of the government assigned to him, whether minister in charge of a specific ministry, department or agency, minister of special duties or just a minister of state. The distinction, drawn in some countries, between ministers of cabinet rank and those of non-cabinet rank, is unknown to our constitution.