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Publicity of Subordinate Legislation in Nigeria: An Appraisal

N.O.A. JAIYA
University of Ilorin, Nigeria

1. Introduction

The term 'subordinate legislation' has been variously described as subsidiary legislation, delegated legislation, administrative rule making *et. cetera*. In Nigeria, section 4 of the 1979 constitution vested the Federal and State legislative powers in the National Assembly and State House of Assembly respectively. An Act or act traceable to either of these bodies is regarded as a valid legislative one. During Military regime with the enactment of the constitution (suspension and modification Decree) 'the power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter what whatsoever' was vested in the Federal Military Government. This power was to be exercised by means of Decree signed by the Head of the Federal Military Government while that of the State was exercised by means of Edicts signed by the State Military Governor. In 1999 there was another Military take over that enacted the Constitution (Suspension and Modification) Amendment Decree of 1985. This decree substantially in corporate Decree No. 1 of 1984 and the major charge which was introduced was in respect of the title of the signatory of Decree. Instead of the head of the Federal Military Government, it was the President, Commander-in-Chief of the Armed Forces. The exercise of all legislative powers was vested in the Armed Forces Ruling Council which is the highest ruling Military body. This paper therefore addresses itself to the requirements for

publication of laws made by persons other than the Legislature in Nigeria.

2. Subordinate Legislation

Subordinate Legislation can be said to mean the rules or regulations made by a person, body or group of persons in accordance with the legislative power given by the Legislative to him or it as the case maybe. It can also be said to mean the exercise of legislative power by a person or body other than the Legislative power delegated by the Legislature.

The difference between the two is that in the earlier case power to legislate is a direct and specific gift to be done and is irretrievable except by an Act of the Legislature, while in the latter case the delegated power is wide and general and retrievable at will.

The Legislature delegates very extensive law-making power over matters of detail and contents itself with providing a framework of more or less permanent statutes. Subordinate legislature reduces the work load of parliament in that the burden of rules and regulations required for the smooth running of the society enormously outweigh the time, energy and other resources at the disposal of the legislature. Law-making power is therefore vested in administrative agencies such as Public Corporations local government authorities, nationalized industries and also in certain professional bodies such as Nigeria Bar Association (NBA). As JAFFE puts it 'power

should be delegated where there is agreement that a task must be performed and it cannot be performed effectively by the legislature without an expenditure of time so great as to lead to a neglect of equally important business'. Rapid technological and other advancements of modern time put into consideration, it will be appreciated that there are very many issues over which legislature lacks the expertise to competently legislate upon. Some of these items are so technical and needful of professional expertise that legislations regarding them are better left to the expertise in the relevant fields or to the specialized Government Ministries or Departments concerned. In case such as these that legislative power is a direct gift and not delegated. Such conferment augurs well for speedy, competent and efficient legislation on technical matters. Flexibility is of essence if the legislature would make laws adaptable to the over changing needs of the Society. For nothing remains the same for long. As WADE stated in his book Administrative law.

'Flexibility is of essence and it is one of the advantages of rules and regulations that can be altered more quickly and easily than (Acts of parliament).'

During periods of emergency the convenience or other-wise of convening the legislature further strengthens the rational for subordinate legislation. In recognition of this section 12(6) of Decree No. 1 of 1984 provides that

'The President and Commander-in-Chief of the Armed Forces, may subject to such conditions as he may think fit, delegate any function. Conferred on him by any law including the Constitution of the Federal Republic of Nigeria (1979) to the Federal Executive Council or to any other authority in Nigeria.

Provided that this section shall not apply to the function of signing Decrees.

The subject matter of a subordinate legislation is limited to the law-making authority of the donor as was stated in *Williams V Majekodunmi*

'It is trite law that the subordinate legislator must confine himself, within the ambit of the authority conferred on him by the legislature, but of the legislature itself overstepped the bounds of its own authority or if it did not fulfill certain conditions which were indispensable to

give effect to its legislation, then in so far as its own legislation was ineffective, then in so far as its own legislation was ineffective, the subsidiary legislation would equally be without effect.

Under the 1999 constitution, recipients of Federal Legislative Authority were limited to matters contained in the exclusive and concurrent Legislative lists while donees of the State legislative power were restricted to items on the concurrent list and residual matters. In as much as the Head of State, Commander-in-Chief of the Armed Forces has power of legislate for any part of Nigeria with respect to any matter whatsoever, it then follows as in British, it is impossible to define with a general formula the subject matter of subordinate legislation in Nigeria. Because of the nature of subordinate legislation to cover wide and important areas of life it is imperative that some amount of legislative and judicial control be exercised. Amongst the devices used by the courts in controlling the exercise of subordinate legislative power are the operation of the exhaustion doctrine whereby all the administrative remedy would have been exhausted before judicial intervention is sought. Ripeness doctrine is also use as a form of control when a court considers whether or not a case is ripe for adjudication. The doctrine of substantive and/or procedural ultra vires, exercise of the inherent power of the court, to construct statutes. No subordinates legislation will stand if its construction, the courts find it in contradistinction with the enabling statute or the constitution. There are other numerous legislative control of subordinate legislation such as the done to consult interested Parties before rule-Making, the proposed rule brought before parliament before becoming law, stipulating the approval of the Minister or other officer to be obtained before sub-delegated legislation becomes law.

KERSELL, J.E. in his book parliamentary supervision of Delegated legislation said,

'If a legislature realistically expects sub-legislation made under its authority to be effective and also controllable, it must make minimal provisions for publicity and for 'laying'

so that it may know what has been done under the powers delegated by it'.

Thus the legislature sometimes stipulates in the enabling statute or in a specific statute made applicable to all exercise of subordinate legislative power, that the proposed legislation be published for a given period of time before coming into effect.

Rule making

The rule-making procedure to be adopted in a particular case is also often dependent on the enabling act.

It is the intention of the legislature that where procedural requirements are laid down in the enabling act. They must be followed strictly depending on the provisions of the law and administrative exceed agencies. Funsho has however succeeded in identifying some four general type rule-making procedures, Investigational, consultative, additive and adversary.

Investigational rule-making procedure where the rough investigation, hearing and report through the community or the affected before the regulations are made.

Consultative rule-making procedure developed as a result of the practice of receiving opinions, advice and suggestions from interested groups before rule making.

Additive rule-making procedure consists of holding public hearings at which interested groups are permitted to appear to express their views and to make useful suggestions before the regulations are made.

Adversary rule-making procedure where the administrative bodies sit as tribunals before whom affected interests and government representative present evidence and arguments (these bodies are freed by statute from the requirements of judicial procedure, they are required to base their factual conclusions upon their findings) before regulations are made.

3. Publicity of Legislation

The practice of subordinate legislation has been criticized because of inadequate publicity both before and after the rule-making.

It has been contended that the public ought to be aware when these legislation are to be made so as to make considerable contributions should it so desire. Also it ought to know how the legislation affects them. Let us now consider the antecedent publicity or notice of rule-making publicity.

Antecedent Publicity

The requirement of antecedent publicity is satisfied when an advance notice of proposed rules are made known to the general public, or to that particular section of the public whose interests are likely to be affected for a certain period before its coming into effect. This should usually be accompanied by a provision requiring the opinions of members of the public to be considered. By S.I., the Rule Publication Act 1893 of England required forty days' notice of the proposal to make satisfactory rules and orders, and the place where the draft rules might be obtained to be published in the London Gazette. This law was repealed in England by the Statutory Instruments Act 1946 as a result of its cumbersome methods of consultation.

In Australia, the Rules Publication Act enacted in 1903 required delegated (subordinate) legislation to be published 60 days before coming into effect but was repealed in 1916. In American Section 4(c) of the Administrative Procedure Act 1946 requires notice of proposed rules to be published in the Federal Register 30 days prior to the effective date that the affected persons might have opportunity of participation.

The statutory instrument act failed to reenact the 40 days notice of publicity of an impending instrument. In that country such publicity depends on the provisions of the enabling statute. The question then becomes one of determining whether the Act of 1893 does apply in Nigeria as a statute of general application in force in England before January, 1900.

To determine what does the constitute statute of general application, will have to applying the principle laid down by Osborne, C.J. in the case of *Attorney General V John Holt and Co* where he lamented the lack of attempt at defining the

expression statute of general application' and noted that each case has to be decided on the merits of the particular statute sought to be enforced. The learned Chief Judge went further to say:

'If on January 1, 1900, an Act of parliament were applied by all civil and criminal courts, as the case may be, to all classes of the community, there is a strange likelihood that it is in force within jurisdiction. If, on the other hand, it were applied only by certain courts (e.g. an Act regulating a particular trade, the probability is that it would not be held to be locally applicable.'

This has been criticized as been restrictive and has excluded a number of Acts which ought to be included. ILUYOMADE and EKA contended that,

'there is no general statute requiring antecedent publication of rule making exercises by the administration'.

Their conclusion flowed from the premise that the Rule publication Act 1983 would not be applicable in this country being an Act regulating procedure which is not a statute of general application. DR. OLU ADEDIRAN on the hand finds it difficult to support ILUYOMADE and EKA's contention that the 1893 Act would **not apply in Nigeria as statute of general application**. His views is promised on the fact that the 1983 Act was a statute of procedure which applied generally in Britain whenever the administration was to exercise subordination legislative power. He concluded, however that this submission may sound futile as Nigeria statutes have always made provisions for antecedent publicity.

Examples of Nigeria statutes providing for antecedent publicity in rule making is the Legal practitioners Act, No. 33 of 1962 (as amended), Section 2 (2) of which states:-

—The Chief Justice may, after Consultation with the Bar Council, by regulations provide for the enrolment of the names of persons who are authorized by law to practice as members of the legal profession in any country where, in his opinion, person whose names are on the roll are afforded special facilities for practicing as members of that profession|.

Also section 35 of the Firearms Act provides that ~~the Inspector General of police may~~, by notice published in the Gazettee, delegate all or any of the powers or duties conferred upon him by this Act (other than his power of delegation) to any police officer or officers|.

Here in the Obafemi Awolowo University even when notice is given, because of the unawareness or ignorance of the requirement for antecedent publicity most people will not read the notice but complain after the rule takes effect. Unlike in the Ife Central Local Government where a proposed rule is initially discussed by the Chairman and Secretary with the Traditional rulers of the Local Government and Market Leaders. If it is agreed upon the rule is disseminated to the subjects by the rulers/leaders. Objections raised are routed back to the council through the same route. The rules are then posted on the local government Secretariat notice boards with 14 days within which members of the public are to react thereto.

Subsequent publicity

The requirement of subsequent publicity is the publication of these rules, orders or regulations after they are made.

By section 22 (3) of the Interpretation Act which provides that:-

"All orders, regulations and rules of Court made under any (Act) shall be published in the Gazette of the Federation, and if made under any Law shall be published in the (state) existing (Act) by a Governor, a Resident, Local authority, Local Government Council, native authority, planning authority appointed under Nigeria Town and Country planning (Act), other officer authority approved under the water works (Acts), or any other officer or authority carrying out functions within a (State) shall be published in the (state) Gazette alone unless such order, regulations or rules of court are applicable to Lagos, (in which case) they shall be published in the Gazette of the Federation".

Also Section 22 (4) provides that:

"All orders, regulations and rules of Court, shall have the force of law upon Publication thereof, in accordance with the provisions of this section or from the date named therein".

Unfortunately these provision were not re-enacted in the renamed interpretation Act of

1964. Although specific provisions for publication in the Gazette is made in some statutes, any other officer or authority carrying out functions within a (State) shall be published in the (State) Gazette alone unless such order, regulations or rules of court are applicable to Lagos, (in which case) they shall be published in the Gazette of the Federation.

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* Section 4(3) (4) of Decree 1 of 1984 provides that:-

"where no other provision is made as to the time when a particular provision contained in a Decree, Edict or subsidiary instrument is to come into force, it shall subject to subsection (4) below, come into force on the day when the Decree, Edict or subsidiary instrument, as the case may be, is made (4) where a provision contained in a Decree, Edict or subsidiary instrument is expressed to come into force on a particular day, it shall be construed as coming into force immediately on the expiration of the previous day".

So by section 4 of Decree 1 of 1984 a subsidiary instrument acquires force of law once it is made. In effect making publication irrelevant. Although the Decree went further to provide that where there are two Decrees or Edicts as the case may be on a subject matter and one is published on the relevant Gazette while the other is not, the published one prevail. The question then is, where there is one unpublished law on a subject-matter, how fair is it to punish persons for infringing it? This law can be likened to the situation under Caligula the Roman emperor whose laws were written in fine print but hung on pillars too high for the ordinary passerby to read?

By Decree 1 of 1984, the Government fits into Bentham's description of the tyrant who -punish men for disobedience of laws and orders which he had kept them from the knowledge of Factors that have contributed to the ignorance and non-enforcement of subsequent publicity rule are the high level of illiteracy in Nigeria, even among the literates the high level of low reading culture, the limited circulation of gazette and the low level of the people's socio political consciousness. Take the University for example, where the News Bulletin is the official medium of communication there are limited number of copies and even the limited copies are poorly circulated. The result being that members of the community are not aware of the rules until they infringe thereon.

4. Effect of Non-Publication

Generally, where publication is a statutory requirement, the exercise of sub-ordinate legislation is a nullity. It is thus the publication in such cases that makes the regulation or law valid. In spite of the general effect of non-publication it is necessary to look at whether publication in particular cases is mandatory or merely regulatory. Where it is mandatory, lack of publication automatically nullifies the regulation, rule or order. But where it is merely directory, the regulation, rule or order would be valid irrespective of its non-publication.

In Nigeria some statutes make categorical provisions for the effect of non-publication. Section 7(2) of the Nigeria Research Institute Act, 1964 provides that failure to publish in the Gazette would render the regulations ineffective. Also section 23(2) of the Nigeria Council for Scientific and Industrial Research Decree No. 83 of 1966 provides that regulations made under the law shall not have effect until they are approved by the appropriate authority and have thereafter been published in the Federal Gazette.

Other jurisdiction especially Britain, the effect of non-publication of sub-ordinate legislation as provided by section 3(2) of the English Statutory instrument Act 1946 -In proceedings against any person for an offence consisting of a contravention of any such statutory instrument, it shall be a defence to prove that the instrument