

Subsidiary Legislation as a Vital Component of Administrative Law

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Abstract: *Administrative law is the law relating to the administration of the State. Administration is the systematically detailed and practical implementation of the policies of the central government aimed at the smooth running of the entire State.*

Keywords: Administrative law, primary and subsidiary legislation, statutory instrument, and court controls.

Learning Objectives

To be able to;

- Define and explain delegated or subsidiary legislation
- Distinguish between primary and subsidiary legislation
- Explain reasons for delegated or subsidiary legislation\state types of delegated legislation in democratic countries

1. Introduction

This article specifically focuses on delegated or subsidiary legislation as a vital component of administrative law of the State.

Nature

Administrative Law is the law relating to the administration of the State. Administration of the State is the detailed and practical implementation of the policies of the central government aimed at the running of the State.

Purpose

Administrative law regulates legal relations between public authorities and private individuals and bodies, and between a public authority and other public authorities. One of the primary functions of Administrative law is to exert legal control over the way in which administrative authorities exercise their functions in order to ensure that these authorities do not exceed or abuse their powers. Administrative law also has the more positive role of facilitating good administration by enforcing the rules that are conducive to good administration at all levels, of government and administration, be it at central, provincial and local government. It is not the function of the courts to usurp the role of public administrators, and it is certainly not the role of the courts to obstruct the implementation of progressive legislation.

Administrative law has also developed a set of remedies that are available to persons who have suffered as a result of illegal or irregular administrative action. But this article concentrates on the delegated or subsidiary legislation as a vital component of administrative law of the State.

2. Delegated or Subsidiary Legislation

This section deals with the concept of delegated or subsidiary delegation.

What is Delegated or Subsidiary Legislation?

Legislation can be divided into **primary legislation**, that is, legislation passed by Parliament, and **subsidiary or subordinate legislation**, that is legislation created by bodies or individuals under powers **delegated** to them by Parliament. These powers empower them to create such legislation. This means that subsidiary legislation may imply any proclamation, rule, regulation, order, resolution, notice, rule of court, ordinance, by-law or any instrument made under or by virtue of any ordinance and having legal effect.

Types of Delegated Legislation

There are various types of delegated or subsidiary legislation. Most pieces of subsidiary legislation are contained in Statutory Instruments. (The title Statutory Instrument was adopted as from SI 381 of 1979. Prior to this, what are now known as Statutory Instruments were referred to as Government Notices. This designation

applied up to GN 380A of 1979) in the case of Zimbabwe. There are various particular types of subsidiary legislation:

- a. **Proclamations:** for example, the state President has power to make proclamations on such matters as the proroguing of Parliament. These proclamations are published in the Government Gazette [herein referred to as GN].
- b. **By-laws:** for example, local authorities such as urban councils have power to make by-laws. (See, for instance, the provisions of the Urban Councils Act (Chapter 29:15))
- c. **Rules:** for example, the courts have power to make rules governing their own procedures.
- d. **Regulations:** for example, the Minister has power in terms of SI 159 of the Rural District Councils Act (Chapter 29:13) to make regulations for various purposes.
- e. **Statutory instrument:** This is defined in SI 3 of the Interpretation Act (Chapter 1:01) in the case of the Republic of Zimbabwe

Reasons for Delegated Legislation

In modern state, central government intervenes in many spheres and regulates a lot of different activities. Its activities will include measures aimed at providing employment, housing, medical services, transport, food supplies and so on. Parliament itself cannot realistically be expected to pass all the multifarious rules and regulations necessary to run the complex modern state. Thus, what often happens is that Parliament passes legislation that simply establishes broad public policies and then delegates to subordinate authorities such as metropolitan, provincial and local government councils the power to pass subsidiary legislation in order to bring into effect in detailed form those broad policies. The delegates may, for instance, be a Minister who is able to call upon technical expertise within his Ministry when deciding how the broad policies can best be brought into operation, or the delegate could be a metropolitan or provincial council or local authority which is able to decide how best to implement the policies in the light of local conditions.

Need for controls

Although it is now accepted that in the modern State delegated legislation cannot be avoided, there is nonetheless concern that the exercise of delegated legislative powers be properly controlled to ensure that they are not abused to the detriment of citizens.

3. Types of controls over delegated or subsidiary legislation

These are illustrated as follows:

a. Parliamentary controls

One of the most effective controls is for Parliament in the first place to carefully spell out the limits of the delegates law making powers so that there can be no doubt when the delegates is exceeding his powers. If the provisions in the enabling legislations that set out the powers of the

delegates are vague or ambiguous, then the limits of the powers of the delegate will be unclear and control over the exercise of these powers will be made more difficult.

There are also certain controls that are applied after delegated or subsidiary legislation has been passed. In terms of S.I. 36 of the Interpretation Act (chapter 1:01), copies of all delegated legislation must be laid before Parliament on one of the thirty days on which Parliament next sits after publication of such delegated legislation in the Gazette. However, it would seem that delegated legislation is not rendered invalid by the failure to lay it before Parliament.

Given then many other calls upon the time of Parliamentarians, it is most unlikely that they will scrutinise much, if any, of the huge amount of delegated legislation that is laid before the House.

Presently, there is no specialist Parliamentary sub – committee tasked with examining delegated legislation to ensure that the delegated authority has not been abused. All we have is the Parliamentary Legal Committee, the main function of which is to scrutinise all statutory instruments published in the Gazette, and any draft statutory instruments referred to it, to determine whether they are in conformity with the provisions of the Declaration of Rights. Very much as secondary function it is provided that when it examines statutory instruments, it may report to Parliament or the Minister whether the statutory instrument is ultra vires the enabling Act.

b. Court controls

For subsidiary legislation to be valid, it must satisfy a number of requirements. If these requirements have not been satisfied, a person who is directly affected by the subsidiary legislation, or who is being directly affected by the subsidiary legislation, or who is being prosecuted under that legislation, can challenge the validity of the legislation. The court must then make a ruling on whether or not the legislation is valid.

4. The requirements for validity of delegated legislation

These requirements are stated and explained as follows:

a. Promulgation

Generally, the purpose of promulgation is to inform the general public of any new law of by-law.

Both under common law and in terms of the Constitution of Zimbabwe all legislation becomes binding, unless otherwise specified; only when it is promulgated, that is published in the Government Gazette. This requirement is also laid down in S.I. 20 of the Interpretation Act (chapter 1:10).

In the case of *Hayes vs. Baldachin & Ors* (2) (1980) at 754, Fieldsend C) had this to say:

It is a recognised principle in Zimbabwe that no law becomes effective until it has been published in the Gazette. But the general rule that before a law or any regulation or by – law having the force of law can become operative it must be *duly promulgated*, must be read subject to the qualifications that the word “law” in the rule must not be given too wide a connotation and that the enabling enactment must be looked to in order to see whether the necessity for promulgated is or not excluded.

The court went on to rule that an administrative direction did not have to be promulgated before it became operative.

b. Follow prescribed procedures

Prescribed procedures laid down in the enabling Act for the passing of such subordinate legislation must be fully observed. Thus, for instance, the procedures laid down for the passing of by – laws in terms of SI. 228 of the Urban Councils Act (chapter 29:15) must be fully adhered to otherwise by – laws will be invalid.

c. Consistent with general law

Delegated legislation cannot make unlawful something which is lawful under the general law and cannot make lawful something which is unlawful under general law. It must also not interfere with the administration of justice.

d. Certain and positive

Such legislation must indicate with reasonable clarity the act required or prohibited; if it does not to do this it may be struck down as being void for vagueness.

Delegated legislation must also be positive in the sense that it must contain a clear prohibition or command leaving no doubt that it is to be obeyed; it should not be merely an expression of desire that a certain act is done or a state of affairs be achieved.

e. Intra vires

The delegates can only create legislation on matters upon which it has been empowered to legislate. If it creates legislation on matters upon which it has not been given power to legislate it is acting ultra vires (beyond or in excess of its powers).

If only part of the subsidiary legislation is ultra vires, the court may strike down that part, provided that what is left can stand on its own. In deciding whether the delegated legislation is intra (that is within) vires the enabling Act, the courts will have to decide whether the power to make that type of legislation was expressly or impliedly delegated to the subordinate authority by Parliament. It will, for instance consider whether the power was impliedly necessary for or reasonably ancillary to the full and effective exercise of the powers expressly conferred by the enabling statute.

5. Gross unreasonableness

Delegated legislation can be declared ultra vires if it is grossly unreasonable. As laid down in the English case of *Kruse vs Johnson (1898)*, pieces of legislation can be ruled to be invalid on the grounds of their unreasonableness:

..... if, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclose bad faith; if they involved such oppressive and gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court may well say, “Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires”.

Baxter at 522 – 533 argues that gross unreasonableness is present when the provisions entail discrimination or disproportionality or are vague and uncertain.

The test enunciated in *Kruse vs Johnson* has been adopted in our law in cases such as:

R. V. Jeremiah (1956); *R. V. Campbell (Pvt.) Ltd (1956)*, *Caterers & Entertainers (Pvt.) Ltd vs City of Salisbury (1974)*, *PF ZAPU vs Minister of Justice, Legal & parliamentary Affairs (1985)* and *S. vs Delta Consolidated (Pvt.) & Ors (1991)*.

The onus of providing that regulations are ultra vires on the ground of unreasonableness is on the person who seeks to prove their unreasonableness.

The courts, however, cannot review on the grounds of unreasonableness regulations made by a body that has been given power in terms of the Constitution directly to pass regulations.

Sub delegation

Whether or not it is permissible for the delegate to further delegate a law making power granted to him will depend upon whether the legislature intended the delegate to exercise the power himself. Sub delegation will thus be impermissible where it was not envisaged that this be done.

6. Summary and Conclusion

Delegated or subsidiary legislation as a vital component of administrative law is created by bodies such as metropolitan, provincial or local councils or individuals under powers delegated to them Parliament. Five types of delegated or subsidiary legislation exist. Subsidiary legislation is subject to Parliamentary control and court controls, and the requirements for the validity of subsidiary legislation.

7. Conclusion

Delegated or subsidiary legislation is a vital component of administrative law of the modern state.

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