Bennion's Constitutional Law of Ghana

Part III – Law-making under the Republic

CHAPTER 6 – Modes of Legislation

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2. Statutory Instruments

The will of Parliament is expressed by Acts of Parliament but it is not possible to include in an Act all the matters of detail which will need attention if the legislative purpose is to be achieved. There are a number of reasons for this. Most countries which use the Parliamentary system have found that, under the circum-

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stances of today, when it is generally accepted that legislation should regulate almost every aspect of a nation's social and economic life, Parliament has neither the time nor the capacity to concern itself with all the ramifications of its enactments. Furthermore the conditions upon which legislation operates are often in a state of change, necessitating frequent adjustments to the law which, where they are not substantial, it would be unnecessarily rigid to call upon Parliament to make itself. Again, particularly in the administrative field, the legislative purpose may call for day-to-day decisions to be taken by Ministers, civil servants and others. These decisions, which are often executive rather than legislative in character, may require expert knowledge which Parliament does not possess. Whether this is so or not, they can usually only be taken on the facts of particular cases as they arise, and thus cannot be taken by Parliament itself. These factors are commonly experienced, and have everywhere led to the delegation of Parliamentary powers. In Ghana they are felt also, but one point of difference should be noted. It can hardly be said that the National Assembly has no time to consider more detailed legislation than it does at present. In fact, owing to the disinclination of many Members to join in debate and the lack of use made of the opportunities offered by Parliamentary procedure (for example the right of back-benchers to put down amendments and to introduce Bills of their own), the House often finds itself with nothing to do. On the other hand, to balance this factor, the Government frequently requires important legislation to be prepared so quickly that there is not time to do more than set out the broad outlines in the Act and leave the details to be filled in later under delegated powers. This may have an incidental advantage. If the Act is properly drafted, the legislative scheme is easier to grasp when it is not obscured by masses of detail.

In Ghana delegated powers have a history as old as the Colonial regime itself. Indeed, in Colonial times all the Governor's powers were delegated to him by the Crown and were exercised in the form of Ordinances, Orders of the Governor in Council, proclamations and so on.[1] After the setting up of the Parliament of Ghana in 1957, Acts of Parliament provided for the delegation of a wide variety of powers. These ranged from power to make

[1] See Chapter 1, *ante*. Ordinances frequently provided for further delegation; indeed it was common to include in an Ordinance a wide power to make regulations for carrying it into effect, though this was often reserved to the Governor himself.

rules or regulations which were legislative in character and of a general and lasting importance to power to make an order or other instrument of an executive and personal character, such as a deportation order or an instrument of appointment to an office. Despite their differing character and importance almost all these instruments were described as 'delegated legislation', numbered in one series and bound up together in one annual volume. In some cases, however, an important power, as for example to bring an Act into operation, would be exercisable not by a formal instrument but by a notice published in the *Gazette.* This system, or lack of it, led to difficulties. It was troublesome to hunt up important regulations in a volume containing masses of ephemeral executive orders. It was worse to find that no scheme of noting up the regulations or otherwise presenting them in their current form existed. Nor could such a scheme be made practicable until the wheat was first separated from the chaff.[1] Towards the end of 1959 it was therefore decided to reform the entire system of subordinate legislation. Since the reform was based to some extent upon similar reforms carried out in the United Kingdom it is necessary to say a word about these first.

Until 1893 there was no general control over the form and publication of delegated legislation in the United Kingdom. In that year however, following complaints of difficulties caused by the growing volume of such legislation and the failure to make it sufficiently known to the public, the Rules Publication Act, 1893 was passed. This required all statutory rules to be numbered in one series and published by the Queen's Printer, and applied to rules, regulations or byelaws which were made under an Act of Parliament and which related to procedure in courts of justice or were made by Her Majesty in Council or a Government department. Thereafter, until 1947, annual volumes of these instruments, under the name of 'Statutory Rules and Orders', were published by the Stationery Office. The definition of 'statutory rules' in the Rules Publication Act was found to be too narrow and in 1946 the Act was replaced by the Statutory Instruments Act. By this the new term 'statutory instrument' was applied

[1] The 1958 volume of subsidiary legislation contains 419 legal notifications (as they were then called). Of these only 84 were, under the system later adopted, 'wheat', that is legislative instruments. The remaining 355 were 'chaff', or executive instruments. In 1960, the first year in which the new system operated, 92 legislative instruments were made as against 273 executive instruments.

to orders, rules, regulations and other subordinate legislation made by a Minister under a power conferred by that or any future Act if the Act in question stated that the power was exercisable by statutory instrument.[1] This means that, when an Act conferring power to make subordinate legislation is being enacted in the United Kingdom it is for Parliament (or in practice the department concerned) to decide whether an instrument by which this power is exercised is likely to be sufficiently important to be published in the numbered series of statutory instruments. In Ghana it was decided to adopt the term 'statutory instrument' but to widen its meaning by including in it all instruments made under statutory powers, drawing a distinction between statutory instruments which were legislative in character and those which were executive. Although in many cases it is obvious whether an instrument is legislative or executive, there is a wide borderland in which this is very much a matter of opinion. As mentioned above, the British Statutory Instruments Regulations state that instruments made under statutory powers earlier than 1948 are to be treated as statutory instruments if they are 'of a legislative and not an executive character'. In order to decide whether to look in the statutory instruments series for an instrument made under a pre-1948 power it is therefore necessary to make up one's mind whether the instrument is likely to be legislative in character.

This is often a matter of considerable difficulty, and in Ghana it was found possible to attain greater precision by expressly stating which powers under existing legislation were powers to make instruments of a legislative character. The great complexity and bulk of British statute law made this course impracticable in the United Kingdom, but in Ghana the chance was seized while the body of statute law was still relatively small. The importance of the distinction between the two types of instrument in Ghana lies mainly in the method of publication. Legislative instruments, which are usually general in application and permanent in nature, and are often subject to amendment, are published in a convenient form in the cumulative binder service, which incorporates amendments as they are made.[2] Executive instruments are published

[1] Statutory Instruments Act, 1946, s. 1. The term also includes Orders in Council, and instruments of a legislative character made under Acts passed before 1948 (Statutory Instruments Regulations, 1947 (S.I. No. 1), reg. 2).

[2] This is discussed in detail at pp. 291, *et seq., post*

separately and amendments (which are infrequent) are not incorporated.

The new system was introduced by the Statutory Instruments Act, 1959 (No. 52). Section 3 of the Act provides that an instrument made (whether directly or indirectly) under a power conferred by an enactment shall be known as a statutory instrument. The term thus covers not only delegated legislation but also what is sometimes known as sub-delegated legislation, that is instruments made under powers contained in other subordinate legislation. The word 'enactment' has a special meaning here, the effect of which is to bring within the description 'statutory instrument' all past and future instruments made (whether directly or indirectly) under any Act, Ordinance or Order of Her Majesty in Council. Since it might have been said that an Act of Parliament was itself made under an enactment in this sense, provisions laying down the legislative powers of Parliament were expressly excluded.[1] It will be seen that the definition of statutory instrument is so wide that it covers the most trivial documents, for example a driving licence or a letter of appointment to a post. It also covers documents issued by or under the authority of a court of law. It was considered impracticable to attempt to exclude such things as these, but, for reasons which will appear, the width of the definition does not matter in practice.

The Act next proceeds to define a legislative instrument. This is done differently in relation to existing powers and powers to be contained in future Acts. In relation to existing powers the Attorney-General was enabled by s. 4(1) to make a declaration to the effect that statutory instruments made under specified enactments 'are legislative in character and of sufficient importance to justify separate publication'. This is the only indication given by the Act of the nature of legislative instruments, but further light may be obtained from the explanatory note at the beginning of Volume 1 of the cumulative binder service. This begins as follows:

> 'Legislative instruments form the most important body of delegated legislation in Ghana. They consist of those statutory instruments *(i.e.,* instruments made under statutory powers) which are legislative in character and are of general importance either because they amend or otherwise affect Ordinances and Acts of Parliament or because they embody rules, regulations or similar provisions of continuing public concern.'

[1] Statutory Instruments Act, 1959 (No. 52), s. 2.

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The order embodying the Attorney-General's declaration was made some three months after the passing of the Statutory Instruments Act.[1] During this period the entire statute book, consisting of the four volumes of the 1951 edition of the Ordinances, the two volumes of the 1952-1954 supplement and the five subsequent annual volumes, was read through to pick out the provisions which should be treated as conferring power to make legislative instruments. This was done by one person [F. A. R. Bennion] so as to produce uniformity of treatment. The resulting order specified four hundred and eleven empowering provisions, of which two hundred and forty-four conferred power to make regulations. Other descriptions of the delegated legislation in question included orders, rules, declarations, notices, notifications, resolutions, instruments, proclamations and byelaws. The use of such terms as these is not affected by the new arrangements, and a set of rules or regulations, for example, may continue to be described as such, although embodied in a legislative instrument.

The other half of the definition of a legislative instrument dealt with future Acts. This was a much simpler matter. It would be left to the draftsman of the Act to decide, when drawing a provision conferring power to make statutory instruments, whether the power was of such a nature that the instruments should be legislative. Thus s. 4(2) of the Statutory Instruments Act states that, in addition to those made under powers specified in the Attorney-General's declaration, instruments made 'under powers expressed to be exercisable by legislative instrument' shall be known as legislative instruments. The first use of this formula occurs in s. 4 itself, which begins 'The Attorney-General may ***by legislative instrument*** declare . . .' Deciding whether a power should be exercisable by legislative instrument or not is to some extent one of 'feel', but draftsmen have been advised that the following should normally be legislative instruments—

(a) instruments which amend Acts, Ordinances, or other legislative instruments;

(b) rules and regulations which are 'permanent' and either general or, although local, of national importance;

(c) instruments made under powers contained in consolidation Acts reproducing any of the enactments specified in the Attorney-General's declaration;

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[1] Statutory Instruments Order, 1960 (L.I. 9).

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(d) instruments bringing an Act into operation;

(e) instruments which are otherwise legislative rather than executive in their effect and of national importance—not being merely temporary.

In exceptional cases even temporary instruments may, because of their great importance, be classed as legislative. Thus for example regulations made when a state of emergency has been declared under the Emergency Powers Act, 1961 (Act 56)[1] are treated as legislative because they are likely to contain drastic provisions, including provisions modifying Acts of Parliament. Legislative instruments are required by s. 4(3) of the Statutory Instruments Act to be published by the Government Printer. If the instrument itself is not published in the *Gazette*, a notice of its publication must be inserted in the *Gazette* as early as possible. In fact legislative instruments are published in a separate series.[2] They are numbered consecutively from L.I. 1, the numbering not being started again at the beginning of a year.

Section 5 of the Act provides that statutory instruments other than legislative instruments or instruments of a judicial character are to be known as executive instruments. As mentioned above, court orders, being made under statutory powers, are within the definition of a statutory instrument. It would be misleading to describe them as executive instruments however, and hence they are excluded. Also excluded as being of a judicial character are a small number of instruments which more closely resemble delegated legislation, as for example declarations under s. 9 of the Stool Lands Boundaries Settlement Ordinance (Cap. 139).

The Act does not require executive instruments to be published, but such a requirement is sometimes included in the enactment which empowers a particular executive instrument to be made. In practice executive instruments of any importance are usually published—most of them in the executive instruments series which is published by the Government Printer and numbered from E.I. 1 onwards, starting afresh at the beginning of each year. Some instruments which are strictly executive instruments are however for greater convenience published in the *Gazette* itself or in one of the three Official Bulletins.

A power to make a statutory instrument normally implies a power to amend or revoke the instrument once made.[3] This is

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[1] See p. 253, *ante*
[2] See p. 295, *post*
[3] The term ‘revoke’ is applied to statutory instruments, ‘repeal’ being used only of Acts

laid down by s. 14(1) of the Statutory Instruments Act, which applies unless the context of the empowering enactment otherwise requires. The amendment or revocation must be done by the same authority as has power to make original instruments and must be exercised in the same manner.[1] A power to make, amend or revoke an instrument may be exercised from time to time, as occasion requires.[2]

The Statutory Instruments Act concludes by empowering the Attorney-General, by legislative instrument, to amend any existing enactment conferring power to make statutory instruments so as to bring it into line with the new arrangements, or to make such other provision as appears expedient for the purposes of the Statutory Instruments Act.[3] It was contemplated that the amending powers would be used to make textual amendments in all the enactments specified in the Attorney-General's declaration. However, many of these enactments have, under the statute law reform programme begun early in 1960, been repealed and re-enacted with appropriation modifications. Since this programme is expected to continue until the entire pre-Republican statute law has been re-enacted in modern form the amending powers are not likely to be used. The power to make 'such other provision as appears expedient' has been used to lay down rules as to the form of statutory instruments. These rules, together with provisions of the Statutory Instruments Act which govern the making of instruments, are described in Chapter 9.

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[1] Note that where the power to make original instruments has been transferred since the instrument which is to be amended or revoked was made, it is the transferee authority who has power to amend or revoke, and not the authority who made the instrument.
[2] Interpretation Act, 1960 (C.A. 4), s. 10.
[3] Statutory Instruments Act, 1959 (No. 52), s. 17.