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## REPUBLIC OF KENYA

### ELEVENTH PARLIAMENT

### (SECOND SESSION)

### THE NATIONAL ASSEMBLY

### COMMUNICATIONS FROM THE CHAIR

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#### COMMUNICATION ON THE PROCEDURE FOR CONSIDERATION OF DELEGATED LEGISLATION

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#### **Honourable Members,**

As you may be aware, there are currently several sets of delegated legislation pending before the House for consideration in accordance with statutory requirements. The House has not previously been engaged in the practice of considering statutory instruments on a wider scale than it is now being called upon to do owing to recent changes in the law relating to statutory instruments. It has therefore become necessary for the Chair to clarify to the House the procedure to be followed by the House with respect to consideration of delegated legislation as outlined both in our Standing Orders and in the written law.

#### **Honourable Members,**

The consideration of statutory instruments by the House is governed by the Statutory Instruments Act, 2013 (*Act No 23 of 2013*) and Standing Order 210 of the Standing Orders. Both section 2 of the Act and Standing Order 210(6) define a statutory instrument to mean “**any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which**

**that statutory instrument or subsidiary legislation is expressly authorized to be issued."**

The Statutory Instruments Act, 2013 came into operation on the 25<sup>th</sup> of January, 2013. Before the coming into force of this Act, the laying of statutory instruments before the House was previously governed by section 34 of the Interpretation and General Provisions Act (Cap 2 of the Laws of Kenya) but this section was repealed by section 27 of the Statutory Instruments Act, 2003. The new procedure for consideration of statutory instruments by the House is now as laid out in Part IV of the Statutory Instruments Act, 2013.

### **Honourable Members,**

Before I expound on the procedure for consideration of statutory instruments by the House as laid out in the Act, it should be noted that both the repealed section 34 of the Interpretation and General Provisions Act and Part IV of the Statutory Instruments Act, 2013 do not contemplate any process of approval of a statutory instrument by the House. It is presumed that the House, in delegating the power to make statutory instruments, has already signified its approval of that statutory instrument. It is for this reason that both the repealed section 34 of the Interpretation and General Provisions Act and the existing Part IV of the Statutory Instruments Act, 2003 are cast in a language that contemplates the involvement of the House only in instances of annulment of the whole or part of the statutory instrument as opposed to approval of the whole or part of the statutory instrument.

The said repealed section 34 of the Interpretation and General Provisions Act provided as follows-

"All rules and regulations made under an Act shall, unless a contrary intention appears in the Act, be laid before the National Assembly without unreasonable delay, and, if a resolution is passed by the Assembly within twenty days on which it next sits after the rule or regulation is laid before it, **that the rule or regulation be annulled**, it shall thenceforth be void, but without prejudice to the validity of anything previously done there under, or to the making of any new rule or regulation"

The same principle of involvement only in annulment is now espoused in Part IV of the Statutory Instruments Act, 2013.

**Honourable Members,**

I will now expound on the procedure for consideration of statutory instruments by the House as sequentially set out in Part IV of the Statutory Instruments Act, 2013.

Under section 11 of the Act, every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the Clerk for tabling before the House together with an explanatory memorandum in the manner prescribed in the Schedule. Upon receipt of the statutory instrument and the memorandum, the Clerk enters this instrument into the register required to be maintained under the Act.

I must observe with great regret that there has been little compliance by the Cabinet Secretaries with this provision and I urge the Leader of the Majority Party to follow up with the appropriate channels on this issue as lack of compliance with this requirement is fatal to the statutory instrument being sought to be made. Under section 11(4) of the Act, if a copy of a statutory instrument that is required to be laid before the House is not so laid within seven (7) sitting days after its publication, the statutory instrument ceases to have effect immediately after the last day for it to be so laid.

Under section 12 of the Act, every statutory instrument tabled stands referred to the Committee on Delegated Legislation. Section 13 of the Act then sets out principles which the Committee should be guided by in carrying out its scrutiny of the statutory instrument.

Section 16 requires the Committee, in so far as its practically possible, to confer with the regulation-making authority for which the statutory instrument has been made before tabling the report to House for their information and modification where necessary. It is at this stage that the Committee shares with the regulation making authority its desired modifications to the regulations, if any.

Upon completion of the scrutiny, section 15 of the Act requires the Committee to make a report to the House **containing only a resolution that the statutory instruments that stands permanently referred to the Committee be revoked.**

Under section 17 of the Act, the Committee shall state in its report the overall objective of the statutory instrument, the identity of the portion of the statutory instrument in relation to which the report has been made and an indication of the manner in which it offends the criteria set out in section 10 of the Act and the recommendations thereof.

Under section 18 of the Act, when a report on a statutory instrument has been tabled in the House, the statutory instrument shall be deemed to be annulled if the House passes a resolution to that effect.

Under section 19 of the Act where the House has adopted a report or a resolution that a statutory instrument be revoked, the instrument shall stand revoked and the regulation making authority shall publish the revocation within fourteen days.

### **Honourable Members,**

It is apparent that Part IV of the Statutory Instruments Act does not contemplate the full involvement of the House in the regulation making process. As such, the House is not required to approve or make any amendments to the statutory instrument. Rather, the House is only required to annul the whole or any part of the statutory instrument that the House is not happy with. In making the annulment of the whole or any part of the regulation, the House is required to give it reasons which will guide the regulation making authority in formulating new provisions to replace the ones annulled by the House.

Indeed, a reading of sections 15, 18 and 19 of the Act clearly contemplate an annulling resolution by the House. There is no contemplation of an amending or approving resolution. The Committee report to the House must therefore comply with this statutory requirement.

This is in consonance with Article 94 (6) of the Constitution which requires Parliament, in delegating any legislative authority, to specify the purpose and objectives for which the authority is delegated, the limits of that authority, the nature and scope of the law to be made and the principles and standards applicable to the law made under that authority. Parliament should therefore only come in to check the procedural exercise of that power and not exercise the power itself.

**Honourable Members,**

The provisions of the Statutory Instruments Act have in fact been clearly expounded on by Standing Order 210 of our Standing Orders.

Although Part IV of the Statutory Instruments Act may be argued to apply to those statutory instruments that have been published in the Gazette, Standing Order 210 applies the same procedure to all statutory instruments submitted to the House irrespective of whether publication has taken place or not. The procedure outlined in this communication therefore applies to all statutory instruments that are submitted to the House prior to publication and after publication.

Under paragraph (2) of Standing Order 210, whenever a statutory instrument is submitted to the Assembly pursuant the Constitution, any law or these Standing Orders, the statutory instrument shall, unless a contrary intention appears in the relevant legislation, be laid before the Assembly by the Chair of the relevant Departmental Committee, or any other member and shall thereafter stand referred to the Committee on Delegated Legislation.

The Committee is then obliged to scrutinize the statutory instrument in accordance with the criteria set out in the Act and upon completion of its scrutiny, there is no contemplation of any motion for approval or amendment of the statutory instrument, except for a motion of annulment where the Committee has recommended so.

Of particular emphasis is paragraph (4) of the Standing Orders which provides as follows-

(4) If the Committee-

- (a) resolves that the statutory instrument, be acceded to, the Clerk shall convey that resolution to the relevant state department or the authority that published the statutory instrument.
- (b) does not accede to the statutory instrument, the Committee may recommend to the House that the Assembly resolves that all or any part of the statutory instrument be annulled .

The Committee therefore only reports back to the House in the instances where it is desired to annul the whole or part of the statutory instrument. Where there is no desire to annul the whole or any part of a statutory instrument, that resolution is communicated to the Clerk who then communicates to the relevant state department or the authority that published the statutory instrument.

**Honourable Members,**

It is my hope that the foregoing exposition will clarify to the House and the Committee on Delegated Legislation the procedure that should be adopted in the consideration of the statutory instruments that are pending before the House. Indeed, under Standing Order 47(3), the Chair will not allow debate on any motion or report that is contrary to the Constitution or an Act of Parliament, without expressly proposing appropriate amendment to the Constitution or the Act of Parliament. The power to make regulation, once delegated under an Act of Parliament should not be exercised by the House itself unless if the House amends that particular piece of legislation.

**Thank you!**

**THE HON. JUSTIN B.N. MUTURI, EGH, MP**  
**SPEAKER OF THE NATIONAL ASSEMBLY**  
**March 26, 2014**