

REPUBLIC OF KENYA
THIRTEENTH PARLIAMENT - (FIRST SESSION)
THE NATIONAL ASSEMBLY
COMMUNICATION FROM THE CHAIR

(No. 25 of 2022)

ON

**THE STATUS OF STATUTORY INSTRUMENTS MADE BY BODIES
THAT HAVE NOT BEEN TRANSMITTED TO THE HOUSE FOR
TABLING**

Honourable Members,

- 1.** You will recall that on **Thursday, 10th November, 2022** the Hon. Samuel Chepkonga, MP, rose pursuant to Standing Order 83 to seek guidance from the Speaker on the failure by regulation-making bodies to table regulations before the House for scrutiny.
- 2.** The Hon. Chepkonga stated that the Committee on Delegated Legislation has noted with concern that there are various instruments that currently have the force of law but were not tabled before the House as required by law. On account of both the Statutory Instruments Act No. 23 of 2013 and the Standing Orders limiting the mandate of the Committee to statutory instruments tabled in the House, the Hon. Chepkonga sought guidance on the powers of the Committee in relation to statutory instruments that have not been tabled in the House.

Honourable Members,

3. In seeking further guidance on the powers and mandate of the Committee on Delegated Legislation, the Hon. Chepkonga cited the ruling of my predecessor dated 26th March, 2014 on this matter. In that Ruling, the Speaker while referring to the Statutory Instruments Act No. 23 of 2013 stated that:

“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.”

4. The Hon. Chepkonga noted that even as early as 2014, the then Speaker took notice of the practice adopted by regulation-making bodies of neglecting or failing to transmit regulations to the House.

Honourable Members,

5. In the ensuing debate, several Members including the Leader of Majority Party, the Hon. Kimani Ichung'wah MP, the Deputy Minority Leader, the Hon Robert Mbui MP, the Minority Whip, the Hon. Junet Mohamed MP, the Hon. Martha Wangari MP and the Hon. William Kamket MP weighed in on the matter.
6. The Hon. Members, joined issue with the Hon. Chepkonga and noted a sustained practice of regulation-making bodies bypassing Parliament while formulating regulations that they expect to have the force of law. Further, a query was raised on whether the definition of what constitutes a statutory instrument in both the Statutory Instruments Act, 2013 and the Standing Orders is ambiguous and whether that contributes to the failure by regulation-making bodies to comply.

Honourable Members,

7. From the request for direction made by the Hon. Chepkonga and the contributions by Hon. Members on the matter at hand, I have isolated the following two issues for response—

- (i) The nature of the statutory instruments that ought to be tabled before the House for scrutiny; and
- (ii) The mandate of the Committee on Delegated legislation with regard to statutory instruments that have been operationalized but have not been tabled in the House.

Honourable Members,

8. With regard to the first issue, as Members are aware, Article 94(5) of the Constitution vests Parliament with a unique legislative mandate to the exclusion of any other person or body. A person or body other than Parliament may **ONLY** issue an instrument having the force of law **under authority conferred by the Constitution or by legislation.**

Honourable Members,

9. Article 94(6) of the Constitution further elucidates the procedure to be followed with regard to any delegation of law-making by Parliament. It provides, and I quote—

"An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority."

Honourable Members,

10. In its wisdom, Parliament passed the Statutory Instruments Act in 2013 to provide for the making, scrutiny, publication and operation of statutory instruments.

The Act contains provisions which guide regulation-making bodies on the need for wide-stakeholder consultations and fidelity to the Constitution and laws passed by Parliament in making subsidiary legislation.

11. In furtherance of the requirements of the Constitution, the Act subjects every statutory instrument to scrutiny by Parliament. It further outlines thirteen (13) criteria against which Parliament, through its relevant committee, must assess every instrument. These range from compliance with the Constitution and written law, defective drafting, delay in tabling, among other issues the Committee considers fit to examine.

Honourable Members,

12. With regard to the definition, the Act defines a statutory instrument as, and I quote,

*"any rule, order, regulation, direction, form, tariff of costs or fees, letter patent, commission, warrant, proclamation, by-law, resolution, guideline or other 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."*

13. **The definition is unequivocal.** Any instrument said to be made pursuant to a power granted by an Act of Parliament **MUST** be brought before the Parliament for scrutiny.

Honourable Members,

- 14.** With regard to the second issue, I agree with the concern of Members on the neglect or failure by regulation-making bodies to transmit statutory instruments to the House for scrutiny. Having guided that any instrument said to be made pursuant to a power granted by Parliament must be tabled before the House; what should obtain if a regulation-making body fails to table such an instrument?
- 15. As noted by the Deputy Leader of the Minority, the Hon. Robert Mbui, MP,** Section 11 of the Statutory Instruments Act, 2013 automatically nullifies statutory instruments not laid before Parliament for scrutiny. Though the provision may be clear to us as a House, it has to be put into context.

Honourable Members,

- 16.** Both the Statutory Instruments Act, 2013 and the Standing Orders only contemplate the activation of the mandate of the Committee on Delegated Legislation **UPON tabling** of a statutory instrument before the House. Conversely, regulation-making bodies and other functionaries of the Executive publish various instruments they require the public to obey without providing any evidence that they have tabled such instruments for scrutiny.

Honourable Members,

- 17.** It is therefore clear that the gap between the exercise of delegated law-making authority and the scrutiny of subsidiary legislation has led to the general public blindly abiding by statutory instruments merely on the basis that they have been published.
- 18.** Further, the public is not able to access information on when and whether such statutory instruments have had the force of law. Currently, a public-spirited citizen is the one required to ascertain whether a particular instrument that impacts on his or her rights was indeed tabled before Parliament.

Again, if the citizen discovers that an instrument was not laid before Parliament and has not therefore been scrutinized, he or she is the one to seek judicial review and quashing of that instrument. To my mind, Parliament ought not to allow such a state of affairs to exist unchecked.

Honourable Members,

19. Allow me to give you an overview of the practice and procedure obtaining in the United Kingdom where we have borrowed quite heavily, on the law, practice and procedure relating to Statutory Instruments. In the UK, Ministers use delegated legislation to make changes to the law under powers given to them in an Act of Parliament.
20. Statutory Instruments are the most common type of delegated legislation. About 3,500 become law each year. It is worth noting that in the UK, the Act that contains the power to make delegated legislation usually ***specifies what needs to happen to the statutory instrument for it to become law.*** Many statutory instruments are not subject to any parliamentary procedure and a minister can simply sign them into law.

In the same jurisdiction, where parliamentary procedure applies, the statutory instrument must be formally presented to Parliament. It then usually takes one of the following three main routes:

- (a) **Negative procedure:** the statutory instrument automatically becomes law unless there are objections to it within a specified period (usually 40 days).
- (b) **Affirmative procedure:** in this case the statutory instrument must be actively approved before it becomes law. It's debated in a Delegated Legislation Committee or, less commonly, in the Chamber. Then the House decides whether to approve it.
- (c) **Super-affirmative procedure:** This involves an additional stage of scrutiny where Parliament considers a proposal for a statutory instrument before the statutory instrument is formally presented ('laid'), akin to our pre-publication scrutiny.

This last procedure is used for statutory instruments that are considered to need a particularly high level of scrutiny.

21. There are some specialized categories of statutory instrument that are used for particular purposes that are, or can be, considered under the super-affirmative procedure. These statutory instruments usually **amend or repeal Acts of Parliament**.

Under the super-affirmative procedure, a minister presents a proposal for a statutory instrument and an explanatory statement. Committees in the House of Commons and the House of Lords consider the proposal and can make recommendations. Then the minister can formally present ('lay') a draft of the statutory instrument under the *affirmative procedure*.

22. When statutory instruments are **formally presented to** Parliament they are said to be '**laid**' and when a minister has **signed them into law** they are said to be '**made**'. Most statutory instruments are presented to the House of Commons and the House of Lords. Some—mainly those involving finance—are only presented to the House of Commons. Statutory instruments can't usually be amended. Each House can simply approve or reject the instrument.
23. Worth noting too is that the UK has a Statutory Instrument Service that enables the public and all concerned to follow the progress of all statutory instruments formally presented to Parliament and to see what stages are coming up next. It provides the deadlines for annulling a negative instrument and also shows a link to all debates, committee reports, and decisions in both Houses, a link to the text of the statutory instrument and information on whether the statutory instrument will be debated in a Delegated Legislation Committee or the Chamber.

Honourable Members,

24. While we borrowed a lot from the UK law, practice and procedure, our constitutional architecture is different and our law, practice and procedures have been evolving. Indeed, our Committee on Delegated Legislation is a creation of both the Statutory Instruments Act, 2013 and Standing Order 210. As a Committee of the House, it is imbued with the full powers and privileges outlined under Paragraph (1) of Standing Order 191 which provides as follows—

Committees shall enjoy and exercise all the powers and privileges bestowed on Parliament by the Constitution and statute, including the power to—

- (a) **summon any person to appear before it for the purposes of giving evidence or providing information;***
- (b) **enforce the attendance of witnesses and examine them under oath, affirmation or otherwise;***
- (c) **compel the production of documents;***
- (d) **request for and receive papers and documents from the Government and the public; and***
- (e) **issue a commission or request to examine witnesses abroad.***


25. The foregoing powers allow the Committee to call for scrutiny of any instrument said to be made in exercise of powers delegated under an Act of Parliament. Additionally, Hon. Members, the Committee is at liberty, pursuant to its oversight mandate, to notify the Executive and all regulation-making bodies to ensure that any instrument said to be made in exercise of authority delegated under an Act of Parliament is tabled before Parliament strictly within the prescribed timelines. In the unlikely event that the regulation-making bodies persist in their failure to table instruments that ought to be tabled in Parliament, the Committee is at liberty to report that fact to the House.

To insulate the public from blind obedience of instruments that are seemingly immunized from Parliamentary scrutiny, the House may resolve to direct the publication of a notice highlighting the non-compliant statutory instruments and their fate in light of Section 11 of the Statutory Instruments Act, 2013.

Honourable Members,

26. In summary, I therefore guide as follows—

- (1) **THAT**, Article 125 of the Constitution and Standing Order 191(1) of the National Assembly Standing Orders allow the Committee on Delegated Legislation to call up for scrutiny of any instrument said to be made in exercise of powers granted under an Act of Parliament; and
- (2) **THAT**, in the event that regulation-making bodies persist in failure to table instruments that ought to be tabled in the House, the Committee on Delegated Legislation is at liberty to report that fact to the House. The House may resolve to direct the publication of a notice highlighting the non-compliant statutory instruments and their fate in light of Section 11 of the Statutory Instruments Act, 2013.


THE RT. HON. MOSES WETANGULA, EGH, MP
SPEAKER OF THE NATIONAL ASSEMBLY

Wednesday, 30th November, 2022

