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ON

DELEGATED LEGISLATION

A REPORT ON THE RETREAT OF THE COMMITTEE ON DELEGATED
LEGISLATION AND THE CHAIRPERSONS OF DELEGATED LEGISLATION
COMMITTEES OF THE COUNTY ASSEMBLIES

HELD ON

19TH TO 21ST FEBRUARY, 2014 AT SERENA BEACH RESORT, MOMBASA

Clerk's Chambers,
First Floor,
K.I.C.C Buildings,
NAIROBI.

FEBRUARY, 2014

*Paper laid by
Chair of the Committee
Gen. Sang
17/7/2014*



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Statutory Instruments Act, 2013



ABBREVIATIONS

SI.....	Statutory Instrument
SO.....	Standing Orders
KCLR.....	Kenya Council for Law Reporting
NA.....	National Assembly
CA.....	County Assembly
SUNY.....	State University of New York
DL.....	Delegated Legislation
L.S.K.....	Law Society of Kenya
CEO.....	Chief Executive Officer
KICD.....	Kenya Institute for Curriculum Development
KNEC.....	Kenya National Examinations Council
DLCs.....	Delegated Legislation Committees
CGA.....	County Government Act
UON.....	University of Nairobi

PREFACE

The Sessional Committee on Delegated Legislation is established pursuant to the Senate Standing Order 212 which states:-

- (1) There shall be a select Committee to be known as the Committee on Delegated Legislation.
- (2) Whenever a statutory instrument is submitted to the Senate pursuant to 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 Senate by the Chair of the Senate Committee on Delegated Legislation and thereafter stand referred to the Committee.
- (3) The Committee shall consider in respect of any statutory instrument whether the statutory instrument-
 - (a) is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written law;
 - (b) infringes on fundamental rights and freedoms of the public;
 - (c) contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament;
 - (d) directly or indirectly bars the jurisdiction of the courts;
 - (e) gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;
 - (f) involves expenditure from the Consolidated Fund or other public revenues;
 - (g) is defective in its drafting or for any reason, the form or purport of the statutory instrument calls for any elucidation;
 - (h) appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;

- (i) appears to have had unjustifiable delay in its publication or laying before Parliament;
- (j) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (k) makes rights , liberties or obligations unduly dependent insufficiently defined administrative powers;
- (l) inappropriately delegates legislative powers;
- (m) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
- (n) appears for any reason to infringe on the rule of law;
- (o) inadequately subjects the exercise of legislative power to Parliamentary scrutiny; and
- (p) accords to any other reason that the Committee considers fit to examine.

(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, or part of a statutory instrument, the Committee may recommend to the Senate that the Senate resolves that all or any part of the statutory instrument, as the case may be, be annulled.

(5) If the Senate-

- (a) fails to agree to the recommendation of the Committee under paragraph (4)(b), the statutory instrument shall be deemed to have been approved by Parliament;
- (b) resolves to annul a statutory, or part of a statutory instrument, the resolution shall, within seven days of the passage of the resolution, be referred to the National Assembly for concurrence.

The Committee is comprised of the following members:-

1. Sen. Mvita Mshenga - Chairperson
2. Sen. Judith Sijeny - Vice Chairperson
3. Sen. (Dr.) Boni Khalwale
4. Sen. Emma Getrude
5. Sen. Daniel Karaba
6. Sen. Liza Chelule
7. Sen. Stewart Madzayo
8. Sen. Sammy Leshore

Acknowledgement

Special appreciation goes to Hon. Senators, Chairpersons of the County Assembly Committees on Delegated Legislation, resource persons and all other participants in the retreat.

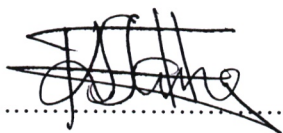
The Committee would wish to extend its gratitude to the development partner, State University of New York (SUNY -Kenya) for its support towards the planning the retreat.

The Committee finally appreciates the office of the Speaker of the Senate and the Clerk of the Senate for facilitating the retreat.

Mr. Speaker Sir,

It is my pleasant duty, pursuant to Standing Order 204, to present the Report of the Sessional Committee on Delegated Legislation on the retreat with the Chairpersons of its counterpart committees of the county assemblies for consideration by the House.

Signed.....



Date.....

10/07/2014

SEN. STEPHEN SANG'

CHAIRPERSON, SESSIONAL COMMITTEE ON DELEGATED LEGISLATION

EXECUTIVE SUMMARY

The Sessional Committee on Delegated Legislation held a retreat with the Chairpersons of its Counterpart Committees of the County Assemblies from 19th to 21st February, 2014 at Serena Beach Resort in Mombasa. The objective of the retreat was to build capacity of the Chairpersons of the counterpart committees of the county assemblies and to further share ideas and deliberate on issues of mutual interest.

This report documents the proceedings of the retreat which are contained in the three main chapters of the report.

During the retreat, several resource persons made presentations on various topics which included but were not limited to origin and development of Delegated Legislation Committee; background operational mechanisms and enhancing of delegated legislation; mandate of the Committee; tracking of delegated legislation; and overview of the Statutory Instruments Act, 2013. The participants had successful deliberations from which it was recommended that the Committee should:-

1. Forge a closer working relationship with the Committee on Legal Affairs due to their overlapping mandates.
2. Initiate the process of review of Section 3 of the Statutory Instrument Act, 2013 to incorporate the counties.
3. Form linkages with organizations such as Law Society of Kenya, Kenya Law Reform Commission among others, for purposes of capacity building for members and secretariat.
4. Define parameters for public participation in the process of making statutory instruments

Organize similar capacity building workshops for Members of the County Executive Committees and Members of the Committees on Delegated Legislation of the county assemblies.

The role of the Senate under Article 96 of the Constitution is to, among others, represent the counties, and serve to protect the interests of the counties and their governments. In the new political dispensation, there is need for the Senate to enlighten the county assemblies for the successful implementation of devolution.

During its meeting held on 29th January, 2014, the Committee on Delegated Legislation noted that their role in protecting counties under Article 94(1) of the Constitution included building capacity of members of its counterpart committees of the county assemblies. This was with the objective that the Members of the county assemblies would understand clearly the mandate of the Committee on Delegated Legislation and its operations. The Chairpersons would then share the knowledge gained with their Committee Members.

It was against this that the committee resolved to hold a retreat with the chairpersons of its counterpart committees of the county assemblies. The retreat was held from 19th to 21st February, 2014 at Serena Beach Hotel in Mombasa with the support of the development partner, SUNY Kenya.



2.1 REMARKS BY THE CHAIRPERSON OF THE COMMITTEE

Sen. Mvita K. Mshenga, the chairperson of the Sessional Committee on Delegated Legislation welcomed members to the retreat. She briefed members about the role of the Committee, objective of the workshop and the expectations. She took the members through the programme that was tailored to fit into the objectives of the retreat. Members then unanimously adopted the programme of the retreat.

2.2 REMARKS BY THE VICE- CHAIRPERSON

Sen. Judith Sijeny welcomed all the participants to the workshop. She made the following remarks:-

She began by congratulating members of the County Assemblies for their election, not only as Members of the County Assemblies, but also as Chairpersons of their respective committees. She quoted Article 94 of the Constitution which vested the legislative authority in Parliament. She noted that Members of the County Assemblies had been given powers by the Constitution to perform several duties, among them the power to supervise delegated authority. She mentioned that delegated legislation was a difficult area to oversee but with the support of SUNY (Kenya), Speaker of the Senate, Clerk of the Senate through capacity building, there would be a lot to learn through sharing of information.

She quoted Article 96(1) that empowers the Committee to engage with the County Assembly Committee. It was within the mandate of the senate to supervise and oversee the work at the County Assembly level and to ensure that the legislations being passed were in order.

She explained that the Committee had convened the retreat to discuss on the mode of engagement between the Senate Committee on Delegated Legislation and its counterpart committees of the county assemblies and

further to understand the working dynamics of passing delegated legislation upon this basis.

The Senate Committee on Delegated Legislation had gone through a lot of transformation in terms of capacity building. Several forums had been organized and executed through the support of the Offices of the Speaker, the Clerk of the senate and development partners – SUNY (Kenya) with the aim of equipping members with the necessary skills and understanding of the role of the committee.

The objective of the workshop was to enable the participants to understand the development of the Committee on Delegated Legislation, operational mechanisms of delegated legislation, mandate and scope of the County Assembly committees, overview of the Statutory Instruments Act and the best practices for tracking and documenting Delegated Legislation.

2.3 REMARKS BY THE CLERK OF THE SENATE –BY MRS. C.W. MUNGA

Senior Deputy Clerk of the Senate, Mrs. C.W. Munga conveyed the apologies of the Clerk of the Senate, Mr. J.M. Nyegenye, who was not able to attend the retreat due to other prior official engagements.

Mr. Munga termed the workshop as timely considering that it was coming at time when the County Assemblies and the Senate were almost celebrating their first anniversaries since their inceptions. In her opinion, the two committees knew what was expected from them and could learn from each other.

She proceeded by reminding members that citizens are more informed, more vibrant and rich in terms of their intellectual capacity. The Constitution had given them powers to participate in the law making processes hence the Committee had to be alive to that fact and ensure the citizen's rights are safeguarded. Chairpersons were reminded to follow up the implementation of their reports.

She informed the meeting that prior to the year 2006, the National Assembly did not have a Delegated Legislation Committee. It was only when it was realized that there were a lot of delegated powers which were not being scrutinized that the National Assembly resolved upon a motion moved by Hon. Amina Abdalla to form the Delegated Legislation Committee.

She urged members to strive to understand the Committee mandate and work closely with other committees, most notably the committee on Legal Affairs, for purposes of consultation. She recommended that the Committee could hold joint sittings where necessary to help in complimenting the work of committees and solve problems amicably.

In her concluding remarks, she reminded members that strategic leadership was very crucial in the operations of the committee. It was incumbent upon the chairpersons of respective committees to demonstrate inclusive leadership, respect for members and the secretariat.

Lastly she assured the County Assembly Committee Chairpersons that the Senate leadership was ready and willing to work with the counties in any matter within its capability.

2.4 REMARKS BY SUNY (KENYA) REPRESENTATIVE

Ms. Sylvia Nyaga conveyed the apologies the SUNY Chief of Party, Mr. Francis Aywa, for being unable to attend the retreat due to other commitments.

She informed the Members that SUNY Kenya was an international Non-Governmental Organization that operated in many countries. Their work was geared towards parliamentary strengthening through capacity building. SUNY (Kenya) had been supporting Parliament for the past thirteen years. It had helped in building the capacity for members of Parliament and also through sponsoring benchmarking visits.

SUNY (Kenya) had been very instrumental in the creation of technical departments in parliament such as the Budget Department, Research Department and Legal Department among others. SUNY (Kenya) works with Parliament in a process that improves the process of laws making in Kenya.

With the introduction of a bicameral legislature, Delegated Legislation Committee existed in the National Assembly, Senate and at the county assemblies. Such committees have a huge responsibility which could be overwhelming hence they had to lay down strategies to execute their mandates promptly. She urged the committees to work complementarily and share ideas.

She assured the participants of SUNY Kenya's commitment in partnership with parliament in capacity building and strengthening devolution.

2.5 KEYNOTE ADDRESS BY THE DEPUTY SPEAKER OF THE SENATE

The Deputy Speaker of the Senate, Sen. Kembi Gitura began by congratulating the Chairpersons for their election.

He noted that delegated legislation was an important creation that allowed Honourable Members to donate the power to make secondary laws to the Executive. He gave an example of Section 135 of the County Governments Act which gave power to the Cabinet Secretary to make Regulations for the better carrying out of the Act.

When carrying out their legislative mandate, legislators may not practically be able to incorporate all the procedural aspects of every law they pass. Secondary laws were therefore needed for the better carrying out of provisions of the primary Acts enacted by legislators.

Committees were given a long checklist as a guide in considering statutory instruments before them. The checklist emphasizes on the constitutionality of any delegated legislation. It requires members to critically examine whether the delegate followed principles of law in the making the delegated legislation in question.

He mentioned two main things that were of utmost importance to members of the Delegated Legislation Committee. First, they needed to know and understand the Constitution very well. Second and more important, they needed to practice the Constitution.

As far as delegated legislation was concerned, members could donate their power to make laws to other persons. However, they would never delegate the power to scrutinize the laws made.

Members were called upon to scrutinise delegated legislation with a fine tooth comb to ensure that they met the threshold of good laws for the people. He quoted Article 185 of the Constitution which conferred legislative and oversight authority at the county level to County Assemblies. Senate Standing Order No. 211 on Delegated Legislation Committee contains a checklist of what the Committee should consider in respect of any statutory instrument. This checklist includes constitutionality, rights of others, retrospectively, scope of the proposed law and comparison to existing laws.

The Constitution and the laws on devolution give a lot of weight to public participation. At the same time, the people of Kenya were increasingly using all means available to them to participate in governance. Public participation gives an avenue for leaders not only to protect the public interest but also engage the public on the work they are undertaking.

The Deputy Speaker concluded by calling upon the Committee Chairs to replicate similar exercises with their members once they returned to their counties and that the Senate pledged to support the County Assemblies as important pillars in devolution.

3.1 AN OVERVIEW OF THE ORIGIN AND DEVELOPMENT OF THE SESSIONAL COMMITTEE ON DELEGATED LEGISLATION: WHY WAS IT NECESSARY?

BY NJENGA NJUGUNA, DIRECTOR COMMITTEE SERVICES, SENATE

The Director, Committee Services, Mr. Njenga Njuguna gave an outline of his presentation as follows:-

- I. Establishment of the Committee on Delegated Legislation
- II. From a resolution of the House to a Committee of the House
- III. From establishment to operationalizing the Committee on Delegated Legislation
- IV. Challenges

He explained that the Committee on Delegated Legislation in Kenya emanated from personal frustrations faced by Hon. Amina Abdalla as member of the 9th Parliament. There were unfulfilled government promises which put the legislative authority of parliament in jeopardy. The frustration about one of the subsidiary legislations which was developed under the Environmental Management and Coordination Act required an environmental impact assessment for every construction in an area already zoned for construction of a particular density. This prompted Hon. Amina to initiate the process of forming a Committee on Delegated Legislation.

After long discussions with the Opposition Whip, it was realized that important regulations were in some cases not even gazetted. The Opposition agreed to push for more scrutiny of delegated law making powers as it was realized that a lot of corruption loopholes were being created through subsidiary legislation especially those that involved taxation and imposing a charge.

Hon. Muturi (then KANU Chief Whip) convinced Hon. Abdalla to deal with the wider problem of Delegated Legislations rather than focusing on a legislative challenge posed by this one subsidiary legislation. It was on this advice that she drafted a motion on the establishment of the Committee on Delegated Legislation which read as follows:-

***THAT,** in view of the fact that subsidiary legislation should be consistent with current statutes; aware that certain authorities have failed to Gazette mandatory rules and regulations as required by the parent Act; concerned that some of the delegated authorities have been abused by the concerned authorities by gazetting regulations that are ultra vires to the parent law; this House resolves to establish a Delegated Legislation Committee to scrutinise all subsidiary legislation.*

The motion on establishing a Committee on Delegated Legislation was debated and passed by the House on 21st April 2006.

From a Resolution of the House to a Committee of the House

There was a challenge in having the proposed Committee be part of the Standing Orders. Fortunately the change of ruling party from KANU to NARC meant that both side of the political divide had reason to change the Standing Orders. By the end of the 9th Parliament, the draft Standing Orders had agreed to include a Committee on Delegated Legislation as one of the new Committees. The 9th Parliament however came to an end before replacing the Standing Orders.

In the Tenth Parliament, despite not being a member of the House Procedures and Rules Committee, the then Speaker Hon. Kenneth Marende co-opted Hon. Abdalla to the Committee that finally delivered the 2009 Standing Orders. Hon. Abdalla's presence in that Committee played a major role in maintaining the proposed Committee in the Standing Orders. This was because many members were not convinced of the need of having such a Committee.

From establishment to operationalizing the Committee on Delegated Legislation

Upon adoption of the Standing Orders, Hon. Amina Abdalla was appointed to the Select Committee on Delegated Legislation and as is tradition she was elected its first Chairperson.

The challenges faced were:-

a) Weak legal regime for the making and scrutiny of subsidiary legislation

Despite the provisions of the Interpretation and General Provisions Act on scrutiny on delegated legislation, negligible tabling of subsidiary legislation had taken place since independence. The Standing Orders wanted the Committee to cause the tabling of these legislations –the question was how? What would happen to those ministries who decline to table? How do you change a long tradition of non-tabling?

b) Where to begin the scrutiny?

It was not clear when scrutiny would begin, what would happen to the legislations gazetted prior to the establishment of the Committee, obtaining records of the list of Delegated Legislations that had been gazetted since independence and how to deal with emerging issues.

Action: they chose to be reactive as we set up the structures for more proactive work such as amending legislation and developing tools.

c) Lack of tools for scrutinizing delegated legislations

There was no clarity as to what parameters to look at while scrutinizing delegated legislation.

d) Low capacity and understanding of the mandate of the Committee

The capacity and understanding problem affected members of Parliament, staff and members of the executive.

e) Gazette Notices linked to appointments

The fact that Ministers acted outside the parent Acts of Parliament while appointing Chief Executive Officer of state corporations and or Semi

Autonomous Government Agencies (SAGAs) were the most complaints forwarded to the Committee for annulment. It reached a point where the committee concentrated on such matters of appointments that almost derailed its work.

3.2 BACKGROUND, STATUS OF OPERATIONAL MECHANISMS AND ENHANCING OF DELEGATED LEGISLATION

BY: PROF. BEN SIHANYA, JSD ADVOCATE, LECTURER U.O.N

Prof Ben Sihanya made his presentation on the background, status of operational mechanisms and enhancing of delegated legislation as follows:-

Delegated legislation, secondary, subsidiary or subordinate legislation was legislation made by authority of an Act of Parliament or delegated to lower tiers of Government by the constitution. It included statutory rules, by-laws, ordinances, orders-in-council and various other “instruments” made by the executive.

Delegation of power to the executive raised issues of separation of powers. There had to be checks and balances to avoid executive overreach and misuse or abuse of power. It is law made by an executive authority under powers given to them by primary legislation in order to implement and administer the requirements of that primary legislation.

There are three types of delegated legislation;

- a) Statutory instruments which are regulations made by government departments,
- b) By-laws which are made by county governments and local authorities, or public corporations, and
- c) Legal Notices issued by Cabinet Secretaries.

Reasons for delegated legislation

- The area to be legislated on may be technically complex, making it difficult to set out all the permutations in the original statute.

- The subject matter may be novel hence needing time to experiment and determine how the legislation is operating.
- The executive may wish to implement the legislation at a later stage or to alter its detail.
- An Executive with an onerous legislative timetable, or only a small majority, there is the temptation to pass skeleton legislation with the details being etched in by the minister

Rules to check delegated legislation

This must be constitutional with the statute or Act of parliament with other statutes, Acts or written law. These rules must be reasonable and certain; two maxims developed here *delegate potestas non potest delegari* – a delegated authority cannot be again delegated, and *delegatus non potest delegare* – a delegate or deputy cannot appoint another. This shows that legislative organs like Senate, the National Assembly and County Assemblies may pass delegated legislation. These include standing orders, rules and regulations.

He cited the following as laws governing delegated legislation:-

- a) Statutory Instrument Act No 23 of 2013 which provides for the making, scrutiny, publication and operation of statutory instruments.
- b) Paragraph 211 of the Senate Standing Orders “Committee on Delegated Legislation.”
- c) Paragraph 210 of the National Assembly Standing Orders ‘Committee on Delegated Legislation.’

Procedure to be followed when a statutory instrument is brought before Parliament

The Statutory Instrument Act No 23 of 2013 provides in section 10 for Parliamentary scrutiny of Statutory Instruments and set out the circumstances and manner in which the statutory instruments, or provisions of the statutory

instruments, may be disallowed, as well as the consequences of the disallowance.

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 with an explanatory memorandum in the manner prescribed in the Schedule shall be attached is transmitted to the responsible Clerk for tabling before Parliament.

The Committee shall in carrying out its scrutiny of any statutory instrument or published bill be guided by the principles of good governance, rule of law. Subject to Section 16 of the Statutory Instrument Act, the Committee may exempt certain statutory instruments from scrutiny if the committee is satisfied that the scrutiny is not reasonably practical due to the number of regulations in that class.

The Committee shall then make a report to Parliament containing only a resolution that the statutory instruments that stand permanently referred to the Committee be revoked.

Subject to section 11 of the Statutory Instrument Act, and so far as its practically possible, the Committee shall confer with the regulation-making authority for which the statutory instrument has been made and brought before the Committee for scrutiny, before tabling the report to Parliament for their information and modification where necessary.

3.3 MANDATE OF THE DELEGATED LEGISLATION COMMITTEES OF COUNTY ASSEMBLIES, THEIR ROLE AND SCOPE

BY – MR. PETER MUSYIMI, LAW REFORMS COMMISSION

He stated that Article 185 of the Constitution vests the legislative authority of a county on its county assembly. Consequently, at the national level, Article 94 vests the legislative authority of the Republic on Parliament. No person/body

can make a provision with the force of law except under the authority of the Constitution or legislation.

Article 94 (6) requires that an Act of Parliament or legislation of a county that confers the authority to make a provision having the force of law shall expressly specify:

- a) the purpose and the objective for which the authority is conferred;
- b) the limits of the authority;
- c) the nature and scope of the law that may be made; and
- d) The principles and standards applicable.

Section 14 of the County Governments Act provides for the application of the standing orders of the National Assembly to the county assemblies with necessary modifications pending formulation of their own standing orders.

To assist county assemblies finalize this exercise, a set of Interim County Assembly Standing Orders had been circulated to all county assemblies.

Apart from the Constitution, the Statutory Instruments Act, and section 8 of the CGA define the mandate of the Committee.

Section 13 of the Statutory Instruments Act which is replicated in the Standing Orders mandates the Committee carry out scrutiny of any statutory instrument or published Bill be guided by the following principles of good governance, rule of law and report whether it-

- i. is in accord with the Constitution, or other law;
- ii. infringes on fundamental rights and freedoms;
- iii. contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament;
- iv. contains imposition of taxation;
- v. directly or indirectly bars the jurisdiction of the Courts
- vi. retrospective effect;

- vii. involves expenditure from the Consolidated Fund or other public revenues;
- viii. is defective in its drafting;
- ix. appears to make some unusual or unexpected use of the powers conferred by the Constitution;
- x. appears to have had unjustifiable delay in its publication or laying before Parliament
- xi. makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers;
- xii. inappropriately delegates legislative powers;
- xiii. makes rights , liberties or obligations unduly dependent upon non-reviewable decisions;
- xiv. imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
- xv. appears for any reason to infringe on the rule of law;
- xvi. inadequately subjects the exercise of legislative power to parliamentary scrutiny; and
- xvii. Accords to any other reason that the Committee considers fit to examine.

Every Statutory instrument is required to be accompanied by a memorandum containing:

- a) a statement of the objects and reasons of the instrument,
- b) a statement of delegation of legislative powers
- c) a statement on limitation of fundamental rights and freedom, if any,
- d) a statement of its financial implication and if the expenditure of public moneys.
- e) Consultations with the people.

- vii. involves expenditure from the Consolidated Fund or other public revenues;
- viii. is defective in its drafting;
- ix. appears to make some unusual or unexpected use of the powers conferred by the Constitution;
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- d) a statement of its financial implication and if the expenditure of public moneys.
- e) Consultations with the people.

**3.4 TRACKING DELEGATED LEGISLATION AND DOCUMENTATION;
BEST PRACTICES FOR COUNTY ASSEMBLIES
BY MR. TONY MUSIGA, ADVOCATE, REPORTER, NATIONAL
COUNCIL FOR LAW REPORTING**

Mr. Musiga briefed the Members about the National Council for Law Reporting. It is a State Corporation within the Judiciary. It was established under the National Council for Law Reporting Act, No. 11 of 1994 and is mandated to:-

- I. Publish the Kenya Law Reports, which are the official law reports of the Republic of Kenya.
- II. Revise, consolidate and publish the Laws of Kenya.

He cited the following rules on delegated legislation:-

- *Delegatus non portest delegare* – rule against sub delegation.
- There is no general power to make delegated legislation
- Delegated legislation must be based on /spring from parent statute
- Delegated legislation must conform to the parent statute. Meaning of each cause/word must be similar to the usage in the parent statute.

The Parent statutes contain the general broad principles of law while delegated legislation contains their enforcement or implementation as the circumstances may determine.

In understanding devolution, he stated that it was important to note the following:-

- Devolution follows the multi- dimensional approach to governance.
- It organizes State Power along multiple lines - Vertically and Horizontally

However, Article 6(2) describes the governments at the two levels as being DISTINCT (different responsibilities) and Interdependent (must work together/

not in isolation of each other) and which should conduct their mutual relations on the basis of consultation and cooperation.

Article 186 provides the principles that guide assignment of functions recognize three categories of functions.

- *Exclusive* functions which can be performed by only one level of government.
- *concurrent* functions which can be performed by two or more levels of government
- *residual* functions which reside with the original level of government which existed before the creation of the other levels of government

Article 185 provides for functions of the County Assembly. They exercise the legislative authority of the county to make laws that are necessary for, or incidental to, the effective performance and exercise of the powers of the county government. The legislative limits of the County Assemblies are however set out in the Fourth Schedule, Constitution.

All Regulations come to National Council for Law Reporting in the form of Legal Notices. So far only Nairobi County has sent their Statutory Instrument Legal Notices for Commencement dates of Finance and Tax Waiver Act.

Counties who wish to send their instruments do so through scanning and sending them to – countylaws@kenyalaw.org

3.5 OVERVIEW OF STATUTORY INSTRUMENTS ACT, 2013

By: MS. EMMY CHEPKWONY, SENIOR CLERK ASSISTANT, SENATE

According to Section 2 of the Statutory Instruments Act, 2013 “statutory instrument” is defined as 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.

Stages in the Making of a Statutory Instrument

Pre-Publication Scrutiny: this stage involves consultation before making statutory instruments. Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to have a direct, or a substantial indirect effect on business; or

- a. Restrict competition; the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.

In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—

- drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and
- ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content

Involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or

Invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument. The requirement for consultation is mandatory before making of any statutory instrument. It is therefore upon the regulation-making authority to determine who to consult and the manner of consultation. The Act is clear on the class of the Statutory Instruments upon which consultation is a must.

Publication

Every statutory instrument shall be published in the Kenya Gazette and shall be assigned a serial number as of the year in which it is made which shall be printed on the face of the instrument.

Laying and tabling of statutory instruments before Parliament

Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after publication of an statutory instrument, cause to be tabled a copy of the statutory instrument before Parliament. The instruments shall be tabled together with:

- a. Explanatory memorandum; and
- b. Regulatory impact statement.

Explanatory Memorandum is a statement that is prepared by a regulation-making authority and it explains the purpose and operation of the statutory instrument. If any documents are incorporated in the statutory instrument by reference, contains a description of the documents so incorporated and indicates how they may be obtained;

Consequences of not tabling

If a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid without prejudice to any act done under the statutory instrument before it became void

Referral to the Committee

Every statutory instrument issued or made or established after the commencement of this Act shall stand referred to the Committee or any other committee that may be established for the purpose of reviewing and scrutinizing statutory instruments.

The Committee can also scrutinize statutory instruments previously published before the commencement of this Act.

The provisions of the Act shall not apply to any rules, regulations and orders emanating from a court of competent jurisdiction in Kenya.

In carrying out its scrutiny of any statutory instrument or published Act be guided by the principles of good governance, rule of law and shall in particular consider whether the statutory instrument are in tandem with the certain principles as provided in the Act.

Report to Parliament

The Committee shall make a report to Parliament containing only a resolution that the statutory instruments that stands permanently referred to the Committee be revoked. The Committee shall confer with the regulation-making authority for which the statutory instrument has been made and brought before the Committee for scrutiny, before tabling the report to Parliament for their information and modification where necessary.

Commencement of Instruments

A statutory instrument shall come into operation on the date specified in that behalf in the instrument or, if no date is so specified, then, subject to subsection (2), it shall come into operation-

- a. on the date of its publication in the *Gazette* or elsewhere as may be prescribed under section 17(2);
- b. in any other case, on the date on which it is made.

If an instrument is made after the passing or making but before the coming into operation of the enabling legislation under which it is made, the instrument, whether or not it is previously published, shall not come into operation before the date on which the enabling legislation comes into operation.

Annulment and revocation

When a report on a statutory instrument has been tabled in Parliament, the statutory instrument shall be deemed to be annulled if Parliament passes a resolution to that effect.

Where Parliament 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.

CHAPTER FOUR OBSERVATIONS AND RECOMMENDATIONS

OBSERVATIONS

1. There was need for the Committee members to be well informed regarding rules, procedures and the relevant legislations.
2. The mandate of the Committee overlapped with other standing Committees like the committee on Legal Affairs.
3. The provisions of the Statutory Instrument Act, 2013 were not aligned to the Constitution to incorporate counties.
4. There was need for capacity building for Members of the Committee and the Secretariat.
5. There was no legislation to define parameters for public participation in the process of making statutory instruments.
6. There was need for an increased understanding of the mandate of the counterpart committees.
7. The County Assembly Committees needed to consult more with the office of the Clerk of the Senate on matters pertaining to legislation in the counties and more importantly in the domain of statutory documents.
8. A meaningful working relationship between the Chairpersons and Secretariat was important for a harmonious working engagement.
9. Strategic leadership is very crucial for the success of committees.
10. It was important to exercise vigilance in exercising its constitutional mandate and legislative powers to scrutinize subsidiary legislations.
11. There is need for public sensitization and creation of awareness on the mandate of the committee and provisions of the Statutory Instruments Act, 2013.

RECOMMENDATIONS

1. The Committee members to study and familiarize themselves with key legislative documents such as the constitution, Statutory Instrument Act 2013, Standing Orders, briefing notes etc.
2. The Committee to forge a closer working relationship with the committee on Legal Affairs due to their overlapping mandates.
3. The Committee to review the Statutory Instrument Act, 2013 to incorporate the counties in the provisions of the Act.
4. The Committee to partner with relevant organizations such as Law Society of Kenya, Kenya Law Reform Commission among others, for purposes of capacity building for members of the Committee and the secretariat.
5. The Committee to initiate legislation to define parameters for public participation in the process of making statutory instruments.
6. The Committee to organize similar workshops with Members of the County Executive Committees and chairpersons of county assembly Committees to increase in-depth understanding of their mandates and in the spirit of forging a working relationship.
7. The County Assembly Committees to consult with the office of the Clerk of the Senate on any matter pertaining to legislation in the counties and more importantly in the domain of statutory documents.
8. The respective Chairpersons of Committees to establish meaningful working relationships with the secretariat for a harmonious working engagement.

9. Committees to exercise oversight and make follow-ups in the implementation of recommendations in their reports.
10. Committee chairpersons to exercise strategic leadership for the success of their committees.
11. Committee members to remain vigilant in exercising the Committees' constitutional mandate and legislative powers to scrutinize subsidiary legislations.
12. The Committee to prepare documentations aimed at publicizing and simplifying the contents and meaning of Statutory Instruments Act 2013 and operations of the Committee.

REPUBLIC OF KENYA



PARLIAMENT OF KENYA

THE SENATE

**A RETREAT OF
THE SENATE COMMITTEE ON DELEGATED LEGISLATION
AND CHAIRPERSONS OF THE COMMITTEES ON DELEGATED
LEGISLATION OF THE COUNTY ASSEMBLIES**

19TH TO 21ST FEBRUARY, 2014

TO BE HELD AT SERENA BEACH HOTEL MOMBASA

PROGRAMME

Clerk's Chambers,
The Senate,
County Hall, 2nd Floor,
Parliament Buildings,
Nairobi.

February, 2014

Day 1: Wednesday, 19th February, 2014

Arrival and Check-in at the hotel

Responsible Officers: *Ms. Pamela Atieno*

Day 2: Thursday, 20th February, 2013

SESSION 1:

OPENING SESSION

Session Chair: **Sen. Mshenga K. Mvita, Chairperson Senate Committee on Delegated Legislation**

8.30- 9.00am

Registration

Responsible officer: *Ms. Pamela Atieno*

9.00-9.10am

Outline of objectives of retreat by the Vice-Chairperson, Senate Committee on Delegated Legislation, *Sen. Judith Sijeny*

9.10 – 9.25 am

Remarks by the Clerk of the Senate
Mr. J. M. Nyegenye

9.25- 9.40 am

Remarks by representative of SUNY Kenya

9.40-9.55am

Keynote address by the Deputy Speaker of the Senate, *Sen. Kembi Gitura, MGH, MP*

10.00-10.30am

Health break and photo session

SESSION 2:

CONCEPTUAL FRAMEWORK OF DELEGATED LEGISLATION COMMITTEES

Session Chair:

Sen. Stewart Madzayo

10.30am -11.40pm

An Overview of the Origin and Development of the Sessional Committee on Delegated Legislation: Why was it Necessary?

Presenter: *Mr Njenga Njuguna, Director, Committee Services*

Panel of Discussants

Sen. Emma Mbura

Sen. Boni Khalwale

11.40am-12.30pm

Contextualizing delegated legislation

I. Background and status of Delegated Legislation

II. Operational mechanisms of Delegated Legislation;
Enhancing quality of Delegated Legislation

*Prof. Ben Sihanya, JSD Advocate & Lecturer University
of Nairobi*

1.00-2.00pm

Lunch break

SESSION 3:
Session Chair:

LEGAL FRAMEWORK
Sen. Emma Gertrude

2.00-3.15pm

**Defining Mandate of the Delegated Legislation
Committees of the County Assemblies and examining
their scope:-**

Presenter: *Mr. Peter Musyimi, Kenya Law Reforms
Commission*

Panel of Discussants

*Sen. Liza Chelule
Sen. Daniel Karaba*

3.15-5.00pm

Overview of the Statutory Instruments Act:

I. Pre-publication & Publication stage

II. Post- Publication stage/ Parliamentary scrutiny of
Statutory instruments

Presenter: *Ms. Emmy Chepkwony, Senior Legal Counsel*

Panel of Discussants

*Sen. Mvita Mshenga
Sen. (Dr.) Boni Khalwale*

Day 3: Friday 21st February, 2013

SESSION 4

Session Chair: Sen. Daniel Karaba

9.30-10.30am Tracking Delegated Legislation and documentation; best practices for county Assembly Committees

Presenter: *Mr. Teddy Musiga, Advocate & Reporter, National Council for Law reporting*

Panel of Discussants

Sen. Judith Sijeny
Sen. Liza Chelule

10.30-11.00am Health break

11.00-12.00pm Way forward by *Mr. Njenga Njuguna, Director Committee Services*

12.00-12.30pm Vote of thanks by representative of the Chairpersons of the counterpart committees of the County Assemblies

12.30-1.00pm Closing remarks by *Sen. Mvita Mshenga, Chairperson, Committee on Delegated Legislation*

1.00pm Lunch break and departure for all

END OF THE PROGRAM

Rapporteurs:

Mr. Leonard Opiyo - Junior Legislative Fellow

Programme Coordinator

Ms. Joyce Aluoch -Clerk Assistant- 0787771662

THE SENATE
RETREAT OF THE COMMITTEE ON DELEGATED LEGISLATION AND
CHAIRPERSONS OF THE COMMITTEES ON DELEGATED LEGISLATION OF
THE COUNTY ASSEMBLIES

19TH TO 22ND FEBRUARY 2014 AT WHITESANDS BEACH RESORT

LIST OF PARTICIPANTS

Deputy Speaker's office

- | | | |
|------|-----------------------------|---------------------|
| (1.) | Sen. Kembi Gitura, MGH, M.P | -Deputy Speaker |
| (2.) | Grace Mutung'a | -Personal Assistant |
| (3.) | Victor Kabugi | |

Committee members

- | | | |
|-------|----------------------------|--------------------|
| (4.) | Sen. Mshenga M. Kisasa | - Chairperson |
| (5.) | Sen. Judith A. Sijeny | - Vice-Chairperson |
| (6.) | Sen. (Dr.) Boni Khalwale | |
| (7.) | Sen. Daniel D. Karaba | |
| (8.) | Sen. Emma Mbura | |
| (9.) | Sen. Liza Chelule | |
| (10.) | Sen. Stewart M. S. Madzayo | |

Clerks' office

- | | | |
|-------|------------------|--------------------|
| (11.) | Mrs. C. S. Munga | - Clerk |
| (12.) | Susan Juma | - Office attendant |
| (13.) | Sophie Salamba | -Secretary |

Secretariat

- | | | |
|-------|-------------------|-----------------------------------|
| (14.) | Njenga Njuguna | -Director, Committees |
| (15.) | Emmy Chepkwony | -Senior Legal Counsel |
| (16.) | Joyce Aluoch | -Clerk Assistant |
| (17.) | Rose Mudibo | -Clerk Assistant |
| (18.) | Pamela Atieno | - Secretary |
| (19.) | Philemon Okinda | -Serjeant -At -Arms |
| (20.) | Leonard Opiyo | - Junior Legislative Fellow |
| (21.) | Keneth Otieno | -IT officer |
| (22.) | Christine Ndiritu | -Office of the Leader of Majority |
| (23.) | Gideon Keter | |

Resource persons

- | | |
|-----|-----------------------------|
| (1) | Sen. Kembi Gitura, MGH, M.P |
| (2) | Mrs. C. S. Munga |
| (3) | Teddy Musiga |
| (4) | Peter Musyimi |