

PENAL
PROVISIONS
AND
DELEGATED
LEGISLATION

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INTRODUCTION

- In certain cases, Parliament may pass an Act without making provisions relating to the nitty gritty matters of implementation but instead leave it to the implementing body to propose provisions with force of law for the better implementation of the Act or carrying out of the provisions in the Act.
- To this end, Parliament, through an Act passed by it, may delegate its legislative authority to certain Government agencies for purposes of coming up with subsidiary legislation
- The exercise of delegated legislative authority by government bodies other than Parliament is usually under strict supervision by Parliament, which donated the power, to ensure that the authority to whom the power is delegated acts within the authority delegated.

STATUTORY INSTRUMENTS

- Subsidiary legislation, also referred to as delegated legislation or subordinate legislation, occurs when Parliament gives legislative power to another person, generally a Cabinet Secretary to deal with administrative or procedural matters to implement the objectives of an Act.
- Section 2 of the Statutory Instruments Act, 2013 and the Standing Orders of the respective Houses of Parliament define a statutory instrument 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.”

PRE-REQUISITES FOR STATUTORY INSTRUMENTS

- Statutory instruments are prepared by a Cabinet Secretary or a body with power to make them, for example, a commission, an authority or a board.
- Statutory Instruments must be in conformity with the following:
 1. The Constitution
 2. The Interpretation and General Provisions Act
 3. The Parent Act
 4. The Statutory Instruments Act
 5. The National Assembly Standing Orders

THE CONSTITUTION

Article 94 (5) and (6) of the Constitution provide that-

- (5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.
- (6) 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.
- A Cabinet Secretary or a body or a commission, or an authority or a board with power to make a delegated legislation, must ensure that they act within the power delegated under the Constitution.

THE INTERPRETATION AND GENERAL PROVISIONS ACT

- Under section 3 of the Interpretation and General Provisions Act (Cap 2)-
- "subsidiary legislation" means, any legislative provision (including a transfer or delegation of powers or duties) made in exercise of a power in that behalf conferred by a written law, by way of by-law, notice, order, proclamation, regulation, rule, rule of court or other instrument;
- Part III of the Interpretation and General Provisions Act (Cap 2) sets out the broad principles governing subsidiary legislation in Kenya.

- **Publication and commencement of subsidiary legislation**

- 27. (1) All subsidiary legislation shall, unless it is otherwise expressly provided in a written law, be published in the Gazette, and shall come into operation on the day of publication, or, if it is enacted either in the subsidiary legislation or in some other written law that the subsidiary legislation shall come into operation on some other day, on that day, subject to annulment where applicable.
- (2) Notwithstanding anything in sub-section (1), where a written law contains a power to prescribe forms then, unless it is otherwise expressly provided therein, those

- **Retrospective operation of subsidiary legislation**

- 28. Subsidiary legislation may be made to operate retrospectively to any date, not being a date earlier than the commencement of the written law under which the subsidiary legislation is made, but no person shall be made or become liable to any penalty whatsoever in respect of an act committed or of the failure to do anything before the day on which that subsidiary legislation is published in the Gazette.

THE INTERPRETATION AND GENERAL PROVISIONS ACT

- **Construction of subsidiary legislation**

- 29. Where an Act confers power to make subsidiary legislation, expressions used in the subsidiary legislation shall, except where a contrary intention appears, have the same respective meanings as in the Act conferring the power, and a reference in the subsidiary legislation to "the Act" shall mean the Act conferring the power to make the subsidiary legislation.

THE INTERPRETATION AND GENERAL PROVISIONS ACT

- **Exercise of powers between publication and commencement of Act**
- 30. Where an Act is not to come into operation immediately on the publication thereof and confers power to make an appointment, to make subsidiary legislation, to prescribe forms or to do any other thing for the purposes of the Act, the power may, unless a contrary intention appears, be exercised at any time after the publication of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation on the day of the commencement thereof, but an instrument made in exercise of that power shall not, unless a contrary intention appears in the Act or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation.

THE INTERPRETATION AND GENERAL PROVISIONS ACT

• General provisions with respect to power to make subsidiary legislation

- 31. Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—
 - (a) when subsidiary legislation purports to be made or issued in exercise of a particular power or powers, it shall be deemed also to be made or issued in exercise of all other powers thereunto enabling;
 - (b) no subsidiary legislation shall be inconsistent with the provisions of an Act;
 - (c) subsidiary legislation may at any time be amended by the

THE INTERPRETATION AND GENERAL PROVISIONS ACT

replaced wholly or in part by another authority, the power conferred hereby upon the original authority may be exercised by the replacing authority concerning all matters or things within its jurisdiction as if it were the original authority;

(d) where an Act confers power on an authority to make subsidiary legislation for a general purpose and also for special purposes incidental thereto the enumeration of the special purposes shall not be deemed to derogate from the generality of the powers conferred with reference to the general purpose;

(e) there may be annexed to the breach of subsidiary legislation a penalty, not exceeding six thousand shillings or such term of imprisonment not exceeding six months, or both, which the authority making the subsidiary legislation may think fit.

THE INTERPRETATION AND GENERAL PROVISIONS ACT

- **References to written law to include subsidiary legislation thereunder**
- 32. A reference to a written law in another written law shall include a reference to subsidiary legislation made under the written law to which reference is made.
- **Acts done under subsidiary legislation deemed done under Act which authorizes it.**
- 33. An act shall be deemed to be done under an Act or by virtue of the powers conferred by an Act or in pursuance or execution of the powers of or under the authority of an Act, if it is done under or by virtue of or in pursuance of subsidiary legislation made under a power contained in that Act.

THE INTERPRETATION AND GENERAL PROVISIONS ACT

- **Rules and regulations to be laid before National Assembly**

- 34.(1) 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 thereunder, or to the making of any new rule or regulation.
- (2) Subsection (1) shall not apply to rules or regulations a draft of which is laid before the National Assembly and is approved by resolution before the making thereof, nor to rules of court.
- (3) In this section, "rules" and "regulations" mean respectively those forms of subsidiary legislation which may be cited as rules or regulations, as the case may be.

THE INTERPRETATION AND GENERAL PROVISIONS ACT

• Fees

- 35.(1) Where an Act confers power on a person to make subsidiary legislation, and provision may be made by that subsidiary legislation in respect of fees or other charges, the subsidiary legislation may provide for all or any of the following matters—
 - (a) specific fees or charges;
 - (b) maximum or minimum fees or charges;
 - (c) maximum and minimum fees or charges;
 - (d) the payment of fees or charges either generally or under specified conditions or in specified circumstances; and
 - (e) the reduction, waiver or refund, in whole or in part, of any such fees or charges, either upon the happening of a certain event or in the discretion of a specified person.

THE INTERPRETATION AND GENERAL PROVISIONS ACT

- (2) Where a reduction, waiver or refund in whole or in part, of a fee or charge is provided for, the reduction, waiver or refund may be expressed to apply or be applicable either generally or specifically—
 - (a) in respect of certain matters or transactions or classes of matters or transactions;
 - (b) in respect of certain documents or classes of documents;
 - (c) when an event happens or ceases to happen;
 - (d) in respect of certain persons or classes of persons; or
 - (e) in respect of a combination of those matters, transactions, documents, events or persons,
- and may be expressed to apply or be applicable subject to such conditions as may be specified in the subsidiary legislation or in the discretion of any person specified therein.

THE PARENT ACT

- All delegated legislation is made pursuant to powers delegated under a parent Act.
- Delegated legislation must be made in conformity with the parent Act and particular attention must be paid to the provision delegating legislative powers.
- Where timelines for preparing delegated legislation are stipulated, strict adherence ought to be observed
- Some delegated legislation require pre-publication scrutiny by the National Assembly and the draft thereof must therefore be tabled in the House before publication. In such cases, the requirements are expressly provided for under the parent Act.

THE PARENT ACT

- For instance, with respect to statutory instruments relating to election, section 109(3) of the Elections Act (No. 24 of 2011) provides—

“ The power to make regulations shall be exercised only after a draft of the proposed regulations has been approved by the National Assembly, at least four months preceding a general election:

Provided that this applies to the first general election under this Act.”

- Therefore, any regulation relating to election matters once made by the Independent Electoral and Boundaries Commission (IEBC), must be approved by the House

THE STATUTORY INSTRUMENTS ACT

- The Statutory Instruments Act outlines the criteria that guide the scrutiny of delegated legislation.
- The key requirements under the Act are:
 - i. Consultations between the regulation-making authority and persons likely to be affected by a proposed instrument (section 5)
 - ii. Provision of a Regulatory Impact Statement in certain instances (sections 6, 7 and 8)
 - iii. Preparation of an Explanatory Memorandum (section 11)
 - iv. Tabling of the statutory instruments within seven sitting days from the date of publication. (section 11)

THE STATUTORY INSTRUMENTS ACT

- v. Adherence to principles of good governance and rule of law (section 13)
- vi. The Committee must report to the House within twenty-eight (28) days after the date of referral of the statutory instrument failure to which the statutory instrument is deemed to have fully met the relevant considerations and the responsible regulation making authority will be at liberty to operationalize it.
- vii. The Act empowers the Committee to confer with the regulation-making authority before tabling a report to Parliament for their information and modification if necessary. This consultation is necessary to facilitate understanding of the regulations by the Committee and an opportunity for the regulation making authority to rectify errors in the statutory instruments.
- viii. Statutory instruments are automatically revoked ten years after their making unless a sooner expiry date is provided or if such regulation is

NATIONAL ASSEMBLY STANDING ORDERS

- Standing Order 210 contains provisions for dealing with delegated legislation. Standing Order 210(3) provides the criteria for scrutinizing statutory instruments which criteria is imported from section 13 of the Statutory Instruments Act. Upon scrutinizing a statutory instrument, the Committee on Delegated Legislation may, pursuant to Standing Order 210(4) either:
 - (a) accede to the instrument; or
 - (b) recommend to the House that the instrument be annulled in part or in its entirety.

NATIONAL ASSEMBLY

- **Committee on Delegated Legislation**
- The Committee on Delegated Legislation is one of the select committees of the National Assembly established under the Statutory Instruments Act and the Standing Order 210.
- Whenever a statutory instrument is laid before the Assembly, it is referred to the Committee for scrutiny. After scrutinizing a statutory instrument, the Committee may resolve that the statutory instrument be acceded to or if it does not accede to it, recommend in its report to the House that the House resolves that all or any part of the statutory instrument be annulled.

NATIONAL ASSEMBLY

Can the House amend delegated legislation?

- Ordinarily, when Parliament delegates legislative authority to a regulation making body, the statutory instruments made thereof ought not be subject to amendment by Parliament.
- Parliament is expected to either approve them in the form presented or reject them and require the responsible body to re-submit in compliance with the Statutory Instruments Act.
- In a Communication on the Procedure for Consideration of Delegated Legislation delivered on 26th March 2014, the Speaker stated that the House is not required under the Statutory Instruments Act to approve or make any amendments to the statutory instrument. The Speaker ruled:

“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.”

NATIONAL ASSEMBLY

- **Timelines**

- Section 15 of the Statutory Instruments Act provides as follows in Sub-section (2):
- *“Where the Committee does not make the report referred to in Subsection (1) within twenty eight days after the date of referral of the statutory instrument to the Committee under Section 12, or such other period as the House may, by resolution approve, the statutory instrument shall be deemed to have fully met the relevant considerations referred to in Section 13.”*

DELEGATED LEGISLATION – IMPORTANT CONSIDERATIONS

- As a legislative drafter, you must always ensure that the regulations to be made are within the scope of the enabling power.
- You must also ensure that the empowering provision and the general law have been complied with.
- If there are preconditions to be satisfied before the delegated power is exercised, the drafter must check that the consultation between the relevant parties has occurred. – For example, The Cabinet Secretary, on the recommendations of the Board, may make regulations:

DELEGATED LEGISLATION – IMPORTANT CONSIDERATIONS

- The drafter should ensure that the person given the delegated power does not sub-delegate it – For Example, where the power is given to the Rules of Court committee to make Rules signified under the hand of the chairperson but the Rules are made by the Attorney-General instead, this is likely to be found to be illegal.
- Before the power to make subsidiary legislation is exercised, the drafter should check that the proposed regulations are not inconsistent with any other enactment, particularly the Constitution.
- The drafter should ensure that the obligations to be imposed under subsidiary legislation are certain and understandable.

DELEGATED LEGISLATION

- If the Cabinet Secretary is empowered to make regulations to regulate an activity, this does not permit, the Cabinet Secretary to prohibit the activity.
- Regulatory provisions generally list the matters on which regulations can be made and conclude with a general provision or omnibus clause. For Example:

“.....and provide for any other matter necessary for the effective carrying out of the provisions of this Act.

- These general words cover matters incidental or ancillary to what is enacted in the statute itself. They will not support a widening of, or departure from the general purpose of the Act.
- Words and expressions in subsidiary legislation have the same meaning as in the substantive legislation and should not be defined again except if the word or expression is to have a different meaning.

DELEGATED LEGISLATION

- The subsidiary legislation may be considered to be outside the enabling power on the following grounds:
 - I. Failure to comply with legal rules that control the making of the subsidiary legislation;
 - II. The subsidiary legislation is not authorized by the empowering provision,
 - III. The subsidiary legislation contains an unlawful sub-delegation;
 - IV. The subsidiary legislation is inconsistent with Acts other than the empowering Act;
 - V. The power to make the subsidiary legislation has been exercised for an improper purpose;
 - VI. The subsidiary legislation is uncertain in its application;

DELEGATED LEGISLATION

Problems related to subsidiary legislation-

- I. there is no effective control by the Executive;
- II. wide discretion is given to the Cabinet Secretary;
- III. there is a possibility the subsidiary legislation may extend to matters of policy, and too much power may be given to the Cabinet Secretary;

PENAL PROVISIONS

- There are two matters to be considered when drafting penal provisions
- (i) What is the appropriate legislative form?
- (ii) Where, within that appropriate legislative form, should the provision be placed?

1. **The Appropriate Legislative Form**

Regarding the drafting of legislation, Thornton has commented as follows:

“ensure that matters which ought by reason of their importance or substance to be in principal legislation are not, either with malice aforethought or in blissful ignorance, slipped into subsidiary legislation.”

PENAL PROVISIONS

- Generally, matters of policy or principle ought to be captured in the Parent Act
- The appropriate legislative medium for penal provisions is the Parent Act which is most thoroughly debated during its passage and which is most readily accessible to the public after its enactment. Rules and regulations do not readily fit that description.
- The suggestion that penal provisions might be "hidden" (intentionally or otherwise) in subordinate legislation, ready to spring upon the unsuspecting citizen, is unpalatable.

PENAL PROVISIONS

- From the drafter's point of view, however, there needs to be careful consideration before penal provisions are placed in subordinate legislation.
- When drafting penal provisions, care must be taken to ensure that:
 - (a) The regulation-making provision in the parent Act permits this, and
 - (b) The regulation which is drafted does not exceed any limits cast upon it by that provision.

PENAL PROVISIONS

Where should the penal provisions be placed?

- The "main elements" of a penal provision are - "offence, conduct, and penalty".
- The text of the provision should make clear (as a minimum)
- **(1) that if certain conduct occurs,**
- **(2) an offence will have been committed, and**
- **(3) the penalty to which the offender is liable.**
- For example: Every person (unless authorised by this Act) commits an offence, and is liable to a fine not exceeding Kshs 1,000, who takes, removes, disturbs, or interferes with any fish, aquatic life, or seaweed being farmed in an area in respect of which a marine farming permit has been issued under section 67J of this Act.

PENAL PROVISIONS

- Any other practice results in a 'legislative dislocation', which is at best annoying, at worst dangerous, and nearly always unnecessary.
- This dislocation occurs whenever one or more of those elements is separated in the legislation from one or more of the others.

PENAL PROVISIONS

Dislocation of conduct and offence elements

Sections 15 and 61 of the Employment Act states:

15 Duties of employers in respect of employees —

Every employer shall main a contract of service for all employees

61 Other offences —

- (1) Every person commits an offence who fails to comply with —
- (2) (a) Any provision of Part II of this Act (other than section 14);

PENAL PROVISIONS

- Here, certain conduct is required, and a failure to fulfil that requirement constitutes an offence, but that link is not made clear at the place at which the conduct is set out.
- Readers should be clear about when they might be committing an offence, but an employer reading section 15 would not immediately (and maybe not until too late) realise that a breach of that duty is an offence punishable by a fine of up to Kshs 50,000.
- Furthermore, employers may more readily satisfy the requirements of s 15 if they know that a failure to do so constitutes an offence.

PENAL PROVISIONS

- Contrast s 105 of the same Act –
- **105 Rules to be observed by person finding a wreck —**
- (1) Where any person finds or takes possession of any wreck within the limits of Kenya, or takes possession of and brings within the limits of Kenya any wreck found outside those limits, he or she shall —
- (a) If he or she is the owner thereof, give notice to the Maritime Authority, stating that he or she has found or taken possession of the wreck, and describing the marks by which the same may be recognised:
- (b) If he or she is not the owner thereof, as soon as possible deliver the same to the Maritime Authority.
- (3) Every person who fails without reasonable cause to comply with this section commits an offence and is liable to a penalty not exceeding Kshs 20,000.
- Section 105 links the conduct, offence and the penalty; it clearly indicates that certain conduct constitutes an offence, and it does so without requiring the reader to refer elsewhere in the statute.

PENAL PROVISIONS

- When drafting penal provisions, careful thought needs to be given to the manner in which they are enacted.
- Once the appropriate form of legislation has been selected, it is submitted that, unless there are good reasons to the contrary, the main elements of the provision - **ie the proclamation of the offence, the conduct that constitutes the offence, and the penalty** - should appear in the same section, clause or rule.
- If the elements are to be dislocated in any way, consideration should be given to including in each of the separate provisions a subsection or explanatory footnote which directs the reader to the related provision. To fail to do so can lead to legislation which is difficult to follow and to a denial of basic principles of access to justice.

QUESTIONS??
- THE END -