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REPUBLIC OF KENYA

THIRTEENTH PARLIAMENT- SECOND SESSION (2023)

THE NATIONAL ASSEMBLY

COMMITTEE ON DELEGATED LEGISLATION

REPORT ON THE UNIVERSITIES REGULATIONS, 2023

(LN. No.56 of 2023)

SEPTEMBER, 2023	
THE NATIONAL ASSEMBLY	
DATE: 14 SEP 2023 Thursday	
TABLED BY:	Chairperson, Delegated Legislation Hon. Samuel Chepkonga, MP
Chairman of The House	Tracy Chebet

**The Directorate of Audit, Appropriations & Other Select Committees**  
The National Assembly  
Parliament Buildings  
**NAIROBI.**

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## **ABBREVIATIONS**

<b>LN</b>	<b>Legal Notice</b>
<b>RMA</b>	<b>Regulatory Making Authority</b>
<b>SI</b>	<b>Statutory Instruments</b>
<b>SO</b>	<b>Standing Order</b>

## CHAIRPERSON'S FOREWORD

The Universities Regulations, 2023 ("the Regulations") are made *vide LN No. 56 of 2023*, pursuant to powers conferred on the Cabinet Secretary for Education under section 70 of the University Act, (*No. 42 of 2012*).

The Regulations were published in the Gazette as *LN. No. 56 of 2023* on 2<sup>nd</sup> May, 2023, received by the Clerk of the National Assembly on 8<sup>th</sup> May, 2023 and were laid on the table of the House on 6<sup>th</sup> June, 2023, being the fourth sitting day since publication hence were within the Statutory timelines contemplated under section 11(1) of the Statutory Instruments Act.

The Regulations seek *inter alia*, to provide for other modes of teaching and delivery such as open, Distance *e-learning*, taking into account the effect of COVID-19, Open University of Kenya, A framework for collaboration between; local Universities and local Tertiary Institutions, better carrying out of activities of Specialized Degree Awarding Institutions and better direction and Quality Assurance of activities in Universities in Kenya such as institutionalizing quality audit in the University Statutory Instruments Act, 2013.

However, the Regulations fall short of complying with the minimum threshold set out in Articles 10, 118 and 259 (11) of the Constitution as read with sections 5, 5A and 13 of Statutory Instruments Act, 2013, section 70 of the Universities Act, 2012, the Interpretations and General provisions Act, (*Cap 2 Laws of Kenya*) for failure to conduct sufficient public participation, omitting to subject the Regulations to a regulatory impact assessment, inclusion of provisions that are *ultra vires* the enabling provisions of the Universities Act, 2012, and blatant contravention of section 13 of the Statutory Instruments Act, 2013 and on other grounds set out in detail in this report.

Pursuant to section 16 of the Statutory Instruments Act, 2013 which requires the Committee to confer with the Regulation-Making Authorities before making its decision, the Committee held a meeting with Cabinet Secretary for Education on 29<sup>th</sup> June, 2023 within Parliament Buildings to deliberate on the Universities Regulations, 2023.

The Committee was cognizant of the provisions of the Report on the Presidential Task Force recommendations regarding University Education and sought to urge the Ministry to realign the Regulations with that report, as well as the issues raised by the Committee.

Having examined the Universities Regulations, 2023, *Legal Notice No. 56 of 2023* in accordance with the Constitution, the Interpretations and General Provisions Act (*Cap 2*), the Statutory Instruments Act (*No 23 of 2013*), the University Act, (*No. 42 of 2012*), the Committee recommends that the House **Annuls in entirety** the Universities, 2023, (LN. No. 56 of 2023) for non-compliance with the relevant Statutes, and to give the Ministry an opportunity to align the Regulations with the Constitution, the relevant Statutes and the Report of the Presidential Task Force on the recommendations on University Education.

I wish to most sincerely thank the Speaker and the Office of the Clerk of the National Assembly for the invaluable support accorded to the Committee in the discharge of its mandate.

On behalf of the Members of the Select Committee on Delegated Legislation and pursuant to Standing Order 210 (4) (b), it is my pleasure and duty to present to the House, the **Committee's Report on the Consideration of the Universities Regulations, 2023** (*LN. No. 56 of 2023*).

**HON. CHEPKONGA KIPRONO SAMUEL, CBS, MP**

## 1.0 PREFACE

### 1.1 Establishment and Mandate of the Committee

1. The Select Committee on Delegated Legislation is established pursuant to *Standing Order No. 210* and is mandated to consider statutory instruments submitted to Parliament for consideration. The Committee is expected to consider in respect of any statutory instrument, whether it is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written laws.
2. During the scrutiny, the Committee is guided by the principles of good governance, rule of law considers whether the instrument-
  - a. is in accordance with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written laws;
  - b. infringes on fundamental rights and freedoms of the public;
  - c. contains a matter which in the option of the Committee should more properly be dealt with in an Act of the Parliament;
  - d. contains imposition of taxation;
  - e. directly or indirectly bars the jurisdiction of the court;
  - f. gives retrospective effect to any of the provision in respect to which the Constitution does not expressly give any such power;
  - g. it involves expenditure from the consolidated fund or other public revenues;
  - h. is defective in its drafting or for any reason form or part of the statutory instrument calls for any elucidation;
  - i. appears to make some unusual or unexpected use of the power conferred by the Constitution or the Act pursuant to which it is made;
  - j. appears to have had unjustifiable delay in its publication or laying before Parliament;
  - k. makes rights, liberties or obligations unduly dependent upon non-renewable decisions;
  - l. makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers;
  - m. inappropriately delegates legislative powers;
  - n. imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
  - o. appears for any reason to infringe on the rule of law;
  - p. inadequately subjects the exercise of legislative power to Parliamentary scrutiny; and
  - q. accords to any other reason that the Committee considers fit to examine.

## 1.2 Committee Membership

3. The Committee membership comprises –

Hon. Chepkonga Kiprono Samuel, CBS, M.P. (Chairperson)

Ainabkoi Constituency

UDA

Hon. Githinji Robert Gichimu, M.P. (Vice Chairperson)

Gichugu Constituency

UDA

### COMMITTEE MEMBERS

Hon. Mbui Robert, CBS, M.P

WDM-KENYA

Kathiani Constituency

Hon. Chebor, Paul Kibet, M.P

UDA

Rongai Constituency

Hon. Maj (Rtd) Dekow Barrow Mohamed,

M.P

UDA

Garrisa Township Constituency

Hon. Yakub Adow Kuno, M.P

UPIA

Bura Constituency

Hon. Julius Lekakeny Ole Sunkuli, EGH,

EBS, M.P.

KANU

Kilgoris Constituency

Hon. (Maj) (Rtd) Abdullahi, Bashir Sheikh

,M.P.

UDM

Mandera North Constituency

Hon. Kamene Joyce, M.P

WDM-KENYA

Machakos County

Hon. Mwirigi John Paul, M.P.

UDA

Igembe South Constituency

Hon. Onchoke, Mamwacha Charles, M.P.

UPA

Bonchari Constituency

Hon. Odoyo, Jared Okello, M.P.

ODM

Nyando Constituency

Hon Kimaiyo, Gideon Kipkoech, M.P.

UDA

Keivo South Constituency

Hon. Chepkorir Linet, M.P.

UDA

Bomet County

Hon. Komingoi, Kibet Kirui, M.P.

UDA

Bureti Constituency

Hon. Munyoro Joseph Kamau, M.P

UDA

Kigumo Constituency

Hon. Ruku, Geoffrey Kariuki Kiringa, M.P.  
DP

**Mbeere North Constituency**

Hon. Lenguris Pauline, M.P.  
UDA

**Samburu County**

Hon. Mwale, Nicholas S. Tindi M.P.  
ODM

**Butere Constituency**

Hon Mnyazi Amina Laura, MP.  
ODM

**Malindi Constituency**

Hon. Mugabe Innocent Maino, M.P.  
ODM

**Lukuyani Constituency**

### **1.3 Committee Secretariat**

4. The secretariat facilitating the Committee comprises –

**Ms. Esther Nginyo**  
*Clerk Assistant I (Team Leader)*

**Mr. Dima Dima**  
*Principal Legal Counsel I*

**Mr. Jacknorine Buleemi**  
*Clerk Assistant III*

**Ms. Winny Otieno**  
*Clerk Assistant III*

**Mr. Brian Langwech**  
*Clerk Assistant III*

**Mr Peter Barasa**  
*Legal Counsel II*

**Mr. Daniel Ominde**  
*Research Officer III*

**Mrs. Sheila Chebotibin**  
*Serjeant at Arms*

**Mr. Charles Ayari**  
*Audio Officer*



## **2.0 CONSIDERATION OF THE UNIVERSITIES REGULATIONS (LEGAL NOTICE NO. 56 OF 2023)**

### **2.1 Introduction**

5. The Universities Regulations, 2023, (*Legal Notice No. 56 of 2023*) were made pursuant to powers conferred on the Cabinet Secretary for Education under section 70 of the University Act, (*No. 42 of 2012*) hence, is a statutory instrument within the meaning of section 2 of the Statutory Instruments Act (*No 23 of 2013*).
6. The Regulations were published in the Gazette as LN No. 56 of 2023 on 2<sup>nd</sup> May, 2023, received by the Clerk of the National Assembly on 8<sup>th</sup> May, 2023 and were laid on the table of the House on 6<sup>th</sup> June, 2023, hence were within the statutory timelines contemplated under section 11(1) of the Statutory Instruments Act, 2013.
7. Pursuant to section 16 of the Statutory Instruments Act, 2013 which requires the Committee to confer with the regulation-making authorities before making its decision, the Committee held a meeting with Cabinet Secretary Ministry of Education on 29<sup>th</sup> June, 2023 within Parliament Buildings to deliberate on the Universities Regulations, 2023.
8. The purpose of the Regulations is to:
  - a. enhance the current Regulations taking into account the various amendments to the Universities Act, 2012;
  - b. provide for other modes of teaching and delivery such as open, distance and eLearning, taking into account the effects of COVID-19;
  - c. provide for the establishment of the Open University of Kenya;
  - d. provide for a framework for collaborations between; local universities and local tertiary institutions, and between a local university and another local university in the award of academic degrees in Kenya;
  - e. provide for the better carrying out of activities of specialized degree awarding institutions; and
  - f. provide for the better direction and quality assurance of activities in universities in Kenya such as institutionalizing quality audit in the Universities.

### **2.2 Summary of the Universities Regulations, 2023, Legal Notice No. 56 of 2023**

9. **Part I** of the Regulations provide for preliminary provisions including the citation, interpretation of the various terminologies used in the text of the regulations and the scope to be covered in the process of implementation of the regulations.
10. **Part II** of the Regulations provide for eligibility and application procedure of establishing a university, inspection of universities operating under a letter of interim authority and procedures for revocation of the said letter, application for award of charter, accreditation process for award of charter, requirement for accreditation report, grant of charter, mergers and acquisition, change of sponsorship of a university, withdrawal of a

sponsor of a university, accreditation of foreign universities, institutionalization of quality assurance, institutional quality audit, impromptu quality audit, inspection or investigation; promotion of quality teaching research, industry linkages, innovation and community, university data and information and university information system.

11. **Part III** of the Regulations provide for eligibility for establishment of a technical university and conditions for declaration, procedure for declaration and inspection of proposed technical universities. It further provides for consideration of technical inspection reports, declaration quality audit and privileges of a technical university.
12. **Part IV** of the Regulations provide for establishment of specialized degree awarding institutions, criteria of establishing the same, accreditation process, consideration of the inspection report, audit and declaration of a specialized degree awarding or research institution.
13. **Part V** of the Regulations provide for establishment of a constituent college. It further provides for application, consideration, operation, tenure and revocation of legal order establishing a constituent college.
14. **Part VI** of the Regulations provide for the establishment of a university campus. It further provides for the process of application, consideration for application, operation and tenure the process for application to establish an open, distance and E-learning centre.
15. **Part VII** of the Regulations provide for the process of accreditation or approval of academic programmes. It further provides for the engagement of professional bodies in accreditation or approval of academic programmes, conditions for credit accumulation and requirement for universities to develop internal quality assurance for academic programmes.
16. **Part VIII** of the Regulations provide for the process of application for foreign universities intending to collaborate with a local university or institution authorized to operate in Kenya. It further provides for obligations on both foreign and local universities entering into a collaboration agreement, process of approval of collaboration, maintenance of register of universities granted authority to collaborate and revocation of authority.
17. **Part IX** of the Regulations provide for the process of application for a local University intending to collaborate with a local university or institution authorized to operate in Kenya. It further provides for a collaboration review committee, the power of the committee to grant authority to collaborate, publication of grant and revocation of the authority to collaborate.
18. **Part X** of the Regulations provide for application for license to operate student recruitment agencies and activities of foreign universities. The same provides for conditions for operating a student recruitment agency and monitoring student recruitment agencies. It further provides

for the effects of the license; obligation of an agency and maintenance of student recruitment agencies registered by the commission.

19. **Part XI** of the Regulations provides for recognition and equation of degrees, diplomas and certificates conferred or awarded by a foreign university and institution. This further provides for principles of recognition and equation, evaluation of foreign qualification and criteria for recognition and equation of qualification.
20. **Part XII** of the Regulations provides for general provisions in terms of fees, penalties, review and appeals, transitional arrangements, continuation of time, preparation of standards and guidelines and declaration of standards and guidelines. Further the regulation provides for revocation of legal notice no. 76 of 2014.
21. **The First Schedule** to the Regulations provides for governance and management of a university.

### **2.3 Legislative Context**

22. Section 70 of the Universities Act, 2012 grants the Cabinet Secretary for Education the power to make Regulations for the better carrying out of the objects of and purpose of the Universities Act, 2012. Therefore, the Universities Regulations, 2023 have been made towards that context.

### **2.4 Policy Background**

23. The Universities Act, 2012 was enacted on 13<sup>th</sup> December, 2012 and came into operation on 14<sup>th</sup> December, 2012. The Act establishes the Commission for University Education as the successor to the Commission for Higher Education. The Commission advises the Cabinet Secretary for Education on the policy relating to university education.
24. The Universities Act, 2012 has undergone various amendments without corresponding changes to the subsidiary legislation, and in particular the Universities Regulations. The Act on its own, however, is not sufficient since it does not provide the form, operational procedures and guidelines on all matters relating to the mandate of the Commission. Regulations are therefore necessary to govern the implementation of the said mandate.
25. It is considered that if the Universities Regulations, 2023 were to be made in a way that conforms to the constitutional and statutory requirements. They would provide a framework to assist in the proper and better management of universities in Kenya and in particular, it would make Kenyan universities and graduates to remain competitive internationally.

### 3.0 COMMITTEE OBSERVATIONS

26. Having examined the Universities Regulations, 2023 in line with the Constitution of Kenya 2010, the Interpretation and General Provisions Act (Cap. 2) Laws of Kenya, the University Act, (No. 42 of 2012) and the Statutory Instruments Act (No. 23 of 2013) the Committee made the following observations –

#### 3.1 Statutory Timelines

27. **THAT**, the Regulations were published in the Gazette as LN No. 56 of 2023 on 2<sup>nd</sup> May, 2023, received by the Clerk of the National Assembly on 8<sup>th</sup> June, 2023 and were laid on the table of the House on 6<sup>th</sup> June, 2023 being the fourth sitting day since publication, hence were within the Statutory timelines contemplated under section 11(1) of the Statutory Instruments Act.

#### 3.2 Public Participation

28. Articles 10 and 118 of the Constitution requires that the public be involved in any legislative agenda by public institutions, and is buttressed by section 5, 5A and the schedule to the Statutory Instruments Act, 2013 which requires that consultation be made with the persons to be affected by the Regulations.
29. Section 70 of the Universities Act, 2012 mandates the Cabinet Secretary to make Regulations on specific areas **in consultation with the stakeholders**. Article 259(11) of the Constitution provides that *if a function or power conferred on a person under the Constitution (or a law) is exercisable on that person ...only ...on consultation with another person, the function may be performed or power exercised only...after that consultation.*
30. The Ministry, being the Regulation Making-Authority, did not demonstrate to the Committee sufficient evidence of having conducted public participation or consultations with any stakeholders, or at all. This is in contravention of Articles 10, 118 and 259(11) of the Constitution and sections 5, 5A and the schedule to sections 5,5A and 13 of Statutory Instruments Act, 2013, section 70 of the Universities Act, 2012.

#### 3.3 Regulatory Impact Statement

31. **THAT**, section 6 of the Statutory Instruments Act, 2013 requires that a Regulatory Impact Assessment be conducted where the proposed regulation is likely to impose significant costs on the community or part of the community. The very nature of the Universities Regulations involves matters relating to: -
- a. establishment of public and private universities, technical universities, open universities, university campuses and university constituent colleges;
  - b. issuance, revocation and variation of University Charters;

- c. implementation of differentiated unit costs, and discipline differentiated remuneration the academic year for the universities;
- d. continuous accreditation and quality assurance, including programme accreditation;
- e. procedure for the revoking a Letter of Interim Authority, varying or revoking a Charter and for winding up of universities; and
- f. registration of agents of foreign universities.
- g. procedure for approval of academic programmes by the Commission;
- h. procedure for recognizing and equating degrees, diplomas and certificates conferred by foreign universities.
- i. criteria for evaluating internal tools developed by universities for the purpose of assessing quality assurance.

32. **THAT**, the above matters impose direct and significant costs on the general public, and which therefore, attracts the requirement of a Regulatory Impact assessment and a statement to that effect. This was neither conducted nor demonstrated to the Committee.

#### **3.4 Inappropriate delegation of Legislative powers contrary to section 13(m) of the Statutory Instruments Act and section 70 of the Universities Act, 2012.**

33. **Section 13(m)** of the Statutory Instruments Act, 2013 requires the Committee to consider *inter alia*, if the person to whom power is delegated to make regulations inappropriately delegates legislative powers. The Committee took note with concern that the Cabinet Secretary has in Regulation 100, inappropriately delegated legislative powers to the Commission to make guidelines and to formulate standards on a raft of nineteen issues which are very pertinent such as; promotion of staff/ lecturers which ought to be a preserve of labour laws, and not to be dealt with under further sub-delegated powers or legislation.

34. Guidelines are defined as “statutory instruments” under section 2 of the Statutory Instruments Act, 2013; hence, a further sub-delegation of legislative authority to the Commission to make guidelines, which by themselves have a force of law, would contravene Article 94 (5) and (6) of the Constitution and sections 13(a) and (m) of the Statutory Instruments Act, 2013 and would be *ultra vires* section 70 of the Universities Act, 2012.

35. The Committee further noted that the areas on which the Ministry proposes the Commission to formulate guidelines on, under Regulation 100, are important, pertinent and touch on the very core of universities administration and ought not to be regulated under sub-delegated authority or legislation.

#### **3.5 Non-conformity to the Parent Act contrary to section 13(a) of the Statutory Instruments Act**

36. While the Universities Act requires the Cabinet Secretary to make Regulations on the procedures for approval of academic programmes by the Commission; procedure for recognizing and equating degrees, diplomas and certificates conferred by foreign universities and criteria for evaluating internal tools developed by universities for the purpose of

assessing quality assurance, a detailed analysis of the Regulations does not outline any such procedures hence contravening both sections 13(a) of the Statutory Instruments Act, 2013 which requires that Regulations to conform to the Act under which it is made and section 70 of the Universities Act, (No. 42 of 2012).

### **3.6 Conferring with the Regulation making Authority pursuant to section 16 of the Statutory Instruments Act.**

37. Section 16 of Statutory Instruments Act, 2013 requires the Committee to confer with the regulation making authority before making its decision while Section 13(q) of the Act, requires the Committee while scrutinizing any set of regulations, to consider any other matter that the committee deems fit and proper to examine. At its consultative meeting with the Ministry on the 29<sup>th</sup> June, 2023, the Committee highlighted the following issues-

- a. That there was a need for review of Regulation 97(c). It was the proposal of the Committee that instead of the Regulations being read “as the Cabinet Secretary may give such orders”, the Regulations should be couched in a mandatory tone to read “the Cabinet Secretary **shall** issue such orders.”
- b. The Committee observed that Regulation 98 on transitional arrangement was not clear on timelines. It was proposed that the same should provide for a transition period of six months from the time of coming into operation of the regulations to allow institutions to comply.
- c. On the issue of revocation of the interim letter of authority and charter, the Committee observed that the same lacked the provision on issuance of notice to revoke, and as such the same offends the right to fair administrative action.
- d. The Regulations are not clear on the body that is responsible for the equation of degrees offered by foreign universities as the same appeared to be a function of Kenya National Qualifications Authority.
- e. The Committee observed that the definition of “private universities” as “a university which is not established or maintained out of public funds. “may operate to block students who are studying in private universities from accessing or benefit from bursaries offered at the constituency level, hence infringing on their Constitutional rights to Education. The Committee sought clarity on the definition of private university.
- f. The Committee raised issues with compliance with Regulation 56 (2) where it was concerned with the timelines within which a campus is to comply upon the Regulations coming into force.
- g. The Regulations do not create penalties for acts committed in contravention of the regulations. The Committee further sought clarification as to which penalties the Regulations Making Authority were cross-referencing to the University Act, (No. 42 of 2012.)
- h. The Committee proposed that Regulations 93 should be clear on the timeline within which evaluation of application made for recognition and equation of foreign degrees, diplomas and certificates conferred by foreign universities.
- i. The Committee was cognizant of the provisions of the Report on the Presidential Task Force recommendations regarding University Education and sought to guide the Ministry to realign the Regulations with the report and the issues raised by the Committee.

#### 4.0 COMMITTEE RECOMMENDATION

38. Having examined the Universities Regulations, 2023, *Legal Notice No. 56 of 2023* in accordance with the Constitution, the Interpretations and General Provisions Act (*Cap 2*), the Statutory Instruments Act (*No 23 of 2013*), the University Act, (*No. 42 of 2012*), the Committee recommends that the House **Annuls in entirety** the Universities, 2023, (LN. No. 56 of 2023) for non-compliance with the relevant Statutes, and to give the Ministry an opportunity to align the Regulations with the Constitution, the relevant Statutes and the Report of the Presidential Task Force on the recommendations on University Education.

Signed..........

Date.....13/09/2023.....

**THE HON. CHEPKONGA SAMUEL KIPRONO, CBS, MP  
(CHAIRPERSON)**