

Role of Public Participation in Delegated Legislation Process in Kenya

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Abstract—Governance essentially means or portends how people are ruled and administered as well as the way state affairs are driven and regulated. It is the way through which people, organizations, and governments work toward common objectives, make decisions, generate legitimate authority and power, and promote and protect human rights. Within the constitutional architecture of Kenya, it is only Parliament that is mandated to enact laws. However, the same constitution provides that Parliament may delegate or cede limited powers to the executive arm of government to make delegated legislations. This delegated power to make legislations should however be specific and limited. This study, therefore, sought to determine the role of governance aspects in the delegated legislation process in Kenya. A descriptive survey research design and positivism philosophy were adopted with the target population was 410 from the delegated legislation mandates in three arms of government, legislature, executive, and the judiciary. The study used stratified random sampling, purposive and simple random sampling was used to select the sample population, and the sample size was 202 respondents with the key mandate of delegated legislation determined by using Yamane's (1967) Formula. The primary data was collected by use of questionnaires and analyzed quantitatively using inferential analysis. Based on the multiple linear regression results, it was revealed that public participation positively and significantly related with delegated legislation process in Kenya. The study recommended that legislature should adopt appropriate public participation strategies in delegated legislation process. This could go a long way in ensuring there is improved delegated legislative process in Kenya.

Index Terms—Public Participation, Delegated Legislation Process.

I. INTRODUCTION

Background Information

Delegated legislation is generally a type of law made by the executive authority as per the powers conferred to them by the primary authority (the Legislature) to execute, implement, and administer the requirements of the primary authority. It is also known as subordinate or subsidiary legislation in administrative law.

Delegated legislation dates back to many centuries especially in the United Kingdom (Greenberg 2012). Around 1337, the government in the United Kingdom was largely governed through administrative proclamations and actions

derived by the Sovereign Council (ibis). These administrative proclamations had no legislative limitations and definitions (Miers 1982). What is generally referred to in the United Kingdom as Henry VIII clauses in 1531 (Institute of Australia) gives a glimpse of the history of delegated legislation. Under that clause, the executive arm of government would have the power to make secondary regulations that would, sometimes, alter the content of primary legislation itself. Originally, the power to make subsidiary legislation was conferred to the Commissioner of Sewer in the United Kingdom in 1531. The commissioner was given the power to make regulations that would have the effect of imposing certain taxes and penalties to the general public. Later in 1539, the King was given the power to make regulations that would have the same effect as an Act of Parliament (ibis).

In the nineteenth century, in England, the supremacy of parliament in enacting laws was continuously affirmed. However, in the same period- paradoxically- the growth of the sphere and scope of delegated legislation was remarkable (The Law in the Making, 1993). The reason for this growth of delegated legislation was attributed to the pressure of parliament in terms of time as well as the flexibility and the need to deal with technical matters in legislation. These needs would only have been met through delegated legislation by the executive arm of government and not parliament itself (The Law in the Making, 1993). Further, during the two-world wars period, there was a need to regulate the political, socio-economic, and cultural spheres of people. This meant a remarkable passage of delegated legislation to match the time and speed (The Law in the making, 1993). Indeed, because of this expansion, there was a public outcry on the place of delegated legislation as opposed to primary legislation by the peoples' representatives (Williams, 2007).

In Kenya, the history of delegated legislation is not succinctly recorded. A well-defined delegated legislation framework was after the enactment of the Statutory Instruments Act, 2013. Before that period, delegated legislation was defined by the Interpretations and General Provisions Act, Cap 2 Laws of Kenya.

II. STATEMENT OF THE PROBLEM

The Statutory Instrument Act, 2013 in Kenya provides for the entire framework of making, scrutinizing, publication, and operationalization of delegated legislation in Kenya through consultation by the executive, regulatory impact assessment, parliamentary scrutiny, and eventual operationalization including the phased expiry of the legislation (Statutory Instrument Act, 2013). Although the

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process of making, scrutinizing, publication, and operationalization of delegated legislation is expressly provided for in the constitution and law there are still governance shortcomings as far as consideration of these instruments is concerned; leading to several delegated legislation being annulled by the National Assembly (National Assembly, 2019). According to the Third Sessional Progress Report (January to December 2019) of the Delegated Legislation Committee, thirty-six pieces of delegated legislation were approved while thirty-nine were annulled including all the 2018 Kenya Civil Aviation Regulations (National Assembly 2019).

The nullification of such a large number of delegated legislations by the National Assembly is based on certain governance aspects – and more the public participation- which are specifically the core of this study. The Statutory Instrument Act, 2013 (section 5, 5A and schedule of the Act) and Constitution (article 10 and 118) provides for the executive arm of government to conduct public participation before making delegated legislation. There are instances where this has not (or effectively) done- this has led to the National Assembly annulling some of the statutory instruments (National Assembly, 2019). The executive arm of government is obligated in the Statutory Instrument Act, 2013 (section 6) to assess the environmental, economic, and social impact of particular delegated legislation before publishing them. The impact assessment ensures the government is well advised on the most appropriate policy option in addressing the issue in question.

The assessment must expressly detail the cost/benefit analysis of the proposed legislation as well as its costs of implementation (when enacted) (section 7) However, according to the National Assembly, some delegated legislations have been annulled by parliament for want of prior impact assessment (National Assembly, 2019) For example, the National Assembly required that Private Security (General) Regulations, 2019- The Legal Notice Number 108 of 2019- be subjected to impact assessment process before being tabled for consideration (National Assembly, 2019). Legal Notice No 101 of 2019).

Article 9 (6) of the constitution of Kenya expressly provides that delegated legislation must remain within the scope of primary legislation. In Kenya, their instances where delegated legislation has tended to stretch beyond the allowable governance legislative and legal limits. In those instances, those pieces of delegated legislation have fallen (Report on Delegated Legislation, Nov 2019). For example the Air Passenger Service Charge Act (Apportionment) Order, 2018 was annulled by the National Assembly for apportioning Tourism Promotion Fund as one of the beneficiaries of the charges collected under this 2018 order yet this had not been contemplated under section 3(3) of the Air Passenger Service Charge Act, the enabling provision and therefore violated Section 24(2) of the Statutory Instruments Act, 2013 (National Assembly 2019).

In the same measure, delegated legislation that has conflicted with the constitution has also been annulled (Report on Committee on Delegated Legislation, 2018). The Insurance (Motor Vehicles Third Party Risks) (Certificate of Insurance)(Amendment) Rules, 2019 (Legal Notice 92 of 2019) was annulled by the National Assembly for being against the Constitution of Kenya particularly want of public participation which is expressly required under articles 10 and 118. (National Assembly, 2019). Gisselquist (2012) studied Good governance as a concept and why it matters for the development of Policy, but none of the studies has looked at the role of governance in the delegated legislation process. More specifically no study has delved into the role of governance (particularly governance aspect of public participation) in influencing the entire delegated legislation process in Kenya. This is why this study fills this gap by examining the role of governance aspects on the delegated legislation process in Kenya.

Research Objectives

The purpose of the study was to establish the role of public participation in the delegated legislation process in Kenya

Research Hypotheses

H₀: There is no significant role of public participation in the delegated legislation process in Kenya

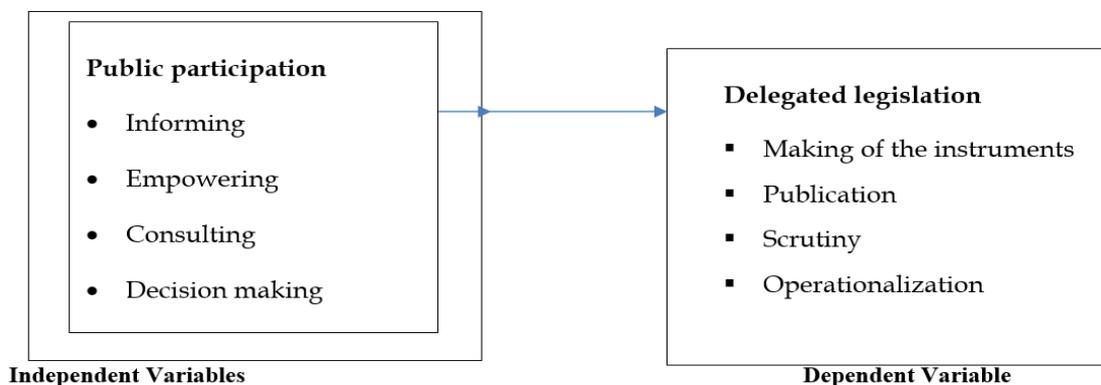
III. LITERATURE REVIEW

Theoretical Review

Participatory theory of development portends that any community or society has solutions to the problems undermining socio-economic transformation. Hence it emphasizes creating partnerships and using participatory and people-centered approaches to solve those problems (Syokau et al, 2010). Vorhölter (2009) argues that the principles of the participatory theory of development are all people-centered; commitment to holism, sustainability, capacity building, self-reliance, and finally community-driven development. Participatory development is essential for at least two reasons; it empowers communities to negotiate with governance institutions and thus influencing public policy which provides a check to government power and secondly it enhances efficiency, effectiveness, and sustainability of development programs (Narayanasamy, 2009). According to Tufte and Mefalopoulos (2009) public participatory development approaches must be purposive, targeted, and authentic. The approach must not be exclusively defined by the managers and the governors and must not be top-down. This approach essentially means all stakeholders around a development initiative are sufficiently informed, engaged and their concerns taken into consideration (ibis). Participatory development also in other terms known as popular public participation is the process by which people take an active and influential role in decisions that affect their lives (Doll, 2010). Participatory development is a natural process where the communities know their needs and must be actively involved in all the stages of development; this can be achieved through informing, involving, consulting, and decision making as essential to participatory development; it is enhanced when the projects in which the people participate

are based on the democratic approach and strengthening their capacities to initiate action on their own.

Participatory theory of development generates the capacity of people to influence development in various levels of the community (United Nations Department of Economics and Social Affairs, 2009). There are two alternative uses of participation; it can be an end in itself or a means to development argues Narayanasamy (2009). She continues that as an end, participation entails empowerment and as a means, it leads to efficiency. Participation is indeed a powerful tool that leads to the development of policies through better decisions. People are more likely to implement decisions that they have made rather than those imposed on them. Community motivation is enhanced during setting up of goals in the participatory decision-making processes and finally, participation improves communication and cooperation. This theory is very relevant to the role of public participation in the delegated legislation processes in Kenya.



Public participation in governance is practically a new area in Kenya today. In the past, citizens' dynamics and engagement in governance matters were largely unstructured and not expressly provided for in the constitution and other legal regimes (Gaventa (2007)). It is important to underscore that the direct engagement of the citizens in all matters that concern them is critical and a good governance practice (World Bank, 2017). Public participation is having an open, accountable, and structured process where citizens or people or a segment of a community can interact, exchange views, and influence decision making (World Bank, 2017). Public participation is part of a democratic process (Cooke 2000). Public participation is also about the outcome of the policy options adopted after the robust and purposive involvement of the concerned public (Cooke 2007).

Historically, public participation in governance was largely believed to happen through the people's elected representatives and focused on access to information about and government activities and engagements (Aulich 2009). In the current dispensation, the focus is more than participation through the elected representatives. It now focuses on citizens having a direct engagement with government activities and not necessarily and exclusively through the elected representatives Aulich (2009). Public participation today is a constitutional right. It is the foundation of democracy (Lukensmeyer, 2009). Lammers (1988) further argues that public participation is an avenue for citizens to demand, direct, and even control decision

This is so because both the Kenya constitution and the Statutory Instruments Act, 2013 obligates both the executive and legislature arms of government to involve and engage the public in making, scrutinizing, and implementation of delegated legislations.

IV. CONCEPTUAL MODEL AND HYPOTHESIS

A conceptual framework is a concise description of the phenomenon under study accompanied by a graphical or visual description of the major variables of the study (Cooper & Schindler, 2008). Muchelule(2017) states that a conceptual framework is a diagrammatical representation that shows the relationship between the dependent variable and independent variables. This study's conceptual framework sought to demonstrate the relationship between public participation and delegated legislation processes in Kenya. The conceptual framework is illustrated in Figure 1.

making in governance matters. It is a bridge between the general population and those who are in government offices. It is an avenue for demanding transparency and accountability in service delivery (Moseti 2010).

Tshabalala and Lombard, (2009) further argue that public participation gives space and voice to those who would hitherto be marginalized including women, youth, and even children. It must be legitimate and driven, guided, and structured in a way that gives voice to those who are being involved. Malek 2005 quoting the International Association for Public Participation outlines a descriptive list of seven standards that would show that effective public participation has been done. These standards include ensuring that the public has a direct and clear say and solid influence on what affects them, not tokenistic opportunities; the process of participation must be inclusive, facilitatory, clear cut, information-driven, and targeted and structured to genuinely influence decisions.

Tomkins, &Pytlik (2012) undertook a study on the role of public participation in Lincoln, Nebraska on effective budgeting. The World Bank (2015) and the Institute of Economic Affairs (2015) looked at public participation as the process by which an organization consults with interested or affected individuals, organizations, and government entities before making a decision. They further view public participation as two-way communication and collaborative problem solving to achieve better and more acceptable decisions (World Bank, 2015). It is widely believed that public participation contributes to better projects, better development, and collaborative governance. Research has

shown that public participation is, indeed, advantageous for the speed and quality of implementation of planning decisions (Mitchels&Graaf, 2010).

According to Ochieng's (2012) study of the devolution in Kenya as a means of engendering public participation in Kenya. He focuses on counties in Kenya but does a reasonable comparison with other jurisdictions especially South Africa and Uganda. From the constitutional provisions, it is clear that public participation is now a guaranteed process in Kenya. The constitution in various chapters and articles outlined above requires that public participation be undertaken at all levels of government before government officials and bodies make official decisions. In essence, public participation is a governance pillar in Kenya's constitutional architecture. The involvement of the public in law-making in Kenya has been buttressed above and outlined clearly in the constitution. The Legislature must engage the public in its law-making process (article 118 of the constitution). The constitution further obligates the executive to involve and engage the public in its policy processes.

The Statutory Instruments Act, 2013 (section 5) expressly provides that the executive arm of government shall consult the public before making the delegated legislations. The legislature is considering the delegated legislation is also expressly required to annul any delegated legislation it would consider on account of no or insufficient public participation (section 6). Afridi et al. (2016) find more program inefficiencies and leakages in village councils especially when there has been no public participation. A study done by Dasgupta (2016) found that public participation can put more pressure on their elected representatives and ensure better delivery of services

V. RESEARCH METHODOLOGY

This study adopted a positivist research paradigm. [Cooper and Schindler \(2017\)](#) assert that the positivism research paradigm takes the quantitative approach and is based on real facts, objectivity, neutrality, measurement, and validity of results. The study adopted a cross-sectional research to obtain the correct information on the role of public participation in delegated legislation systems in Kenya. This study focused on three arms of government and legal institutions responsible for or involved in delegated legislation functions. This involved key respondents in the legislative (Parliament & Senate), executive, judiciary and specific legal institutions totaling 410 key respondents mandated with governance and delegated legislation functions. Yamane's (1967) formula was used to calculate the sample size of the study since it is simple and the population is less than 10,000. The formula is as follows:

$$n = \frac{N}{1 + N(e)^2}$$

Where:

n = Desired sample size for the population of less than 10,000.

e = sampling error at 95% confidence level assumed to be 0.05.

Therefore, sample size is arrived at as follows:

$$n = \frac{410}{1 + 410(0.05)^2}$$

$$= 202$$

Therefore, the sample size was 202 key staff with the governance of delegated legislative mandate in the three arms of government (executive, legislative, and judiciary) and specific legal institutions who were selected through simple random sampling. Further analysis was done to test the significance of the model by the use of Analysis of variance (ANOVA) and R² was used to measure the extent of the goodness of fit of the regression model. The statistical significance of the hypothesized relationship was interpreted based on F and t-test values at a 95% confidence level.

VI. RESULTS AND DISCUSSION

Regression analysis was conducted to determine the proportion of delegated legislation process (dependent variable) which could be predicted by public participation (independent variable). A univariate analysis was conducted to establish the role of public participation in the delegated legislation process in Kenya. The null hypothesis stated:

H₀₁: There is no significant role of public participation in the delegated legislation process in Kenya

Therefore, to test this hypothesis, the model Y= β₀ + β₁X₁ + ε was fitted. Where y is delegated legislation process and X₁ is Public Participation

The R-Squared tends to depict the variation in the dependent variable that can be explained by the independent variables: the greater the value of R-squared the greater the effect of independent variable. The R Squared can range from 0.000 to 1.000, with 1.000 showing a perfect fit that indicates that each point is on the line. As indicated in Table 1, the R-squared for the relationship between public participation and delegated legislation process in Kenyawas 0.492; this is an indication that at 95% confidence interval, 49.20% variation in delegated legislation process in Kenya can be attributed to changes in public participation. This means that the remaining 50.80% are other factors associated with delegated legislation process in Kenya which were not explained by the model. The correlation coefficient of 0.702 indicates public participation had a positive correlation with delegated legislation process in Kenya. Therefore public participation was an important factor that could be considered in the delegated legislation process in Kenya.

Table 1: Model Summary for the Public Participation on Delegated Legislation

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	0.702 ^a	0.492	0.487	0.43654

a. Predictors: (Constant), Public Participation

The ANOVA results in Table 2 shows that (F (1,185) = 180.638, p <0.05). This shows that the overall model is significant. The findings imply that public participation was statistically significant in explaining delegated legislation process in Kenya. Therefore, at p <0.05 level of significance, null hypothesis" **H₀₁: There is no significant role of public**

participation in the delegated legislation process in Kenya” is not supported thus rejected and the alternative hypothesis (H_{a1}) which states that “There is a significant relationship between public participation and delegated legislation process in Kenya” is accepted implying that public participation played a significant role in delegated legislation process in Kenya.

Table 2: Analysis of Variance for Public Participation on Delegated Legislation

Model	Sum of Squares	df	Mean Square	F	Sig.
Regression	6.503	1	6.503	180.638	0.000 ^b
1 Residual	6.714	185	0.036		
Total	13.217	186			

The coefficients or beta weights for each variable allows the researcher to compare the relative importance of each independent variable. In this study the unstandardized coefficients and standardized coefficients were given for the

Table 3: Beta Coefficients for Public Participation on Delegated Legislation

Model	Unstandardized Coefficients		Standardized Coefficients	t	Sig.
	B	Std. Error	Beta		
1 (Constant)	3.876	0.299		12.963	0.000
Public Participation	0.768	0.044	0.702	17.454	0.000

VII. CONCLUSION

The study found that public participation practices were inculcated and incorporated in various institutions’ decision making on delegated legislation process as required by the constitution of Kenya; that in scrutinizing delegated legislation, the National Assembly satisfied itself that sufficient public participation was done before publication of the statutory instrument and that the public participation process (by both all organs of government) on delegated legislation was preceded by civic education (on the delegated legislation) and therefore enriching the process.

The study also found that some delegated legislations had been annulled by the National Assembly on account of want of sufficient public participation and that the public was sufficiently informed of opportunities and avenues available to engage and influence delegated legislation processes. This requirement to sufficiently inform the public of the opportunities to engage and influence these processes is actually provided for in law and constitution of Kenya.

In addition, it was agreed that members of the public understood their right to public participation and hence they engaged and contributed constructively to delegated legislation; and that feedback from the public during public participation influenced choice of policy options around delegated legislation. The study also found that there were hurdles institutions were facing around public participation in the delegated legislation process. These hurdles included the cost of public participation.

A major internal challenge in public participation was inadequate financial and human resources. Other challenges

multiple regression equations. The regression equation revealed that holding public participation to a constant zero, delegated legislation process in Kenya would be at a constant value of 3.876. Therefore, the regression of coefficients results in Table 3 shows that there is a significant and positive relationship between public participation and delegated legislation process in Kenya as supported by a $p < 0.05$ and a beta coefficient of 0.768. This implies that a unit increase in public participation would increase the delegated legislation process in Kenya by 0.768 units. This was supported by the t values whereby $t_{cal} = 17.454 > t_{critical} = 1.96$ at a 95 percent confidence level which depicts that we reject the null and accept the alternate hypothesis. Further, this confirms the positive effect of public participation in delegated legislation process in Kenya. The fitted equation is as shown below: $Y = 3.876 + 0.768X_1$, that is, Delegated Legislation Process = $3.876 + 0.768$ Public Participation. The findings agree with Mitchels and Graaf (2010) that public participation contributes to better projects, better development, and collaborative governance and that public participation is, indeed, advantageous for the speed and quality of implementation of planning decisions.

reported were lack of skilled facilitators during public participation processes and public not being interested in participation as well as language barriers.

Recommendations

The study found that public participation positively related with delegated legislation process. There were however challenges that were experienced during public participation. The study recommends improving public participation processes by applying platforms that are convenient and easy to use. A technology platform (even using social media avenues) that can reduce the time spent on engagement without compromising the outcomes would be helpful. The platform should be able to quickly and easily submit information and feedback from the public and report problems real time.

It would be important for parliament of Kenya to pass a comprehensive public participation law that would be the overall guide on public participation process. The law would answer some of the issues raised in this research including the need for members of the public to track and follow-up on implementation of issues raised during public participation forums. Public participation can also be improved by ensuring that the process is purposeful and authentic and not a ‘tick-the-box’ requirement. The public participation should be preceded by a comprehensive civic education space where they are informed about the content of delegated legislations under consideration. This can also be done through information products like brochures, posters and web pages. In certain situations there should be incentives to motivate people to participate in public participation processes, these would include for example giving real-time feedback on the

status of public proposals given during such forums.

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