

# Role of Capacity Building on the Delegated Legislation Process in Kenya

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DOI: <https://doi.org/10.5281/zenodo.8142817>

Published Date: 13-July-2023

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**Abstract:** Governance provides a framework for ethical decision-making and managerial action that is based on transparency, accountability, and defined roles. 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 study, therefore, sought to determine the role of capacity building 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 capacity building positively and significantly related with delegated legislation process in Kenya. The study thus recommends every institution that makes delegated legislation should assess its obtaining capacity to undertake impact assessment before the instruments are made and approved. . This assessment should focus on both the conceptual as well as practical capacity of those institutions. The capacity building plan should be implemented in full. It is further recommended that the capacity assessment and building should not only focus on the executive and judiciary arms of government, but also the Legislature. Indeed there is need to have a comprehensive plan to build the capacity of parliament on how to process delegated legislation. This should focus particularly on the Delegated Legislation Committee as well as the support staff of that committee. This could go a long way in ensuring there is improved delegated legislative process in Kenya.

**Keywords:** Capacity Building, Delegated Legislation Process.

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## 1. 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.

### **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 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 capacity building as a governance aspect in the delegated legislation process. More specifically no study has delved into the role of governance (particularly governance aspect influencing the entire delegated legislation process in Kenya. This is why this study fills this gap by examining the role of capacity building as a governance aspect on the delegated legislation process in Kenya.

### Research Objective

The purpose of the study was to establish the role of capacity building in the delegated legislation process in Kenya

## 2. 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.

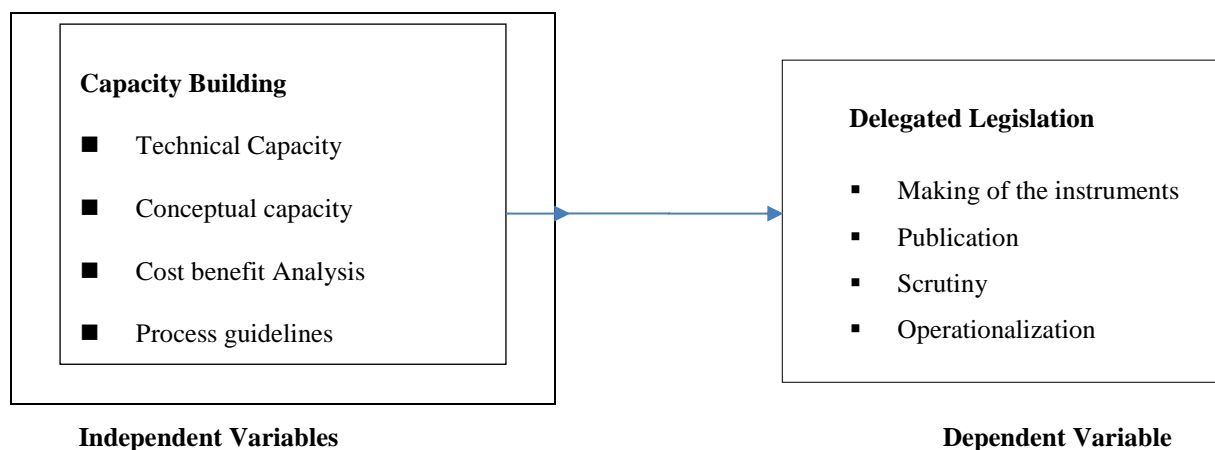
Participatory development is essential for at least two reasons; it empowers communities to negotiate with governance institutions and thus influencing public policy which provides a check to government power and secondly it enhances efficiency, effectiveness, and sustainability of development programs (Narayanasamy, 2009). According to Tufte and Mefalopulos (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 a 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 capacity building through 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. Capacity building 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 capacity building in the delegated legislation processes in Kenya. 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 through capacity building of the public in making, scrutinizing, and implementation of delegated legislation.

### 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). Michelle (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 capacity building and delegated legislation processes in Kenya. The conceptual framework is illustrated in Figure 1.



**Fig 1**

### Empirical Review

According to Kumuwawan (2005) capacity building is an important scientific tool available to policymakers to help them make appropriate decisions that are backed by quantitative and qualitative data. It gives the stakeholders and local communities a chance to be involved in finding solutions to their local problems. This eventually brings the community into co-creating possible interventions (Carroll 2010). The tool eventually ensures policy options adopted by governments are effective and foster accountability (Rodrigo 2005). A National Capacity Building Framework has been developed to support the capacity building for devolved governance. Kenya School of Government (KSG), Centre for Parliamentary Studies and Training (CPST), and other institutions of higher learning are obligated to use the framework.

In a study done in Indonesia, Kumuwawan (2005), it was clear there lacked clear conceptual and technical knowledge on the essence, need, and even methodology of conducting an impact assessment. Impact assessment is an important step and tool in the process of making delegated legislation by the executive arm of government. The research also found out that there was a need for overall leadership, political as well as overarching policy support for capacity building to be entrenched further in Indonesia in the whole process of delegated legislation. In most cases, the whole concept of impact assessment is difficult to understand if regulators have not dealt with it previously. In the process of implementing an impact assessment of delegated legislation, technical problems are continuously faced, and a lack of solid and continuous training has hindered efficiency and effectiveness. If the inclusion of impact assessment in the policy-making process does not actively involve policy officials, there is a high risk of having a burdensome bureaucratic process.

In Kenya, in most cases, the whole concept of regulatory impact assessment (RIA) is difficult to understand if regulators have not dealt with it previously. According to (Carroll 2010) In many other jurisdictions, the obstacles to full optimization of capacity building as a tool to improve governance especially in legislation are largely the same. These obstacles revolve around the conceptual and technical capacities of both leaders and technical staff in government. There is also the challenge of understanding the process as well as budgetary constraints (Rodrigo 2005). OECD 2008, captured the realities and challenges of the capacity building thus: Insufficient institutional support and staff with appropriate skills to conduct RIA.

The Statutory Instruments Act, 2013 (section 6) provides for a mandatory regulatory impact assessment whenever a proposed delegated legislation is likely to impose costs on the community or even part of the community. This process helps the regulation-making authority to be advised on the best policy option to take. More specifically, the capacity building must focus on the costs and benefits of the proposed delegated legislation (section 7 (d)). This cost and benefit analysis should include the economic, environmental, and social impact and the likely administrative and compliance costs including resource allocation costs (section 7 (2)). This study will be focusing on the extent to which this process has been applied in

Kenya- especially on the conceptual and technical capacity of that involved-and the possible benefits accrued and any challenges and obstacles encountered. There will also be practical recommendations moving forward.

### 3. 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 descriptive research design to obtain the correct information on the role of capacity building 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  $R^2$  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.

### 4. RESULTS AND DISCUSSION

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

***H<sub>01</sub>: There is no significant role of capacity building in the delegated legislation process in Kenya***

Therefore, to test this hypothesis, the model  $Y = \beta_0 + \beta_1 X_1 + \varepsilon$  was fitted. Where y is delegated legislation process and  $X_1$  is Capacity Building

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 capacity building and delegated legislation process in Kenya was 0.659; this is an indication that at 95% confidence interval, 65.90% variation in delegated legislation process in Kenya can be attributed to changes in capacity building. This means that the remaining 34.10% are other factors associated with delegated legislation process in Kenya which were not explained by the model. The correlation coefficient of 0.812 indicates capacity building had a positive correlation with delegated legislation process in Kenya. Therefore capacity building was an important factor that could be considered in the delegated legislation process in Kenya.

**Table 1: Model Summary**

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	0.812a	0.659	0.637	0.56321

a. Predictors: (Constant), Capacity Building

The ANOVA results in Table 2 shows that ( $F(1,185) = 362.916, p < 0.05$ ). This shows that the overall model is significant. The findings imply that capacity building was statistically significant in explaining delegated legislation process in Kenya. Therefore, at  $p < 0.05$  level of significance, null hypothesis”  $H_0$ : There is no significant role of capacity building in the delegated legislation process in Kenya” is not supported thus rejected. This implies that capacity building played a significant role in delegated legislation process in Kenya.

**Table 2: ANOVA**

Model		Sum of Squares	df	Mean Square	F	Sig.
	Regression	8.710	1	8.710	362.916	0.000b
1	Residual	4.507	185	0.024		
	Total	13.217	186			

a. Dependent Variable: Delegated legislation

b. Predictors: (Constant), Capacity Building,

Based on the regression coefficients as established in Table 3, the regression equation revealed that holding capacity building to a constant zero, delegated legislation process in Kenya would be at a constant value of 2.765. Therefore, the regression of coefficients results in Table 3 shows that there is a significant and positive relationship between capacity building and delegated legislation process in Kenya as supported by a  $p < 0.05$  and a beta coefficient of 0.846. This implies that a unit increase in capacity building would increase the delegated legislation process in Kenya by 0.846 units. This was supported by the t values whereby  $t_{cal} = 6.175 > t_{critical} = 1.96$  at a 95 percent confidence level which depicts that we reject the null hypothesis. Further, this confirms the positive effect of capacity building in delegated legislation process in Kenya. The fitted equation is as shown below:  $Y = 2.765 + 0.846X_3$ , that is, Delegated Legislation Process =  $2.765 + 0.846$  Capacity building. This agrees Kumuwani (2005) that capacity building is an important scientific tool available to policymakers to help them make appropriate decisions that are backed by quantitative and qualitative data. It also portends that it is important to build the capacity of those involved in making, enacting and even implementing delegated legislations.

**Table 3: Beta Coefficients for Capacity Building**

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error			
1	(Constant)	2.765	1.093		2.529	0.000
	Capacity Building	0.846	0.137	0.812	6.175	0.000

a. Dependent Variable: Delegated legislation

## 5. CONCLUSION AND RECOMMENDATIONS

The study found that capacity building is statistically significant in explaining delegated legislation process in Kenya. This indicates that capacity building positively and significantly relates with delegated legislation process in Kenya. Despite capacity building playing an important role in ensuring successful delegated legislation process, it faces challenges. The study thus recommends addressing those challenges. It is recommended that every institution that makes delegated legislation should assess its obtaining capacity to undertake impact assessment before the instruments are made and approved. This assessment should focus on both the conceptual as well as practical capacity of those institutions. The staff involved should be assessed on whether they understand the benefits – to the institution and public- of carrying out an impact assessment on delegated legislations. They should also be assessed on whether they can practically carry out that assessment. After that assessment and the results thereof, the institutions should create a long-term and sustainable capacity building plan for the staff involved in making delegated legislations. The capacity building plan should be implemented in full.

It is further recommended that the capacity assessment and building should not only focus on the executive and judiciary arms of government, but also the Legislature. Indeed there is need to have a comprehensive plan to build the capacity of parliament on how to process delegated legislation. This should focus particularly on the Delegated Legislation Committee as well as the support staff of that committee. It is further recommended that chairs of all committees of parliament be trained on the delegated legislation process. This training would ensure that the chairs guide their committees accordingly especially when dealing parent legislative proposals. This is important because legislative proposals provide for delegation of limited legislative powers by parliament to other agencies of government.

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