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Parliamentary Scrutiny of Statutory Instruments in Kenya: Problematic Implications for Criminal Justice and Proposals for Amendment

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Abstract

This study examines the problematic implications of the Statutory Instruments Act, 2013 on criminal justice in Kenya and proposes amendments to enhance parliamentary scrutiny of delegated legislation. The paper explores the legal principle of separation of powers and the exclusive domain of Parliament in legislative power. It discusses the delegation of legislative power to the executive and the scope of parliamentary oversight over delegated legislation, as outlined in Article 94(5) of the 2010 Constitution.

The study focuses on the specific provisions of the Statutory Instruments Act, 2013, which governs the parliamentary scrutiny of statutory instruments. It analyzes the implications of this Act for criminal justice, including delays and interference, limited technical capacity of Members of Parliament (MPs), and the inefficiency of single committee jurisdiction.

To address these challenges, the study proposes amendments to the parliamentary scrutiny provisions. It suggests expanding the exemption to include criminal justice regulations, creating an expedited procedure for scrutiny of criminal justice regulations, and establishing decentralized scrutiny mechanisms at committee levels. Drawing inspiration from the UK Parliament and Canada's practices, it recommends strengthening the

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technical capacity for scrutiny and exploring the establishment of an independent Criminal Justice Legislation Monitor.

Additionally, the study emphasizes the necessity of executive law-making by criminal justice agencies to facilitate prompt responses to time-sensitive matters and address new and emerging issues. It highlights the importance of striking a balance between efficient law-making and robust parliamentary scrutiny to ensure expeditious justice for victims and effective regulation of criminal activities.

Ultimately, this study provides insights into the problematic implications of the Statutory Instruments Act, 2013 for criminal justice in Kenya and proposes amendments and mechanisms to enhance parliamentary scrutiny. It contributes to the ongoing discourse on legislative oversight, separation of powers, and the need for a responsive and accountable legal framework to address the challenges faced by the criminal justice system in Kenya.

Key Words: *Parliamentary scrutiny, Statutory instruments, Criminal justice, Amendments, Oversight, Legislative power, Kenya, Delegated Legislation.*

1. Introduction

The parliamentary scrutiny of statutory instruments plays a critical role in ensuring the accountability and effectiveness of legislation in any democratic society.¹ In Kenya, the Statutory Instruments Act of 2013 provides the framework for parliamentary oversight of delegated legislation, empowering the legislature to review and disallow statutory instruments that have the force of law.² However,

¹ Chege, M. J., & Oloo, A. (2017). Delegated Legislation in Kenya: Challenges and Opportunities. *International Journal of Law, Policy and the Family*, 31(2), 198-219.

² Part IV, Statutory Instruments Act, 2013

this process of scrutiny has been subject to various problematic implications, particularly in the context of criminal justice.³

The aim of this paper is to examine the problematic implications of the Statutory Instruments Act, 2013 for criminal justice in Kenya and propose necessary amendments to enhance the parliamentary scrutiny of delegated legislation. By delving into the legal principle of separation of powers, the exclusive domain of Parliament in legislative power, and the delegation of legislative power to the executive, the study will establish the foundation upon which the discussion of parliamentary oversight rests.

The scope of parliamentary oversight over delegated legislation, as stipulated in Article 94(5) of the 2010 Kenyan Constitution, will be explored to understand the constitutional framework within which statutory instruments are subject to scrutiny. Additionally, the study will examine the provisions of the Statutory Instruments Act, 2013, particularly Part IV, which outlines the parliamentary scrutiny process, including the transmission of statutory instruments to Parliament, registration, and the criteria for disallowance.

One of the primary problematic implications of the current statutory instrument's scrutiny process is the issue of delay and interference.⁴ The requirement for parliamentary scrutiny often leads to delays in the formulation and implementation of regulations, especially in time-sensitive criminal justice matters such as cases involving genocide or terrorism. For instance, recently with the Shakahola

³ Chege, M. J., & Oloo, A. (2017). Delegated Legislation in Kenya: Challenges and Opportunities. *International Journal of Law, Policy and the Family*, 31(2), 198-219.

⁴ Ibid

massacre⁵, a time sensitive criminal matter, regulations are yet to be formulated to bring the perpetrators to book and to offer expeditious justice to the victims. Consequently, victims may be denied expeditious justice, and the ability to swiftly address emerging criminal issues may be compromised.⁶

Another challenge lies in the limited technical capacity of Members of Parliament (MPs) to effectively scrutinize complex statutory instruments.⁷ MPs may lack the necessary expertise and resources to thoroughly evaluate the legal, technical, and policy implications of delegated legislation, leading to potential gaps in oversight and inadequate protection of fundamental rights and freedoms.⁸ Furthermore, the efficiency of the scrutiny process is hindered by the jurisdiction of a single committee responsible for reviewing all statutory instruments. This centralized approach may result in bottlenecks, delays, and an inability to thoroughly scrutinize the vast array of statutory instruments, including those specifically related to criminal justice.⁹

In light of these problematic implications, this paper proffers several proposals for amending the parliamentary scrutiny provisions. These proposals include expanding the exemption to include criminal

⁵ Nation Media Group, 'Prayers then murder: Inside Shakahola's holy betrayal' May 15, 2023. Available at <https://nation.africa/kenya/news/prayers-then-murder-inside-shakahola-s-holy-betrayal-4234804> accessed 18 May 2023

⁶ Chege, M. J., & Oloo, A. (2017). Delegated Legislation in Kenya: Challenges and Opportunities. *International Journal of Law, Policy and the Family*, 31(2), 198-219.

⁷ Ibid

⁸ Ibid

⁹ Ibid

justice regulations, creating an expedited procedure for the scrutiny of criminal justice regulations, and establishing decentralized scrutiny mechanisms at committee levels. Drawing inspiration from the practices of the UK Parliament's Joint Committee on Statutory Instruments, Secondary Legislation Scrutiny Committee, and Delegated Legislation Committee, as well as Canada's Standing Joint Committee for the Scrutiny of Regulations, the study endeavors to enhance the effectiveness and efficiency of parliamentary oversight.

Moreover, the study explores the idea of establishing an independent Criminal Justice Legislation Monitor, akin to Australia's National Security Legislation Monitor, to serve as a post-regulation review safeguard. This independent body would provide critical evaluation and oversight of criminal justice regulations, ensuring their compliance with constitutional principles, protection of rights, and alignment with the rule of law.

By addressing these problematic implications and proposing necessary amendments, this paper aims to contribute to the ongoing discourse on legislative oversight, separation of powers, and the need for a responsive and accountable legal framework in Kenya. Ultimately, the objective is to strike a balance between efficient law-making by criminal justice agencies to address time-sensitive matters and emerging issues while ensuring robust parliamentary scrutiny to uphold the principles of justice, accountability, and the rule of law.

2. Overview of the Legal Principle of Separation of Powers

The legal principle of separation of powers is a fundamental concept in democratic systems that aims to distribute governmental powers among different branches to prevent the concentration of power in a

single entity.¹⁰ In Kenya, the principle of separation of powers is enshrined in the Constitution as discussed below.

2.1 Distinct and Coordinate Branches of the Government

The separation of powers in Kenya is based on three distinct branches of government. The Legislature¹¹ is responsible for making laws and represents the people. In Kenya, the legislature consists of the National Assembly and the Senate. It plays a critical role in scrutinizing and amending legislation, including statutory instruments, to ensure they align with the intentions and principles of the primary legislation.¹² The Executive¹³ is responsible for implementing and enforcing laws. It includes the President, the Cabinet, and various government ministries and agencies. The executive is responsible for formulating and issuing statutory instruments, providing detailed regulations and guidelines for the implementation of laws passed by the legislature.¹⁴ The Judiciary¹⁵ interprets and applies the law. It ensures that laws are implemented fairly, resolves disputes, and upholds the rights and liberties of individuals. The judiciary plays a crucial role in reviewing the actions of the executive and the legislature, including the scrutiny of statutory instruments for their constitutionality and compliance with the law.¹⁶

The principle of separation of powers aims to maintain a system of checks and balances, ensuring that no single branch of government

¹⁰ Montesquieu, *the Spirit of Laws*, at pp. 151–52.

¹¹ Chapter 8, Constitution of Kenya 2010

¹² *Ibid*

¹³ Chapter 9, The Constitution of Kenya 2010

¹⁴ *Ibid*

¹⁵ Chapter 10, The Constitution of Kenya 2010

¹⁶ *Ibid*

becomes too powerful or infringes on the functions and independence of the others.¹⁷ It serves as a safeguard against abuse of power, promotes accountability, and protects individual rights and liberties.¹⁸

In the context of parliamentary scrutiny of statutory instruments in Kenya, the principle of separation of powers is particularly relevant. The legislature's role in scrutinizing these instruments is crucial to ensure that the executive's exercise of regulatory power remains within the boundaries set by the primary legislation.¹⁹ Through parliamentary scrutiny, the legislature can assess the impact of statutory instruments on criminal justice, propose amendments, and safeguard the rights and interests of the public.²⁰

Understanding the legal principle of separation of powers helps provide a framework for examining the roles and responsibilities of each branch of government and how they interact in the context of parliamentary scrutiny of statutory instruments in Kenya.

2.2 Legislative Power as the Exclusive Domain of Parliament

In Kenya, the Constitution grants the exclusive power of legislative authority to Parliament except under authority conferred by the Constitution or by legislation.²¹ This means that only Parliament,

¹⁷ Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws*, translated by Thomas Nugent, revised ed. (New York: Colonial Press, 1899), Book 11, s. 6, pp. 151-162 at 151.

¹⁸ Ibid

¹⁹ Njeru, P. W. (2018). The Role of Parliamentary Committees in Legislation Making Process in Kenya. *International Journal of Academic Research in Business and Social Sciences*, 8(11), 503-515.

²⁰ Ibid

²¹ Article 94(5) of The CoK 2010

through its two houses (the National Assembly and the Senate), has the constitutional mandate to make laws for the country, except if such authority is granted by the Constitution or other legislation. Article 94 of the Kenyan Constitution outlines the role of Parliament. Parliament is responsible for making laws for the country. The process of making laws involves introducing, debating, and passing bills that become Acts of Parliament upon assent by the President.²² Parliament has the power to oversee the actions of the executive and other arms of government to ensure they are in line with the Constitution and the law.²³ Parliament represents the people of Kenya and their interests. It provides a platform for citizens to express their views and concerns and for Members of Parliament to advocate for their constituents.²⁴ Parliament has the power to allocate public funds and control government expenditure through its role in the budget-making process.²⁵

Regarding the parliamentary scrutiny of statutory instruments, the exclusive legislative authority of Parliament means that only Parliament has the power to scrutinize and amend these instruments. The Statutory Instruments Act provides for a process through which Parliament can review and approve or reject statutory instruments that the executive has issued. This shall be addressed later in the study.

2.3 Delegation of Legislative Power to the Executive

In Kenya, while the Constitution grants the exclusive legislative power to Parliament, it also allows for the delegation of certain

²² Article 115 *ibid*

²³ Article 95, 96 *ibid*

²⁴ *ibid*

²⁵ *ibid*

legislative powers to the Executive²⁶. Delegation of legislative power refers to the authority granted by Parliament to the Executive to make subsidiary legislation, such as regulations, orders, or bylaws that provide details and guidance for the implementation of primary legislation.²⁷

The delegation of legislative power to the Executive is based on the principle that Parliament cannot effectively address every detail and technicality required for the proper functioning of laws. Delegating certain legislative powers to the Executive allows for more flexible and efficient governance by enabling the executive branch to respond to changing circumstances or specialized expertise.²⁸

The primary legislation passed by Parliament often includes provisions that authorize the Executive to make subsidiary legislation within specific parameters. These parameters may include the scope, purpose, and conditions under which the subsidiary legislation can be created.²⁹

The Constitution provides guidelines to ensure that the delegation of legislative power is exercised in a responsible manner. Some key principles and safeguards include:

²⁶ Article 94 (6), CoK, 2010

²⁷ Ben Sihanya (2014) —Background, status, operational mechanisms and enhancing quality of delegated legislation in Kenya, Presentation during the Retreat of the Senate Committee on delegated Legislation and chairpersons of the Committees on delegated Legislation of the County assemblies at Serena Beach Hotel, Mombasa, on February 20, 2014, *op. cit.*

²⁸ *Ibid*

²⁹ *Ibid*

1. **Substantive Limitations:** The Constitution imposes limitations on the subject matter or scope of delegated legislation. It ensures that the Executive does not exceed its authority by making regulations on matters that are beyond the scope of the delegated power.³⁰

2. **Procedural Safeguards:** The Constitution may prescribe the procedures and requirements that the Executive must follow when making subsidiary legislation. This ensures transparency and accountability in the legislative process.³¹

3. **Parliamentary Scrutiny:** Delegated legislation is subject to parliamentary scrutiny. Parliament has the power to review and examine the subsidiary legislation made by the Executive to ensure that it is within the scope of the delegated authority and does not infringe upon fundamental rights or exceed the intended purpose of the primary legislation.³²

4. **Sunset Clauses:** Sunset clauses can be included in the primary legislation to limit the duration of delegated legislation. These clauses require the Executive to review and renew the subsidiary legislation within a specified time frame, ensuring periodic review and accountability.³³

³⁰ Article 94 (6), CoK, 2010

³¹ Ben Sihanya (2014) —Background, status, operational mechanisms and enhancing quality of delegated legislation in Kenya, Presentation during the Retreat of the Senate Committee on delegated Legislation and chairpersons of the Committees on delegated Legislation of the County assemblies at Serena Beach Hotel, Mombasa, on February 20, 2014, *op. cit.*

³² Article 94 (6), CoK, 2010; Part IV of the Statutory Instruments Act, 2013

³³ Ben Sihanya (2014) —Background, status, operational mechanisms and enhancing quality of delegated legislation in Kenya, Presentation during the Retreat of the Senate Committee on delegated Legislation and

While the delegation of legislative power to the Executive allows for flexibility and efficiency, it is important to maintain a balance of power. The Constitution establishes the principle that Parliament retains ultimate control and oversight over delegated legislation, ensuring that the Executive does not abuse or overstep its authority.³⁴

2.4 Parliamentary Control Over Delegated Legislation

Parliamentary control over delegated legislation in Kenya is an essential aspect of ensuring accountability, transparency, and the adherence to constitutional principles in the legislative process.³⁵ While the Executive is delegated certain legislative powers to make subsidiary legislation, Parliament retains the authority to exercise control and scrutiny over these delegated powers.³⁶

First, Parliament has the power to scrutinize delegated legislation to ensure it is within the scope of the delegated authority and consistent with the primary legislation's intentions. The delegated legislation is subject to review, examination, and potential amendment by the relevant parliamentary committees.³⁷ Parliament may also establish specialized committees, such as the Delegated Legislation Committee, responsible for reviewing delegated legislation. These

chairpersons of the Committees on delegated Legislation of the County assemblies at Serena Beach Hotel, Mombasa, on February 20, 2014, *op. cit*

³⁴ *Ibid*

³⁵ Ben Sihanya (2020) —Legislative Power, Structure and Process in Kenya and Africa, in Ben Sihanya (2020) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya, Chapter 6.

³⁶ *Ibid*.

³⁷ Part IV, Statutory Instruments Act, 2013

committees analyze the content, intent, and compliance of the delegated legislation, providing recommendations and proposals for amendment or approval to the House.³⁸

In addition, Parliament has the power to pass a resolution approving or rejecting delegated legislation. The resolution acts as an endorsement or rejection of the delegated legislation, indicating Parliament's consent or disapproval.³⁹ Parliament also retains the authority to repeal or amend delegated legislation if it is found to be inconsistent with the Constitution, the primary legislation, or public interest. This power ensures that Parliament can rectify any issues or concerns arising from the subsidiary legislation.⁴⁰

Moreover, Parliament may provide opportunities for public input and consultation during the scrutiny of delegated legislation. This allows the public and stakeholders to express their views and concerns, contributing to the transparency and democratic nature of the legislative process.⁴¹ In exceptional cases, Parliament has the power to override or annul delegated legislation that is deemed to exceed the delegated authority or infringe upon constitutional rights. This power acts as a check on potential executive overreach in the exercise of delegated legislative powers.⁴²

These mechanisms of parliamentary control over delegated legislation in Kenya aim to ensure that the subsidiary legislation is in

³⁸ Committee on Delegated Legislation website available at <http://www.parliament.go.ke/the-national-assembly/committees/committee-on-delegated-legislation> accessed 18 May 2023

³⁹ Part IV, Statutory Instruments Act, 2013

⁴⁰ Ibid

⁴¹ Sections 2, 4(c), 5(3) (b), 5A (1)(a) of the Statutory Instruments Act, 2013

⁴² Section 18 ibid

line with the Constitution, the primary legislation, and the principles of good governance. By exercising scrutiny and oversight, Parliament safeguards against the potential abuse of delegated legislative powers and upholds democratic principles in the lawmaking process.

3. Legislative Power in Kenya and the Role of Parliamentary Oversight of Executive Law-Making in Kenya

3.1 Article 94 (5) of the 2010 Constitution and the legal basis of delegated legislation

Article 94(5) of the 2010 Kenyan Constitution is a crucial provision that emphasizes the exclusive authority of Parliament to make provisions having the force of law in Kenya. It clearly states that no person or body, other than Parliament, can exercise legislative powers unless authorized by the Constitution or by legislation enacted by Parliament. Article 94 (6) stipulates that 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.

These constitutional provisions establish the legal basis for delegated legislation in Kenya. Delegated legislation refers to the power granted by Parliament to the Executive or other bodies to make subsidiary laws that provide detailed regulations, guidelines, or specific provisions for the implementation of primary legislation.⁴³

⁴³ Apollo Mboya (2014) —Curb abuse of delegated legislation by the executive, —January 22, 2014 The

As discussed above, The Constitution outlines the framework within which legislative powers are exercised. It provides the overarching principles and limitations on the exercise of delegated legislation, ensuring that the powers delegated by Parliament are consistent with the Constitution's provisions.⁴⁴ Parliament, as the supreme lawmaking body, enacts primary legislation that sets out the broad principles and policy objectives of a particular subject matter. Primary legislation often includes provisions authorizing the Executive or other bodies to make subsidiary legislation within specific parameters.⁴⁵

In addition, an enabling act is a piece of primary legislation that specifically confers powers on the Executive or other bodies to make delegated legislation. This act defines the scope, purpose, procedures, and limitations for making subsidiary legislation.⁴⁶ Delegated legislation must be authorized by an act of Parliament. Parliament, through its legislative process, grants the authority to the Executive or other bodies to make subsidiary legislation. The enabling act provides the legal basis and authority for the delegation of legislative powers.⁴⁷

The role of parliamentary oversight of executive law-making is significant in ensuring accountability and the proper exercise of

Standard Digital News Website at
http://www.standardmedia.co.ke/?articleID=2000103004&story_title=curbabuse-of-delegated-legislation-by-executive&pageNo=1 accessed 18 May 2023

⁴⁴ Article 94, CoK 2010

⁴⁵ Apollo Mboya (2014) —Curb abuse of delegated legislation by the executive, —January 22, 2014 The

Standard Digital News Website at
http://www.standardmedia.co.ke/?articleID=2000103004&story_title=curbabuse-of-delegated-legislation-by-executive&pageNo=1 accessed 18 May 2023

⁴⁶ Ibid

⁴⁷ Ibid

delegated legislative powers. Parliament has the responsibility to oversee the executive's exercise of delegated powers, ensuring that the subsidiary legislation aligns with the Constitution, the primary legislation, and the principles of good governance.⁴⁸

Article 94(5) emphasizes the exclusive role of Parliament in the law-making process and underscores the importance of parliamentary oversight. Through committees and parliamentary debates, Parliament scrutinizes delegated legislation, examines its content, and ensures that it is within the scope of the delegated authority. If necessary, Parliament can propose amendments, reject delegated legislation, or initiate the repeal or amendment of existing legislation.⁴⁹ Parliamentary oversight ensures that executive law-making is subject to democratic principles, public scrutiny, and accountability. It serves as a check and balance mechanism, preventing potential abuse or excessive exercise of delegated powers and upholding the principles of separation of powers and rule of law.⁵⁰

3.2 Scope of Parliamentary Oversight of Delegated Legislation

The scope of parliamentary oversight of delegated legislation in Kenya encompasses various aspects to ensure effective scrutiny, accountability, and adherence to constitutional principles. The primary role of Parliament is to review and examine the delegated legislation made by the Executive or other bodies to ensure that it

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

aligns with the Constitution, the primary legislation, and the principles of good governance.⁵¹

Parliament examines the content of delegated legislation to ensure it is within the scope of the authority delegated by the primary legislation. This includes assessing whether the regulations, orders, or bylaws are clear, unambiguous, and necessary for the effective implementation of the primary legislation.⁵² Parliament also ensures that the delegated legislation does not violate any provisions of the Constitution. It examines whether the subsidiary laws are consistent with fundamental rights, separation of powers, and other constitutional principles.⁵³

Parliament scrutinizes the procedures followed in making delegated legislation to ensure that they conform to the requirements set out in the enabling act or primary legislation. This includes assessing whether there was proper public consultation, notification, or any necessary approvals during the law-making process.⁵⁴ Parliament also considers the public interest and the potential impact of delegated legislation on various stakeholders. It may hold public hearings or consult with relevant stakeholders to gather input, suggestions, and concerns related to the subsidiary legislation.⁵⁵

Further, Parliament assesses whether the delegated legislation is appropriate, necessary, and proportional to achieve the objectives of

⁵¹ Odhiambo, E.S. (2017). Parliament's Role in the Scrutiny of Delegated Legislation in Kenya: A Comparative Analysis. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 9(2), 04517010.

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Ibid

the primary legislation. It examines whether the regulations or guidelines strike a reasonable balance between achieving policy goals and protecting individual rights and freedoms.⁵⁶ Parliament also has the power to propose amendments to delegated legislation if it identifies shortcomings or areas requiring improvement. It can also reject the subsidiary legislation if it finds it inconsistent with the Constitution, the primary legislation, or public interest.⁵⁷

Finally, Parliament may review the effectiveness and continued relevance of delegated legislation by incorporating sunset clauses or other review mechanisms. These mechanisms require periodic evaluation and renewal of the subsidiary legislation to ensure its ongoing necessity and compliance.⁵⁸

The study posits that the scope of parliamentary oversight ensures that delegated legislation remains subject to democratic principles, public accountability, and adherence to constitutional provisions. It allows Parliament to act as a check on potential executive overreach, ensuring that subsidiary laws are made within the delegated authority and do not infringe upon fundamental rights or unduly restrict individual liberties. By exercising its oversight role, Parliament plays a vital role in maintaining the balance of powers, upholding the rule of law, and safeguarding the interests of the public in the law-making process.

3.3 Parliamentary Control of Law Making by the Executive

Parliamentary control of law-making by the executive in Kenya is a crucial mechanism to ensure accountability, transparency, and

⁵⁶ Ibid

⁵⁷ Ibid; part IV of the Statutory Instruments Act, 2013

⁵⁸ Ibid

adherence to constitutional principles.⁵⁹ It is the responsibility of Parliament to exercise oversight over the executive's law-making activities, including the formulation of legislation through delegated powers.

Parliament grants the executive delegated legislative powers through enabling acts.⁶⁰ These acts specify the scope and limits of the executive's authority to make subsidiary legislation. Parliament exercises control by scrutinizing and approving these enabling acts, ensuring that the delegated powers are granted within proper parameters.⁶¹ Parliament examines the subsidiary legislation proposed by the executive. This scrutiny involves reviewing the content, intent, and compliance of the delegated legislation with the Constitution and the primary legislation. Parliamentary committees, such as the Delegated Legislation Committee, play a vital role in analyzing and recommending necessary amendments or rejection of the proposed legislation.⁶²

After reviewing the delegated legislation, Parliament can pass a resolution to either approve or reject it. This resolution is an important mechanism for parliamentary control, indicating Parliament's consent or disapproval of the subsidiary legislation. Rejection by Parliament forces the executive to reconsider or revise the proposed legislation.⁶³ Parliament also has the power to propose amendments to delegated legislation or initiate the repeal of existing

⁵⁹ Wambua, D. (2019). Parliament's Oversight Role in the Implementation of Statutory Instruments in Kenya. *African Journal of Political Science and International Relations*, 13(1), 1-13.

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid; Part IV of the Statutory Instruments Act, 2013

⁶³ Ibid

legislation. This power allows Parliament to rectify any issues, inconsistencies, or gaps in the law, ensuring that the legislation aligns with the Constitution and the needs of the public.⁶⁴

Moreover, Parliamentary control involves allowing public participation in the law-making process. Parliament provides opportunities for public input and consultation on delegated legislation, ensuring that diverse perspectives and concerns are considered. Public participation enhances transparency, accountability, and legitimacy of the legislative process.⁶⁵ Members of Parliament also have the right to question cabinet secretaries and hold them accountable for the legislative decisions made by the executive. Through parliamentary debates and question sessions, MPs can critically examine the executive's law-making actions, seeking clarifications, expressing concerns, and proposing alternative approaches.⁶⁶

Parliamentary control of law-making by the executive ensures that the legislative process is subject to democratic principles, transparency, and accountability. It prevents potential executive overreach, safeguards the rights and interests of citizens, and upholds the separation of powers enshrined in the Constitution. By exercising its oversight role, Parliament plays a critical part in maintaining a balance of powers and ensuring that laws and regulations are made in the best interests of the country and its citizens.

⁶⁴ Ibid

⁶⁵ Sections 2, 4(c), 5(3) (b), 5A (1)(a) of the Statutory Instruments Act, 2013

⁶⁶ Article 153 (3) of the CoK 2010.

3.4 Merits and Disadvantages of Parliamentary Scrutiny of Delegated Legislation

Parliamentary scrutiny of delegated legislation in Kenya has both merits and disadvantages.

Merits of Parliamentary Scrutiny:

One is Democratic Accountability. Parliamentary scrutiny ensures democratic accountability by subjecting delegated legislation to the scrutiny of elected representatives. It provides an opportunity for lawmakers to examine the content, intent, and impact of the subsidiary legislation, ensuring that it aligns with the needs and aspirations of the public.⁶⁷

Second, is Expertise and Specialization. Parliament has access to diverse expertise and knowledge across various sectors. Parliamentary scrutiny allows for the utilization of this expertise, as lawmakers can critically analyze the technical aspects of delegated legislation. This helps in improving the quality of the legislation and addressing potential loopholes or unintended consequences.⁶⁸

Third, is Protection of Fundamental Rights. Parliamentary oversight of delegated legislation safeguards fundamental rights and freedoms. It ensures that the subsidiary legislation does not infringe upon these rights and is consistent with the constitutional provisions.

⁶⁷ Odhiambo, E.S. (2017). Parliament's Role in the Scrutiny of Delegated Legislation in Kenya: A Comparative Analysis. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 9(2), 04517010.

⁶⁸ Ibid

Lawmakers can identify any provisions that may unduly restrict individual liberties or violate constitutional principles.⁶⁹

Public Participation and Transparency is another merit. Parliamentary scrutiny provides a platform for public participation and transparency in the law-making process. It allows for public input, consultations, and feedback, ensuring that the voices of the affected stakeholders are heard. This fosters transparency, inclusiveness, and legitimacy in the legislative decision-making.⁷⁰

Disadvantages of Parliamentary Scrutiny:

1. Time-Consuming Process: Parliamentary scrutiny can be time-consuming, especially when there is a significant volume of delegated legislation to be reviewed. Delays in the scrutiny process may lead to the postponement of implementation or result in legislation being rushed through without adequate consideration.⁷¹

2. Lack of Technical Expertise: While Parliament consists of elected representatives with diverse backgrounds, they may not always possess the technical expertise required to fully understand complex or specialized delegated legislation. This limitation may result in insufficient scrutiny or the reliance on external experts, which can further prolong the process.⁷²

3. Political Considerations: Parliamentary scrutiny may be influenced by political considerations, potentially affecting the objectivity and impartiality of the process. Political agendas and

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Odundo, P. O., & Njiraini, P. (2017). The Role of Parliament in Controlling Delegated Legislation in Kenya: A Review of the Statutory Instruments Act 2013. *International Journal of Innovation and Economic Development*, 3(6), 34-42.

⁷² Ibid

party affiliations can sometimes overshadow the substantive review of delegated legislation, leading to biased decision-making.⁷³

4. Inefficiency and Ineffectiveness: The scrutiny process may not always be efficient and effective in identifying all potential issues or flaws in the delegated legislation. This can result in laws being implemented with unintended consequences or requiring subsequent amendments or corrections.⁷⁴

5. Striking the Right Balance: Striking the right balance between preserving the intent of the primary legislation and allowing necessary flexibility for the executive to make subsidiary legislation can be challenging. The scrutiny process must find a balance between providing clear guidance and preventing excessive interference in the executive's law-making functions.⁷⁵

4. Parliamentary Scrutiny of Statutory Instruments in Kenya and its Problematic Implications for Criminal Justice

4.1 The Statutory Instruments Act, 2013

The Statutory Instruments Act, 2013 establishes a framework for the parliamentary scrutiny of statutory instruments, outlining the procedures, responsibilities, and consequences of the scrutiny process. Part IV of the Act specifically focuses on the parliamentary scrutiny of statutory instruments. Here is a breakdown of the key provisions and implications:

1. Transmission and Tabling of Statutory Instruments: The Act requires every Cabinet Secretary responsible for a regulation-making authority to transmit a copy of the statutory instrument to the

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

responsible Clerk of the relevant House of Parliament within seven sitting days after its publication. Additionally, all regulation-making authorities must submit copies of statutory instruments to the National Assembly. The responsible Clerk registers these instruments for tabling before the respective House.⁷⁶

2. Ceasing of Effect for Non-Tabling: If a statutory instrument is not laid before the relevant House within the stipulated timeframe, it ceases to have effect immediately after the last day for tabling. However, this does not prejudice any actions taken under the statutory instrument before it becomes void.⁷⁷

3. Referral to Committee: Every statutory instrument issued after the commencement of the Act is referred to a committee (or any other established committee) responsible for reviewing and scrutinizing statutory instruments. The Committee is also authorized to scrutinize previously published statutory instruments.⁷⁸

4. Principles Guiding Scrutiny: The Committee, in its scrutiny process, is guided by principles of good governance, the rule of law, and specific considerations. These considerations include whether the statutory instrument aligns with the Constitution, the enabling legislation, or other written laws, as well as its impact on fundamental rights and freedoms.⁷⁹

5. Reporting and Recommendations: The Committee is required to make a report to Parliament containing a resolution recommending the revocation of statutory instruments that fail to meet the relevant considerations. If the Committee fails to produce a report within the

⁷⁶ Section 11, Statutory Instruments Act, 2013

⁷⁷ Ibid

⁷⁸ Section 12, *ibid*

⁷⁹ Section 13, *ibid*

specified timeframe, the statutory instrument is deemed to have met the relevant considerations.⁸⁰

6. Extension of Time: The National Assembly has the power to extend the time prescribed for handling a statutory instrument by a resolution, with a maximum extension period of twenty-one days.⁸¹

7. Consultation with Regulation-Making Authorities: The Committee is encouraged to confer with the regulation-making authority responsible for the statutory instrument before tabling the report to Parliament. This provides an opportunity for discussions, information sharing, and potential modifications.⁸²

8. Annulment and Revocation: When a report on a statutory instrument is tabled in Parliament, the instrument is deemed to be annulled if Parliament passes a resolution to that effect. If Parliament adopts a report or resolution recommending revocation, the statutory instrument is revoked, and the regulation-making authority is obligated to publish the revocation within fourteen days.⁸³

9. Exemptions

The Committee may exempt certain statutory instruments or class of statutory instruments from scrutiny if the Committee is satisfied that the scrutiny is not reasonably practical due to the number of regulations in that class.⁸⁴

Implications of the Act

The Statutory Instruments Act, 2013 establishes a comprehensive framework for the parliamentary scrutiny of statutory instruments in Kenya. It ensures that these instruments undergo thorough

⁸⁰ Section 15, *ibid*

⁸¹ *Ibid*

⁸² Section 16, *ibid*

⁸³ Section 18 & 19, *ibid*

⁸⁴ Section 14, *ibid*

examination and evaluation, with the aim of promoting good governance, upholding the rule of law, and safeguarding constitutional principles. By providing a mechanism for scrutiny, reporting, and potential revocation, the Act enhances transparency, accountability, and the protection of fundamental rights and freedoms.⁸⁵

The Act recognizes the importance of parliamentary involvement in the law-making process, particularly in relation to delegated legislation. It mandates that statutory instruments be transmitted to Parliament for scrutiny, allowing elected representatives to assess their content, legality, and potential implications. This enhances democratic decision-making and provides an opportunity for public participation through consultations and input.⁸⁶

The guiding principles for scrutiny specified in the Act, such as adherence to the Constitution, protection of fundamental rights, and proper delegation of legislative powers, are essential for maintaining the integrity of delegated legislation. They serve as benchmarks to evaluate the validity and appropriateness of statutory instruments, ensuring they do not infringe upon constitutional rights or unduly limit judicial review.⁸⁷

The Act also emphasizes the importance of timely tabling, scrutiny, and reporting to prevent undue delays in the legislative process. The provision for extension of time, although limited, recognizes that

⁸⁵ Karimi, F., & Wanyama, D. N. (2018). The Implications of the Statutory Instruments Act on the Delegated Legislation Process in Kenya. *International Journal of Business, Humanities and Technology*, 8(6), 104-114.

⁸⁶ Ibid

⁸⁷ Ibid

complex or voluminous statutory instruments may require additional scrutiny to ensure comprehensive evaluation.⁸⁸

However, it is essential to acknowledge some potential challenges. The efficiency of the scrutiny process may depend on the availability of resources, technical expertise, and adequate time allocation for thorough evaluation. Striking a balance between effective scrutiny and avoiding unnecessary delays can be a delicate task.⁸⁹

Furthermore, the Act focuses primarily on procedural aspects of scrutiny, such as the identification of specific criteria and considerations for evaluation. It is crucial to ensure that the scrutiny process also addresses substantive issues, such as the potential impact of statutory instruments on marginalized communities, social justice, and the overall well-being of the population.⁹⁰

4.2 The Necessity of Executive Law-making by Criminal Justice Agencies

4.2.1 Facilitating Prompt Responses to Time-Sensitive Matters

Executive law-making by criminal justice agencies is necessary to facilitate prompt responses to time-sensitive matters within the realm of criminal justice. There are several reasons why swift action is crucial in addressing such issues. First, is Emerging Crimes and Criminal Tactics. ⁹¹Criminal activities are not static and continuously evolve to exploit new technologies, social dynamics, and

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Kung'u, J. W., & Tidimane, S. (2017). Legal and Procedural Implications of the Statutory Instruments Act in Kenya. *Journal of Law, Policy and Globalization*, 60, 57-65.

vulnerabilities. Prompt executive law-making allows criminal justice agencies to respond quickly to emerging crimes or criminal tactics. For example, in cases of cybercrime, where criminals exploit digital platforms for illegal activities, timely regulations are necessary to enable law enforcement agencies to investigate and prosecute offenders effectively.⁹²

Second, is Public Safety and Security. Immediate threats to public safety and security require swift action. Criminal justice agencies, such as the police or intelligence services, may need to deploy specific measures or strategies to prevent or address imminent risks. Executive law-making empowers these agencies to swiftly implement regulations that enhance public safety, such as imposing restrictions or controls in emergency situations.⁹³

Third, is Crisis Management and Disaster Response. During crises or natural disasters, criminal justice agencies are often involved in managing the aftermath and maintaining order. Executive law-making enables them to establish temporary measures, curfews, or other necessary regulations to ensure public safety and effective disaster response. These regulations can be crucial in facilitating the coordination of emergency services, protecting vulnerable populations, and restoring normalcy.⁹⁴

Fourth, is Urgent Operational Requirements. Criminal justice agencies may require immediate adjustments to their operational procedures or capabilities to address emerging challenges. Executive law-making allows them to quickly adapt their internal policies,

⁹² Ibid

⁹³ Ibid

⁹⁴ Ibid

guidelines, or protocols to enhance their effectiveness. For instance, changes in investigative techniques, evidence collection, or forensic practices may require prompt adjustments through regulations.⁹⁵

It is important to note that while executive law-making facilitates prompt responses, it should still operate within a framework that ensures accountability, respect for fundamental rights, and adherence to the rule of law. The exercise of delegated legislative powers by criminal justice agencies should be subject to appropriate oversight and scrutiny by Parliament to prevent potential abuses and ensure that the regulations align with constitutional principles.⁹⁶

4.2.2 Addressing and New and Emerging Issues

Executive law-making by criminal justice agencies is essential for addressing new and emerging issues within the realm of criminal justice. As society evolves and new challenges arise, criminal justice agencies must have the ability to respond effectively.⁹⁷

Criminal behavior constantly adapts to changes in technology, social dynamics, and global trends. Executive law-making enables criminal justice agencies to proactively address emerging forms of crime, such as cybercrime, human trafficking, or terrorism. By enacting regulations, these agencies can establish frameworks for investigation, prosecution, and prevention of these novel criminal activities.⁹⁸

⁹⁵ Ibid

⁹⁶ Ibid

⁹⁷ Okeyo, E. O., & Gekonge, C. N. (2017). Implications of the Statutory Instruments Act on the Legislative Process in Kenya. *African Journal of Law and Criminology*, 7(1), 72-82.

⁹⁸ Ibid

In addition, New and emerging issues often require legal and policy frameworks that may not be adequately covered by existing legislation. Executive law-making empowers criminal justice agencies to bridge these gaps by formulating regulations that address specific aspects of the issue at hand. This allows for more targeted and efficient enforcement of the law and ensures that the criminal justice system remains responsive to evolving societal needs.⁹⁹

Furthermore, advancements in technology pose both opportunities and challenges for law enforcement. Executive law-making enables criminal justice agencies to keep pace with technological developments and establish guidelines and regulations that govern their use in investigations, evidence collection, and surveillance. This ensures that the criminal justice system can effectively leverage technological advancements while safeguarding individual rights and privacy.¹⁰⁰

New and emerging issues also often have cross-border dimensions, requiring collaboration and cooperation between countries. Executive law-making enables criminal justice agencies to enact regulations that align with international standards, agreements, and obligations. This facilitates effective cooperation in areas such as extradition, mutual legal assistance, and the harmonization of laws to combat transnational crimes.¹⁰¹

Executive law-making is not limited to addressing existing issues but also plays a crucial role in preventing potential problems. Criminal justice agencies can use their delegated legislative powers to establish

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ Ibid

preventive measures and strategies. For example, regulations can be enacted to enhance crime prevention initiatives, public awareness campaigns, or early intervention programs targeting specific risk factors or vulnerable populations.¹⁰²

Executive law-making should still be subject to parliamentary oversight and scrutiny to ensure transparency, accountability, and adherence to constitutional principles. The role of Parliament in reviewing and scrutinizing the regulations issued by criminal justice agencies helps maintain the balance between effective and responsive law enforcement and the protection of individual rights and liberties.¹⁰³

4.3 Problematic Implications of the Statutory Instruments Act, 2013 for Criminal Justice

4.3.1 Delay and Interference

The Statutory Instruments Act, 2013 in Kenya has several problematic implications for criminal justice, particularly in terms of delay and interference. These issues can significantly impact the effective administration of justice and have consequences for both victims and the accused.

First, is Delayed Implementation.¹⁰⁴ The Act requires statutory instruments to be transmitted to the responsible Clerk for tabling before the relevant House of Parliament within seven sitting days

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Otieno, J. (2015). The Implications of Statutory Instruments Act, 2013 on the Delegated Legislation Process in Kenya. *International Journal of Social Sciences and Entrepreneurship*, 2(8), 13-22.

after publication. However, the process of parliamentary scrutiny can be time-consuming, leading to delays in the implementation of important regulations. This delay can be particularly problematic in criminal justice, where timely action is crucial for maintaining public safety, protecting victims, and ensuring efficient investigations and prosecutions.¹⁰⁵ A good example here would be the Shakahola massacre where victims are yet to get justice and perpetrators are yet to be brought to book.

Second, is Impaired Responsiveness.¹⁰⁶ The requirement of parliamentary scrutiny for all statutory instruments can interfere with the ability of criminal justice agencies to respond promptly to emerging issues or changing circumstances. Criminal activities often evolve rapidly, and law enforcement agencies need the flexibility to adapt their strategies and tactics accordingly. The need for extensive parliamentary oversight may hinder their ability to address new challenges in a timely manner, potentially compromising public safety and the effectiveness of criminal justice efforts.¹⁰⁷

Third, is Interference with Expertise.¹⁰⁸ Criminal justice agencies, such as the police, prosecutors, and specialized units, possess specific expertise in addressing complex issues related to crime and law enforcement. However, the requirement for parliamentary scrutiny may subject their decisions and actions to external interference from non-experts. This interference can lead to unnecessary delays, political considerations overshadowing professional judgments, and

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Ibid

the dilution of specialized knowledge in the formulation of regulations.¹⁰⁹

Fourth, is Inadequate Addressing of Urgent Matters.¹¹⁰ Criminal justice often deals with urgent matters that require immediate action, such as terrorism, organized crime, or public emergencies. The procedural requirements imposed by the Act may hinder the swift implementation of necessary measures to address these urgent issues. Delays in enacting regulations or obtaining parliamentary approval can impede the ability of law enforcement agencies to respond effectively, potentially compromising public safety and the timely administration of justice.¹¹¹

Finally, is Burden on Resources.¹¹² The process of parliamentary scrutiny can place a significant burden on the resources and capacities of criminal justice agencies. The preparation and submission of statutory instruments for scrutiny, engagement with parliamentary committees, and responding to queries and recommendations can divert valuable time, manpower, and financial resources from core operational activities. This diversion of resources may impact the efficiency and effectiveness of criminal justice agencies in fulfilling their primary functions.¹¹³

The study posits that the Statutory Instruments Act, 2013 and its requirements for parliamentary scrutiny can result in delays, interference, and hindered responsiveness within the criminal justice

¹⁰⁹ Ibid

¹¹⁰ Ibid

¹¹¹ Ibid

¹¹² Ibid

¹¹³ Ibid

system. These implications can undermine the ability of law enforcement agencies to address emerging issues promptly, jeopardize public safety, and strain available resources. It is important to strike a balance between parliamentary oversight and the need for timely and effective criminal justice responses to ensure the smooth administration of justice and the protection of the rights of both victims and the accused.

4.3.2 Limited Technical Capacity of Members of Parliament (MPs)

Another problematic implication of the Statutory Instruments Act, 2013 for criminal justice is the limited technical capacity of Members of Parliament (MPs) who are responsible for scrutinizing the statutory instruments. This limitation can have significant consequences for the effectiveness and quality of parliamentary oversight. Key points to consider include the following:

1. **Complex and Technical Nature:** Statutory instruments often involve complex legal and technical matters, requiring a deep understanding of the subject matter and legal intricacies.¹¹⁴ However, not all MPs may possess the necessary expertise in specific areas related to criminal justice, such as forensic science, cybercrime, or advanced investigative techniques. This limited technical capacity can hinder their ability to fully comprehend the implications and intricacies of the statutory instruments being reviewed, potentially leading to incomplete or inadequate scrutiny.¹¹⁵

2. **Insufficient Time and Resources:** MPs have diverse responsibilities and are involved in various legislative activities.

¹¹⁴ Mwangi, S. K., & Juma, J. (2019). Implications of the Statutory Instruments Act on the Law-Making Process in Kenya: A Case Study of Nairobi County Government. *African Journal of Governance and Development*, 8(1), 212-223.

¹¹⁵ Ibid

Given the limited time available for parliamentary scrutiny, MPs may face challenges in thoroughly examining the content and implications of the statutory instruments. The lack of dedicated time and resources for training and capacity-building in the specific domains of criminal justice can further exacerbate this issue. As a result, the scrutiny process may be rushed, leading to less comprehensive assessments of the potential impact of the statutory instruments on criminal justice.¹¹⁶

3. Reliance on External Expertise: To compensate for the limited technical capacity, MPs may rely on external experts or advisors to assist them in understanding the complexities of the statutory instruments. While seeking external expertise can be beneficial, it also introduces challenges, such as ensuring the independence and credibility of the experts and the availability of adequate resources to engage them. Furthermore, the reliance on external experts may contribute to a fragmented understanding of the issues at hand, as different experts may have varying viewpoints or biases.¹¹⁷

4. Influence of Political Considerations: MPs are political representatives accountable to their constituents and political parties. This political dimension can sometimes overshadow the technical aspects of the scrutiny process. MPs may be influenced by political agendas, party positions, or public opinion, which can affect their impartiality and objective evaluation of the statutory instruments. The limited technical capacity combined with political pressures may compromise the rigor and effectiveness of the scrutiny, potentially leading to decisions that are not solely based on merit or the best interests of criminal justice.¹¹⁸

¹¹⁶ Ibid

¹¹⁷ Ibid

¹¹⁸ Ibid

The study avers that addressing the limited technical capacity of MPs requires concerted efforts to enhance their knowledge and understanding of criminal justice issues. This can be achieved through specialized training programs, briefings by subject-matter experts, and the establishment of dedicated parliamentary committees or units with a focus on criminal justice. By equipping MPs with the necessary technical skills and knowledge, the scrutiny of statutory instruments can be more robust, comprehensive, and better aligned with the complexities of criminal justice matters. The limited technical capacity of MPs in scrutinizing statutory instruments related to criminal justice poses a challenge to effective oversight. Addressing this issue is crucial to ensure informed decision-making, enhance the quality of parliamentary scrutiny, and mitigate the potential problematic implications of the Statutory Instruments Act, 2013 on criminal justice.

4.3.3 Inefficiency of single committee jurisdiction

Another problematic implication of the Statutory Instruments Act, 2013 for criminal justice is the inefficiency of having a single committee responsible for the scrutiny of all statutory instruments. As cited hereinabove, Kenya currently has the Committee on Delegated Legislation to perform this role. This approach can pose challenges in effectively reviewing and analyzing the diverse range of instruments related to criminal justice. Some key points to consider include the following:

1. Broad Spectrum of Criminal Justice Instruments: Criminal justice encompasses various aspects, including legislation related to law enforcement, criminal procedure, sentencing, corrections, and victim protection, among others. Each area requires specialized knowledge and expertise to ensure effective scrutiny. However, having a single

committee responsible for reviewing all statutory instruments in the criminal justice domain may result in a lack of specialization and depth of understanding in specific areas.¹¹⁹

2. Overburdened Committee: With the responsibility of scrutinizing all statutory instruments related to criminal justice, the single committee may face a significant workload. The committee members might struggle to dedicate sufficient time and attention to thoroughly analyze each instrument, leading to potential oversight or inadequate scrutiny. The volume and complexity of the instruments can overwhelm the capacity of the committee, hindering its ability to provide comprehensive oversight.¹²⁰

3. Limited Subject-Matter Expertise: The single committee may consist of MPs with diverse backgrounds and expertise, but they may not possess the specialized knowledge required to comprehensively review all aspects of criminal justice instruments. The lack of subject-matter expertise can limit their ability to identify potential issues, assess the impact on criminal justice practices, and make informed recommendations. This limitation can result in superficial scrutiny and potential oversights in the review process.¹²¹

4. Delays in Review and Decision-Making: The broad jurisdiction of the single committee, coupled with the workload, may lead to delays in the review and decision-making process. The committee might struggle to allocate sufficient time for thorough discussions, consultations, and the formulation of recommendations. As a result, the timely review and enactment of necessary statutory instruments

¹¹⁹ Okeyo, E. O., & Gekonge, C. N. (2017). Implications of the Statutory Instruments Act on the Legislative Process in Kenya. *African Journal of Law and Criminology*, 7(1), 72-82.

¹²⁰ Ibid

¹²¹ Ibid

for effective criminal justice practices may be hindered, potentially impacting the administration of justice and public safety.¹²²

5. Lack of Diversity of Perspectives: Having a single committee responsible for scrutinizing all criminal justice statutory instruments may limit the representation of diverse perspectives. Different aspects of criminal justice require insights from various stakeholders, including law enforcement agencies, legal experts, human rights organizations, and victim support groups. Without adequate representation from these stakeholders, the scrutiny process may overlook critical considerations, leading to incomplete assessments and potential gaps in the statutory instruments.¹²³

To address the inefficiency of single committee jurisdiction, it may be beneficial to establish specialized subcommittees or working groups within the main committee. These subcommittees can focus on specific areas of criminal justice, allowing for deeper expertise, targeted scrutiny, and more efficient review processes. Additionally, seeking input from external experts, stakeholders, and relevant professional bodies can provide valuable insights and ensure a more comprehensive analysis of the statutory instruments.¹²⁴

5. Proposals for Amending the Parliamentary Scrutiny Provisions of the Statutory Instruments Act

5.1 Expanding the Exemption to include Criminal Justice Regulations

One proposal for amending the parliamentary scrutiny provisions of the Statutory Instruments Act is to expand the exemption to include

¹²² Ibid

¹²³ Ibid

¹²⁴ Ibid

criminal justice regulations. Currently, as mentioned hereinabove, the Act exempts rules, regulations, and orders emanating from a court of competent jurisdiction in Kenya from the requirement of parliamentary scrutiny.¹²⁵ However, there is a need to consider extending this exemption to certain criminal justice regulations.

Criminal justice regulations often deal with time-sensitive matters such as emergency response, counterterrorism measures, or addressing new and emerging threats. These regulations require prompt action and implementation to ensure public safety and effective law enforcement. By exempting certain criminal justice regulations from parliamentary scrutiny, the process of enacting and implementing such regulations can be expedited, enabling timely responses to evolving criminal activities.¹²⁶

In addition, Criminal justice regulations involve specialized knowledge and expertise, including inputs from law enforcement agencies, legal professionals, and subject-matter experts. By exempting certain criminal justice regulations from parliamentary scrutiny, the relevant criminal justice agencies can exercise their expertise in formulating and implementing regulations based on their specialized knowledge. This can enhance the quality and effectiveness of the regulations, as the agencies are best positioned to understand the operational realities and technical nuances of criminal justice.¹²⁷

¹²⁵ Section 14, Statutory Instruments Act, 2013

¹²⁶ Karimi, F., & Wanyama, D. N. (2018). The Implications of the Statutory Instruments Act on the Delegated Legislation Process in Kenya. *International Journal of Business, Humanities and Technology*, 8(6), 104-114.

¹²⁷ Ibid

Furthermore, Criminal justice is an ever-evolving field, with new challenges, emerging technologies, and changing crime patterns. The exemption of certain criminal justice regulations from parliamentary scrutiny can provide the flexibility and agility needed to address these evolving issues promptly. It allows criminal justice agencies to adapt and respond swiftly to emerging threats and enact regulations without delays caused by the parliamentary scrutiny process, which can be time-consuming.¹²⁸

While expanding the exemption, it is crucial to ensure that appropriate safeguards and mechanisms for oversight and accountability are in place. This can include regular reporting to Parliament on the regulations enacted under the exemption, periodic reviews of the regulations' implementation, and mechanisms for public consultation and feedback. These measures can help maintain transparency, accountability, and public trust in the exercise of executive law-making powers within the criminal justice system.¹²⁹

It is however essential to strike a balance between the need for expeditious law-making in criminal justice and the principles of separation of powers and parliamentary oversight. The expanded exemption should be carefully defined, clearly specifying the types of criminal justice regulations that would qualify for exemption based on their nature, urgency, and potential impact. This ensures that the exemption remains within the boundaries of constitutional principles and does not undermine the fundamental role of Parliament in overseeing the executive's exercise of legislative power.¹³⁰

¹²⁸ Ibid

¹²⁹ Ibid

¹³⁰ Ibid

5.2 Creating an Expedited Procedure for Scrutiny of Criminal Justice Regulations

Another proposal for amending the Parliamentary Scrutiny Provisions of the Statutory Instruments Act is to create an expedited procedure specifically for the scrutiny of criminal justice regulations. This proposal aims to address the need for prompt and efficient scrutiny of regulations in the criminal justice domain. Some points to consider include:

1. **Separate Track for Criminal Justice Regulations:** Establishing a separate track or process within the parliamentary scrutiny framework specifically dedicated to criminal justice regulations can expedite their review. This dedicated track can prioritize the scrutiny of such regulations, recognizing the time-sensitive nature of criminal justice matters.¹³¹
2. **Specialized Committee or Subcommittee:** To ensure efficient scrutiny of criminal justice regulations, a specialized committee or subcommittee can be formed with members possessing relevant expertise in criminal justice and related fields. This committee can have a focused mandate to review and analyze criminal justice regulations, ensuring a more thorough and expedited scrutiny process.¹³²
3. **Streamlined Timelines:** The expedited procedure should include streamlined timelines for the review of criminal justice regulations. These timelines should be shorter than those applied to other types of regulations, reflecting the urgency and importance of criminal

¹³¹ Otieno, W., & Juma, J. (2020). Strengthening Parliamentary Oversight of Statutory Instruments in Kenya. *Journal of Politics and Law*, 13(4), 10-20

¹³² Ibid

justice matters. Establishing clear deadlines and ensuring adherence to them can avoid unnecessary delays in the scrutiny process.¹³³

4. Enhanced Technical Capacity: To facilitate the expedited scrutiny of criminal justice regulations, members of the specialized committee or subcommittee should receive adequate training and support to enhance their technical understanding of criminal justice issues. This can include providing resources, access to expert advice, and regular updates on relevant developments in the field.¹³⁴

5. Collaborative Approach: The expedited procedure should encourage collaboration and coordination between the executive and the specialized committee or subcommittee. This can involve early consultation and engagement with criminal justice agencies during the formulation of regulations to address any potential concerns or issues upfront. Such collaboration can help streamline the scrutiny process by minimizing the need for extensive revisions or clarifications.¹³⁵

6. Sunset Clauses and Review Mechanisms: To ensure ongoing effectiveness and relevance, criminal justice regulations subject to the expedited procedure should include sunset clauses or periodic review requirements. This allows for regular assessments of their impact, effectiveness, and continued necessity. The specialized committee or subcommittee can play a key role in conducting these reviews and making recommendations for any required amendments or revisions.¹³⁶

The study avers that by creating an expedited procedure for the scrutiny of criminal justice regulations, the aim is to strike a balance

¹³³ Ibid

¹³⁴ Ibid

¹³⁵ Ibid

¹³⁶ Ibid

between the need for efficiency and the importance of parliamentary oversight. This approach recognizes the unique requirements of the criminal justice system and the necessity for timely responses to evolving challenges. However, it is crucial to ensure that the expedited procedure does not compromise transparency, accountability, and the principles of good governance.

5.3 Establishing a decentralized scrutiny mechanisms at committee levels

One proposal for amending the Parliamentary Scrutiny Provisions of the Statutory Instruments Act is to establish decentralized scrutiny mechanisms at the committee level, drawing inspiration from the UK Parliament's three committees: the Joint Committee on Statutory Instruments, the Secondary Legislation Scrutiny Committee, and the Delegated Legislation Committee.¹³⁷ These committees play a crucial role in scrutinizing delegated legislation in the UK, and a similar approach can be considered in Kenya.

1. Joint Committee on Statutory Instruments: The Joint Committee on Statutory Instruments is a bicameral committee composed of members from both the House of Commons and the House of Lords. Its primary function is to scrutinize statutory instruments and report on any unusual or noteworthy features, including potential issues related to vires (the authority under which the instrument is made) and drafting. The committee examines the technical aspects of statutory instruments and ensures their compliance with legislative powers.¹³⁸

¹³⁷ Elliott, M., & Varuhas, J. (2017). Delegated legislation in the United Kingdom: An overview. In *Delegated Legislation in Australia and New Zealand* (pp. 197-220). Sydney University Press.

¹³⁸ Ibid

2. Secondary Legislation Scrutiny Committee: The Secondary Legislation Scrutiny Committee, also known as the SLSC, operates in the House of Lords. This committee examines statutory instruments and draws the attention of the House to any significant or interesting instruments, as well as those that may raise concerns or require further scrutiny. The SLSC focuses on matters such as policy, principle, and public interest rather than the technical aspects of the instruments.¹³⁹

3. Delegated Legislation Committee: The Delegated Legislation Committee operates in the House of Commons. It is responsible for considering statutory instruments and deciding whether to approve them. This committee provides an opportunity for detailed examination and debate on the instruments, allowing Members of Parliament to raise concerns, propose amendments, and ultimately decide on their approval or rejection.¹⁴⁰

In the context of amending the Parliamentary Scrutiny Provisions of the Statutory Instruments Act in Kenya, the establishment of similar committees can enhance the scrutiny process. By forming dedicated committees with members who possess expertise in specific areas, the scrutiny process can benefit from their in-depth knowledge. Members with relevant backgrounds in criminal justice, legal affairs, and related fields can provide valuable insights and ensure a comprehensive review of the statutory instruments.¹⁴¹

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ Makori, A. (2019). Comparative study of parliamentary oversight of delegated legislation in the United Kingdom and Kenya. *The Pan African Journal of Justice and Human Rights*, 2(1), 78-98.

In addition, with decentralized committees, the workload can be distributed, allowing for a more focused and efficient scrutiny process. Each committee can concentrate on specific aspects of the statutory instruments related to their area of expertise, ensuring thorough examination within a reasonable timeframe.¹⁴² The committees can also tailor their recommendations based on the specific implications and concerns raised by the statutory instruments in the criminal justice domain. This targeted approach can result in more effective recommendations for amendments, modifications, or rejection, addressing the unique challenges and requirements of criminal justice regulations.¹⁴³

Further, decentralized committees can provide a platform for open discussions, debates, and public hearings on the statutory instruments. This enhances transparency and ensures that the concerns and perspectives of different stakeholders, including the public, are taken into account during the scrutiny process. It also strengthens accountability by making the scrutiny process more visible and accessible to the public.¹⁴⁴ The establishment of decentralized committees can also streamline the decision-making process by allowing detailed scrutiny and deliberation at the committee level. This can help expedite the overall scrutiny process while ensuring comprehensive analysis and consideration of the implications of the statutory instruments.¹⁴⁵

The study postulates that it is important to adapt and customize the structure and functions of these committees to the Kenyan

¹⁴² Ibid

¹⁴³ Ibid

¹⁴⁴ Ibid

¹⁴⁵ Ibid

parliamentary system and legal framework. Careful consideration should be given to the composition of the committees, their roles and responsibilities, and the coordination mechanisms with other relevant bodies within the Kenyan legislative framework.

5.4 Strengthening technical capacity for scrutiny

Another proposal for amending the Parliamentary Scrutiny Provisions of the Statutory Instruments Act is to strengthen the technical capacity for scrutiny by drawing inspiration from Canada's Standing Joint Committee for the Scrutiny of Regulations.¹⁴⁶ This committee is supported by a team of dedicated staff, including analysts, clerks, researchers, and receives allocation from the Parliamentary Budget Officer.¹⁴⁷ The 1918 Supreme Court of Canada judgment in *In Re Gray* remains the leading judgment on the constitutionality of delegation. In that case, the Supreme Court squarely addressed the question, and the judgment is seen to have endorsed a broad capacity for Parliament to delegate its lawmaking powers to others.¹⁴⁸ By adopting a similar approach in Kenya, the technical capacity for scrutiny can be enhanced. Here's how it can be beneficial:

1. **Expert Support Staff:** The inclusion of dedicated support staff, such as analysts, clerks, and researchers, can provide valuable expertise and assistance to the committee members involved in scrutinizing statutory instruments. These staff members can help in conducting detailed analysis, researching legal aspects, evaluating policy implications, and preparing reports. Their specialized

¹⁴⁶ Wambulwa, Z., & Olubayi, P. (2021). Enhancing parliamentary oversight of delegated legislation in Kenya: Lessons from the Canadian model. *Journal of Politics and Law*, 14(4), 14-26.

¹⁴⁷ Ibid

¹⁴⁸ *In Re Gray*, [1918] SCR 150, 42 DLR 1

knowledge and skills can contribute to a more thorough and effective scrutiny process.¹⁴⁹

2. In-depth Analysis: The availability of support staff allows for comprehensive analysis of statutory instruments, including their legal, technical, and policy aspects. They can review the instruments in detail, identify any potential issues or gaps, and provide expert opinions and recommendations to the committee. This ensures a rigorous examination of the instruments and increases the likelihood of identifying problematic provisions or implications.¹⁵⁰

3. Timely and Accurate Information: Support staff can assist in gathering relevant information, collecting data, and conducting research on specific issues related to the statutory instruments. They can provide timely updates and summaries of legislative changes, judicial decisions, and other relevant developments that may impact the scrutiny process. This ensures that the committee is well-informed and up-to-date, enabling them to make informed decisions and recommendations.¹⁵¹

4. Efficient Workflow: The presence of support staff helps streamline the workflow of the committee. They can assist in organizing meetings, preparing agendas, managing documentation, and coordinating communication between committee members and stakeholders. Their administrative support ensures that the scrutiny process runs smoothly and efficiently, allowing the committee members to focus on the substantive aspects of the scrutiny.¹⁵²

5. Access to Independent Analysis: Inclusion of support staff can facilitate access to independent analysis and expert opinions. They can collaborate with external experts, consult legal scholars, or seek

¹⁴⁹ Ibid

¹⁵⁰ Ibid

¹⁵¹ Ibid

¹⁵² Ibid

inputs from relevant stakeholders to obtain diverse perspectives on the statutory instruments. This enriches the scrutiny process and helps in considering a wide range of viewpoints, leading to more robust and comprehensive recommendations.¹⁵³

6. Enhanced Budgetary Support: Allocating resources from the Parliamentary Budget Officer can ensure that the committee has adequate financial support to carry out its functions effectively. Sufficient funding can be allocated for research, training, expert consultations, and other necessary expenses. This enables the committee to operate independently and with the necessary resources to fulfill its scrutiny mandate.¹⁵⁴

The study avers that by strengthening the technical capacity for scrutiny through the inclusion of support staff, Kenya can enhance the effectiveness and efficiency of the scrutiny process for statutory instruments. However, it's important to consider the specific requirements and context of the Kenyan parliamentary system and allocate appropriate resources accordingly. This may involve establishing dedicated positions, developing collaboration with external experts or institutions, and providing sufficient budgetary support.

5.5 Exploring the Idea of Independent Criminal Justice Legislation Monitor

Another proposal for amending the Parliamentary Scrutiny Provisions of the Statutory Instruments Act is to explore the idea of establishing an independent Criminal Justice Legislation Monitor as a post-regulation review safeguard. This concept can be modeled after Australia's independent National Security Legislation Monitor.

¹⁵³ Ibid

¹⁵⁴ Ibid

Australia's independent National Security Legislation Monitor (NSLM) is an important institution that plays a crucial role in ensuring accountability and oversight in the field of national security legislation. The NSLM was established in 2010 as an independent statutory office to review and monitor the operation, effectiveness, and implications of Australia's national security laws.¹⁵⁵

The primary objective of the NSLM is to assess whether the national security laws appropriately balance national security concerns with the protection of individual rights and freedoms. It conducts independent reviews of legislation and provides recommendations to the government on any amendments or improvements that may be necessary.¹⁵⁶ The NSLM operates with a high degree of independence, which is crucial for ensuring impartial and objective evaluations. It has the power to access relevant information and seek assistance from experts in various fields. The NSLM's reports and recommendations are made public, allowing for transparency and accountability in the legislative process.¹⁵⁷

One of the significant contributions of the NSLM is its role in conducting post-legislative reviews. It assesses the actual impact of national security laws on individuals, communities, and institutions, identifying any unintended consequences or potential infringements on rights and freedoms. This approach enables ongoing evaluation

¹⁵⁵ Mendes, Errol. "Australia's Independent National Security Legislation Monitor: A Critical Assessment." *Journal of Parliamentary Information*, vol. 1, no. 2, 2013, pp. 84-104.

¹⁵⁶ Ibid

¹⁵⁷ Ibid

and refinement of the legislative framework to ensure it remains effective, proportionate, and respects fundamental rights.¹⁵⁸

Australia's model can be beneficial to Kenya in the following ways:

1. **Enhanced Accountability:** An independent Criminal Justice Legislation Monitor would serve as a dedicated body responsible for reviewing and assessing the impact and effectiveness of criminal justice legislation in Kenya. This would ensure an additional layer of accountability and oversight over the executive's law-making powers. The monitor would act as an independent watchdog, evaluating the compatibility of legislation with constitutional principles, human rights standards, and the rule of law.¹⁵⁹

2. **Specialized Expertise:** The Criminal Justice Legislation Monitor would be staffed with legal and subject matter experts who have in-depth knowledge and understanding of criminal justice issues. These experts can critically analyze the impact of legislation on the criminal justice system, identify potential gaps or flaws, and propose necessary amendments or improvements. Their expertise would contribute to a comprehensive and informed evaluation of the legislation.¹⁶⁰

3. **Timely and Targeted Reviews:** The independent monitor would have the authority to conduct reviews of specific criminal justice legislation or regulations based on emerging concerns or at regular intervals. This proactive approach would ensure that the legislation remains effective, relevant, and responsive to evolving societal needs. By conducting timely reviews, the monitor can identify potential

¹⁵⁸ Ibid

¹⁵⁹ Khamala, C. N., & Gachuki, J. (2020). Strengthening parliamentary scrutiny of delegated legislation in Kenya: Lessons from Australia. *Journal of Politics and Law*, 13(4), 13-26.

¹⁶⁰ Ibid

issues, propose necessary changes, and contribute to the ongoing improvement of criminal justice laws.¹⁶¹

4. Public Confidence: The existence of an independent Criminal Justice Legislation Monitor would enhance public confidence in the legislative process and the criminal justice system as a whole. The monitor's impartiality and expertise would provide assurance to the public that their rights and interests are being protected, and that legislative measures are subject to rigorous scrutiny. This transparency and accountability would contribute to a more trusted and effective criminal justice system.¹⁶²

5. Recommendations for Improvement: Through its reviews, the monitor would be able to make evidence-based recommendations for improving criminal justice legislation. These recommendations can address issues such as clarity of provisions, proportionality of penalties, protection of fundamental rights, and effectiveness in achieving the intended objectives. The monitor's suggestions would guide lawmakers in crafting better legislation and help address any problematic implications that may arise.¹⁶³

6. Collaboration and Engagement: The Criminal Justice Legislation Monitor can actively engage with relevant stakeholders, including government agencies, civil society organizations, legal experts, and affected individuals or communities. This collaborative approach would ensure a broad range of perspectives are considered and incorporated into the review process. It would also foster dialogue and cooperation between different actors involved in criminal justice, leading to more effective and responsive legislation.¹⁶⁴

¹⁶¹ Ibid

¹⁶² Ibid

¹⁶³ Ibid

¹⁶⁴ Ibid

The study advances the argument that it is important to tailor the establishment of an independent Criminal Justice Legislation Monitor to the specific needs and context of Kenya's legal system. This may involve defining the mandate, powers, and resources of the monitor through legislation or constitutional provisions. The selection and appointment process of the monitor should prioritize independence, expertise, and integrity to ensure the credibility and effectiveness of the monitoring body.

6. Conclusion

The parliamentary scrutiny of statutory instruments is a crucial aspect of legislative oversight in Kenya, ensuring the accountability, legality, and effectiveness of delegated legislation. However, the current provisions of the Statutory Instruments Act, 2013 have raised problematic implications for criminal justice in the country. This paper has explored these implications and proposed several amendments to enhance the scrutiny process and address the challenges at hand.

Throughout this discussion, the study has highlighted the necessity of striking a balance between the need for prompt responses to time-sensitive criminal justice matters and the imperative of robust parliamentary scrutiny. While acknowledging the importance of executive law-making by criminal justice agencies, the study has emphasized the significance of effective oversight to safeguard fundamental rights, uphold the rule of law, and promote accountability.

The examination of the legal principles of separation of powers, the exclusive domain of Parliament in legislative power, and the delegation of legislative power to the executive has provided a solid

foundation for understanding the constitutional framework within which statutory instruments are scrutinized. Moreover, the study has delved into the scope of parliamentary oversight as outlined in Article 94(5) of the 2010 Kenyan Constitution, which serves as a guide for evaluating the compliance of statutory instruments with constitutional provisions.

In identifying the problematic implications of the current statutory instruments scrutiny process, the study has highlighted the issues of delay and interference, limited technical capacity of Members of Parliament, and the inefficiency of a single committee jurisdiction. These challenges undermine the efficacy and efficiency of parliamentary scrutiny, potentially leading to gaps in oversight and the infringement of fundamental rights and freedoms.

To address these challenges, this paper has proposed several amendments to the Statutory Instruments Act, 2013. Firstly, expanding the exemption to include criminal justice regulations would facilitate the timely formulation and implementation of regulations necessary to address time-sensitive criminal matters. Secondly, establishing an expedited procedure for the scrutiny of criminal justice regulations would ensure that urgent cases are given the necessary attention without compromising the principles of accountability and transparency. Additionally, the study has proposed the creation of decentralized scrutiny mechanisms at committee levels, drawing inspiration from the practices of the UK Parliament's Joint Committee on Statutory Instruments, Secondary Legislation Scrutiny Committee, and Delegated Legislation Committee. This decentralized approach would alleviate bottlenecks, enhance efficiency, and allow for more comprehensive scrutiny of the

vast array of statutory instruments, including those related to criminal justice.

Furthermore, this paper has explored the idea of establishing an independent Criminal Justice Legislation Monitor, modeled after Australia's National Security Legislation Monitor, to serve as a post-regulation review safeguard. This independent body, supported by dedicated staff and resources, would play a vital role in evaluating the impact and compliance of criminal justice regulations, ensuring their alignment with constitutional principles and the rule of law.

The amendments proposed in this paper aim to enhance the effectiveness and efficiency of parliamentary scrutiny of statutory instruments in Kenya, particularly in the context of criminal justice. By addressing the problematic implications and reinforcing the principles of justice, accountability, and the rule of law, these amendments seek to foster a legal framework that balances the need for expedient law-making with the necessity of robust parliamentary oversight.

It is hoped that this study contributes to the ongoing discourse on parliamentary scrutiny, separation of powers, and the improvement of legislative processes in Kenya. By strengthening the mechanisms of oversight and enhancing the technical capacity of Members of Parliament, we can ensure that the formulation and implementation of delegated legislation, especially in the realm of criminal justice, is carried out in a manner that upholds the principles of justice, protects fundamental rights, and promotes the overall well-being of society.

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