THE DISCRETIONARY ROLE OF CABINET SECRETARIES IN COMMENCEMENT OF ACTS OF PARLIAMENT

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By

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DEDICATION

This is for all the civil societies involved in drafting and fighting for the commencement of the Public Benefits Organisations Act, the day will come when it sees the light.

DECLARATION

I, **MELISSA WAITHERA MITHAMO**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or
in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....Mithamo.....

Date: 9th March 2024

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....

CECIL ABUNGU

ABSTRACT

Commencement of acts is an important step in the law-making process that is often overlooked by not only legislators but also law academics. It is an important part of the process which is left in the hands of Cabinet Secretaries. The objective of this project is to do a deep dive into this role to understand the extents to which role they play in reference to commencement. The act of commencement is not unique to Kenya and is standard practice as has been for years. In Kenya, we follow the Westminster model of commencement and historical documents are the main guide as to how this practice has been viewed over the years and actualized.

The major point of concern which is also the point of investigation in this paper is the limits of a cabinet secretaries' discretion in relation to commencement. Their role is accorded wide discretionary powers, and the point of the study is to justify whether the same is necessary and how the same should be regulated and if it should be regulated. We look at the drafters' intentions behind according these powers and whether the same is appropriate in relation to commencement.

LIST OF ABBREVIATIONS

AFRICOG Africa Centre for Open Governance

CSO Civil Society Reference Group

KADU Kenya African Democratic Union

KANU Kenya African National Union

KPU Kenya People's Union

MUHURI Muslims for Human Rights

LIST OF CASES

Adrian Kamotho Njenga v *Attorney General: Judicial Service Commission & 2 others* 2020.

Bryant v Withers, Court of King's Bench 1813.

International Community of Women Living with HIV registered Trustees v Non-Governmental Organizations coordination board 2021.

Kenya Human rights Commission v Non-Governmental Organizations coordination board 2017.

Latless, Executrix and Patten v Holmes, Court of King's Bench 1792.

M v Scottish Ministers United Kingdo Supreme Court 2012.

Muslims for Human rights (MUHURI) & another v Inspector general of Police & five others 2016.

Panter v Attorney-General, Court of King's Bench 1772.

R. v Secretary of State for the Home Department, Ex p. Fire Brigades Union, House of Lords 1995.

Republic v CS Ministry of interior & 6 others ex parte Africa Centre for open governance and 7 others 2017.

Republic v Non-Governmental Organizations coordination board ex parte Research, Care and Training Programme Family Aids Care & Education Services 2016.

Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning and three others 2016.

LIST OF LEGAL INSTRUMENTS

Acts of Parliament (Commencement) Act 1793 (United Kingdom).

Constitution of Kenya 1969.

Constitution of Kenya 2010

House of Lords Hansard Report, July 1997

Interpretations Act (United Kingdom) 1978.

Non- Governmental Organizations Coordination Act 1990.

12th report, The Select Committee on Delegated Powers, 1997.

Public Benefits Organizations Act 2013.

Public Order Act 1950.

1.1 Introduction

Commencement or what is commonly referred to as entry into force or coming into force[1] is when a statute operationalizes. This simply means, in the legislative process after an Act of parliament is passed it may provide for a date for which it will come into effect. In Kenya, Article 116 of the Constitution provides for instances in which Acts of parliament come into force. The various instances include an Act coming into force on the fourteenth day after publication in the gazette or on a different date as is stipulated in the act.[2] In order for an Act to operationalize on a different date, the same is elected by way of legal notice by the Minister in charge of the matters in which the Act is concerned.[3]

The practice of commencement is not a recent one and dates back to as early as the 18th Century when the Acts of Parliament (Commencement) Act 1793 was enacted. The purpose of the Act was to prevent Acts of parliament from taking effect before their passing.[4] This Act thus provided that in Acts of parliament where a date of commencement has not been elected, the same shall be enacted by way of Royal Assent. Prior to this Act, in instances where an act did provide for a particular commencement date, it was considered to have commenced on the first day of the parliamentary session in which the act was made. This in itself applied retroactively as the public is unaware of the existence of this legislation by the time it is considered commenced. This rule was based on the legal fiction that a session of Parliament lasted one day no matter how long it actually lasted. This approach was retroactive and a cause of conflict.[5]

The practice of commencement that ensued from the 18th Century thus entailed that clerks of parliament shall indorse the date of receiving assent which shall also operate as the date of commencement. As this practice continued, it continually began to become unpopular for various reasons. The problem arising from this rule was that there was no time interval between assent and commencement. An interval between the two was desirable for various reasons,

[1] Philip Kaye, "When do Ontario Acts and regulations come into force" Research Paper B31 2018.
[2] Article 116, *Constitution of Kenya* (2010).
[3] Kenya Law: The Legislative Process
[4] Preamble, *Acts of Parliament (Commencement) Act* 1793 (United Kingdom).
[5] *Panter* v *Attorney-General* (1772) *Latless* v *Holmes* (1792), *Bryant* v *Withers* (1813).

majorly being commercial publishers need time to prepare and publish these orders. Professionals and the public as a whole need time to be able to acquire a copy, to study it and prepare one's affairs accordingly.[6] The Government may also need time to avail money to set up an organization or carry out executive tasks.[7]

The same is highlighted in the UK Supreme Court *in M v Scottish Ministers*. It was stated that the point of commencement is to allow time for persons to familiarize themselves with its provisions in order to make any necessary alterations. It also gives officials time to draft any necessary regulations or other instruments provided for in the Act.[8] This thus draws attention to the legislative process outside the confines of parliamentary walls.[9] This Act has since then been repealed by the Interpretations Act 1978.[10] Kenya being a former colony of Britain mirrored the features of the Westminster model of commencement.

There are various reasons as to why a minister is given the discretion to elect a commencement date. For one, in various Acts, there is a requirement to come up with various regulatory bodies and instruments in order for the act to operationalize effectively. Further, reasons such as taking into account supervising developments such as ratification of international conventions may be necessary, or, the economic situation of the nation, some Acts require expenditure of money which may not be available at the given time.[11]

On the other hand, undue delay to elect a commencement date is unjustified and leads to treating Acts as writ in water because they have no statutory power. Lord Lloyd of Berwick in *R. v Secretary of State for the Home Department* stated that although uncommenced Acts have no statutory force, they contain a statement of parliamentary intention.[12]Thus, a minister's discretion, although unfettered, only extends so far as to when an Act is operationalized and not whether or not an Act should be operational. Similarly, a report presented by the Select

[6] The Broadcasting Act 1980 (Commencement No. 2) Order 1981 S.I. 1759 was operative June 1, became available to the Law Society June 3.
[7] House of Lords Hansard Report, July 1997
[8] *M v Scottish Ministers* (UK Supreme Court) 2012
[9] House of Lords Hansard Report, July 1997
[10] *Interpretations Act* 1978 (United Kingdom).
[11] House of Lords Hansard Report, July 1997, para 13.
[12] *R. v Secretary of State for the Home Department, Ex p. Fire Brigades Union* (House of Lords) 1995.

Committee on Delegated Powers[13] highlighted that in the period between 1979 and 1992, sixty-nine Acts out of eight hundred and ten which were assessed to have not been operationalised, this constitutes 8.5 percent which is not negligible. The reason for non-implementation was also not accorded.

This same debate is presented in Kenya in relation to the Public Benefits Organization Act (PBOA).[14]The PBOA is a by-product of the Civil Society Reference Group (CSO)[15]and the then sitting parliament in 2013. It was drafted with the aim of achieving novel approaches in creating an enabling space for civil societies. The PBOA was enacted on 14th January 2013, however it still has not operationalized ten years later due to the lack of a commencement date which was meant to be elected by the Cabinet Secretary as per Section One of the Act.[16] A petition was filed two and a half years later, on 24th August 2015, by the CSO reference group through the Trusted Society of Human Rights Alliance.

The Petitioner's contention was to solve the mystery behind the unreasonable delay to gazette a commencement date. The case highlighted that particularly when a future date of commencement is to be provided for an Act, Parliament is not expected to defeat the intention of legislation. It is a constitutional expectation that a date is stipulated as to when an Act comes into force. Legislation should thus not be suspended indefinitely due to lack of the same. This is the mischief that Article 116(2) sought to cure.[17] This petition succeeded, and the court held that the Cabinet Secretary in failing to act had effectively abused its discretion and had not advanced any plausible reason for the failure to act. An order of mandamus was issued to compel the Cabinet Secretary to elect a date within the following fourteen days and the same was granted on 31st October 2016.[18]

[13] 12th report, The Select Committee on Delegated Powers, 1997.
[14] *Public Benefits Organizations Act* (2013).
[15] The Civil Society Reference group is the umbrella network of local and international NGOs and CSOs operating in Kenya, working for the establishment and realization of an enabling legislative which was established in 2009.
[16] Section 1, *Public Benefits Organizations Act* (2013).
[17] *Trusted Society of Human Rights Alliance* v *Cabinet Secretary for Devolution and Planning and three others* (2016) eklr.
[18] *Trusted Society of Human Rights Alliance* v *Cabinet Secretary for Devolution and Planning and three others* (2016) eklr.

There have been many human rights violations under the current governing NGO Act which are attributed to extensive powers offered to the NGO Coordination board.[19] The PBOA was meant to remedy the same by changing the board's constitution and revising the powers accorded to the board.[20] Fundamentally, the lack of clarity as to the reason behind non implementation has left questions as to the discretionary power of Cabinet Secretaries in relation to commencement of Acts of parliament. Nonetheless, the abuse of unchecked executive power in Kenya is not a recent milestone. Historically, Kenya has had a plague of imperial presidentialism[21] and an era whereby the executive had unchecked power.[22] The effects of the same led to the development of the 2010 transformative constitution[23]which aimed to restore the rule of law in Kenya by affording various checks and balances.

1.2 Problem Statement

Article 116 (2) of the Constitution accords Cabinet Secretaries the discretionary power to elect a different date which shall act as the commencement date. The provision of this Act is to ensure that every act of parliament is accorded a commencement date even in cases of delay. This discretionary power remains unchecked and can lead to abandonment of various Acts of parliament. This study thus aims to investigate whether these broad discretionary powers accorded to Cabinet Secretaries should be checked and how best to check them.

1.3 Research Objectives

1. To study the historically unfettered executive discretion in Kenya and its impact in relation to commencement of Acts.

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[19] Section 12, 14, 19, 32, 12(4*), Non- Governmental Organizations Coordination Act* (1990).
[20] *Republic* v *CS Ministry of interior & 6 others ex parte Africa Centre for open governance and 7 others* (2017) eklr, *Kenya Human rights Commission* v *Non-Governmental Organizations coordination board* (2017)eklr, *International Community of Women Living with HIV registered Trustees* v *Non-Governmental Organizations coordination board* (2021)eklr, *Republic v Non-Governmental Organizations coordination board ex parte Research, Care and Training Programme Family Aids Care & Education Services*(2016) eklr, *Muslims for Human rights (MUHURI) & another* v *Inspector general of Police & five others* (2016) eklr. The New Humanitarian 13 January 2016, United Nations Human Rights, Press Release 14th February 2017
[21] Paul Goldsmith, "Daniel Arap Moi and the Politics of Kenya's Release," The Elephant.
[22] Okoth-Ogendo, Hastings W, *Constitutions without constitutionalism: reflections on an African political paradox*. American Council of Learned Societies, 1988. Yash Pal Ghai, "A Short History of Constitutions and What Politicians Do to Them."
[23] *Constitution of Kenya* (2010).

2. To lead an investigation on why broad discretionary powers are accorded to Cabinet Secretaries for commencement.
3. To investigate whether the broad discretion accorded to Cabinet Secretaries in relation to commencement should be limited and to propose how it is best limitable.

1.4 Research Questions

1. a) What is the history of unrestrained executive power in Kenya?

   b) What is the impact of unchecked executive discretion on commencement of Acts of parliament?

2. Why are broad discretionary powers accorded to Cabinet Secretaries for commencement?
3. Should this broad discretion in relation to commencement be limited and how is it best limited?

1.5 Hypothesis

1.6 Justification

Negligence to the rising incursion of commencement dates will lead to a blind and ignorant practice of the legislative process. Methods in which Acts are commenced should be considered as a pertinent part of the legislative process not only for the purposes of timetabling but also to keep track of the work done by the legislature. This paper would be beneficial to parliamentarians during the legislative process.

Similarly, this paper would be beneficial to both lecturers and students of legal systems and methods. This paper can be used to refer to what happens after parliamentary debate and what technical measures are involved in implementation of various Acts of parliament. It is important to look into the legislative process as whole in order to properly understand and appreciate the different parties and conditions in which Acts can exist or be altered.

This study will yield information that is useful to adjudicators as well in determining cases pertaining to commencement of Acts of parliament. Additionally, it will also help researchers

studying statutory law in relation to the legislative process as well as policy makers that have the responsibility of making supporting guidelines and implementing statutes themselves**.**

1.7 Conceptual Framework: Discretion as Power

What is discretion? In an attempt to elucidate this term reference will be made to its various definitions and interpretations. To a lay man discretion is the ability to make choices based on their own judgment.[24]In the legal context, discretion is often used to describe the authority granted to individuals such as public officials. In this case we expect that they exercise discretion in a responsible and appropriate manner.[25]Thus in law, discretion is defined as the right conferred upon a judge or other public official to act according to personal judgment in certain circumstances.[26]Discretion is at the centre of government institutions[27]and thus should not be interpreted as simply a matter of choice.

For the purposes of this section, I will adopt a view whereby discretion will be equated to power rather than choice. The concept of power has been defined in a variety of ways in history by various scholars and thinkers throughout history. In order to grasp the various idealizations of power, a brief reference will be made to both classical and contemporary definitions of power.

In the classical era, definitions around power centre on the ability to exercise authority over others in order to get what it is you want.[28]Arguments are made for the exercise of power by rulers to maintain their position and strength.[29]As for Michael Foucault, he conceptualizes power as multiple and decentralized, and as a by-product of social structures and knowledge. This thus characterizes power as pervasive and one which operates at all levels of society, shaping how we relate to each other.[30]Similarly, in hard law such as constitutions, international

[24] Oxford dictionary 3 ed.
[25] HLA Hart, Harvard Law Review, 127, 652-665, 2013.
[26] Black's law Dictionary 3ed.
[27] George P. Fletcher, Some Unwise Reflections about Discretion, 47 Law and Contemporary Problems, 4 1984.
[28] Max Weber, "Max Weber and International Relations" *Cambridge University Press.*
[29] Machiavelli N, Bull G *The Prince*. Penguin Classics 2003.
[30] Gerald Turkel, "Michael Foucault: Law, Power and Knowledge" 17(2) *Journal of Law and Society* 1990, 170- 193.

treaties, and domestic laws, power is often defined in terms of political authority and legitimacy.

On the other hand, contemporary scholars have departed from the classical way of conceptualizing power as authority or use of force. In this era, Steven Luke defines power as the ability to shape the discourse of another contrary to their interests.[31] This idealization of power has since then gathered a lot of criticism from critical realists.[32]As for the scope of sociology, power is defined as the ability to maintain or transform social structures and institutions. It is argued that power is not simply about domination and control, but also about the ability to bring about change and innovation.[33]

Power is a complex and multifaceted concept which cannot be bound by a specific definition. Thus, discretion being equated to power can exist within different dimensions. Firstly, discretion can be equated to power in terms of the ability to control and exert dominance. In situations whereby wide discretion is awarded to individuals, it no longer limits them to the ability to make choices but also to act or not act. This wide discretion is not subject to checks or limitations and hence works as the ability to do as one wishes which is beyond the bounds of discretion as a choice.

Additionally, discretion can be equated to power due to its ability to exert change. Discretion in itself is set on the premise that one should invoke their personal judgment in order to make a decision. Therefore, the decision in itself does cause change as it is the desired effect. However, if the decision made does not cause the desired or intended outcome it would be considered outside the scope of the intended discretion. The non limitation of discretion to achieve a desired end is thus a subject of concern.

This expanded visual as to how discretion applies beyond the confines of choice poses the danger of misuse. Fear of concentration of power is addressed by constitutions today, providing for safeguards against its arbitrary exercise.[34] Similarly, in relation to exercise of discretion,

[31] Steven Lukes, "on the concept of power" 4(2) 2006,124-135.

[33] Gilani, Shahwaiz," The Work of Giddens Structure and Agency Sociology" 2020.
[34] Karl Klare, "Legal Culture and Transformative Constitutionalism" South African Journal on Human Rights, (1998)146-188.

the same standard of should be applied. The danger posed by arbitrary use of discretion warrants for strong oversight in order to afford accountability in situations whereby discretion is exercised.[35]

1.8 Literature Review

As it stands, literature on commencement of Acts revolves mainly around describing essentially what it entails and the various ways in which the same is exercised in various jurisdictions.[36] Further, a discussion on the gradual adoption and increased reliance on ministers in relation to commencement of Acts is also an ongoing discourse.[37]Although Patricia Sheehy does touch on one section of my research problem, it is done with an aim of trying to uncover the increased reliance on ministers in relation to commencement. The study is conducted with its main focus on Ireland and a comparative and quantitative methodology are used. I therefore expect that my paper will be novel in its contribution by focusing on Kenya and primarily focusing on ways of limiting this ministerial discretion using a deductive and qualitative methodology.

On the historical study of unchecked executive discretion in Kenya and its impact in relation to commencement

Most of the scholarly work in relation to the history of unchecked executive discretion in Kenya is in various forms such as newspaper articles, books and journal articles. Newspaper articles give us a depiction of the state of affairs of the time and cover various eras and demonstrate the various human rights violations that occurred. These articles give us a historical feel into our past.[38]

[35] The U.S. Constitution defines power in terms of the separation of powers and the checks and balances between the different branches of government. International Treaties, Un Charter defines power alongside with the right to self-determination and sovereignty.
[36] Mark Gobbi, "When to Begin: A Study of New Zealand Commencement Clauses with Regard to those Used in the United Kingdom, Australia, and the United States" 31(3) *Statute Law Review*, 2010, 153–216.
[37] Patricia Sheehy, "Commencement order" 59 *Irish Jurist* 2018, 93-129.
[38] Online: Yash Pal Ghai, "Constitutionalism for Convenience: How Kenyan Presidents Have Subverted the Supreme Law, Othieno Nyanjom "Daniel Arap Moi and the Politics of Kenya's Release", Paul Goldsmith "A Short History of Constitutions and What Politicians Do to Them."

As for the various books and articles, they individually look at the injustices caused by the executive in relation to the three arms of government. Some scholars have chosen to look into the relationship between the executive and the judiciary,[39]the legislature and the constitution,[40] and others a focus on the power yielded by the executive. All the scholarly work in this area depicts the dangers of unrestricted power yielded by the executive and thus the desire to check the same.[41]

As for discretion, there are various papers discussing the desire to conduct oversight or rather to check executive discretion. The literature on discretion goes further to discuss the nuances that come with limiting discretion and further suggests guidelines and systems which are applicable in different situations with the aim of limiting discretion or enabling the same and which situations.[42]Lastly, in this section in order to demonstrate the impact of unchecked discretion on commencement, reference will be made to research reports that give a statistical depiction of the impact various Acts have on us and our society.[43]

On the study of the broad discretionary powers accorded to Cabinet Secretaries in relation to commencement

In regard to this section, scholarly work mostly takes the form of journal articles, books, and reports. Hansard reports and reports primarily give reasons as to why this discretion accorded to cabinet secretaries/ministers in relation to commencement of Acts is necessary and sometimes even desirable.[44] The articles on the other hand, get into different discussions relating to ministerial acts and discretionary powers. These works investigate the necessity of discretionary powers accorded to Minister's in relation to various administrative actions and

[39] Mutua M, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya', Human Rights Quarterly, 23, 1, 108,
[40]Okoth Ogendo, Hastings W, *Constitutions without constitutionalism: reflections on an African political paradox*. American Council of Learned Societies, 1988.
[41] Samuel W cooper "Considering power in separation of powers" 46 (2) *Stanford law review*, 1994, 361-400
[42] Bert A Rockman, "Legislative executive relations and legislative oversight" 9(3) Legislative *Studies Quarterly*, 1984 387-440. Jorum Duri, "Parliamentary oversight tools and mechanisms" *Transparency International* (2022),
[43] Amnesty International press release 2013, Kenya Human Rights Commission Open letter on amendments to the PBO, 2017.
[44] Samuels, A. Briggs, R. Fisher, D Gamon, "Statute law society working party on commencement of acts of parliament" 1 *Statute Law Review*, 40-56,1980.

the constitutional limitation arising in the different ministerial acts.[45]Other works are mainly focused on the desirability to limit executive power due to its historical potential of abuse.[46]

In order to deduce the reason for these broad discretionary powers being accorded to cabinet secretaries; we will look into why these powers were accorded to ministers in the first place using various Hansard reports. Further, we will look at the constitutional limitation that exists in relation to these discretionary powers. Lastly, we will now investigate the various ways in which such discretion could be limited.

1.9 Methodology

My first research objective is primarily focused on doing a deep dive into the history of unlimited executive discretion in Kenya and its impact therein. In order to achieve the same, the study will gravitate between both primary and secondary sources of law. In order to understand the legal system of the time primary sources such as the Independence Constitution will be referenced. On the other hand, a review of various cases, newspaper articles, journal articles and books will be incorporated to understand the political climate of the time. On the other side of the coin, in relation to unchecked executive discretion and commencement of Acts, both primary and secondary sources will be utilized. Dominantly, secondary sources such as case law and newspaper articles will be used to reference the danger it has posed to society. Further, a deductive and historical approach will be used in order to relate the two concepts.

The study will further lead a discussion on whether broad discretionary powers are necessary for commencement. To establish reasons for according to Cabinet Secretaries unfettered discretion in relation to commencement, a dominant reference on secondary sources such as books, journals, articles and reports will be referenced. Nonetheless, a few primary sources such as Hansard reports discuss the reason why Cabinet secretaries are suitable for this role.

Lastly, in order to investigate why discretion in relation to commencement should be limited and propose systems to check the same, a deductive approach will be employed. This claim is

[45] Hume David, Broad Discretions and Constitutional Limitations: Current Issues, 2013.
[46] Bolton Alexander, Thrower Sharece, "The Constraining Power of the Purse: Executive Discretion and Legislative Appropriations," *The Journal of Politics*, 2019.

a product of all prior claims. In order to achieve the same both primary and secondary sources will be employed. The study as whole is a qualitative study that is supported by both primary and secondary sources. Primary sources are heavily relied on as it is the centre of the study with references being made to various Acts of parliament. The study also employs secondary sources in order to weigh in on the different positions taken by scholars on various concepts such as separation of powers. The paper also employs a deductive approach by setting different premises in the objectives which eventually form the main claim of this study.

Chapter Breakdown

Chapter one will form the introductory part of this paper. It details the research objectives, justification, literature review and methodology among others. This chapter sets the premise on which this study is conducted. It gives a general overview of the lens and the expectations that arise from this study. The second chapter will then assess the history of unchecked executive power in Kenya and the impact of such discretion on commencement. The argument that is made is that due to the history of unchecked executive discretion, it is thus desirable to check the same especially in relation to commencement of Acts.

Chapter three will then be dedicated to a discussion on why broad discretionary powers are accorded in relation to commencement and whether it is desirable to limit this discretion. The aim of this chapter is to discuss the role of cabinet secretaries in relation to commencement of Acts and whether the unfettered discretion accorded to them is necessary to perform this role. The investigation is meant to lead us down a path of discovery to find out how important is the role of a cabinet secretary and whether such discretion is appropriate for commencement. Thereafter, chapter four, will then propose systems on how to limit this discretion. This chapter is a product of the previous premises and aims to suggest a new outlook on how oversight can be conducted. Chapter five will offer the conclusions drawn from conducting this study and further make.

2.0 CHAPTER 2: HISTORY OF UNRESTRAINED EXECUTIVE POWERS IN KENYA

2.1 Introduction

This chapter will lead a discussion on the history of abuse of executive powers in Kenya over the years. This discussion will take part in phases divided according to each presidential regime since independence. In each section, the chapter will reveal the different tactics that have been used over the years to exert arbitrary control over its officials and other branches of government.it will also show the adverse effects this has had on administration in Kenya and how the same is used to the executive's advantage. This chapter will look into various acts of parliament, cases and books that support this chapter. The aim of this chapter is to get a full visual of what unrestrained power can do and has been able to do over the years in Kenya.

2.2 Post Independence era

In 1963 Kenya gained independence and progressively in the following year became a Republic. However, even with this newfound sovereignty many of the administrative structures placed by the British remained the same. In order to fully understand the extent to which the executive managed to obtain its control, we will look into how these structures were modified and moulded to favour the executive. First, the British used the Westminster parliamentary system which is bicameral in nature, dividing parliament into a lower and upper house, which is the House of Representatives and the Senate.[47] The former was instilled largely to safeguard rights of minority groups. This structure was frowned upon by heads of dominant tribes, many of whom disapproved of the "majimbo" system.[48] At the time, Jomo Kenyatta was a prime minister and later became the first president of the Republic.[49] Under his auspice, he made it his agenda to centralize power and he managed to do so through several amendments.

He began by merging the two houses of parliament making it a unicameral house, the National Assembly.[50] Consequently, it was followed by the dissolution of the former opposition party, Kenya African Democratic Union in 1964 making Kenya a de facto one-party state.[51] This

[47] Historical perspective | The Kenyan Parliament Website
[48] Historical perspective | The Kenyan Parliament Website
[49] Chapter 2 Section 4, *Constitution of Kenya* (1969).
[50] A Special Correspondent, "Realignment in Kenya Politics" 13 *Indiana University Press* 3, 1966, 12-16.
[51] A Special Correspondent, "Realignment in Kenya Politics,"13.

meant that it was legally possible for another party to emerge at any time but at the time it did not until 1966. The Kenya People's Union was formed and outlawed three years later followed by detention of all its principal leaders.[52] Further down, in order to gain further control he took advantage of the inherited provincial administration.

During the colonial period, the Governor ruled using a powerful, centralized provincial administrative structure through which he administered over the people.[53] The Independence Constitution had provided for decentralization of this administration; however, the central government managed to maintain sufficient control to prevent any disintegration.[54] This resulted in the position of Provincial Administrator being transferred to the office of the president in 1963.[55] As a department within the office of the president, the provincial administrator was on many occasions used to enforce executive decisions.

2.2.1 Provincial Administration under President Kenyatta

The KANU government effectively manipulated the provincial administrative system to achieve a substantial degree of control through various acts. It started with an Africanisation process where positions of administrators were taken up by the top echelons of society but besides this, the structure largely remained the same.[56] In the first year of independence, they delayed the transfer of financial powers to regions which gave them financial control.[57] Thereafter, they officially restored control of the Tribal Police, whose title changed to Administration Police to their former role. They retained their position as a subordinate force under direct authority of the administration.[58] They also managed to gain control over areas which were out of central administrative hands such as responsibility for rural health, roads, and schools.[59]

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[52] Democratisation and the Rule of law in Kenya, *International Commission of Jurists* 11, 1997.
[53] Oyugi W, "The uneasy alliance: Party state relations in Kenya" Politics and administration in East Africa *East African Educational Publishers* 1994.
[54] Cherry Gertzel, "The provincial administration in Kenya" 4 *Journal of Commonwealth Political Studies* 3, 1966, 201-215.
[55] Cherry Gertzel, "The provincial administration in Kenya,"205.
[56] Cherry Gertzel, "The provincial administration in Kenya,"205.
[57] Cherry Gertzel, "The provincial administration in Kenya,"206.
[58] JR Nellia, "Is the Kenyan Bureaucracy Developmental? Political Considerations in Development Administration" 14 *African Studies Review* 3,1971, 389-401.
[59] Obuya Bagaka, "Restructuring the Provincial Administration: An Insider's View" Society for International Development, Constitution Working Paper Number 3, 4the_provincial_administration-an_insiders_view-wp3.pdf (constitutionnet.org)

Responsibility of matters connected to regional administration in 1964 were retained in the Ministry of Home affairs. It retained a direct line of communication with civil secretaries of regions. In this regard, the minister directed that civil secretaries should maintain close liaison with his ministry so that the government might effectively discharge its responsibilities.[60] The result of this directive was to restore executive control of administrative staff. This established a direct chain of command from the centre down to each district. Provincial administration in Kenya at the time was regarded as too powerful and widely political and this is demonstrated through various acts.

As early as 1965, in accordance with the Public Order Act, President Kenyatta issued a directive to the provincial administrators to require all members of parliament to obtain permits before addressing any meetings including those in their own constituencies.[61] This is very similar to how the act operated in the colonial era whereby all public gatherings had to be licensed by district commissioners. This caused conflict as those members of parliament who opposed the government had difficulties obtaining licenses.[62] This practice continued in the 1970s till the 1990s. The licenses progressively became harder to obtain and could also be cancelled by district commissioners without prior notice.[63] Another legislative measure that empowered provincial administration was the power to restrict voter registration in some areas and also restrict the political activities of dissident members of parliament.[64]

Critics have assessed the parliament's position at the time as being of "relative unimportance." [65] The executive branch and the bureaucracy became the dominant strata within which the Kenyan political scene revolved around. There are different speculative reasons posited for this degree of control. The first is on the grounds of security and efficiency. The country was faced with a separatist movement which used violence to achieve its aim and therefore

[60] By Circular 1/1963 of 31.7.63. This was issued during the period of internal self-government, when there was a much greater degree of separation of powers between Centre and Regions than subsequently existed; but when the task of the re-organisation of the whole governmental machine to the new regional structure necessitated close communication between Centre and Region

[61] Ndegwa S, "The incomplete transition: The constitutional and electoral context in Kenya" 2 *Africa Today*, 45 193-211, 1998.

[62] Obuya Bagaka, Restructuring the Provincial Administration: An Insider's View, 8.

[63] Nellis J, "Is the Kenya bureaucracy developmental? Political considerations in development administration" 63 *African Studies Review*, 3,1971, 389-401.

[64] Ndegwa N, "The incomplete transition: The constitutional and electoral context in Kenya,"202.

[65] Cherry Gertzel, "The provincial administration in Kenya,"208.

centralisation was thought of as a natural response to this threat.[66] Nonetheless, in matters of efficiency, they drew their argument from the fact that post-independence, local authorities proved to be unprepared in carrying out their transport, health, and education responsibilities. Dispensaries were run down, roads fell apart, and teachers were not paid. In 1969, the central bureaucracy thought that it was a rational move to transfer these responsibilities plus revenue collection to the supposedly more efficient provincial administration.[67]

From the 1960s through to late in the 1990s, the provincial administration amassed sweeping authoritarian powers and was arguably more powerful than local elected members.[68] This was not only a cause of conflict but also a source of frustration leaving members of parliament with only one avenue to vent their frustrations, parliament. These frustrations were expressed as early as 1966 through the Local Government Review Committee, which made a passionate plea for the abolition of the provincial administration. A majority of the members of parliament considered the provincial administration as antiquated and colonial and contrary to the spirit of self-government.[69] This plea, though heartfelt, was unsuccessful during President Kenyatta's regime. After his demise, President Daniel Arap Moi came into power.

2.2.2 Human rights violations under President Moi's regime

President Moi, just like his predecessor, had an agenda to personalize and centralize power during his administration. Using similar tactics, he used various constitutional amendments to enable his autocratic rule. In 1982, President Moi amended the constitution making Kenya a de jure one party state.[70] This meant that no other political party could legally exist at the time. He also amended the constitution to grant him emergency powers. President Moi associated insecurity and instability with open criticism of his administration.[71] Additionally, he criminalized competitive politics and criticism against his administration.[72] He was able to

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[66] Cherry Gertzel, "The provincial administration in Kenya,"208.

[67] Oyugi W, "The uneasy alliance: Party state relations in Kenya: politics and administration in East Africa." *East African Educational Publishers* 1994.

[68] Oyugi W, "The uneasy alliance: Party state relations in Kenya: politics and administration in East Africa."

[69] Oyugi W, "The uneasy alliance: Party state relations in Kenya: politics and administration in East Africa."

[70] The Constitution of Kenya, Amendment Act, Number 7 of 1982, which introduced Section 2(A)

[71] Amnesty International, Kenya, Torture, Political Detention and Unfair Trials. AI Index AFR 32/17/87, 1987 and Amnesty International, Kenya: Torture Compounded by the Denial of Medical Care. AI Index AFR 32/18/95, 1995.

[72] Korwa Adar, Isaac Munyae Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001,1-19."

enforce these restrictions through the use of the police force that suppressed critics in his regime. Additionally, he reinstated detention laws which gave the President the right to suspend individual rights.[73] Moreover, there was a challenge of transparency and accountability in his administration. The right to obtain information from the office of the president was revoked as well.[74]

Moi's obsession with control was not bound within the walls of parliament. He began his attack on the judiciary using his familiar weapon, amendments. He began by imposing limitations on the independence of the judiciary. First the constitution empowered the president to appoint the chief justice and judges upon recommendations of the Judicial Service Commission which is also appointed by the president.[75] In 1986, he made an amendment that provided for the removal of the security tenure offered to the attorney general, and auditor general. This meant that the president could hire and fire either at will.[76] In 1988, he made a similar amendment that removed the security tenure for judges of the high court and the court of appeal.[77] The amendment also extended the detention period for capital cases from twenty four hours to fourteen days without charge.[78] In 1990 due to domestic and international pressures[79] he reinstated the security tenure for judges, this however did not stop him from taking control. In this amendment a judge could be removed for physical or mental inability to execute their functions or for misbehaviour. Nevertheless, the president retained the power to remove a judge upon the recommendation of a five-member tribunal that he himself appoints.[80] The president could also appoint a panel to consider the removal of the chief justice.[81] In the end he still retained an unreasonable amount of control over the judiciary which was also backed by the use of unfavourable transfers. Unfavourable transfers were used when judges made decisions that went against the wishes of the executive.[82]

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[73]Kimondo G,"The Bill of Rights and the Constitution" *Gathii, Editors* 1996, 54-56.
[74] Korwa Adar, Isaac Munyae Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001,5.
[75]Korwa Adar, Isaac Munyae, "Human Rights Abuse in Kenya under Daniel Arap Moi 1978-2001,"6.
[76] Drew Days, "Justice Enjoined: The State of the Judiciary in Kenya" 4 *Robert F Kennedy Memorial Centre for human rights* 1992.
[77] Amendment number 4 1988, *Constitution of Kenya* (1969).
[78] Amendment number 4 1988, *Constitution of Kenya* (1969).
[79] Drew Days, "Justice Enjoined: The State of the Judiciary in Kenya."
[80] Chapter 4 Section 62(4), *Constitution of Kenya* (1969).
[81] Korwa Adar, Isaac Munyae, "Human Rights Abuse in Kenya under Daniel Arap Moi 1978-2001,"6.
[82] Makau Mutua, "Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya, 23 *Human Rights Quarterly*, 2001, 96-118.

The last pin on the coffin of independence was the use of "contract judges". These judges were predominantly British citizens who were hired to carry out the express wishes of the KANU government or otherwise face disciplinary action such as summary dismissal.[83]It is argued that these judges were offered positions that were more beneficial than those offered in their home country. These judges were thus less keen on trying to go against the executive's wishes.[84]

After usurping powers from the branches of government, provincial administration was further empowered and directed to interfere with the internal affairs of KANU. KANU officials and members of parliament were subjected to administrative procedures. Loyalty became pertinent to survive in Moi's government. In the 1988 general elections, most members of parliament were not elected but selected by the party.[85] Additionally, those against KANU policies were denied the right to contest for electoral seats.[86] His authoritarian regime started to die out slowly in the nineties after he reinstated multi-party democracy in Kenya in 1991.[87] This does not mean he did not continue to attempt and effectively restrict those who criticized his rule but the flame began to die out slowly. In 1997, after the elections, a Constitutional Review Commission was appointed to review the flawed Independence Constitution in its entirety. [88]This Commission led to the birth of the 2010 transformative constitution which aimed at preserving all human rights and actively restricting the powers of the executive.

After the promulgation of the 2010 constitution order was restored in the country but this did not fully prevent the abuse of power in all venues. In 2019, President Uhuru Kenyatta blatantly refused to appoint forty-one judges recommended by the judicial service commission.[89] He based his decision on a few arguments. The first was that some of the nominees were of questionable integrity. Apparently, the president had received adverse reports concerning some of the nominees although evidence was not rendered in support of the same.[90] They also argued that the president's role was not ceremonial and he was not meant to simply sign off on the

[83]Korwa Adar, Isaac Munyae, "Human Rights Abuse in Kenya under Daniel Arap Moi 1978-2001,"6
[84] Makau Mutua, "Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya, 104.
[85] Obuya Bagaka, Restructuring the Provincial Administration: An Insider's View, 11.
[86] Adar K, "Ethnicity and Ethnic Kings: The Enduring Dual Constraint in Kenya's Multiethnic Democratic Electoral Experiment"5 *Journal of the Third World Spectrum*, 2, 1998,71-96.
[87]Amendment number 12 of 1991, *Constitution of Kenya* (1969).
[88] Communications between Amnesty International and the Government of Kenya.
[89] Article 131 (1), *Constitution of Kenya* (2010).
[90] *Adrian Kamotho Njenga* v *Attorney General: Judicial Service Commission & 2 others* (2020) eklr.

recommendations if he had concerns.[91] Lastly it was argued that it was the express intent of the constitution to not incorporate a timeframe within which the president would make his appointments.[92]

The court held that once nomination is done by the judicial service commission the president does not have the option of changing or rejecting the list. As for the timeframe, after establishing the president's role as functus officio, the delay was held to be inordinate and unconstitutional. [93] President Uhuru Kenyatta did end up appointing thirty five of the forty-one judges and the non appointment of the six was also declared unconstitutional again in the following year.[94]

2.3 Commencement Orders

Civil societies in Kenya are currently regulated by the Non-Governmental Organisation Coordination Act (NGOA) which came into operation in 1992.[95] Prior to this, there was no legislation that governed registration and operations of non-governmental organisations. Instead, they were registered under different legal regimes which were operational agreements with the Kenyan government through the ministry of culture and social services.[96]

The independence constitution remained silent in relation to commencement however, the Interpretations and General Provisions Act of 1956 [97] provided some guidance. It provided that an act would operationalize the day of publication in the gazette or if it is come into force on some other day, it will be deemed to have operationalized accordingly.[98] In its conceptualisation, the law remains silent on additional guidelines regarding how acts are commenced and if any accountability procedures exist. This power being broad in nature and free from supervision has been subject to abuse. In order to demonstrate how this power can be abused, our main focus will be the case of the Public Benefits Organisations Act (PBOA).

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[91] *Adrian Kamotho Njenga* v *Attorney General: Judicial Service Commission & 2 others* (2020) eklr.
[92] *Adrian Kamotho Njenga* v *Attorney General: Judicial Service Commission & 2 others* (2020) eklr.
[93] *Adrian Kamotho Njenga* v *Attorney General: Judicial Service Commission & 2 others* (2020) eklr.

[95] *Non-Governmental Organizations Coordination Act* (1990).
[96] Restrictions on foreign funding of civil society" 11 (4) *International Journal of Not-for-Profit* law, 2009.

[97] Section 9, Section 30, *Interpretations and General Provisions Act* (1956).
[98] Section 9, *Interpretations and General Provisions Act* (1956).

The PBOA is a by-product of the Civil Society Reference Group (CSO)[99]and the then sitting parliament. It was drafted with the aim of achieving novel approaches in creating an enabling space for civil societies.[100] The PBOA was enacted in 2013 and has since then gone through various hurdles to get a commencement date which is still pending. The commencement date was meant to be allocated by the Cabinet Secretary of Planning and Development until it was moved to the docket of the Cabinet Secretary of the Ministry of Interior and Coordination as an attempt to slow down the process.[101] The CSO reference group through the Trusted Society of Human Rights Alliance took the matter before the court in an attempt to influence the executive to operationalize the law, however, their attempts fell short.[102]

Instead of commencing this act, there was an attempt to amend it before it operationalizes. The proposed amendments were termed as problematic and aimed at shrinking the civic space through various strategies such as capping external funding for non-governmental organisations to not more than fifteen percent of the total funding. It also required that such funds pass through the government instead of directly to the organizations.[103] The proposed amendments were withdrawn by the parliament after rejection by various human rights commissions.[104]

Under the current legal regime, the NGO Coordination Board and the cabinet secretary are accorded broad discretionary powers by the act. Section 12 deals with registration of organizations and it states that the certificate of registration shall be used as conclusive evidence that the organization is operating legally.[105] Despite this, there have been cases where registered organizations have been accused of operating illegally. In one instance, the board accused Africa Centre for Open Governance (AFRICOG) for operating without registration. This led to the freezing of all their bank accounts. A raid was also conducted on the

[99] The Civil Society Reference group is the umbrella network of local and international NGOs and CSOs operating in Kenya, working for the establishment and realization of an enabling legislative which was established in 2009.
[100] Kenya Human Rights Commission Open letter on amendments to the PBO, 2017.
[101] Kenya Human Rights Commission Open letter on amendments to the PBO, 2017.
[102] *Trusted Society of Human Rights Alliance* v *Cabinet Secretary for Devolution and Planning and three others* (2017) eklr.
[103] Kenya Human Rights Commission Open letter on amendments to the PBO, 2017.
[104] Amnesty International press release 2013, Kenya Human Rights Commission Open letter on amendments to the PBO, 2017, International Federation for human rights press release 2013.
[105] Section 12, *Non-Governmental Organizations Coordination Act*, 1990.

organisation on the grounds that they suspected the organisation of committing unspecified tax related offences. The organisation had been operating freely and publicly for years since its registration.

The board has used similar tactics to cancel registration of certificates. In an attempt to cancel the Kenya Human Rights Commission's certificate, they accused them for allegedly committing illegal acts including failing to pay taxes and operating illegal bank accounts. Section 16 of the act provides that the board may cancel a certificate if it is satisfied that the council has submitted a satisfactory recommendation for the same.[106] There are no guidelines as to what is considered as a satisfactory recommendation and has been used arbitrarily. The board has attempted to freeze many other accounts and cancel many other certificates on similar grounds throughout the years.[107]

This crackdown on non-governmental organizations is not only within our country and is in fact a global problem. Governments across the globe are increasingly attacking NGOs by creating laws that subject them and their staff to surveillance, bureaucratic hurdles and the threat of imprisonment. Countries are using bullying techniques and repressive regulations to prevent NGOs from doing their work. A report lists down at least fifty countries worldwide where anti-societal laws have been implemented.[108]Kenya being one of the countries breeding these anti NGO regulations it was an international concern when the PBOA was not operationalized. The PBOA came to remedy most of these arbitrary structures.

The Act introduced a new registration regime unlike the NGOA, the PBOA gives clear directions towards the process and the time of issue. It provides that the PBO Authority is required to issue a registration certificate within sixty days of receiving the application.[109] Further, in relation to refusal of registration, the Authority is required to notify the organization within fourteen days with the grounds for refusal.[110] This thus takes away the arbitrary use of power of deregistering without justifiable grounds. In cases where an applicant is dissatisfied with the decision of the Authority, they can appeal to the Public Benefit Organisations Dispute

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[106] Section 16, *Non-Governmental Organizations Co-ordination Act*, 1990.

[107] *International Community of Women Living with HIV registered Trustees* v *Non-Governmental Organizations coordination board* (2021) eklr, *Republic v Non-Governmental Organizations coordination board ex parte Research, Care and Training Programme Family Aids Care & Education Services* (2016) eklr,

[108] Global assault on NGOs reaches crisis point as new laws curb vital human rights work - Amnesty International

[109] Section 9(1), 10 (1), *Non-Governmental Organizations Co-ordination Act*, 1990.

[110] Section 16 (2) *Non-Governmental Organizations Coordination Act*, 1990.

Tribunal.[111]The PBOA was meant to remedy the outcries of the civil society but instead it fell victim to noncompliance.

2.4 Conclusion

This chapter delves into the depths of our history all the way down to what is happening today in attempt to provide a guide on how executive power has operated in our country. The various ways power has been commanded and the various ways in which it has been used to frustrate the rights and freedoms of others. From this chapter we are meant to garner that leaving power unrestrained in the executive can easily lead to abuse and maladministration. In relation to commencement of acts, we have been able to look at the case of the PBOA which serves as an example of abuse of power by the executive. In the following chapters, we will determine whether leaving this broad power of commencement is desirable in light of our complicated and past and if it is not, how the same can be remedied.

[111] Section 17 (1) *Non-Governmental Organizations Coordination Act*, 1990.

3.0 CHAPTER 3: RATIONALE FOR ACCORDING TO CABINET SECRETARIES THE POWER OF COMMENCEMENT

3.1 Introduction

This chapter will do a deep dive into the act of commencement looking at the origins of this function and how this function has evolved over time. This discussion will lead us down the discovery of how this function operated back in the day and lead us to how we got where we are today. In support of this conversation on commencement, we will also look into discretionary powers, what they are, how it works and where commencement falls on its wide spectrum. This discussion is important in determining how the act of commencement should be treated and to what extent do a cabinet secretaries' powers extend. This chapter will be guided by the use of different articles and books that focus on both of these concepts.

3.2 The Act of Commencement

The act of commencement could be categorized as a legislative function due to its key position in the legislative process. For a long time, it was in fact a legislative function before it became one of the executive. This function was devolved during the industrial era due to the new problems that arose both economically and socially in states.[112] The act of commencement at the time was also a simple function as most laws were largely self-operating at the time.[113] It was a reasonable adjustment to share functions across bodies of government to ensure efficiency. This concept of differentiation of powers and mixing of functions is underpinned on the idea of separation of powers, however, not in its classical understanding. In the classical theory of separation of powers, it calls for a strict separation of both powers and tasks, which may not always be the case in the modern age.

The question becomes whether commencement should be considered a delegated legislative function or an executive function of its own. If it lies in the former, that will mean that cabinet secretaries would need to report to the legislature whenever an act of parliament was being commenced and or be consulting them on the same.[114] In the most practical sense, this is not

[112] Robert Cooper, "Administrative Justice and the Role of Discretion" 47 *The Yale Law Journal* 4, 1938, 577-602.
[113] Robert Cooper, "Administrative Justice and the Role of Discretion,"590.
[114] John Cheadle, "The Delegation of Legislative Functions" 27 *The Yale Law Journal* 7, 1918, 892-923.

how it works. Once an act of parliament is assented by the president, it is now out of the confines of parliament and now occupies space in the chambers of the executive. Further, the power to commence acts of parliament in the earlier age may have been considered a delegated function at first, however, this power was accorded to cabinet secretaries by way of statute making it an executive function.[115]It is also by design that parliament transferred this duty to the executive as the most suitable body. This may be attributed to the fact that the executive was already responsible for implementation of acts.[116] We have now established where this function lies. For cabinet secretaries to effectively perform this function they are accorded with discretionary powers.

3.3 Definition of discretion

The business of law is that of making decisions. At every step of the legal process a choice is made, some being weightier than others.[117] In being able to make these decisions there is discretion accorded to the decision maker. Discretion to a lay man is synonymous with choice.[118] It is the ability for one to make their own judgment based on their own independent thoughts. In the legal context, it is still considered a choice however, it can be argued that the decision made is dependent on more than one's own thoughts. Discretion is not limited to what one is authorized to do or what is legal, but it also extends to the effective limits of the officer's power.[119] Discretion also takes many forms, it can be the choice to do or not to do something.[120] Discretion in the legal context is limited within itself. Every law has its own limits, whether it's underpinned by a legal rule or a legal principle. In law it therefore is not boiled down to the act of choosing, as also every choice is guided.[121]An example is the discretion accorded to judges in deciding cases in court. It may be looked at as if judges can simply pick and choose how a case is decided but that is not real. They are guided by certain laws and legal principles and precedent depending on the case. Nonetheless, there is no complete negation of their

[115] John Cheadle, "The Delegation of Legislative Functions," 897.
[116] John Cheadle, "The Delegation of Legislative Functions," 897.
[117] Keith Hawkins," Legal Decision Making" 43 *Washington and Lee Law Review* 4,1986.
[118] Oxford Dictionary 3ed
[119] Bool Chand, "Discretionary Powers of Government" 15 *International Institute of Administrative Sciences* 3, 1949, 411-465.
[120] Bool Chand, "Discretionary Powers of Government," 422.
[121] Harris W, "The Authority of the Law: Essays on Law and Morality by Joesph Raz" 44 *Modern Law Review* 4, 1981, 482-484.

personal discretion. This discretion manifests in how they decide whether the facts justify the conclusion, and their personal view of what counts as a valid punishment.[122]

Discretion is theorized as the space within and between rules in which legal actors exercise choice.[123] This means that decisions are partly determined by rules, whether organizational or legal.[124]Other scholars also believe that discretionary decisions are made against a background of various underpinning factors such as political morality,[125] the duty created by this function[126] and the best interest of the people in mind.[127] The ability to make this choice exists in varying degrees. It is possible for one official to have more or less discretion than another.[128] The extent in which discretionary powers are accorded is dependent on the need and purpose of this discretion in the performance of the function.[129] It may be noted then that discretion diminishes as we move from the higher to lower ranks.[130]

3.3.1 Forms of discretion

The degrees to which discretion extends can be broadly categorized into two, strong and weak discretion[131] or by others broad and narrow discretion.[132] Narrow or weak discretion is the exercise of the lowest degree of choice as every act connotes a degree of choice.[133] This type of discretion is evidenced in cases whereby the choice is not made largely on their own judgment but rather in obedience to the mandate of legal authority.[134]This form of decision making only requires one to follow the set out guidelines in arriving at their conclusion. Broad or wide discretion on the other hand gives the actor a wide range of choice in relation to how,

122 Harris W, "The Authority of the Law: Essays on Law and Morality by Joesph Raz,"482.
123 Black J, "Which Arrow: Rule Type and Regulatory Policy" 94 *Oxford Publishers* 1997, 40-60.
124 Black J, "Which Arrow: Rule Type and Regulatory Policy,"45.
125 Galligan D, "Discretionary Powers: A Legal Study of Official Discretion" 46 *Clarendon Press* 3,1986, 382-430.
126 Galligan D, "Discretionary Powers: A Legal Study of Official Discretion," 384.
127 Julia Black, "Which Arrow: Rule Type and Regulatory Policy"45.
128 Section 75 *Northern Ireland Act*, Guidelines: A Guide to the Implication of Statutory Duties on Public Authorities" 1998.
129Galligan D, "Discretionary Powers: A Legal Study of Official Discretion," 384.
130Galligan D, "Discretionary Powers: A Legal Study of Official Discretion," 384.
131 Black J, "Which Arrow: Rule Type and Regulatory Policy,"46.
132 Section 75 *Northern Ireland Act*, Guidelines: A Guide to the Implication of Statutory Duties on Public Authorities" 1998.
133Section 75 *Northern Ireland Act*, Guidelines: A Guide to the Implication of Statutory Duties on Public Authorities" 1998.
134Black J, "Which Arrow: Rule Type and Regulatory Policy,"46.

when and the manner in which the act is to be performed or decided.[135] This form of decision making allows a considerable degree of flexibility and adaptability. The decision maker is empowered to consider a wide array of factors beyond the narrowly set out laws, with the aim of tailoring an outcome.

Relying on the classifications set out above, the act of commencement would be considered to lie in the latter, broad discretion. This can be argued out for various reasons, firstly, there are no additional regulations in relation to how acts of parliament are meant to commence. There is no set of rules that guides when each act of parliament which operationalize. This can be attributed to the fact that different acts operationalize on various dates depending on the complexity of the structures it requires. In some cases, it may require the drafting of subsidiary legislation that informs the main act or the formation of an institution to oversee various acts.[136] Another reason could be that the act is influenced by international law and policy and an event has arisen. There are various reasons why broad discretion would be appropriate to effectively operate. It would also be increasingly time consuming and difficult attempting to idealize every instance in which an act may operationalize across every sector which is managed by different cabinet secretaries and operate in different spheres. It is thus desirable to leave this degree of discretion in order to accommodate all the nuances that come into play.

3.3.2 Dangers of Broad discretion

The main critique against broad discretion, which is also the main question in this paper, is what happens when it reaches the level of despotic or bureaucratic control. Frequently, the exercise of discretion is loosely characterized as vague symbolism of tyranny or despotism.[137]This may not always be the case and some arguments posed against this is the fact that this blind hostility and suspicion we accord to strong discretion is a result of misunderstanding basic problems of government.[138]Inasmuch as that may be accurate, abuse of discretionary power is a major point of concern. The question becomes at what point can

[135]Black J, "Which Arrow: Rule Type and Regulatory Policy," 46.
[136] Ruth Grant, Robert Keohane, "Accountability and Abuses of Power in World Politics" 99 *Political Science Review* 32, 2005.
[137]Robert Cooper, "Administrative Justice and the Role of Discretion,"600.
[138] Robert Cooper, "Administrative Justice and the Role of Discretion,"602.

we classify an officer's actions as being of tyrannical intent. To determine the same, we will look into various legal principles which form the basis of principled legal decision making.

At the very basic level, a decision is principled only when it is guided by some form of external consideration. A guiding principle is one that contributes to how a decision is made. This then means that a principled decision cannot be so flexible so as to allow for freewheeling discretion[139] In applying the decision arrived at in a case, it is expected that the case at hand will be treated in a similar manner as to cases that fall within its classification. If in any case, the matter at hand is to be treated differently than it is proper for the decision maker to outline why it is being accorded differential treatment.[140]It is in the meeting of these requirements that a principled decision may be considered as neutral.[141] Abuse of discretion by the decision maker would thus arise in this manner. If the decision maker goes against the guiding principle, it will then be considered arbitrary. Similarly, if they do treat a case differently to those in its classification without reason, it can also be considered as arbitrary.

Impartiality in decision making is another way of investigating whether the decision maker is favouring one group over another or simply aggravating a specific group and not necessarily for the benefit of another group. In its ordinary meaning impartiality is the state of not supporting or helping either side of a matter.[142] It takes the same meaning in the legal context, but it introduces other concepts. Impartiality is treating all individuals and cases equally without favouritism or discrimination. The concept of impartiality is identified with the concept of justice.[143] This reflects in reality whereby many who experience injustice complain of biased treatment.[144]

Broad discretion leaves a platform for an officer to employ bias in their decision making. In Kenya from pre independence the administration can easily be described as a classical type of bureaucracy.[145] This is whereby functions are performed for the purpose of maintaining status quo and the privileges of its masters. Administrators were often faced with a conflict between

[139] Golding M, "Principled Decision-Making and the Supreme Court" 63 *Columbia Law Review* 1 1963, 35-58.
[140] Golding M, "Principled Decision-Making and the Supreme Court,"40.
[141] Golding M, "Principled Decision-Making and the Supreme Court,"40.
[142] Oxford Dictionary 3 ed.
[143] Goran Hyden, "Social Structure, Bureaucracy and Development Administration in Kenya" 119.
[144] Ian Shapiro, "Against Impartiality" 78 *The Journal of Politics* 2, 2016,467-480
[145] Goran Hyden, "Social Structure, Bureaucracy and Development Administration in Kenya" 1 *The African Review: A Journal of African Politics, Development, and International Affairs* 3,1972, 118-129.

the interests of their government in London and those of the white settlers in Kenya.[146] In post-independence Kenya this dilemma existed but between different parties.

Most government officials were in a conundrum between obeying orders from above and acting in the interests of the people. It was also demonstrated that when faced with this conflict they would opt to go with the former due to the consequences that arose from disobedience. This would take the form of dismissal or transfer to unfavourable positions.[147] Further, most of the administrative positions in the executive today are still at the choice of the president. These offices are then used for political reasons rather than getting the most qualified persons to fill these positions.[148] For instance, a minister may be the head of a ministry simply because they funded the president's campaign. These positions are therefore at more risk of being impartial due to the conflicting interests at play.

We have established what grounds a principled decision and ways in which abuse of discretion can be exercised. In Kenya we have observed various instances in which broad discretion has been abused time and time again for various reasons. It is true that there have been individuals who have been accorded this level of control and did not take advantage of it but this may not be the same for each and every one. It thus leaves us wondering whether we should leave it up to the individual and hope that they exercise this power to its expected limits.

In relation to the act of commencement, this broad discretion is subject to abuse if the guiding principle of the statute which is to commence an act of parliament is not achieved. The object of Article 116[149] was to in fact remedy the act of non-commencement of acts. This then does not allow the cabinet secretary to simply not elect a date even with reason. The statute can only allow for reasons of delayed commencement and not reasons as to why an act should not commence as that is beyond the scope of powers accorded. This is the exact case of the Public Benefits Organisations Act. The cabinet secretary simply abandoned this legislation, and a date has not been elected since. It is clear from the court proceedings that a valid reason for the delayed commencement was not availed. This act has ever since been shelved even with the international pressures that existed surrounding the case. The cabinet secretary was also not held accountable for his non-action.

[146] Goran Hyden, "Social Structure, Bureaucracy and Development Administration in Kenya" 120.
[147] Goran Hyden, "Social Structure, Bureaucracy and Development Administration in Kenya" 121.
[148] Goran Hyden, "Social Structure, Bureaucracy and Development Administration in Kenya" 121.
[149] Article 116, *Constitution of Kenya* (2010).

How can this be remedied and prevented from occurring again? In relation to tracking legislation there exists no mechanism to do the same which leaves us in the grey as to how many acts are pending to receive commencement dates. It is also a point of concern that there exist no effective methods in which cabinet secretaries provide reasons for delayed commencement Lastly, without being able to track legislation, abandoning legislation becomes easier as we are already unaware. This abandonment is also a clear indication of a waste of resources which is the taxpayer's money and parliamentarian's time.

3.4 Conclusion

This chapter is meant to give an overview of what type of function the act of commencement is and a brief history of how it used to operate. Once the same was established it led down a discussion on discretion which is at the centre of administration. The discussion on discretion should give an outlook of how discretion is accorded and is meant to be used in different roles. Lastly, it also looked at the different principles which guide officials while making decisions. We have established that depending on the power accorded to an official there should be some way of limiting these powers to prevent abuse. The next chapter will explore different ways in which these powers are limited and could be limited.

4.0 CHAPTER 4: WAYS TO LIMIT THE POWER OF COMMENCEMENT

4.1 Introduction

This chapter will look at the idea of accountability, how it operates and what it entails. An understanding on the theory of accountability will lead us down a path of discovery of how the executive is held accountable for their actions today according to statute and how effective the same has been. We will look at how the same applies in the Kenyan context by looking at the systems in place and whether these systems have been efficient. If it is found that the systems in place are not adequately operative, other ways of regulation will be offered for exploration.

4.2 The Idea of Accountability

It has already been established that given our history it is important to have accountability systems in place not only to catch those abusing their power but also to ensure that systems of government are running smoothly. It is also of importance to have reporting mechanisms in order to keep track of all the decisions and actions of the different agencies of government. In order to actively and effectively regulate the power of commencement we need to understand what accountability is and the different systems arising. To be held accountable is when one is required to justify their actions.[150]

Accountability is defined as a social relationship in which an actor feels an obligation to explain and justify his or her conduct to another.[151] This definition then implies that there exists a relationship in which some actors have the right to hold other actors answerable in line with a set of standards. This is done by judging whether they have in fact fulfilled their obligation in light of the standards.[152] The "accountor" has a duty to justify their conduct to the "accountee."[153] This form of explanation takes different shapes and forms such as providing data on their performance. The accountor is also given a chance to explain their conduct and debate if any inquiries arise. The purpose of accountability is to hold agents answerable to the exercise of their powers. In turn by doing this, it will actively help prevent the abuse of their

[150] Ruth Grant, Robert Keohane, "Accountability and Abuses of Power in World Politics."
[151] Ruth Grant, Robert Keohane, "Accountability and Abuses of Power in World Politics."
[152] Ruth Grant, Robert Keohane, "Accountability and Abuses of Power in World Politics."
[153] Mark Bovens Ewan Ferlie, "Public Accountability" Oxford handbook of Public Management 182, 184 2007.

powers. It also keeps these individuals aware that they can be called upon to account for their actions.[154]

The functionality of accountability goes beyond just preventing abuse of power. It is meant to hold the government accountable in respect to how taxpayers' money is being used and detect waste within the agencies of government. It is also meant to improve transparency of government operations to gain the public's trust. Accountability measures cut across the different branches of government and take various forms, which shall be the next discussion.[155]

4.2.1 National Assembly

Accountability is used synonymously with oversight as is demonstrated by the 2010 Constitution. Oversight is one of the most important functions of good governance which is enshrined as a constitutional duty.[156] The national assembly is the body which the people use to hold the executive accountable. One of the roles of the national assembly is to exercise oversight over the conduct of the president, his deputy and other state officers plus their organs.[157]The executive oversees implementing laws that are passed by the legislature. This accountability is therefore done to ensure that implementation of statutes runs smoothly. Oversight is not restricted to implementation of statutes and entails the authority to scrutinize public expenditure.[158]

The national assembly is able to conduct oversight through a parliamentary select committee which is known as the Constitutional Implementation Oversight Committee. It is responsible for overseeing the implementation of the constitution. It does this using reports. They receive reports on a variety of matters including the preparation of the legislation required by the Constitution and any challenges in that regard among other things.[159] The committee also highlights that it has the mandate to ensure statutes enacted operationalize and establish their required status and investigate any gaps existing.[160]

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[154] Mark Bovens, Ewan Ferlie, "Public Accountability" Oxford handbook of Public Management 182, 184 2007.

[155]S Maganoe, "Legislative Oversight and Executive Accountability in South Africa" 26 *The International Bibliography of Social Sciences* 1,2023.

[156] S Maganoe, "Legislative Oversight and Executive Accountability in South Africa."

[157] Article 95 (5) (b), *Constitution of Kenya* (2010).

[158] Article 95 (4), *Constitution of Kenya* (2010).

[159] Sixth Schedule Section 4,4(a)(i), *Constitution of Kenya* (2010).

[160] Report on the Constitution of Kenya (Amendment) Bill National assembly Bill 4 of 2020.

That as it may, the case of the PBOA has not fallen before the committee. Instead, most of the reports produced by the committee are in relation to various amendment bills which are subject of debate. The committee has not been involved in a case regarding the performance of various cabinet secretaries and their cabinets.

Nonetheless, the national assembly also has the power to summon any person for the purpose of giving evidence.[161]Specifically in relation to cabinet secretaries, they are required to attend before a committee of the national assembly or senate when required for questioning. A cabinet secretary is required to act in accordance with the constitution and provide parliament with full and regular reports on matters under their control.[162]This is done to ensure that their departments are running a clean house and are functioning as to the desired standards.

This form of oversight is periodic in nature for various reasons including waste of resources. It would require a lot of resources and time from legislators which would not only be a waste but also beats the point of delegation of duties. That being said, this form of oversight would be the most effective in relation to commencement. Similarly, the legislature could hold the cabinet secretary answerable and ask them to provide evidence informing their actions. In cases of pure disregard of their duty, what avenues can parliament explore?

If the committee finds the cabinet secretary to be guilty of misconduct or gross violation, then they may proceed to propose a motion requiring their dismissal. This motion needs to be supported by at least one quarter of all members of parliament.[163] If the motion passes, then a committee is selected to investigate on the said misconduct. The cabinet secretary is also accorded the right to be heard.[164] In cases of commencement, the misconduct of the cabinet secretary is a matter of concern. However, their dismissal will not deal with the problem at hand which was operationalizing the act. This remedy would work if the dismissal of one secretary meant that the new incumbent would operationalize the law as one their acts in office. This process would be time consuming if it became repetitive and costly as well.

An avenue that would be worth exploring would be alternative solutions to this long tedious process. One such recommendation that could be a solution in cases of complete disregard of their duty to operationalize the act and the urgency to commence the law could be, the duty of

[161] Article 125, *Constitution of Kenya* (2010).
[162] Article 153 (3) (4), *Constitution of Kenya* (2010).
[163] Article 152, *Constitution of Kenya* (2010).
[164] Article 152, *Constitution of Kenya* (2010).

commencement lies back with the national assembly. The act of parliament pending commencement would have already received presidential assent and is a clear demonstration of parliament's intent to make it a law. It could be considered that the power of commencement lies back with the legislature as the power is only accorded when there are reasons for delayed commencement. It could then proceed to operationalize in the other ways prescribed in Article 116 such as by way of publication by way of gazette notice. This could be used to prevent the inordinate and unconstitutional delay of non-commencement.

4.2.2 Judiciary

Unlike in the legislature, the judiciary's job as a watchdog will only arise when the "accountor" disregards statute and the guiding principle, acting beyond the scope of their prescribed duties. The basis of judicial control arises from the fact that the accountor is exercising their power for improper motives and on improper grounds which is a concern of the judiciary. Judicial authority is derived from the people and is exercised by courts.[165] One of the principles guiding the judiciary is to protect and promote the purpose of the constitution. A judge can do this because of all the safeguards in the constitution. One such safeguard is the fact that a member of the judiciary is not liable in respect of anything done or omitted in good faith in the lawful performance of their action.[166]

Similarly, this is what happened in the case of the PBOA. The cabinet secretary unreasonably delayed commencing this legislation and further tried to amend it before its implementation. This was considered to be acting beyond the scope of his duty. The case arose after the cabinet secretary had gone beyond the scope of his duty of commencement. Once it arose in court they heard the matter to determine whether the cabinet secretary was acting beyond the scope his duties. Both parties were allowed to state their case and provide evidence to demonstrate that non-commencement was constitutional or not.

Once both parties have stated their case the court will make its determination. If they find that the accountor is in fact in line with their duties the accountor will then be allowed to proceed to act accordingly. On the other hand, if the court finds the accountor in breach of their duty, they can order the accountor to proceed to act in line with their duty. The issue arising with the

[165] Article 159 (1), *Constitution of Kenya* (2010).
[166] Article 160 (5), *Constitution of Kenya* (2010).

latter is that if the accountor simply refuses to act in line with their duties, the judiciary cannot further step in and force them to act or act on their behalf. This was the case of the PBOA. The court gave out orders declaring that the act of non-commencement was unconstitutional, and the cabinet secretary was to in fact enact this legislation. The orders were disregarded, and they were in clear contempt of the orders issued. The judiciary could keep giving orders but in cases of pure disregard this can be a waste of time. Besides hearing and determining the matter, the court cannot go further to performing the officer's duty as this would a clear overstep. This shows that accountability also has its own limitations.

4.2.3 Limits to Accountability measures

Kenya like any other country is not completely immune to corruption even with all the established accountability systems. This corruption can arise due to the existence of a dominant political party where party loyalism blurs the line of being accountable. This line can be blurred for the national assembly who are required to hold officers of the executive accountable. In cases where a dominant and loyal majority party rules, it is possible that blatantly going for executive officer's would not be the first avenue explored. This was the case pre 2010 but is also a likely reality even today. Corruption will also ensue in the executive where officers are acting at the pleasure of the office of the president. This can lead to gross violations especially in cases where the parliament as well is not spearheading for accountability.

This venom will also spread to the judiciary. In as much as it holds a bit more independence today, the scope of their control when it comes to accountability is heavily reliant on an independent parliament. In cases where officers of the executive are under the watch of the parliament it is expected that once a matter is declared unconstitutional in the courts, the rest is taken up but parliament. This is in terms of holding the officer answerable to their causes of non-action.

This shows that at the end of the day even in cases where there are accountability measures there is still room for abuse of power depending on the political environment. It is also true that integrity of a leader is also heavily dependent on one's own values and their desire to act according to the wishes of the constitution. There have been cases of complete disregard over

the mandate of the constitution and there are pending questions as to why an officer acted the way they did, as in the case of the PBOA.

4.3 Conclusion

In summary, we have explored the role of cabinet secretaries in relation to commencement of acts and the procedures used to keep officials of the executive answerable for their actions. In relation the case of the PBOA, we have established that even in cases where accountability measures are existent it is still possible for abuse to occur. It is also evident that there is not much data on how effective these accountability measures are in Kenya. This leaves the public blindsided as to the efficiency of cabinet secretaries in relation to commencement specifically.

The case of the PBOA is a clear demonstration of why we need more comprehensive accountability measures in relation to acts which are granted with broad discretionary powers. This is besides the measures already in place, additional guidelines could be added to guide how this act is meant to be implemented. This will also make it clear to cabinet secretaries the real scope of their powers in matters commencement if the same is up to debate.

CHAPTER 5: RECOMMENDATIONS

After an analysis of the cabinet secretary's role in relation to commencement we have been able to answer the scope question, in regard to how far their powers extend. Further, we have also explored avenues of how we keep these cabinet secretaries accountable and the limits to this accountability. In conducting this study, it was difficult to obtain enough materials on this part of the legislative process. This is because the tracking of legislation in Kenya ends at the point of assent, and it leaves us in the blind as to how many acts are awaiting commencement dates and the reasons behind each delay.

It was also clear that the question of non-commencement has not been a point of concern in the legislature. Even post the case of the PBOA, it can be assumed that this has not been a point of contention considering the current stalemate in relation to its commencement eleven years later. It is also a point of concern that there has been no real attempt to define the scope of a cabinet secretaries' power in relation to commencement and repercussions of non-commencement.

That being said, I would like to suggest a tracker which extends past the assent level and looks at commencement. This way we will be able to know the actual state of most acts and it will keep the cabinet secretaries accountable. This will be possible because it will be easier to detect delays and the cabinet secretary may be called in to explain the reasons behind the same, if any. This will also be more transparent for the public, which will enhance public trust in government by giving reasons for government actions which if not understood well could easily be considered as abuse of power. This will also aid in further educating the public on the legislative process.

It would also be in the best interest of parliament to be more rigorous in their review process in order to preserve their efforts in the making of various acts. The law-making process is not only time consuming but also expensive. It would then be a waste of resources if non-commencement became a norm. More importantly, the making of the act is usually for a purpose whether it is to correct and replace old laws or it is a reflection of the evolution of time and laws. Either way, in cases of non-commencement, it will not serve its intended purpose which leaves a gap in law.

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