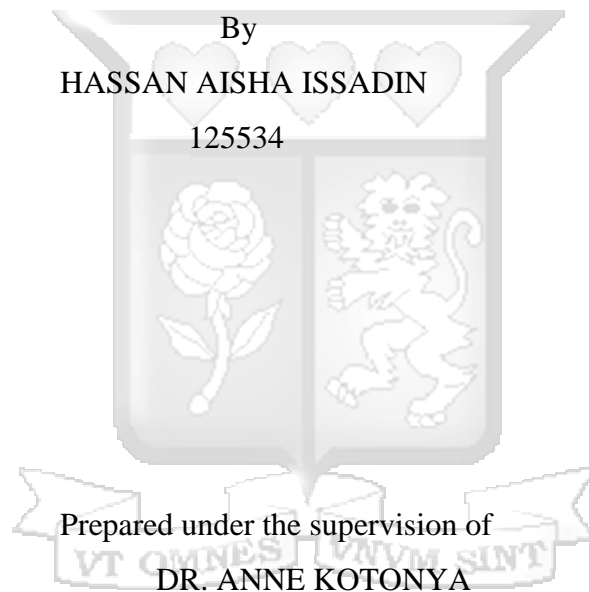


**DISCRETIONARY CITIZENSHIP: AN ASSESSMENT OF THE EXERCISE OF THE
VETTING PROCESS IN KENYA**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School



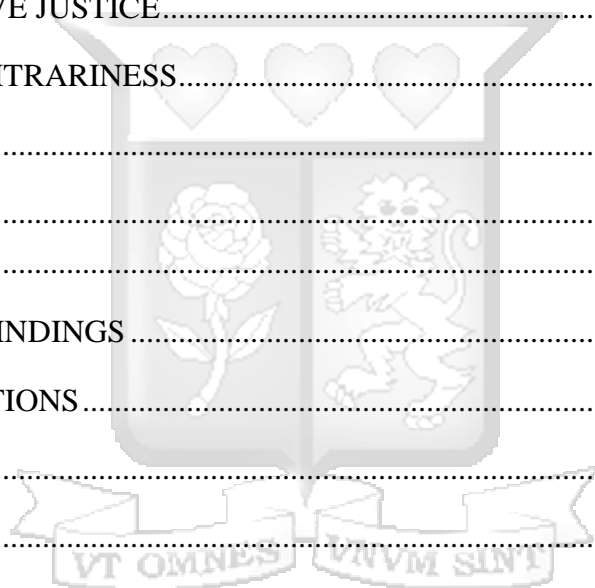
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Declaration

I, HASSAN AISHA ISSADIN, 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:.....
Date:19 February 2024.....



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

Signed:

Abstract

The Constitution of Kenya provides for citizenship documentation such as the National Identity Card as an entitlement for a citizen. The documentation is acquired upon registration for persons who acquire citizenship by birth under the framework of the Registration of Persons Act. Under section 8(1) A, the Act provides for the power to institute identification committees to authenticate information provided by the applicant. This dissertation seeks to study whether the power conferred by the section is wide which makes it susceptible to abuse requiring its limitation. This is by examining the section to show whether the powers conferred are wide and analysing the implications of the use of the wide powers and its effect on border communities. The dissertation argues that abuse of the discretion is exercised by administrative officers which raises the need for reform of the vetting process. The reforms proposed are legislative amendments of the section to include procedural safeguards and circumstances for use. This prevents effects experienced by border communities such as statelessness, indefinite delays and corrupt citizenship. The amendments by the legislature are preferred in the study as previous reliance on administrative rule making by the Minister has had no effect in remedying the problems faced by border communities. Through the analysis of primary and secondary materials, the study came to the conclusion that wide discretionary powers are granted by the Section that affects border communities through its abuse. This therefore necessitates reform in line with administrative justice.



List of Abbreviations

NRB - National Registration Bureau

CKRC - Constitution of Kenya Review Commission

KNCHR - Kenya National Commission of Human Rights

ID - Identification Card



List of Cases

Kenyan Case Law

Nubian Community in Kenya v Republic of Kenya, ACmHPR Comm 317/2006.

Mohamed Mire v Attorney General & another (2016) eKLR.

Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) (2020) eKLR.

Hersi Hassan Gutale & Another v Attorney General & Another (2013) eKLR

E W A & 2 others v Director of Immigration and Registration of Persons & another, (2018) eKLR.

Coalition for Reform and Democracy and others v Republic of Kenya and others (2015) eKLR.

Galma Duba Gufu v AG (2018) eKLR.

Republic v Kenya Bureau of Standards & 4 others (2018) eKLR.

Kulraj Singh Bhangra v Director General, Kenya Citizens and Foreign Nationals Management Service [2014] eKLR

David Onyango Oloo v Attorney General (1987) eKLR.

Foreign Case Law

Baker v Canada (Minister of Citizenship and Immigration), (1999) 2 S.C.R 817

A. v. Australia, Communication No.560/1993, CCPR/C/59/D/560/1993, 30 April 1997.



List of Legal Instruments

Legislation

Constitution of Kenya (2010)

Registration of Persons Act (Act No. 11 of 1979)

Security Laws Amendment Act, 2014.

International Instruments

United Nations Declaration of Human Right



CHAPTER ONE

1.0 BACKGROUND

The Constitution of Kenya provides for citizenship documentations such as passports and national identification cards as the entitlements of a citizen.¹ This comes with the rights and benefits that citizenship accords to Kenyans, however, for some communities this is far from reality. ‘Indigenous communities’ in Kenya are the only groups that can claim such entitlements as they come easy to them without hurdles.² Indigenous persons are defined as the descendants of those who settled on the territory before colonisation and the formation of borders.³ However, border communities who are indigenous to Kenya are subject to different treatment from other ethnic groups in Kenya.

Due to the different treatment, acquisition of identification cards for the border communities and the Nubian community is subject to vetting. This is tied to the nation’s effort to use border effective strategies due to the porosity of Kenyan borders.⁴ An example is the communication in the case of the *Nubian Community of Kenya v Kenya* where the country in its submissions on why citizenship of some communities is regarded on a case-to-case basis stated that a blanket qualification would lead to the influx of the communities into the country.⁵ This is due to the existence of the community in separate countries. However, after subjection to the above process in acquiring an Identification Card (ID), these communities are still unable to acquire a passport without undergoing an additional vetting process.⁶

The lack of blanket qualifications then affects the communities as they experience difficulties in acquiring documents necessary for identification such as the ID. Vetting processes encountered in

¹ Article 12(1)(b), Constitution of Kenya 2010.

² Kohn S, Out of the cold: Vetting for nationality in Kenya, 28 February 2011 <https://www.justiceinitiative.org/voices/out-cold-vetting-nationality-kenya> on 20 December 2022.

³ UN Office of the High Commissioner for Human Rights (OHCHR), *Minority rights: International standards and guidance for implementation*, 2010, HR/PUB/10/3, 3.

⁴ Chumba C, Were E and Okoth P, ‘Effectiveness of border surveillance strategies in the management of transnational terrorism in Kenya and Somalia’ 2 *International Journal of Political Science* 2, 2016,39.

⁵ *Nubian Community in Kenya v Republic of Kenya*, ACmHPR Comm 317/2006.

⁶ Kenya National Commission on Human Rights (KNCHR), *Out of the shadows into the towards ensuring the rights of stateless persons and persons at risk of statelessness*, 2010, 24.

citizenship applications impede the Constitution's nationality rights.⁷ The practice of vetting historically was not found in law but was still practised. However, the passing of the Security Laws Amendment Act, 2014⁸ an omnibus bill led to the amending of section 8(1) A of the Registration of Persons Act to provide the Director with the discretion to establish identification committees to propagate vetting.⁹ This was proposed as a result of heightened security measures to counter terror attacks that plagued the country at the time.¹⁰ National security was cited as the reason and the bill was passed in a hurry by parliament.¹¹ National security is defined by the constitution as the protection against threats both internal and external against the nation's territorial integrity and sovereignty and other national interests.¹²

Despite the constitution providing for compliance with the law and fundamental freedoms despite national security reasons¹³, the vetting process violates rights due to its arbitrary, exclusionary, and unfair nature. The section, in conferring the discretion to invoke identification committees also enables the Director of immigration to establish vetting committees to vet Muslim applicants for the passport.¹⁴ The issue arising from this is the arbitrary standards and undue hurdles that characterise the ID application process affecting the mentioned communities by delaying or preventing the communities from acquiring it.

In the case of Mohamed Mire, the court stated in its determination that the law confers independence on the Director General and Principal Registrar through the Constitution, the Kenya Citizenship and Immigration Act and the Registration of Persons Act.¹⁵ The amendment occasioned by section 8 (1) A of the Registration of Persons Act enables officers to appoint an identification committee to assist in the authentication of information provided by an applicant in acquiring an ID as well as the passport. The purpose of vetting as stated by government actors is

⁷ Nalule C, *Report on citizenship law in Kenya*, 2020, 22.

⁸ Section 23, *Security Laws Amendment Act*, 2014.

⁹ Section 8(1) A, *Registration of Persons Act*, (Act No. 11 of 1979).

¹⁰ Nalule, *Report on citizenship law in Kenya*, 22.

¹¹ National Assembly Hansard Report, 11 December 2014, 12.

¹² Article 238(1), *Constitution of Kenya* (2010).

¹³ Article 238(2)(b), *Constitution of Kenya* (2010).

¹⁴ Section 8(1) A, *Registration of Persons Act*, (Act No. 11 of 1979).

¹⁵ *Mohamed Mire v Attorney General & another* (2016) eKLR.

ensuring that only genuine citizens are issued with identification documents and to curb security concerns posed by Kenya's porous borders.¹⁶

The assumption of administrative independence abuse may arise due to the question of whether the government does not trust the document it has issued itself when vetting the passport applications of Muslims arises.¹⁷ Since before the foundation of the vetting process being established in law, several actors have called for citizens to have the right to have the authenticity of their documents established through rules and procedures and by an impartial and independent regular tribunal.¹⁸

1.2 STATEMENT OF PROBLEM

The Constitution which provides for fair administrative action does not allow any public body or official to be characterised by arbitrariness and undue secretiveness. Discretion in this specific scenario is outlined by the Registration of Persons Act in section 8 (1) A as the way of constituting vetting committees. This effectively bars the court from mandating that the duty be done in a specific manner.¹⁹ The vetting process is established in the Act as a means to identify applicant's eligibility for citizenship. The onus of proving one's citizenship lies with the applicant and border communities are in practice, the only persons subjected to this process. However, the said process is not a requirement for all as it is applied only with regards to border communities leading to unfairness, profiling and delays which present ripple effects to matters such as movement, political rights and more.²⁰ No specific procedure is laid down which leads to wide discretion as the composition, review and other safeguards that are necessary for use of discretion are absent.²¹

Despite clear provisions in the constitution on citizenship and administrative action, many of the communities have been denied registration and identification documents, suffered from inordinate

¹⁶ *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* (2020) eKLR.

¹⁷ KNCHR, *Out of the shadows*, 24.

¹⁸ Human Rights Watch, *The screening of ethnic Somalis: The cruel consequences of Kenya's passbook system*, 1990, 5.

¹⁹ Halsbury's Law of England, 4th edition volume 1 at page 111 from paragraph 90.

²⁰ KNCHR, *An identity crisis? A study on the issuance of national identity cards in Kenya*, 2007, 7.

²¹ Davis K, *Discretionary justice: A preliminary inquiry*, Louisiana State University Press, Louisiana, 1969, 15.

delays and as a result have relied on refugee status to access basic services. This is despite 60 years of independence passing leaving said persons as stateless or having precarious citizenship. Interventions from the departmental committee on administration and internal affairs²² or even through the courts²³ have not managed to streamline the vetting process. The Registration of Persons Act section 8(1) A provides the executive with wide discretionary powers to invoke the vetting process to determine whether an applicant should be registered and issued with documentation. The wide discretionary powers conferred by statute is problematic since border communities are subjected to indefinite delays in acquiring citizenship related documents. This study therefore examines whether section 8 (1) A of the Registration of Persons Act confers wide discretionary powers that should be limited.

1.3 RESEARCH OBJECTIVES

1. To examine section 8 (1) A of the Registration of Persons Act and the power that it confers on administrative officers.
2. To assess the use of administrative discretion conferred and its effect on individuals and communities residing in border areas.
3. To propose amendments that can be used in vetting in an effort to curb abuse of discretionary power in the administrative decisions.

1.4 RESEARCH QUESTIONS

1. How does Section 8A of the Registration of Persons Act lead to wide discretionary powers?
2. What is the effect of the use of the administrative discretion on citizens particularly border communities and minorities?

²² The Republic of Kenya Departmental committee on Administration and National Security, *Report on the Public Petition No.023 of 2021 Regarding accessing national identity cards by the Nubian community*, 2021, 19.

²³ *Hersi Hassan Gutale & Another v Attorney General & Another* (2013) eKLR. The court stated that “the refusal of authorities to issue natural born citizens does not take away their citizenship or the privileges and benefits of being a citizen.”

3. What proposals can be made to curb abuse of discretionary power in the vetting process?

1.5 HYPOTHESIS

The discretion provided to the Director of Immigration and National Registration by section 8 (1) A of the Registration of Persons Act to invoke identification committees for vetting of information is wide and has led to abuse. The discretion should therefore be limited and the Act amended to ensure that the vetting process is subjected to those whose legitimacy of citizenship is in question rather than on an ethnic basis.

1.6 JUSTIFICATION

The study impacts the marginalised communities who are the Kenyan Arabs, Nubians and Somalis since the discretionary powers exercised in subjecting these communities to the vetting process causes problems. Questioning the legitimacy of citizenship through the administrative process occasioned by chiefs, their assistants and immigration officers is justifiable as it reduces instances of fraudulent acquisition of citizenship. However, the legislative conferment of uncontrolled and wide discretionary powers by section 8 (1) A of the Registration of Persons Act has led to its abuse. This study in calling for specific procedures to circumscribe the discretionary abuse will be helpful to lawmakers in the implementation of legislations reflecting the same, human rights commissions and organisations, and the Executive in its exercise of discretion.

1.7 THEORETICAL FRAMEWORK : ADMINISTRATIVE JUSTICE

Administrative justice is concerned with the reconciliation of the requirements of administrative efficiency and justice to the citizen.²⁴ Mashaw, one of the early writers who conceptualised the theory of administrative justice, defined it as the quality of a decision process that provides

²⁴ Australian Commonwealth Administrative review Committee Report, (1971).

arguments for the acceptability of its decisions.²⁵ The general theory of administrative justice outlines four themes that include due process, equal treatment, proper exercise of power and access to administrative processes.²⁶

In instances of broad administrative discretions, the theory suggests that there should be consistent decision making especially with regards to concepts of fairness.²⁷ The theory acknowledges that flexibility is necessary in situations where due to certain circumstances an absurd result would be reached if consistent decision making is applied.²⁸ In such situations internal and external merits review come into play as decision makers at the bottom of the administrative ladder are not well equipped to handle the situation.

Administrative justice considers the interest of individuals affected by administrative decisions and includes basic aspects such as timeliness in decision-making, accessibility of the process and efficiency in decision making where the cost borne by the individual reflects an equitable distribution of burdens with the community as well.²⁹ Application of administrative justice is especially important in administrative settings where deprivation of liberties of individuals occurs.³⁰ In administrative decision making therefore, the rights and freedoms of individuals should be protected due to the impacts that the decision can have on the individual's interests and rights.³¹

The conceptions in this theory by different theorists can be termed as competing in determining the appropriate structure of an administrative state.³² Mashaw set out his models of the theory which were changed by Adler and Kagan in response to the changing situations in administrative law such as a shift to New Public Management.³³ The study is however not affected by the

²⁵ Mashaw J, *Bureaucratic justice: Managing social security disability claims*, Yale University Press, New Haven, 1983, 16.

²⁶ Elton A, 'Administrative justice theory and benchmarks in mandatory immigration detention: principled tensions or power imbalance?' 31 *Griffith Law Review* 1, 2022, 59.

²⁷ French R, 'Administrative justice - words in search of meaning,' Australian Institute of Administrative Law Annual Conference, Sydney, 22 July 2010, 12.

²⁸ French R, 'Administrative justice - words in search of meaning,' 13.

²⁹ French R, 'Administrative justice - words in search of meaning,' 13.

³⁰ Elton A, 'Administrative justice theory and benchmarks in mandatory immigration detention', 58.

³¹ Creyke R and Macmillan J, 'Administrative Justice – The Concept Emerges' in R Creyke and J McMillan (eds) *Administrative Justice – The Core and the Fringe*, Australian Institute of Administrative Law, 2000, 3.

³² Daly P, 'The ages of administrative law' Public Law Conference, Dublin, July 2022, 28.

³³ Daly, 'The ages of administrative law', 28.

competing conceptions as it relies on the general themes of the theory as a guide rather than the models as they bear universal characteristics.³⁴

Administrative justice is constitutionalised in Kenya in that it provides for the right to administrative action that is efficient, lawful, reasonable and procedurally fair.³⁵ This in turn promotes mechanisms of protecting individual rights by restricting excessive exercise of power to the detriment of the rights.³⁶ In this case the administrative setting impacts citizenship rights, specifically the identity card which signifies or leads to the provision of many liberties in the country including freedom of movement.

In looking at the approach of administrative justice the question arises on what criteria is needed to consider processes and decisions reached through the processes as just in scenarios where the legislature enacts a law that confers power on an administrative officer to make decisions affecting individuals. The Constitution of Kenya provides for citizenship by birth³⁷ where descent from a parent who has Kenyan citizenship automatically grants the person citizenship. However in practice those considered as 'indigenous' acquire automatic citizenship on application while the rest have to prove their citizenship. Indigenous persons are defined as the descendants of those who settled on the land before colonisation and the formation of borders.³⁸ This shows that the vetting process as provided for in the Act lacks administrative justice as automatic citizenship is denied to some applicants contrary to the Constitution.

Administrative justice theory proposes that lawmakers should design governance that strives to achieve administrative justice.³⁹ This means that the power that a government actor is conferred with should be in line with the themes of administrative justice. This can be used as a guide in amending section 8(1)A of the Act to reflect due process, equal treatment, proper exercise of power and access to administrative processes for all.

³⁴ Elton A, 'Administrative justice theory and benchmarks in mandatory immigration detention', 59.

³⁵ Article 47, *Constitution of Kenya* (2010).

³⁶ Gichuhi J, 'Constitutionalisation of administrative justice in Kenya', Social Science Research Network, 2018, 2.

³⁷ Article 14, *Constitution of Kenya* (2010).

³⁸ UN Office of the High Commissioner for Human Rights (OHCHR), *Minority rights: International standards and guidance for implementation*, 2010, HR/PUB/10/3, 3.

³⁹ French R, 'Administrative justice - words in search of meaning,' 13.

The proof of citizenship is done through the vetting process which is established in the registration of persons act which in experience is characterised creates barriers to the right of an individual to possess legal identity.⁴⁰ Issues such as delay or denial of identity cards to certain communities in Kenya creates a problem since despite a person fulfilling the criteria for automatic registration of citizenship the treatment by officers as a non-national plays a factor in the conclusion that the government does not consider such the person as a citizen.⁴¹ This is especially prevalent due to the registration of persons act that contains gaps that enables arbitrary administrative actions and is subject to discretion of administrative officers that are tasked with enforcing citizenship provisions.⁴²

1.8 LITERATURE REVIEW

The literature on the vetting process and discretion calls for administrative procedures on rules on determination of nationality as the completely discretionary system for deciding questions of nationality exacerbates the risk of statelessness.⁴³

1.8.1 On administrative discretion and arbitrariness

Kanstroom defines discretion as a power to make a choice between alternative courses of action.⁴⁴ A state officer has discretion when the limits on their power allows him to choose among the courses of action or inaction.⁴⁵ Discretion should be exercised on reasonable grounds since its exercise on the whims of the administrative officer leads to the discretion being uncontrolled and against the rights of individuals.⁴⁶ Incorrect discretionary decisions may be exercised by

⁴⁰ Centre for Internet and Society and Research ICT Africa, *Digital identity in Kenya: A case study conducted as part of a ten country exploration of socio-digital ID systems in part of Africa*, 2021, 10.

⁴¹ UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons*, 2014, para 37.

⁴² Kanyinga K, *Citizenship and inequalities: Democracy and public participation*, Open Society Foundation, Nairobi, 2014, 79.

⁴³ Manby B, *Statelessness and citizenship in the East African Community*, UN High Commissioner for Refugees, Nairobi, 2018, 84.

⁴⁴ Kanstroom D, 'The better part of valor: The Real ID Act, discretion and the 'rule' of immigration law', Boston College Law School, Research Paper 123, 2007, 183.

⁴⁵ Davis K, *Discretionary justice: A preliminary inquiry*, Louisiana State University Press, Louisiana, 1969, 15.

⁴⁶ Manoj K, 'Administrative discretion & limitation on administrative discretion by article 14 and 16 of the Indian Constitution', *SSRN Electronic Journal*, 2009, 2.

administrative agencies, and they are characterised by unconstitutionality, arbitrariness or capriciousness and their abuse needs to be reined in and bound by law.⁴⁷ Claims of abuse of discretion often involve contentions that the agency had either considered an irrelevant factor or disregarded a relevant one or it had decided without sufficient evidence.⁴⁸

The conferring of administrative discretion by legislation without adequate guiding standards lead to arbitrary decision making.⁴⁹ Arbitrariness should be interpreted broadly not as ‘against the law’ but to include elements such as inappropriateness and injustice.⁵⁰ Non-arbitrary discretion is exercised through the governance of the rule of law, subject to justification and that it must apply to all equally.⁵¹

Greater degrees of discretion was conferred to enable administrative agencies to effectively govern the society.⁵² This has, however, received opposition by those interested in uniform and consistent application of the law.⁵³ This then presents two opposing views where too much discretion leads to chaos and lawlessness while on the other hand too little discretion leads to injustice.⁵⁴

On the vetting process provided for by the law, the law is not specific on questions of what is required to prove nationality or citizenship which translates to a lacuna where unlimited discretion is granted to the registration officer.⁵⁵ Vetting is intended to counter fraudulent claims of citizenship but the controls on these fraudulent claims are exercised with regards to specific ethnic groups.⁵⁶ Vetting committees verify citizenship before an identity card will be issued in border regions, or to transborder communities without a judicial element to it.⁵⁷ Manby states that there is no doubt that vetting is to determine a person’s eligibility for citizenship, but the problem is with

⁴⁷ Kanstroom, ‘The better part of valor’, 183.

⁴⁸ Saferstein, ‘Nonreviewability: A functional analysis of “Committed to agency discretion”,’ 82 *Harvard Law Review* 367, 1968, 368.

⁴⁹ Davis, *Discretionary justice*, 16.

⁵⁰ A. v. Australia, Communication No.560/1993, CCPR/C/59/D/560/1993, 30 April 1997, paragraph 9.2.

⁵¹ Lenard P, ‘Trust, discretion and arbitrariness in democratic politics’ 68 *Rivista De Estetica* 1, 2018, 85.

⁵² Konstant A, ‘Rights, administrative discretion and Dawood’ 32 *South African Journal on Human Rights* 1, 2016, 107.

⁵³ Konstant, ‘Rights, administrative discretion and Dawood’, 107.

⁵⁴ Konstant, ‘Rights, administrative discretion and Dawood’, 107.

⁵⁵ KNCHR, *An identity crisis? A study on the issuance of national identity cards in Kenya*, 7.

⁵⁶ Manby B, *Statelessness and citizenship in the East African Community*, 32.

⁵⁷ Manby B, *Statelessness and citizenship in the East African Community*, 32.

its administration as the persons subject to the process have all the official documents required.⁵⁸ Manby also avers that while the vetting process is based on ensuring the integrity of citizenship administration, there is a danger that some cases may be rejected on the basis of trouble that the person has with the local authorities rather than their citizenship claim.⁵⁹

1.8.2 The use of discretion in citizenship matters

Citizenship is manufactured and controlled by government agencies at many levels as it is defined by law, formalised through bureaucracy and evidenced by identity documents.⁶⁰ Those who cannot establish their nationality or have to prove it and those without effective nationality are *de facto* stateless persons and they include persons who have the theoretical right to nationality but are unable to receive it due to administrative and procedural hurdles or other criteria that block their access to nationality.⁶¹ Despite the provision of the Kenyan Constitution on citizenship, Kenya has a large stateless population which is cleaved into two, those who are legally stateless⁶² while the rest experience difficulties in obtaining documents which prove their citizenship making them *de facto* stateless since their citizenship is practically ineffective.⁶³ Classification of the citizenship or nationality of persons as under investigation as is done by the vetting process without a reasonable ground is one such hurdle blocking the access to citizenship or nationality.⁶⁴

The law in Kenya provides significant discretion to administrative officers tasked with processing ID applications to defer, deny or burden applicants with requirements of additional documentation such as grandparents' birth certificates.⁶⁵ Lack of express statutory restrictions leads to the

⁵⁸ Manby B, *Statelessness and citizenship in the East African Community*, 32.

⁵⁹ Manby B, *Statelessness and citizenship in the East African Community*, 32

⁶⁰ Lochery E, 'Rendering difference visible: The Kenyan State and its Somali citizens' 111 *African Affairs*, 2012, 618.

⁶¹ Songa A, 'Addressing statelessness in Kenya through a confluence of litigation, transitional justice and community activism: Reflecting on the cases of the Nubian, Makonde and Shona communities' 5 *African Human Rights Yearbook*, 2021, 254; Batchelor C, 'Statelessness and the problem of resolving nationality status' 10 *International Journal of Refugee Law*, 1998, 174.

⁶² Article 1, 1954 *Convention relating to the Status of the Stateless Person* defines a stateless person as someone who is not considered a national by any state under the operation of its law. This is what is considered as legal statelessness as it is defined by law.

⁶³ Open Society Justice Initiative, *Citizenship discrimination and the right to nationality in Kenya*, 2010.

⁶⁴ Massey H, *UNHCR and De Facto Statelessness*, UN High Commissioner for Refugees (UNHCR), 2010, 29.

⁶⁵ Oppenheim B and Powell B, *Legal identity in the 2030 agenda for sustainable development: Lessons from Kibera Kenya*, Open Society Justice Initiative, October 2015, 4.

possession of broad discretionary powers by the executive branch of government.⁶⁶ The components of executive discretion is therefore presidential which is vested in the president and administrative vested in administrative heads.⁶⁷ Under nationality administration, laws in African countries confer essentially unfettered discretion to the executive which means that the executive through delegation allows junior administrative officers to decide on matters regarding the right to nationality.⁶⁸

The inclusion of citizenship as an instrument whose definition rests on the State by colonial legacies turns the law in favour of the State which leads to the exclusion of some communities based on arbitrary conceptions of citizenship.⁶⁹ Increased abusive use of discretionary executive power is occasioned where the State imposes administrative conditions that frustrate the person or are difficult to fulfil. Contradictions and insecure options in citizenship are evidenced by discretionary deprivations.⁷⁰ Manby recommends for oversight of executive discretion on decisions concerning the refusal to recognise citizenship or deprive a person of nationality.⁷¹

1.8.3 Contribution

The administrative discretion that is placed on the Directorate of Immigration by Section 8 (1) A of the Registration of Persons Act has been abused by its arbitrary use causing adverse effects on some communities in Kenya. Thus, this paper suggests that an amendment of the section should be undertaken to curb the abuse of the discretionary powers conferred. This includes a standard to be set in place in order for identification committees to be invoked on application for citizenship documents and procedural safeguards to ensure administrative justice is attained.

⁶⁶ Akech M, 'Abuse of power and corruption in Kenya: Will the new constitution enhance government accountability?' 18 *Indiana Journal of Legal Studies* 1, 2011, 53.

⁶⁷ Shils E, 'The bounds of executive discretion in the regulatory State' 164 *University of Pennsylvania Law Review* 7, 2016, 1590.

⁶⁸ Manby B, *Citizenship law in Africa: A comparative study*, Open Society Foundations, New York, 2016, 2.

⁶⁹ Melber H, Bjarnesen J, Lanzano C and Mususa P, 'Citizenship matters: Explorations into the citizen-state relationship in Africa' 49 *Forum for Development Studies* 3, 2022, 9.

⁷⁰ Open Society Justice Initiative, *Unmaking Americans: Insecure citizenship in the United States*, 2019, 9.

⁷¹ Manby B, *Citizenship law in Africa*, Open Society Institute, New York, 2010, 4.

Scholarly work on the matter highlights the ethnocentric nature of the vetting process as discriminatory and calls for the removal of the discriminatory obstacles in citizenship.⁷² The discriminatory approach of the vetting process on the basis of ethnicity and religion is discussed by authors who recommend the complete abolishment of the vetting process.⁷³ Additionally, the government's attempt to digitalise the identity card through the Huduma number is studied in relation to the indirect discrimination that the Nubians and other ethnic minorities face.⁷⁴ This study, however, approaches the problem from the scope of limiting discretionary powers conferred to ensure that the discretion is not used in a discriminatory manner.

Discretion is an exercise of the administrative state where when used legitimately it serves to further the exercise of the government's functions.⁷⁵ Complete abolition of the discretion is not necessary rather the study proposes that discretion should be fettered. This will prevent the discretionary decisions taken by the state to be abused while at the same time still leaving flexibility for the State department in exercise of its powers. In line with Davis on confining structuring and checking discretion,⁷⁶ the study suggests the restructuring of the administrative independence of the Director general of the State. This is by controlling the manner of exercise of power by the implementation of restrictions such as implementation of reasonable grounds in suspecting the legitimacy of one's citizenship documents. The civil registration department is familiar with its internal mechanisms and has knowledge on the requirements of legitimate citizenship documents required on application. Thus, the parameters of reasonable grounds are left to the administrative officers but the requirement of reasonable grounds to institute the vetting process should remain.

⁷² Kohn S, Open Society Justice Initiative, *Out in the cold: Vetting for nationality in Kenya*, 28 February 2011. <https://www.justiceinitiative.org/voices/out-cold-vetting-nationality-kenya> ; KNCHR, *An identity crisis? A study on the issuance of national identity cards in Kenya*, 26.

⁷³ Abdulrashid A, 'A prejudiced citizenship' Unpublished LLB Dissertation, Strathmore University, Nairobi, 2021, 43.

⁷⁴ Kiilu N, 'Indirect discrimination: Huduma namba and the plight of the Nubian community in Kenya' 7 *Strathmore Law Review* 1, 2022.

⁷⁵ Cooper R, 'Administrative justice and the role of discretion' 47 *The Yale Law Journal* 577, 1983, 579.

⁷⁶ Davis K, 'Confining discretion, structuring discretion and checking discretion', in Davis K, *Discretionary justice: A preliminary inquiry*, Louisiana State University Press, Louisiana, 1969.

1.9 METHODOLOGY

The nature of the study is qualitative. The study will be desk-based research. The study will rely on the Constitution of Kenya, the Registration of Persons Act and Hansard reports as its primary sources. Books, journals, reports, working papers will also be referred to. The study will employ the use of a deductive approach where the elements of the overarching research question will be employed to prove the hypothesis.

In discussing the vetting process and how it has led to wide discretionary powers, the study shall use a doctrinal analysis as it would study the Registration of Persons Act as well as secondary materials that provide the context on how the Act is to be understood and interpreted. Doctrinal analysis is interested in what the law is and how it can be dissected to understand its essence.⁷⁷ The analysis draws from legislation, journals, case law, parliamentary debates and government reports.⁷⁸

The study additionally employs the socio-legal approach where the law is linked to the social situation to which it applies while demonstrating the part the law plays in the creation, maintenance and change of the said situation.⁷⁹ In assessing the use of the discretionary powers conferred and the effect it has on border communities the study employs the socio-legal approach to show the effect and the part section 8A of the Registration of Persons Act plays in creating the circumstances faced by border communities. This will be through case law, reports from the government and other stakeholders, academic scholarship and empirical research from other researchers.

The discussion of subjective assessments and the proposal of an objective criterion as a procedural safeguard will employ a critical analysis in order to understand and formulate a criterion that will fit the problem of the study. Critical analysis is defined as investigating a subject or action in an objective manner while holding it against a justificatory norm and a claim of legitimacy.⁸⁰

⁷⁷ Lammasniemi L, *Law dissertations: A step by step guide*, Taylor and Francis Group, London, 2021, 72.

⁷⁸ Lammasniemi, *Law dissertations*, 72.

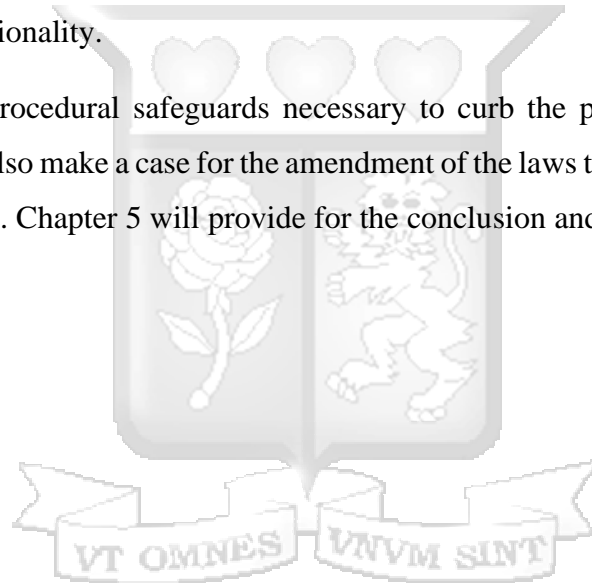
⁷⁹ Schiff D, 'Socio-legal theory: Social structure and law' 39 *The Modern Law Review* 3, 1976, 287.

⁸⁰ Dubber M, 'New historical jurisprudence: Legal history as critical analysis of law' 2 *Critical Analysis of Law: An International and Interdisciplinary Law Review* 1, 2015, 3.

1.10 CHAPTER BREAKDOWN

Chapter 1 is the first chapter in this study, and it discusses amongst others the background to the problem, research objectives and questions, methodology and the literature review. In chapter 2, the study will undertake an analysis on the vetting policy and framework in Kenya and the wide discretionary powers conferred by section 8A of the Act. Chapter 3 will look into the use of discretion in the context of citizenship administration and laws while discussing the notions on fairness of the exercised discretion amongst others. The chapter will also discuss the effects on citizenship rights and nationality.

Chapter 4 will outline procedural safeguards necessary to curb the predominance of arbitrary power. The chapter will also make a case for the amendment of the laws to include these safeguards so as to curb the problem. Chapter 5 will provide for the conclusion and recommendations on the way forward.



CHAPTER TWO

2.1 INTRODUCTION

Citizenship outlines the legal and political relationship between an individual and the State which can also be referred to as nationality. Citizenship characterised as legal identity shows that individual identity is the cornerstone of the rule of law and the State-citizen relationship.⁸¹ The benefits arising from the State-citizen relationship requires citizenship documents that provide proof of one's identity.⁸² The identity card is important and it determines the extent to which an individual enjoys their rights and freedoms in Kenya.⁸³ The constitution provides for the rights and freedoms in the Bill of rights to be accessed and to belong to all⁸⁴, however, the identity card is crucial as it is required to be produced when an individual is applying for the grant of other documents or for the exercise of lawful or judicial functions.⁸⁵

The Constitution of Kenya provides for citizenship by birth to apply to a person who on the day of his or her birth either his mother or father is a citizen of Kenya.⁸⁶ An entitlement that arises from citizenship is a Kenyan passport or any document of registration and identification issued by the state according to the Constitution.⁸⁷ The identity card is issued upon registration in line with the Registration of Persons Act and power is given to registration officers to request additional information to enable registration.⁸⁸ Further powers are given to the Director to establish identification committees or agents to assist in the authentication of information provided by persons in the process of issuing national identity cards.⁸⁹

This power conferred on the Director legalises vetting where a person's right to citizenship by birth is contested and further authentication is needed which places the onus of proof on the person applying for citizenship. Despite citizenship by birth meaning nationality that a person is attributed

⁸¹ Coulmas F, Citizenship, legal status, and proof of identity: Identity as a legal concept, in *Identity: A very short introduction*, Oxford University Press, 2019, 27.

⁸² Oppenheim B and Powell B, *Legal identity in the 2030 agenda for sustainable development: Lessons from Kibera Kenya*, Open Society Justice Initiative, October 2015, 1.

⁸³ KNHRC, *An identity crisis? A study on the issuance of national identity cards in Kenya*, 5.

⁸⁴ Article 19(3)(a), *Constitution of Kenya (2010)*.

⁸⁵ Section 10, *Registration of Persons Act*, (Act No. 11 of 1979).

⁸⁶ Article 14(1), *Constitution of Kenya (2010)*.

⁸⁷ Article 12 (1)(b), *Constitution of Kenya (2010)*.

⁸⁸ Section 8(1), *Registration of Persons Act*, (Act No. 11 of 1979).

⁸⁹ Section 8(1) A, *Registration of Persons Act*, (Act No. 11 of 1979).

to by law from birth rather than acquired through administrative means or as an adult⁹⁰, the Registration of Persons Act confers administrative independence on the constitution of vetting committees that question one's right to citizenship by birth. The vetting is required and legitimate as it will help in distinguishing citizens from those who do not qualify as such. However, what is called into question in this study is the exercise of the process as it is sometimes directed not to the citizen as an individual but due to the person's membership to an ethnic group.⁹¹

This chapter examines section 8(1) A of the Act that provides for the vetting process. And in getting a better understanding, the chapter will highlight the evolution of the vetting process, the discretionary powers conferred and the circumstances that led to the establishment of the process in law.

2.2 EVOLUTION OF THE CITIZENSHIP VETTING PROCESS

Citizenship documents are considered contentious especially among border communities, minorities and non-white immigrants.⁹² These citizenship documents include national identity cards, passports or any other document of registration or identification.⁹³ Identity cards have evolved over years in Kenya's history which consisted of first generation cards issued until 1995 and the second generation cards came into existence due to irregularities with the previous cards such as forgeries, double registration and illegal registration of aliens.⁹⁴ The communities have since independence encountered challenges in acquiring citizenship documents such as the identity card by undergoing additional administrative procedures to prove their lineage.⁹⁵ In the communication in the case of the *Nubian Community of Kenya v Kenya*, the country stated that a blanket qualification would lead to the influx of the communities into the country in its

⁹⁰ *E W A & 2 others v Director of Immigration and Registration of Persons & another*, (2018) eKLR.

⁹¹ Abraham D, Balaton-Chrimes S, Mahmoud M and Manby B, 'Citizenship is a right, not a political tool,' The Elephant, October 9 2023 <https://www.theelephant.info/features/2023/10/09/citizenship-is-a-right-not-a-political-tool/>

⁹² Centre for Internet and Society and Research ICT Africa, *Digital identity in Kenya: A case study conducted as part of a ten country exploration of socio-digital ID systems in part of Africa*, 2021, 10.

⁹³ Article 12, *Constitution of Kenya (2010)*.

⁹⁴ Report by Kenya National Commission on Human Rights (KNCHR), *An identity crisis? A study on the issuance of national identity cards in Kenya*, 2007, 4.

⁹⁵ CIS and RIA, *Digital identity in Kenya*, 10.

submissions on why citizenship of some communities is not regarded on a case-to-case basis.⁹⁶ This is due to the existence of the community in separate countries or the threat of providing documentation to persons who are not Kenyan.

The lack of blanket qualifications then affects the communities as they experience difficulties in acquiring documents necessary for identification such as the national identity card and passport. Vetting committees are constituted for the purpose of identifying Kenyans for the purpose of registration and issuance of identity cards.⁹⁷

The practice of vetting historically was not found in law but was still practised. However, the passing of the Security Laws Amendment Act, 2014⁹⁸ an omnibus bill led to the amending of section 8(1) A of the Act to provide the Director with the discretion to establish identification committees to propagate vetting.⁹⁹ This was proposed as a result of heightened security measures to counter terror attacks that plagued the country at the time.¹⁰⁰ National security was cited as the reason and the bill was passed in a hurry by parliament.¹⁰¹ National security is defined by the constitution as the protection against threats both internal and external against the nation's territorial integrity and sovereignty and other national interests.¹⁰² The introduction of the bill was however contested in court on its constitutionality with regards to the hurried enactment process and also the contents of the bill.¹⁰³

Through the amendment, the vetting exercise derived its legitimate basis that it did not possess previously making it susceptible to abuse.

The legal and policy framework governing the issuance of the IDs is currently the Act that depends on the Constitution of Kenya and the Kenya Citizenship and Immigration Act. Registration is effected upon proof of citizenship and attainment of eighteen years.¹⁰⁴ The requirement of age is

⁹⁶ *Nubian Community in Kenya v Republic of Kenya*, ACmHPR Comm 317/2006.

⁹⁷ KNHRC, *An identity crisis? A study on the issuance of national identity cards in Kenya*, 5.

⁹⁸ Section 23, *Security Laws Amendment Act*, 2014.

⁹⁹ Section 8(1) A, *Registration of Persons Act*, (Act No. 11 of 1979).

¹⁰⁰ Nalule, *Report on citizenship law in Kenya*, 22.

¹⁰¹ National Assembly Hansard Report, 11 December 2014, 12.

¹⁰² Article 238(1), *Constitution of Kenya* (2010).

¹⁰³ *Coalition for Reform and Democracy and others v Republic of Kenya and others* (2015) eKLR.

¹⁰⁴ Section 6, *Registration of Persons Act*, (Act No. 11 of 1979).

provided for in the Act through the production of a birth certificate.¹⁰⁵ The documentation required to prove citizenship is not clearly outlined in the Act which gives the Principal Registrar discretion to decide which documents are necessary. This translates to a gap where discretion is granted due to the Act's silence on the documents required.¹⁰⁶

2.3 DISCRETIONARY POWERS IN THE CITIZENSHIP VETTING PROCESS

Discretion is defined as a power to make a choice between alternative courses of action.¹⁰⁷ Administrative discretion is also present in situations where the law does not provide for a specific outcome or where the officer is given options within a statutorily imposed boundary.¹⁰⁸ The powers granted are discretionary in nature as the establishment of the identification committees is not based on conditions but is rather left to the administrative officers to decide. In the Act as demonstrated by the wording of section 8 (1) A, there are no imposed boundaries nor the circumstances for use of the power as the power is conferred on administrative officers through the Director without any further provisions for direction.

The vetting process is provided for by law,¹⁰⁹ however, it still creates administrative barriers to a person's right to citizenship by birth. The Constitution provided for citizenship for all and guaranteed the rights of citizens but the process occasions administrative barriers when acquiring citizenship documents.¹¹⁰ The Act provides for the power of the Director to establish identification committees to assist in authentication but at the same time it does not address the circumstances that may lead to the exercise of the powers conferred. This then translates to wide discretionary

¹⁰⁵ Rule 4(2)(a), *Registration of Persons Act*, (Act No. 11 of 1979).

¹⁰⁶ Report by Kenya National Commission on Human Rights (KNCHR), *An identity crisis? A study on the issuance of national identity cards in Kenya*, 2007, 4.

¹⁰⁷ Kanstroom D, 'The better part of valor: The Real ID Act, discretion and the 'rule' of immigration law', Boston College Law School, Research Paper 123, 2007, 183.

¹⁰⁸ *Baker v Canada (Minister of Citizenship and Immigration)*, (1999) 2 S.C.R 817.

¹⁰⁹ Section 8(1) A, *Registration of Persons Act*, (Act No. 11 of 1979).

¹¹⁰ CIS and RIA, *Digital identity in Kenya*, 25.

powers on the registrars or the director to determine whether one is a citizen or not leading to unchecked discretion.¹¹¹

It is generally accepted that the Act conceives administrative independence for the National Registration Bureau (NRB) and its officers as well as the Directorate of Immigration.¹¹² This situation is however not unique to Kenya as all around the practice is that States generally enjoy wide discretion in determining who qualifies as a national.¹¹³ The problem that one may foresee from the use of this discretion is that it exemplifies the use of the rule of men and that it threatens individual autonomy as a result of the pre-existing and determinate rules.¹¹⁴ This is especially apparent in circumstances where the discretion is improperly conceived leading to arbitrary action by the administrative officers.

An admission on administrative action states that control of discretion is necessary in order to protect individual rights from arbitrary or unlawful interference.¹¹⁵ It is an assertion that the Kenyan statutory order grants executive actors broad powers without limiting their exercise.¹¹⁶ This then leads to the rise in arbitrary power contrary to the constitution's principles which are exercised by bureaucrats that do as they wish due to the lack of effective regulation.¹¹⁷ Reforms done in light of the new constitution tends to fall short as a result of the breadth and lack of effective regulation of powers conferred by the statutory order. This is evident in the scenario of the National Registration Bureau (NRB) whose mandate is to identify and register all Kenyans who have attained the age of 18. Parliament has questioned practices of the NRB and have tried to set timelines for the issuance of the identity cards and empowered the cabinet secretary for interior

¹¹¹ *Nubian Community in Kenya v Republic of Kenya*, ACmHPR Comm 317/2006.

¹¹² *Mohamed Mire v Attorney General* (2016) eKLR.

¹¹³ *Nubian Community in Kenya v Republic of Kenya*, ACmHPR Comm 317/2006.

¹¹⁴ Cartier G, 'Administrative discretion and the spirit of legality: From theory to practice' 24 *Canadian Journal of Law and Society* 3, 2009, 314.

¹¹⁵ Cooper R, 'Administrative justice and the role of discretion' 57 *Yale Law Journal* 577, 1938, 588.

¹¹⁶ Akech M, 'Abuse of power and corruption in Kenya: Will the new constitution enhance government accountability?' 18 *Indiana Journal of Legal Studies* 1, 2011, 53.

¹¹⁷ Akech M, Abuse of power and corruption in Kenya, 53.

to create guidelines for the vetting process.¹¹⁸ However, the efforts by parliament have amounted to nothing as all the efforts have failed to overhaul the system.¹¹⁹

This issue stems from the law's gaps where no minimum criteria is provided to act as regulation or guidance for the exercise of the powers. These minimum criteria act as a guide to administrative officials ensuring that they will meet the requirements of the law in making decisions that are just.¹²⁰ Section 8 of the Act was amended to merge vetting within the security framework without effective safeguards to guide the bureaucrats.¹²¹ The section in question allows for the establishment of 'identification committees' by the Director for the purpose of 'authentication of information' without mention of any safeguards or standards creating broad discretionary powers.

2.5 CONCLUSION

Citizenship includes the formal status of membership in a state and provides for the direct relationship between the state and the individual.¹²² In Kenya applications for recognition of citizenship are subject to a vetting process that was founded in an effort to counter fraudulent acquisition of the documents. However, in examining the process and its legal foundation it is apparent that the process is characterised by administrative discretion conferred by the Registration of Persons Act. Discretion is generally legal in nature as the legislature cannot counteract all possible circumstances that may arise in practice. However, broad discretionary processes such as the one in the citizenship vetting process pose a problem in one's application for citizenship.

The lack of consistent application of the process in the issuance of IDs is as a result of the lack of safeguards provided by statute and the lack of well established internal guidelines. This leads to the widespread mistrust of the process by the citizens in the country which necessitates reform in the law conferring the discretionary power.

¹¹⁸ CIS and RIA, *Digital identity in Kenya*, 25.

¹¹⁹ CIS and RIA, *Digital identity in Kenya*, 25.

¹²⁰ Creyke R and Mcmillan J, 'Administrative Justice – The Concept Emerges', 3.

¹²¹ Fokala E, 'Do not forget the Nubians: Kenya's compliance with the decision of African regional treaty bodies on the plight and rights of Nubians,' 54 *De Jure Law Journal*, 2021, 492.

¹²² Macklin A, 'Who is the citizen's other? Considering the heft of citizenship,' 8 *Theoretical Inquiries in Law* 2, 2007, 334.

CHAPTER 3

3.0 INTRODUCTION

This chapter follows the discussion in Chapter 2 by examining the use of the conferred discretion and the range of effects that arise from the use. Despite the intention of counteracting fraudulent acquisition of identity cards, the process is susceptible to abuse due to its broad nature. This leads to the characterising of the decisions arising from its use as arbitrary and harmful. Additionally the exercise of this broadly framed power leads to those affected by it to have little to no recourse once wronged. This is due to the difficulty of those affected to ascertain whether the conduct was unlawful and should be challenged in court.¹²³ The right to access legal identity is therefore compromised as a result of a complex and arbitrary bureaucratic process.¹²⁴

3.1 THE USE OF ADMINISTRATIVE DISCRETION

Discretion conferred is bound to be used by administrative officers which then leads to the question of whether the discretion conferred was well-used or poorly-used. Well-used discretion is then classified as discretion that is non-arbitrarily used.¹²⁵ The use of discretion in decision making is as a result limited by a requirement that it not be arbitrary.¹²⁶ The Kenyan Constitution provides for the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.¹²⁷

Non-arbitrariness is synonymous to rationality as arbitrariness is considered as the antithesis of rationality.¹²⁸ Rationality requires that decisions should be impartial and based on logically probative evidence rather than on a personal basis.¹²⁹ Galligan posits that equality is inherent in rationality where differences in treatment of individuals should be based on reasoned accounts.¹³⁰

¹²³ D Hume, 'Broadly-Framed Powers and the Constitution' (Paper presented at New South Wales Bar Association Seminar, 3 March 2015).

¹²⁴ Oppenheim and Powell, *Legal identity in the 2030 agenda for sustainable development*, 10.

¹²⁵ Lenard P, Trust, discretion and arbitrariness in democratic politics.

¹²⁶ Stewart D, Taking the brakes off: Applying procedural fairness to administrative investigations, 13 *Australian Institute of Administrative Law Forum* 1, 1997, 9.

¹²⁷ Article 47, Constitution of Kenya (2010).

¹²⁸ Galligan D, *Discretionary powers: A legal study of official discretion*, 3rd ed Oxford University Press, London, 1990, 6.

¹²⁹ Stewart, 'Taking the brakes off', 9.

¹³⁰ Galligan D, *Discretionary powers*, 6.

This means that different treatment of an individual should be based on matters personal to the specific person. Administrative justice additionally, propagates equal treatment but also acknowledges the need for flexibility in situations where consistency would lead to an absurd result.¹³¹ Rationality is also not a straightforward notion as the classification of a decision as rational depends on the objects to be achieved and the means used.¹³² Despite the existence of circumstances that necessitate different treatment, constraints on the exercise of discretion are needed to prevent arbitrary or capricious decision-making. These constraints are requirements that any exercise of discretionary power should be based on reasons that are impartial and fair.¹³³

In addition to equal treatment administrative justice considers the interest of individuals affected by administrative decisions and includes basic aspects such as timeliness in decision-making, accessibility of the process and efficiency in decision making.¹³⁴ These aspects add to the requirement of fairness ensuring that the discretion is used well rather than poorly.

Poorly used discretionary power is characterised by arbitrariness or capriciousness and the abuse needs to be reigned in by law.¹³⁵ Arbitrary and capricious means doing something according to one's will which translates to a notion of a tendency to abuse the possession of the power.¹³⁶ Arbitrariness in this sense clashes with justice where unfairness can occur when conceptions of fairness in its substantive sense, its procedural sense and formal fairness also known as treating similar issues alike are deviated from.¹³⁷ The concepts of prohibition of arbitrariness also occur in the international context. The prohibition of arbitrariness is an obligation regarding the right to nationality.¹³⁸ Circumstances that make deprivation of nationality arbitrary include where it is discriminatory, it leads to statelessness and there is a lack of due process such as right of review.¹³⁹

¹³¹ French R, 'Administrative justice - words in search of meaning,' 13.

¹³² Galligan D, Discretionary powers, 6.

¹³³ Galligan D, Discretionary powers, 32.

¹³⁴ French R, 'Administrative justice - words in search of meaning,' 13.

¹³⁵ Kanstroom, 'The better part of valor', 183.

¹³⁶ *Republic v Kenya Bureau of Standards & 4 others* (2018) eKLR.

¹³⁷ Galligan D, 'Arbitrariness and formal justice in discretionary decisions', 7.

¹³⁸ Article 15(2), *United Nations Declaration of Human Rights*, 10 December 1948; Von Rutte B, *The human right to citizenship*, Brill, London, 2022, 239.

¹³⁹ Open Society Justice Initiative, *Citizenship discrimination and the right to nationality in Kenya*, 2010, 4.

Deprivation of nationality is permitted in international law in instances of fraudulent acquisition of citizenship only.¹⁴⁰

3.2 THE OPERATION OF THE VETTING PROCESS

The vetting process is instituted with the intention of counteracting fraudulent acquisition of citizenship by birth by authenticating documents provided to furnish proof of citizenship.¹⁴¹ Despite the above mentioned purpose of the process, the government subjects specific communities to vetting procedures prior to issuing identity documents.¹⁴² Individuals subject to the vetting process do not understand the reason for their subjection to the process despite providing the administrative officers with all the official documents normally required.¹⁴³ Additionally, the process is wielded against people fitting particular profiles rather than persons lacking documents proving citizenship.¹⁴⁴

The wording in the Act allows for authentication of information provided without any further guidance. The previous minister for interior submitted in a hearing of a petition, on the vetting process stating that it is one of the ways of identifying applicants' eligibility of those in border counties and in cosmopolitan areas.¹⁴⁵ In the petition, the constitution of the vetting committee was also discussed which comprised of the Deputy County Commissioner, a Civil Registration Officer, three elders nominated by the Nubian Community and Chiefs / Assistant Chiefs. This is, however, not the standard composition of all vetting committees constituted by the National Registration Bureau who are also not required to report to the public.¹⁴⁶ The composition of the committees are shrouded in mystery due to their discretionary nature with some mention of a national vetting committee in testimony in court but no established committee by law in Kenya.¹⁴⁷

¹⁴⁰ Open Society Justice Initiative, Citizenship discrimination and the right to nationality in Kenya, 4.

¹⁴¹ United Nations High Commission for Refugees, Statelessness and citizenship in the East African community, September 2018, 12.

¹⁴² United Nations High Commission for Refugees, Statelessness and citizenship in the East African community, September 2018, 12.

¹⁴³ Manby B, Statelessness and citizenship in the East African Community, 2018, 32.

¹⁴⁴ Manby B, Statelessness and citizenship in the East African Community, 32.

¹⁴⁵ Departmental Committee on Administration & National Security, Report on the Public Petition No. 023 of 2021 on accessing of National Identity Cards by the Nubian Community, November 2021, 8.

¹⁴⁶ CIS and RIA, *Digital identity in Kenya*, 10.

¹⁴⁷ *Galma Duba Gufu v AG* (2018) eKLR.

Vetting generally consists of interview processes and committee hearings where the applicant answers questions and provides evidence of citizenship and entails many stages that make it more susceptible to arbitrary influence by administrative officials on the process.¹⁴⁸ Persons who are in practice subject to the vetting procedure in the issuance of identity documents are those of Asian, Somali, Nubian and muslim heritage disproportionately while the same does not take place for other ethnic groups.¹⁴⁹ Due to such occurrences there is widespread distrust and uncertainty of the proficiency in the process and the issuance of identification documents.¹⁵⁰ The vetting process in some areas includes 3 levels the first being production of parent's id cards and birth certificate (which everyone is subjected to), the second is the requirement of a letter by a chief or assistant chief and the third is 'special security' vetting entails confirmation by elders, police background checks and even confirmation by grandparents despite how feeble they may be.¹⁵¹

Vetting is done on the concern of the porosity of borders with fear of providing documents to aliens. The same reason does not apply to the Nubians who are not situated along the borders of Kenya. People who undergo the process are required to provide additional documentation and in 2011 the High Court found that a circular by the National Registration Bureau (NRB) that required Asians and Arabs to produce their parents and grandparents birth certificates was unconstitutional.¹⁵² Majority of vetted persons do not understand why they have to undergo the process despite providing the required documentation and why people filling particular profiles are subjected to it rather than those unable to prove their citizenship.¹⁵³ Those subject to the process are marginal for historical, social and political reasons as they must answer for their citizenship.¹⁵⁴

The sum of the findings on the operation of the vetting process shows how citizenship is not considered as an individual application rather it is an ethnic affair despite the lack of relevance of

¹⁴⁸ Oppenheim and Powell, 'Legal identity in the agenda for 2030 sustainable development,' 10.

¹⁴⁹ UNHCR, Statelessness and citizenship in the East African Community, 23.

¹⁵⁰ Commission on Administrative Justice, *Stateless in Kenya: An investigative report on the crisis of acquiring identification documents in Kenya*, 2015, 15.

¹⁵¹ Kiai M, State has put unjust obstacles in the process of getting an ID card <https://nation.africa/kenya/blogs-opinion/opinion/state-has-put-unjust-obstacles-in-process-of-getting-an-id-card-316440> 14 October 2016.

¹⁵² *Muhuri and another v The Registrar of Persons and 2 others* (2011) eKLR.

¹⁵³ Manby B, Statelessness and citizenship in the East African Community, 35.

¹⁵⁴ Ng'weno, B. and Aloo L, 'Irony of citizenship: Descent, national belonging, and constitutions in the postcolonial African State' 53 *Law & Society Review* 1, 2019, 143.

ethnicity in current citizenship laws.¹⁵⁵ Persons implicated in the vetting process on the basis of their ethnicity rather than their individual applications face subjective assessments on their nationality which reflects the arbitrary nature of the process. This creates a trickle down effect on other social rights and belonging as will be discussed.

3.3 EFFECTS OF ARBITRARY ACTIONS

Vetting has a direct effect on access to citizenship despite the Constitution's clear demarcation on who becomes a citizen. Barriers created from the vetting process contribute to the construction of a systematically excluded social group which has a trickle down effect on access to social rights.¹⁵⁶ This is because negative administrative experiences form people's perceptions about the State and can make persons wary of seeking access to services while also sending a message about their place in the country's society.¹⁵⁷ National identity documents and passports are a direct access point to the State and leads to access to rights and confirms eligibility for social benefits amongst others.¹⁵⁸

3.3.1 De facto Statelessness

In Kenya, various complaints arise on the process of the issuance of vital nationality documents such as the ID and the passport. The complaints range from inefficiency, denial, delay, discrimination, corruption and abuse of power by the NRB and the Immigration Departments.¹⁵⁹ The vetting procedures determine eligibility for national identity documents are therefore within the decision of the executive.¹⁶⁰ This creates a paradox as this is an entitlement for every citizen and the executive is not the one granting out citizenship at its will and discretion. If this stance is

¹⁵⁵ Abraham D, Balaton-Chrimes S, Mahmoud M and Manby B, 'Citizenship is a right, not a political tool,' The Elephant, October 9 2023 <https://www.theelephant.info/features/2023/10/09/citizenship-is-a-right-not-a-political-tool/>

¹⁵⁶ Chudnovsky M and Peeters R, 'A cascade of exclusion: administrative burdens and access to citizenship in the case of Argentina's National Identity Document' 88 *International Review of Administrative Sciences* 4, 2022, 2.

¹⁵⁷ Moynihan D and Soss J, 'Policy feedback and the politics of administration' 74 *Public Administration Review* 3, 2014, 325.

¹⁵⁸ Chudnovsky and Peeters, 'A cascade of exclusion', 4.

¹⁵⁹ CAJ, *Stateless in Kenya*, iii.

¹⁶⁰ UNHCR, *Citizenship and statelessness in the member states of the Southern African Development Community*, 2020, 82.

employed it causes many persons to be stateless and left at the mercy of the political will. The application procedures as designed by the NRB constitute a decision about whether a person is sufficiently accepted by the community rather than verifying whether the documents provided for proof of citizenship are valid.¹⁶¹

The effect of the arbitrary administrative action in citizenship applications is detrimental to the right to nationality¹⁶² that is protected by both the Constitution and international law as it increases the instances of statelessness. This is because the barriers to acquiring nationality documents makes the persons' citizenship ineffective which leads to *de facto* statelessness.¹⁶³ *De facto* stateless persons have the theoretical right to nationality but are unable to acquire the right due to administrative and procedural hurdles that block their access to nationality.¹⁶⁴

Citizenship by birth in Kenya is available under *jus sanguinis* where descent from a parent who is a citizen automatically grants citizenship to the child. The work of the NRB is therefore to formalise citizenship by registering the person and granting them a national identity card. Despite this Kenya has a large stateless population which include communities such as the Kenyan Somalis, the Coastal Arabs and the Nubians.¹⁶⁵ In practice, high percentages of these groups are arbitrarily deprived of their right to nationality. It is important to note that all border communities that have ethnic groups on both sides of the borders undergo the vetting process, however, reports suggest that the above communities are subjected to additional processes to prove their citizenship.¹⁶⁶

Under the category of *de facto* stateless persons in Kenya, there are those who lack proof of citizenship documents such as the birth certificate despite them having the theoretical right to

¹⁶¹ Manby B, Unblocking access to citizenship in the global south: Should the process be decentralised?, Global Citizenship Observatory, 16 November 2020 <https://globalcit.eu/unblocking-access-to-citizenship-in-the-global-south-should-the-process-be-decentralised/>

¹⁶² Muller L, The law is not enough: Realising the child's right to a nationality in South Africa, 4 *Statelessness and Citizenship Review* 2, 2022, 258.

¹⁶³ Open Society Justice Initiative, *Citizenship discrimination and the right to nationality in Kenya*, 2010, 5.

¹⁶⁴ Batchelor, 'Statelessness and the problem of resolving nationality status', 174.

¹⁶⁵ Open Society Justice Initiative, *Citizenship discrimination and the right to nationality in Kenya*, 5.

¹⁶⁶ KNCHR, *An identity crisis?*, 6.

nationality.¹⁶⁷ The other category is those who have proof of citizenship documents but have difficulties in accessing the national identity cards.¹⁶⁸ The process whose objective is to ensure those deserving of the documents acquire it is subjected to both the above categories. This is despite the second category's possession of proof of citizenship documents which should ordinarily act as sufficient for the acquisition of the documents.

3.3.2 Indefinite Delays and Corruption

The issuance of the identity cards is also marred by delays due to the vetting process as Namati found where the Nubian clients work on their applications for an average of 58 days before submission to the registrar and 145 days after application to the issuance of the document.¹⁶⁹ The debilitating and unnecessary delays that arise from the administrative processes result in the inability to travel, to register as voters and also experiencing harassment by the police in some instances.¹⁷⁰ The court additionally held that

‘a delay of one and a half years in processing a citizenship application amounted to an excessive delay that denied the applicant from the enjoyment of certain rights and in contradiction with the right to fair administrative action.’¹⁷¹

The fact that no timeframe was given for considering citizenship applications does not provide a leeway for the authorities to cause excessive delay.¹⁷² The petitioner in this case managed to secure an order directing the bureau to consider their application in line with article 47 of the Constitution. However, not all applicants are able to turn to the court to secure administrative justice against the injustice enabled by the gap in the law providing discretion without guidance.

Additionally instances of withdrawal of IDs have been occasioned as a result of the vetting process specifically for the Somali community prior to the introduction of the section. A screening exercise

¹⁶⁷ Manby B, *Statelessness and citizenship in the East African Community*, 40.

¹⁶⁸ Manby B, *Statelessness and citizenship in the East African Community*, 41.

¹⁶⁹ Namati, *The vices of discrimination: The impact of vetting and delays in the issuance of ID cards in Kenya*, 2018, 6.

¹⁷⁰ KNCHR, *An identity crisis?*, 6.

¹⁷¹ *Kulraj Singh Bhangra v Director General, Kenya Citizens and Foreign Nationals Management Service* [2014] eKLR

¹⁷² *Kulraj Singh Bhangra v Director General, Kenya Citizens and Foreign Nationals Management Service* [2014] eKLR

was undertaken and the Galjeels, a minority clan of the Somali, had their documents forcibly taken despite proving their citizenship.¹⁷³ This has led the group to experience statelessness while some members have turned to corruption to acquire the documents through changing their identity as the consequences of the exercise have not been resolved.¹⁷⁴

The lack of transparency and corrupt instances that arise from the vetting process characterises it as a subjective assessment of one's citizenship¹⁷⁵. Corruption in public administration in Kenya is endemic¹⁷⁶ and this can be attributed to the prevalence of arbitrary power conferred by statutes without effective mechanisms to guide their exercise.¹⁷⁷ This impacts the citizenship application process as corruption is evidenced by the public's knowledge that bribe amounts are fixed at Ksh 40,000 for an identity card, Ksh 15,000 for a passport and Ksh 1,500 for a birth certificate.¹⁷⁸

3.4 CONCLUSION

A perversion of administrative justice occurs when arbitrary administrative actions lead to the deprivation of citizenship. This is evidenced by administrative burdens and barriers that are in place effectively hindering one's access to citizenship through the national identity card. The use of discretion in an arbitrary manner undermines administrative justice leading to ripple effects. In questions of citizenship the effects materialise in the form of excessive and unreasonable delays, occurrence of statelessness and corrupt identities. This has also led to the loss of trust in the state institution by the citizenry and exclusion of some communities in Kenya. Nationality documents should be provided to those who meet the criteria set down by the law. This however does not reflect the situation in Kenya as persons are questioned based on their ethnicity rather than on an individual basis. This is exacerbated by the lack of guidance in law leaving room for bureaucrats to act arbitrarily. Under administrative justice, everyone bears the right to be protected against arbitrariness from administrative actions. The same should reflect in Kenya's citizenship laws.

¹⁷³ Truth Justice and Reconciliation Commission (TJRC), Final report volume II C, 2013, 230.

¹⁷⁴ KHRC, *Foreigners at home*, 39.

¹⁷⁵ KNCHR, *An identity crisis?*, 22.

¹⁷⁶ Transparency International Kenya, 'Kenya stagnates in corruption perception index', press release 23 January 2020 <https://www.transparency.org/en/cpi/2022/index/ken>.

¹⁷⁷ Akech M, 'Abuse of power and corruption in Kenya', 53.

¹⁷⁸ CAJ, *Stateless in Kenya*, iii.

CHAPTER 4

4.0 INTRODUCTION

From a subjective assessment to an objective assessment as envisioned by the Constitution and the tenets of administrative justice. As citizenship by birth is based on one's descent, if one provides proof of citizenship, then ideally no identification committee should be constituted against the person. However, as evidenced, intervention from the courts or national assembly departmental committees is not enough to tackle the issue at hand. Additionally, persons who have suffered from this process before should have the right to redress if they had the theoretical right to nationality but were unable to access identity documents through the operation of the process.

The administrative independence that the NRB possesses should be controlled as its effects translate directly to the citizenship status which is the basis of rights. The wide discretionary powers allow room for abuse by administrative officers and matters such as circumstances for exercise of power, due process and procedural fairness should be implemented as checks and balances. This would reduce complaints arising from the exercise of these powers and curb effects such as statelessness.

Previous exercise of the vetting process had no legal basis and was often described as discriminatory and arbitrary, effectively excluding some ethnicities from citizenship. With the introduction of the vetting process in the legal arena through section 8(1)A, no restrictions or guidance was provided allowing the NRB to exercise the power without any explicit limits in place. The general inference is that wide administrative discretion is bound by rule of law and public interest. However, the construction of the section which confers wide powers allows for abuse of the discretion which adversely affects the rights and interests of people despite implied principles. The need for limiting and checking the granted powers then arises rather than relying on the assumption of the limit of public interest. The effectiveness of the legal framework on citizenship is compromised by the arbitrariness that the vetting process introduces. This chapter therefore calls for legislative amendment on vetting standards as opposed to administrative rule making which is still discretionary under section 16 of the Act.¹⁷⁹

¹⁷⁹ Section 16, *Registration of Persons Act*, (Act No. 11 of 1979).

4.1 THE NEED FOR REFORM

Those in support for controlling discretion rely on judicial review mechanisms, however, this is a solution that applies retroactively and is limited as the courts can handle a limited number of cases.¹⁸⁰ The court additionally restrains itself from interfering with an express statute mandate to specific authorities unless the tenets of fair administrative action are disregarded.¹⁸¹ The court stated that the refusal by administrative officers to issue natural born citizens with identity documents does not amount to taking away their citizenship and the privileges and benefits that comes with it.¹⁸² However, in practice if the authority treats an individual as a non-national despite the individual meeting the criteria for automatic acquisition of citizenship, it is the authorities' position rather than the law that concludes that the individual is not considered as a national by the State.¹⁸³ Further the perceived authority of the constitution can be undermined if citizenship by birth is granted on a basis of discretion to groups rather than as a legal right.¹⁸⁴ The subjective nature of the recognition of one's citizenship highlights the law's secondary role in the process and the prevailing rule of men rather than rule of law.

An impact report by Namati states that approximately 5 million Kenyan citizens at the time undergo the vetting process and face restrictions such as applying on certain days, the requirement of producing excessive supporting documents and additional scrutiny by a panel of security agents.¹⁸⁵ Under the ambit of this process, the majority of the people encounter denationalisation by informal deprivations of citizenship documents.¹⁸⁶ This is through the denial of the ID card, destroying previously held documents and indefinite delays in processing applications.¹⁸⁷

¹⁸⁰ Koch H, 'Administrative Law - Confining and controlling administrative discretion within the seventh circuit' 54 *Chicago-Kent Law Review* 2,1977, 275.

¹⁸¹ *Mohamed Mire v Attorney General & Another* (2016) eKLR.

¹⁸² *Hersi Hassan Gutale & Another v The Attorney General & Another* (2013) eKLR.

¹⁸³ UNHCR, *Handbook on the protection of stateless persons under the 1954 Convention relating to the status of stateless persons*, 2014, 37.

¹⁸⁴ Abraham D, Balaton-Chrimes S, Mahmoud M and Manby B, 'Citizenship is a right, not a political tool,' *The Elephant*, October 9 2023 <https://www.theelephant.info/features/2023/10/09/citizenship-is-a-right-not-a-political-tool/>

¹⁸⁵ <https://namati.org/our-impact/impact-report-2021/citizenship/> on 20 December 2023.

¹⁸⁶ Institute on Statelessness and Inclusion, *The world's stateless: Deprivation of nationality*, 2020, 194.

¹⁸⁷ Institute on Statelessness and Inclusion, *The world's stateless: Deprivation of nationality*, 2020, 194.

Concerns are raised with regards to the process on the varied standards applied through the country as there is no set criteria on proof of citizenship leading to vagueness that is prone to abuse.¹⁸⁸ Additionally, vague conferral of power is characterised by the failure to provide guidance to the officer which vests arbitrary power.¹⁸⁹ In Kenya efforts to remedy this vagueness are evident through legislative efforts to delegate the rule making exercise to the minister of interior for the better carrying out of the provisions of the Registration of Persons Act.¹⁹⁰

The subjective reality of the process is furthered by the fact that the executive decisions may be out of reach of due process protections due to gaps in law.¹⁹¹ The statute conferring the discretionary power ordinarily states with precision the boundaries of the power.¹⁹² Where enunciation of the boundaries is lacking, decision makers are presumed to be bound simply by public or national interest rather than legislative prescriptions.¹⁹³ This justification of public interest is also employed in this paper's context as the government in its submissions on a petition regarding the identity document requested for the dismissal of the petition on the account of acting in public interest.¹⁹⁴

Calls for controlling discretion often favour the use of administrative rule making where the administration adopts plans, policies, guidelines and rules as a method of confinement.¹⁹⁵ This has proven ineffective in Kenya as is evidenced by legislative efforts to delegate rulemaking to the Minister of Interior in the Act such as guidelines for the vetting of applicants and the setting of timelines.¹⁹⁶ The hope that the empowering of the minister to make guidelines would lessen the discretion of the vetting process withered as it was not effected.¹⁹⁷ Those affected by the subjective

¹⁸⁸ Manby B, Statelessness and citizenship in the EAC, 33.

¹⁸⁹ Craig P, 'Formal and substantive conceptions of the rule of law: An analytical framework' in Craig P (eds), *The rule of law and the separation of powers*, Routledge, London, 2005, 467.

¹⁹⁰ Section 16(f), *Registration of Persons Act* (Act No. 11 of 1979).

¹⁹¹ Manby, *Citizenship erasure*, 200.

¹⁹² Reilly A, 'Unveiling the public interest: The parameters of executive discretion in Australian migration legislation', University of Adelaide, Research Paper No. 64, 2018, 4
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3196546

¹⁹³ Reilly, 'Unveiling the public interest', 4.

¹⁹⁴ *Mohamed Mire v Attorney General & Another (2016) eKLR*.

¹⁹⁵ Davis K, *Discretionary Justice*, 35.

¹⁹⁶ Section 16(ba), *Registration of Persons Act* (Act No. 11 of 1979).

¹⁹⁷ CIS and RIA, *Digital identity in Kenya*, 25.

reality have changed over time ranging from East African Asians, then ‘border people’ and ‘terrorists’ which understates the arbitrary nature of the process.¹⁹⁸ The creation of subjective barriers to the legal identity should be remedied for the country to be able to introduce any new identity documents.¹⁹⁹

4.2 ADMINISTRATIVE JUSTICE

Through the conferral of broad discretionary powers without effective regulation, law often aids the abuse of power.²⁰⁰ The law in light of this should therefore regulate the exercise of administrative powers and provide for the control of its use which has the net effect of reducing arbitrariness.²⁰¹ In discussing how discretion should be exercised, the problem arises in how to restrain abuse of discretion without destroying its non-rule like nature, hence the need for the binding of discretion.²⁰²

The question is how is justice achieved through administrative actions, inactions or decision making by public bodies and in this specific context, the NRB. The expectation of the observance of administrative justice arises from the impact of decision making on the rights and interests of an individual.²⁰³ Administrative justice is ensured when the exercise of discretionary powers by administrative officers is fettered.²⁰⁴ Unfettered discretion is argued to be conferred unrestricted permissive language, however, where rule of law is upheld, unfettered discretion is considered as a contradiction as discretion should be measured by its breadth.²⁰⁵

¹⁹⁸ Ng’weno and Obura, ‘Irony of citizenship’, 141.

¹⁹⁹ CIS and RIA, *Digital identity in Kenya*, 25.

²⁰⁰ M Akech, ‘Abuse of power and corruption in Kenya’, 53.

²⁰¹ Council of Europe, *The administration and you; Principles of administrative law concerning the relations between administrative authorities and private persons*, 1996, 7.

²⁰² Kanstroom, *The better part of valor*, 4.

²⁰³ Creyke and McMillan, ‘Administrative Justice – The Concept Emerges’, 3.

²⁰⁴ Mensah R, ‘Should discretionary power be controlled politically through democratic process or it should be controlled through the courts?’ *13 Mediterranean Journal of Social Sciences* 6, 2022, 36.

²⁰⁵ Grey J, *Discretion in administrative law*, 120.

Despite the requirements of justice and constitutional prescriptions, bureaucrats interpret and implement laws, therefore if the laws confer broad discretion without effective regulation translates into bureaucrats acting as they wish.²⁰⁶ Rule of law however safeguards individuals from arbitrary exercise of power by providing equal access to justice and requiring law and policy to be shaped with the participation of all.²⁰⁷ Citizenship by birth is automatically on birth acquired in Kenya²⁰⁸ and when under consideration, the authority is empowered to determine the person's status by clarifying rather than conferring or withdrawing it.²⁰⁹ Vetting should only be directed at clarifying whether the person is a citizen by birth, not at the individual's membership of an ethnic group.²¹⁰

Delivery of administrative justice relies on the four themes of the theory of administrative justice which include the proper exercise of power, due process, access to administrative processes and equal treatment.²¹¹ Proper exercise of power provides for actions to be lawful and the public and government will to be balanced with international norms.²¹² The theme of due process requires the establishment of procedures to ensure accuracy, fairness and proportionality.²¹³ Equal treatment provides for the limiting of discretion and requires consistency to enable certainty while also recognising individual special circumstances and access to administrative processes provides for readily available law and policy.²¹⁴ The use of the four themes as a guide for review of the section would lead to the achievement of administrative justice through the reduction of arbitrariness.

²⁰⁶ Akech, 'Abuse of power and corruption in Kenya', 54.

²⁰⁷ International Development Law Organisation and UN High Commission for Refugees, *Addressing statelessness through the rule of law*, 2019, 7.

²⁰⁸ Article 14, *Constitution of Kenya* (2010).

²⁰⁹ UNHCR, *Handbook on the protection of stateless persons under the 1954 Convention relating to the status of stateless persons*, 37.

²¹⁰ Abraham D, Balaton-Chrimes S, Mahmoud M and Manby B, 'Citizenship is a right, not a political tool,' *The Elephant*, October 9 2023 <https://www.theelephant.info/features/2023/10/09/citizenship-is-a-right-not-a-political-tool/>

²¹¹ Elton A, 'Towards a normative standard of administrative justice: Themes and principled tensions' 95 *Australian Law Journal* 12, 2021, 997.

²¹² Elton A, 'Towards a normative standard of administrative justice', 999.

²¹³ Elton A, 'Administrative justice theory and benchmarks in mandatory immigration detention: Principled tensions or power imbalance' 31 *Griffith Law Review* 1, 2022, 78.

²¹⁴ Elton A, 'Administrative justice theory and benchmarks in mandatory immigration detention', 63.

4.3 REDUCING ARBITRARINESS

The interpretation of scholars on relying on fundamental principles despite the open wording of the statute is divided in two; the first opines that the underlying principles are constitutive of the legal framework of discretion and their unwritten nature does not affect their identification.²¹⁵ This is evident as in the case of *Onyango v Attorney General*, the court held that a presumption arises that before a conclusion is arrived at, rules of natural justice are applied in the application of any power under statute.²¹⁶ The other view was that the underlying principles should reflect in the delegating statute as it acts as a direct control and a formal limit.²¹⁷ The latter allows for judicial review of executive action as it confines power by outlining what would be *ultra vires*.²¹⁸ The rights and interests of individuals in line with the second view will therefore be safeguarded even in the exercise of administrative discretionary powers.

States maintain the sovereign power to regulate nationality, however, international human rights standards protect individuals against arbitrary actions by prescribing the limiting of the discretion.²¹⁹ Limiting discretion includes eliminating unnecessary discretion and the better control of the necessary discretion by introducing boundaries.²²⁰ The existence of standards and procedures that ensure compliance are important in the reduction of arbitrariness.²²¹ Statutes conferring discretionary powers may confine discretion by prescribing standards as boundaries while others may leave it open.²²² Davis, however, suggests that administrative rule making is more promising in confining wide discretionary powers as opposed to legislative action.²²³ Kenya's circumstances lead to the inference of the opposite as the Minister has not prescribed established guidelines for the vetting process to promote certainty.

²¹⁵ Dyzenhaus D, 'The Deep Structure of *Roncarelli v. Duplessis*' 53 *University of New Brunswick Law Journal* 1, 2004, 114.

²¹⁶ *David Onyango Oloo v Attorney General* (1987) eKLR.

²¹⁷ Cartier G, 'Administrative discretion: Between exercising power and conducting dialogue' in Flood C and Sossin N (2nd eds), *Administrative Law in context*, Edmond Montgomery Publications Limited, Canada, 2018, 390.

²¹⁸ Cartier, 'Administrative discretion', 390.

²¹⁹ Kenya Human Rights Commission, *Foreigners at Home: The dilemma of citizenship in Northern Kenya*, 2010, 42.

²²⁰ Davis K, *Discretionary justice*, 61.

²²¹ Council of Europe, *Administrative discretion and problems of accountability: Proceedings*, 1998, 10.

²²² Davis K, *Discretionary justice*, 61.

²²³ Davis K, *Discretionary justice*, 62.

Limiting the discretion can be based on the competence of the authority and the purpose of the powers conferred.²²⁴ In identifying an objective criterion that will be used to invoke the vetting process, it is important to note the objective of the legal framework on the registration of persons. The Constitution of Kenya Review Commission commented on the unfair application of existing law at the time towards border communities as they faced arbitrary screening measures and recommended for the 2010 Constitution to state the right of all citizens to have an identity card and a passport and also the equality of all citizens.²²⁵ After the promulgation of the constitution, the practice of vetting still affected border communities as they were subject to arbitrary administrative actions.²²⁶ The power to invoke the vetting process through identification committees was proposed as a result of heightened security measures to counter terror attacks that plagued the country at the time under section 8(1)A of the Act by countering fraudulent acquisition of citizenship.²²⁷

While proposing a criterion for limiting the discretionary power through a legislative amendment, the paper takes into account the principle of separation of powers and the expertise of the administrative authority in this case the NRB. The matter at hand relates to clarifying and recognising the status of a citizen by birth which may need the application of identification committees to counter fraudulent applications. The legislature needs to institute an accountability mechanism on the conferring of discretionary powers to avoid any abuse.²²⁸ This is by taking into account the foundations that eliminate arbitrary decision making. Incorporating the requirement of basing the exercise of power on reasons that are applied consistently, fairly and impartially ensure the elimination of such decision making.²²⁹

²²⁴ Silveira J and Ettner D, 'Legislative drafting tools preventing arbitrariness in discretionary powers' 7 *The Theory and Practice of Legislation* 2, 2019, 161.

²²⁵ Constitution of Kenya Review Commission, *Final draft*, 2005, 83.

²²⁶ KNCHR, *Submissions to the Committee on the Elimination of Racial Discrimination in response to the periodic report of Kenya*, 2011, 6.

²²⁷ Nalule, *Report on citizenship law in Kenya*, 22; United Nations High Commission for Refugees, *Statelessness and citizenship in the East African community*, 2018, 12.

²²⁸ Independent Commission Against Corruption Mauritius, *Guidelines on the exercise of discretionary power*, 2020, 6.

²²⁹ Galligan, *Discretionary powers*, 6.

The effect of the vetting process includes deprivation of nationality in international terms through delay and denial of documents which emphasises the need for procedural safeguards.²³⁰ These safeguards include guarantees of due process and even the opportunity to apply for a review of the decision to deny or invalidate citizenship.²³¹ The Registration of Persons Act allows for the constitution of vetting committees by the Registrar to authenticate information whose composition and nature is vague.²³² This translates to a lack of accountability and transparency which causes arbitrariness.²³³ The composition of the vetting committee therefore should be permanently established to ensure consistency and enable accountability.

In line with limiting the exercise of discretion based on the purpose of the power, the purpose should be emphasised acting as a circumstance for use.²³⁴ The exercise of vetting whose main purpose is to counteract fraudulent acquisition in line with the above can be invoked on evidence of irregularities in the proof of citizenship documents provided by individuals. Additionally in Kenya, there are no set criteria on what constitutes acceptable proof of citizenship allowing room for vagueness.²³⁵ The Act's silence on documents required for proof of citizenship should be clarified by the legislature to ensure uniform application to all applicants. This acts as an objective assessment tool that ensures that individuals are questioned on their citizenship on a personal basis rather than on their ethnic or religious ties.

4.4 CONCLUSION

The curbing of the abuse of discretionary power is effected through the elimination of arbitrariness. One of the ways that this is exercised is through the implementation of standards and procedures to guide the exercise of power by the legislature of the administration through rule making. The power to institute the vetting process was delegated in the statute in an open manner without

²³⁰ Open Society Justice Initiative, *Citizenship and equality in practice: Guaranteeing non-discriminatory access to nationality, protecting the right to be free from arbitrary deprivation of nationality, and combating statelessness*, 2005, 8.

²³¹ Open Society Justice Initiative, *Citizenship and equality in practice*, 8.

²³² CAJ, *Statelessness in Kenya*, 103.

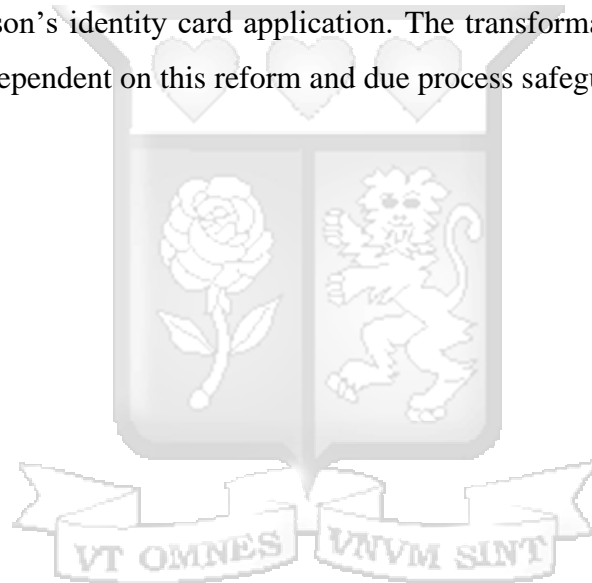
²³³ CAJ, *Statelessness in Kenya*, 103.

²³⁴ Silveira J and Ettner D, 'Legislative drafting tools preventing arbitrariness in discretionary powers', 161.

²³⁵ Manby, *Statelessness and citizenship in the East African Community*, 33.

standards as is evidenced by the wording of Section 8(1)A of the Act. Additionally various efforts towards resolving this issue regarding the vetting process have borne no fruit as efforts to require the implementation of guidelines, timelines and general rules from the administrative arena have been ignored. Most scholars discussing the matter often call for the complete removal of the process on account of its discriminatory outcomes amongst others. However, it is important to note that the process has the legal objective of rooting out fraudulent applications which means that complete removal would leave this objective unattended.

Reform of the delegating statute presents a plausible situation to the problem of arbitrariness. This can be through ensuring proper exercise of power by requiring reasons for the application of the vetting process on a person's identity card application. The transformation of the process to an objective assessment is dependent on this reform and due process safeguards.



CHAPTER FIVE

5.1 INTRODUCTION

The chapter reviews the findings of the study as was discussed in previous chapters. The chapter will also discuss the recommendations reached as a result of the discussion of the research objectives in previous chapters in order to ensure that the exercise of discretionary powers is fair and rational. The chapter will finally conclude the research paper.

5.2 SUMMARY OF FINDINGS

Chapter 1 of the study discussed the problem that the discretionary power conferred by Section 8A of the Registration of Persons Act presented as it led to decision making that was arbitrary and the constitution of identification committees that were uncertain and not established. The chapter presented research objectives that will guide the study while also discussing the literature surrounding the objectives. The lens of the study was also concluded in the chapter as the administrative justice theory that seeks to ensure individuals affected by administrative decisions are protected by safeguards.

In examining the vetting process, the paper analysed section 8(1)A of the Act to determine the breadth of the discretionary powers conferred by the section. The wording of the Act was open and unlimited as the Director is allowed to establish the committees to authenticate the information of any applicant. Additionally, the chapter in its examination concluded that the discretionary powers were wide considering no procedural safeguards were set in place as a means of control. The NRB was therefore empowered to institute administrative action that were unlimited as a result of the lack of limitations on the power.

The discussion on the use of the conferred discretionary power and its effect on individuals relied on the model use of discretion which was rational and fair use to establish effects of abuse of the power. Rational and fair use of the discretionary power is in opposition to arbitrary use of power that leads to arbitrary decisions affecting individuals. The chapter in light of the model use of discretion analysed the operation of the vetting process provided for by section 8A of the Act. In discussing the operations, the findings of the chapter were the inconsistent use of the process, unestablished and differing compositions of the vetting committees as well as many stages that

increase the susceptibility of the process to arbitrary actions by administrative officers. The process was also instituted against persons who have authentic documents on the basis of their ethnic ties rather than determining the individual's personal claims to citizenship. The operation of the vetting process is characterised by arbitrary use of power due to the use of ethnic ties to institute the process. The effects of the vetting process as a result are *de facto* statelessness, indefinite delays in the application process as well as the facilitation of corruption with set prices for one to acquire documents.

The research objective of curbing the abuse of discretionary power through an amendment of the section is discussed in chapter 4 which highlighted the subjective reality of the vetting process and discussed the methods of reform of the said process. In the discussion, the chapter assessed whether the options of judicial review and administrative law making were successful in the reformation of the process. The findings are that judicial review is limited as it is not accessible to all the aggrieved parties and that deference by the courts also extends to the merit of the decisions of the vetting process. The court is therefore limited to matters of time efficiency and not on the persons subject to the process. The chapter further discussed the need for reform in line with administrative justice themes of due process, equal treatment and proper exercise of power. In reforming, the limits placed on discretion take into account that the administrative officers are better suited to their tasks rather than the legislature.

5.3 RECOMMENDATIONS

This study proposes the following recommendations.

The legislature should amend the section to include circumstances for use of the discretionary power as a limit to the wide discretionary powers conferred. While the underlying presumption of natural justice is available, the study found it insufficient as abuse of the power occurred despite the existing presumption. This therefore necessitates the need for legislative clarification as a binding control on the use of the discretion conferred. The circumstance for use should be based on the objective of the conferred power, which in this case is to counter fraudulent acquisition of citizenship. Applications relying on proof of citizenship documents that are considered fraudulent are the only applications that should be subjected to the vetting process. This addresses the problem

of arbitrary use of the vetting process especially against the border communities due to their ethnic ties.

The amendments should also include procedural safeguards with regards to avenues of review of the decision by vetting committees. This is relevant as the matter in question is one's citizenship whose denial would render the person as stateless. As the principle of separation of powers is in effect, the legislature should work with the administration to enable efficient operations as the administration is better equipped with regards to the matter. Procedural safeguards that can be introduced include timely hearing of the case to prevent indefinite delays and due process guarantees such as an opportunity to apply for review of the decision by the Director to withhold or withdraw one's citizenship. This solves the problem of indefinite delays on the applications for citizenship and guarantees the entitlement to citizenship in the Constitution.

5.4 CONCLUSION

Section 8(1) A of the Registration of Persons Act confers discretionary powers to institute vetting process against applicants. The examination of this section shows that the discretionary powers conferred are wide which has led to the abuse of the powers by the administrative officers. This is problematic since those experiencing the abuse are affected and gain statelessness as a result through indefinite delays in their applications while some resort to corruption to acquire the document. Through the above effects, reforming the section is necessary in ensuring that abuse of the vetting process is eliminated and the process is undertaken in a manner that ensures administrative justice.

Reform can be undertaken through an amendment clarifying the discretionary power and setting standards for the exercise. This is in contrast with relying on the Minister to make rules to guide the discretionary powers as that has not been effective in Kenya's situation. The amendments should encompass procedural safeguards such as due process guarantees as the matter in question relates to citizenship which denotes the relationship between the person and the State. Additionally, circumstances for use of the power should be clearly defined to remedy the aspect of the vetting process being instituted with regards to ethnic ties. The reforms proposed act as a limit to the wide discretion conferred by the Act currently and is in line with the themes of administrative justice.

In sum the study has found that the discretionary powers conferred to the Director of Immigration and National Registration to invoke vetting committees in the authentication of documents is wide and as a result has led to the abuse of the process. The study has highlighted the need to limit this discretion as its effect on individuals limits their rights to administrative justice and subjects them to statelessness. The amendment of the section will ensure that citizens enjoy administrative justice in acquiring IDs as the discretion will be limited.



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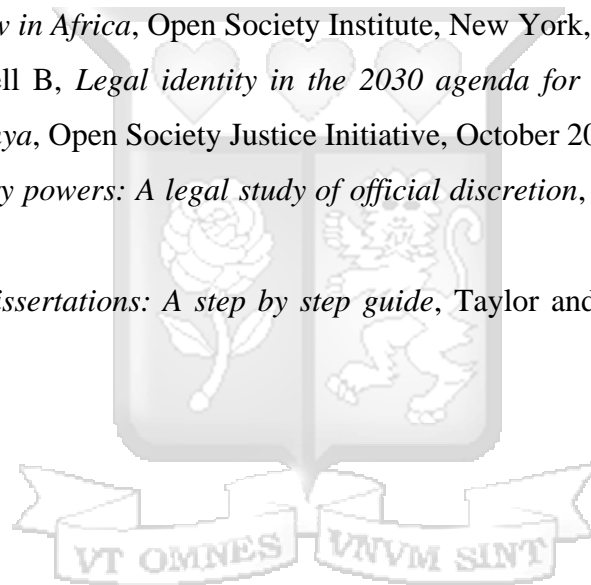
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