

**THE BLAME GAME: AN ANALYSIS OF THE APPLICATION OF THE PRINCIPLE
OF MINISTERIAL RESPONSIBILITY IN KENYA**

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

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November 2019.

Word Count: 11215

Declaration

I, **ALLAN DYLAN AYUB OLIMBA**, 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.

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

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ABSTRACT

Ministerial responsibility is a constitutional principle applied primarily in the Westminster parliamentary system. The principle empowers Parliament to hold ministers accountable for the conduct of their ministries and government as a whole. It revolves around the concept of ensuring that the Executive, ministers in particular, bear responsibility for the decisions they make and for the failures of their ministries. However, modern conceptions of the principle attach a significant amount of responsibility to the subordinates of ministers for the actions they take in the fulfilment of their mandate.

This study sought to find answers as to how the principle of ministerial responsibility is applied in a democratic society, what hinders the Kenyan National Assembly from holding Cabinet Secretaries to account for substandard performance of their duties and how the principle of ministerial responsibility would improve governance in Kenya. Desktop research was the primary means by which answers to the above questions was sought.

By researching on how ministerial responsibility has evolved and is applied in modern day Australia, it becomes evident that it is a subtle but crucial aspect of the accountability mechanism applied to their ministers. Regardless of the fact that it originated from British convention and there is not any legislation that establishes it in the Australian legal system, it is a key feature of the relationship between the Cabinet and Parliament.

An analysis of the legal regime governing the relationship between the National Assembly and the Cabinet in Kenya exposes the absence of an accountability relationship similar to that witnessed in Australia. Cabinet Secretaries in Kenya are only accountable to the National Assembly for a limited number of matters. Crucially, the National Assembly cannot hold Cabinet Secretaries accountable for substandard performance of their duties. Only the President has that power which raises questions on the potential existence of a conflict of interests in the relationship between the President and the Cabinet Secretaries.

Curiously enough, ministerial responsibility applies to members of the Public Service who rank below Cabinet Secretaries in Kenya. This creates a hierarchical absurdity that sees the subordinates

of the chief executive officer of a ministry being held to a higher standard of performance than the chief executive officers themselves.

The research findings indicate that this glaring deficiency of authority borne by the National Assembly is not due to an oversight by the drafters of the Constitution. The law appears to have intentionally been molded to bar the Legislature and its committees from assessing the performance of Cabinet Secretaries.

This study concludes by recommending an amendment to the Constitution that would see the National Assembly obtain the legal standing to assess the conduct of Cabinet Secretaries in their official capacity in a bid to promote a higher degree of accountability in Government.

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CHAPTER 1: INTRODUCTION

1.1 Background of the problem

Under the Old Constitution, the National Assembly had the authority to hold the Cabinet accountable, collectively, for all the actions carried out by or under the authority of the President, the Vice-President or any other Minister in the execution of his mandate.¹ Despite this, it was only the President who had the authority to dismiss a minister from their office.² Individually, the ministers were only held to account by the President. Collectively, as the Cabinet, they were held accountable to the National Assembly.

This state of affairs has not been altered significantly in the current Constitution of Kenya. Cabinet Secretaries are responsible to only the President of the Republic of Kenya for the execution, or lack thereof, of their duties.³ The current Constitution does, however, empower the National Assembly with regard to the issue of removing a Cabinet Secretary from office. A member of the National Assembly, supported by at least one-quarter of all the members of the Assembly may propose a motion requiring the President to dismiss a Cabinet Secretary⁴ on certain grounds.⁵

These grounds are:

1. Gross violation of a provision of the Constitution or any other law.⁶
2. Where there are serious reasons for believing that the Cabinet Secretary has committed a crime under national or international law;⁷ or
3. Gross misconduct.⁸

¹ Section 17(3), *Constitution of Kenya* (Repealed).

² Section 16(3), *Constitution of Kenya* (Repealed).

³ Article 153(2), *Constitution of Kenya* (2010).

⁴ Kenya Law Review, *Electoral Laws Grey Book*, 2017, P. 72.

⁵ Article 152(6), *Constitution of Kenya* (2010).

⁶ Article 152(6)(a), *Constitution of Kenya* (2010).

⁷ Article 152(6)(b), *Constitution of Kenya* (2010).

⁸ Article 152(6)(c), *Constitution of Kenya* (2010).

A gross violation of a provision of the Constitution or any other law are any actions taken by the individual in question that are in direct opposition with the Constitution or any other law.⁹ However, gross misconduct is wrongful, improper or unlawful conduct motivated by premeditated or an intentional purpose or by obstinate indifference to the consequences of one's act.¹⁰ The conduct under scrutiny need not be criminal in order to be considered misconduct.

After an investigation by a select constitutional committee¹¹ and subsequent substantiation of any allegation against a Cabinet Secretary, the Committee takes a vote to decide whether or not to pass the resolution requiring the Cabinet Secretary to be dismissed from office.¹² If the resolution is supported by a majority of the members of the National Assembly, the speaker shall proceed to deliver the document to the President who will then dismiss the Cabinet Secretary.¹³

The National Assembly, to date, remains powerless in the removal of a Cabinet Secretary on the grounds of failure to effectively carry out their mandate as the Constitution does not accord them the authority to do so. As such, if the President does not hold his appointees accountable for shortcomings in the execution of their duty then they shall continue to serve ineffectively until the end of their term legally unchallenged.

The botched rhino transfer operation carried out by the Ministry of Tourism and Wildlife, in coordination with the Kenya Wildlife Service, is an illustration of the lack of accountability in ministry affairs in Kenya. On 20 July 2018, the Ministry of Tourism and Wildlife reported that only two out of eleven black rhinos that were translocated to Tsavo National Park are alive. The report stated that nine black rhinos died as a result of drinking saline water in the course of their translocation.¹⁴ On 25 July 2018, one of the two remaining rhinos died while in the Tsavo National Park with sole surviving black rhino from the botched operation being left in critical condition

⁹ <https://www.macmillandictionary.com/dictionary/british/violation> accessed on 12 April 2020.

¹⁰ Fraedrich F, *Business Ethics, eleventh edition: Ethical Decision Making and Case, Sexual Harassment in Workplace*, February 2017, . P.80.

¹¹ Article 152(7), *Constitution of Kenya* (2010).

¹² Article 152(9), *Constitution of Kenya* (2010).

¹³ Article 152(10), *Constitution of Kenya* (2010).

¹⁴ Kahongeh J, *How routine rhino trip left nine dead, and world stunned*, The East African Newspaper, 23 July 2018.

after being attacked by lions.¹⁵ According to the statement given by the ex-KWS board chairman, Richard Leakey, the Cabinet Secretary for Tourism and Wildlife, Najib Balala, forced the translocation of the black rhinos despite the opposition from the Kenya Wildlife Service Board. The Board opposed the translocation due to the salinity levels of the water from the boreholes in the Tsavo Sanctuary;¹⁶ the exact thing that led to the demise of nine of the eleven black rhinos being translocated.

What is interesting to note from this scenario is that despite being the Cabinet Secretary for Tourism and Wildlife, forcing the translocation of the black rhinos and supervising the entire operation, Najib Balala refused to take responsibility for the failure of the operation¹⁷ and even went as far as to say that he was only answerable to the President and that all those calling for his resignation should “go to hell.”¹⁸

1.2 Statement of the research problem

Cabinet Secretaries are not held responsible to a sufficient degree in the current system of Government for the shortcomings in their ministries. This is a major contributor to the persisting issue of poor governance that plagues the ministries in Kenya. The position of Cabinet Secretary in Kenya is treated as a stepping stone by politicians, much to the detriment of the general public as they are supposed to benefit from the services of the ministries. Often, politicians are not committed to their duty as Cabinet Secretaries. The result of this mindset is the catastrophic failures in ministry-sanctioned operations such as the botched rhino translocation operation conducted by the Ministry of Tourism and Wildlife. It further materializes in the losses of appalling sums of money in their operations as seen in the Ministry of Youth Affairs with the infamous National Youth Service Scandal.

¹⁵ Kahongeh J, *Tenth rhino dead in Kenya after disastrous transfer*, The East African Newspaper, 25 July 2018.

¹⁶ Mwere D, *Ex-KWS board members blame Balala for rhino deaths*, The Daily Nation Newspaper, 24 August 2018.

¹⁷ Mwere D, *Ex-KWS board members blame Balala for rhino deaths*, The Daily Nation Newspaper, 24 August 2018.

¹⁸ Mureithi K, *Tourism CS Najib Balala tells those blaming him for rhinos' deaths to 'go to hell,'* The Daily Nation Newspaper, 30 July 2018.

This status quo, whereby Cabinet Secretaries are only capable of being held to account by the President, is evidently problematic. If the President, for reasons he is not obligated to disclose, opts not to dismiss a Cabinet Secretary from their office for failing in the effective execution of their duties then that decision is final. There exists no overriding power held by any other person or organ of Government to remove a Cabinet Secretary from office for poor performance in their duties. So long as the Cabinet Secretary does not break the law, everyone else other than the President remains powerless in this regard.

1.3 Research questions

1. How is the principle of ministerial responsibility applied in a democratic society?
2. What is currently barring Cabinet Secretaries from being held to account for substandard performance of their duties?
3. How would the principle of ministerial responsibility improve governance in Kenya?

1.4 Hypotheses

1. The establishment of a public accountability mechanism to hold members of the Executive responsible for the actions they undertake in the execution of their mandate will improve the level of their performance.
2. A lacuna in the current Kenyan legal regime is the cause of the absence of accountability mechanisms around the actions taken by Cabinet Secretaries in their official capacity.

1.5 Literature Review

David Smith defines the principle of ministerial responsibility as a fundamental constitutional principle in the British Westminster parliamentary system according to which ministers are responsible to the parliament for the conduct of their ministry and government as a whole.¹⁹ In his publications on the topic of ministerial responsibility, he brings out the idea that it revolves around the idea of ensuring that the Executive, in particular ministers, bear the ultimate responsibility for the courses of action that they opt to take and for the failures of their ministries.

Roger Beale contributes to the foundation laid by David Smith by elaborating on the two levels of ministerial responsibility. The levels being individual ministerial responsibility and collective ministerial responsibility.²⁰ He goes on to give a brief history of the principle, explaining the dominant public viewpoint in Australia with regard to ministerial responsibility from generation to generation. These texts are necessary in this study in order to understand what the principle of ministerial responsibility entails and how it has evolved over the years in order to keep up with the evolution of government.

Samuel Finer raises the point that if ministerial responsibility means more than merely answerability to Parliament then it also carries an implication of liability. In this context, a liability to lose office if the cabinet secretary loses the confidence of Parliament.²² He brings out the need to sanction ministers for underperforming in the fulfilment of their duties. He was of the radical view that ministers ought to resign from their position should their department under-perform regardless of whether or not the minister knew the cause of the underperformance or if they were directly involved in actions that caused the underperformance.

Views on the principle of ministerial responsibility vary significantly but most of them can be placed accurately between two popular views. The first being that of Albert Venn Dicey who is of

¹⁹ Smith D, *Clarifying The Doctrine of Ministerial Responsibility as it Applies To The Government and Parliament of Canada*, Volume 1, p. 104.

²⁰ Beale R, *Ministerial Responsibility for Administrative Actions: Some Observations of A Public Service Practitioner*, ANU Press, Volume 9, Number 4, 2002, p. 291.

²¹ Munro A, *Ministerial Responsibility*, Encyclopedia Britannica, June 2013.

< <https://www.britannica.com/topic/ministerial-responsibility> >

²² Finer S, *The Individual Responsibility of Ministers*, December 1956.

the opinion that ministers ought only to take responsibility for actions they took part in.²³ The other being the opinion of John Howard who opts more for systematic accountability of ministers. That is, accountability for the overall administration of their ministries through policies and management along with their direct responsibility for their own actions.²⁴ John Howard's opinion on the principle reflects to a large degree what the modern formulation of ministerial responsibility is in Australia.

The test of ministerial responsibility is not, and should never be, the number of ministers who have resigned. That is too crude, expecting far too dramatic a gesture. It is more the regular involvement of ministers in the activities of their ministries, their answerability, however limited, to Parliament and the awareness of the ministers of the implications of what is being done.²⁵ This is position put forward by Patrick Weller and Michelle Grattan. Their text is invaluable to this study as they write on the need to ensure that the aspect of answerability in ministerial responsibility remains continuous and not only when something goes wrong within the various ministries.²⁶

The Executive branch of Government and the Legislature should communicate with each other since the Executive's mandate is to serve the public and execute the Government's policies and the Legislature comprises of the elected representatives of the public. In the Kenyan context, being answerable to the National Assembly is the most ideal way for Cabinet Secretaries to be held accountable by the larger public. Phil Larkin compares the relationship between the Legislature and the Executive to an agency relationship. He is of the opinion that members of the Executive are agents of the electorate. Thus, it is to Parliament that the task of sanctioning falls as they would be the principal in the relationship. This is because they are the representatives of the electorate.²⁷

In Kenya, this is not the case. Cabinet Secretaries are not held accountable primarily by the National Assembly for poor performances and controversial occurrences in their ministries.

²³ Dicey A, *Lectures Introductory to the Study of the Law of the Constitution*, Macmillan and Co., 1885.

²⁴ Howard J, *A Guide on Key Elements of Ministerial Responsibility*, December 1998.

²⁵ Weller P & Grattan M, *Can Ministers Cope?: Australian Federal Ministers At Work*, 1981, p.202-203

²⁶ Weller P & Grattan M, *Can Ministers Cope?: Australian Federal Ministers At Work*, 1981, p.203-206.

²⁷ Larkin P, *Ministerial Careers and Accountability in the Australian Commonwealth Government*, ANU Press, 2012, P. 97.

Instead, they are held to account by the President.²⁸ This raises concerns on the extent to which the Cabinet Secretaries will be held accountable for the decisions they make in the governance of their ministries as the President has a vested interest in the good performance or perceived good performance of the ministries. He is unlikely to dismiss Cabinet Secretaries for poor performances in office lest his judgement of character be brought into question for appointing the individual in the first place.²⁹

Accountability of Cabinet Secretaries to the National Assembly is limited solely to gross violations of the provisions of the Constitution, instances of commission of a crime or gross misconduct.³⁰ The National Assembly cannot hold them to account for under-performing in the performance of their mandate. As such, the principle of ministerial responsibility cannot be said to be practised in Kenya and Cabinet Secretaries often get away with not fulfilling their mandate.

Thomas Axworthy writes that the reason many citizens opt out of the political process is due to the lack of attention paid to accountability as an overriding goal of the political system.³¹

This paper thus aims to investigate viability of the principle of ministerial responsibility as remedy to the lack of accountability for Cabinet Secretaries' actions by analysing its application, merits and demerits in other jurisdictions in which it is in use. In so doing, this paper intends to add on to the current body of knowledge that addresses improving national leadership standards in Kenya.

1.6 Justification for the study

This study will begin a conversation on the need for a system to ensure Cabinet Secretaries are accountable for the losses occasioned by the activities and operations of their respective ministries. Kenya loses millions of shillings every year due to inefficient operations of various ministries without Cabinet Secretaries taking responsibility as often as they should. Although the President has occasionally removed Cabinet Secretaries from their positions, these are often seen to be for

²⁸ Article 153(2), *Constitution of Kenya* (2010).

²⁹ Ghai JC & Ghai YP, *Cabinet Secretaries: Role, Appointments and Tenure*, Katiba Corner, Katiba Institute, January 2018.

³⁰ Article 152(6), *Constitution of Kenya* (2010).

³¹ Smith DE, *Clarifying The Doctrine of Ministerial Responsibility as it Applies To The Government and Parliament of Canada*, Volume 1, p. 105.

political reasons. The ex-Cabinet Secretaries are often appointed to different offices in the Government or simply shuffled to other ministries.

There is a need to rectify this. Holding government leaders to account for their performances while in office is a necessary aspect in any democracy committed to promoting the welfare of its citizens. The electorate deserves the right to assess the performance of the officials whose mandate it is to serve them, regardless of the fact that this assessment is likely to be done through their political representatives.

1.7 Research Methodology

The research design to be used in this paper is the case study design coupled with desktop research. This model of research was chosen as it would be the most practical means to analyze the feasibility of the implementation of the principle of individual ministerial responsibility, in the Kenyan context.

The methods of research to be employed include the study of:

1. Journals and books
2. Theses and dissertations
3. Statute
4. Case law
5. Any available statistics and reports
6. Internet resources

1.8 Scope and limitation of the study

This paper will cover what Ministerial Responsibility entails as a principle by first analyzing its application in Australia's Westminster style of Government. This analysis will provide a basis for which this paper will attempt to discuss the means, pros and cons of applying the principle to the Kenyan context as a means of improving the efficiency with which Cabinet Secretaries carry out their mandate. To properly achieve this end, this paper will conduct a comparative analysis between the Kenyan and Australian situation with regard to how Cabinet Secretaries and Ministers respectively are held responsible for activities and results of their ministries.

Access to literature on the procedures used to execute the principle of Ministerial Responsibility is not widely available. This is because the principle came about and evolved through constitutional conventions and precedents but not through positive legislation. This may pose a problem in the development of means to apply the principle as a procedure in Kenya.

1.9 Dissertation Outline

This dissertation will consist of five chapters. The chapter above, which is the first chapter, is an introductory chapter which comprised of: the background of the area of study, statement of the problem, statement of objectives, hypotheses, research questions, justification and limitations of the study. This introduction lays the foundation for the dissertation.

The second chapter will address the theoretical framework and methodology of the dissertation. The theoretical framework will provide perspective on the research paper by introducing and using various theories to view the topic in discussion. It will be the lens through which the subsequent chapters will be viewed.

The third chapter will be used to conduct a case study on how the principle of Ministerial Responsibility is applied in Australia. This is necessary in order to acquaint the reader with what the principle is and how it is used to hold members of the Government accountable to Parliament.

The fourth chapter will be a comparative analysis between the accountability mechanisms used to hold members of Government accountable in Australia and in Kenya. The purpose of this is to identify the shortcomings of the current accountability mechanisms in place in Kenya and to determine the viability of the application of the doctrine of ministerial responsibility.

The fifth chapter will discuss the findings of the comparative analysis in the context of the research questions posited in chapter one. The expected result of this is to potentially determine the efficacy of the principle of Ministerial Responsibility if applied to the Kenyan context. A conclusion will be drawn in this chapter alongside recommendations by the writer on potential means by which the principle could be introduced into the current Kenyan legal regime.

CHAPTER 2: THEORETICAL FRAMEWORK

This research is based on Bernard Bass' theory of transactional leadership. Transactional leadership is based on classical principles of exchange where individuals are rewarded or punished for meeting or failing to meet certain standards.³² Within transactional leadership, there are two factors, contingent reward and management-by-exception. Contingent reward provides rewards for effort and recognizes good performance. Management-by-exception maintains the status quo, intervenes when subordinates do not meet acceptable performance levels and initiates corrective action to improve performance.³³ Michael Aamodt contributes to the theory of transactional leadership by subdividing the concept of management-by-exception into two parts. These parts are management-by-exception: active and management-by-exception: passive.³⁴

Management-by-exception: active entails constantly supervising workers as they perform their designated tasks. The expected outcome of this kind of supervision is that the managing body or individual would be perfectly placed to instantly reprimand and deliver punishment for poor quality work or incompleteness of designated tasks.³⁵

This paper will apply the management-by-exception: passive in its analysis of the topic. Management-by-exception: passive differs from the active approach in that the managing individual or body need not constantly supervise the work at all times. Instead, they will only step in to deploy corrective measures should there be a significant problem in how a particular task is being executed or in the overall performance of the worker.³⁶

Cabinet Secretaries are usually rewarded for fulfilling their mandate in their respective ministries. However, they do not seem to be reprimanded for failing to fulfill the same. Using Bernard Bass'

³² Bass B, *Leadership and Performance Beyond Expectations*, Free Press, 1985.

³³ Hackman C, *Leadership: A Communication Perspective*. Waveland Press, 2009, p. 102–104.

³⁴ Aamodt M., *Industrial/organizational psychology: an applied approach*, Australia: Cengage Learning, 2016, pg 8.

³⁵ Aamodt M., *Industrial/organizational psychology: an applied approach*, Australia: Cengage Learning, 2016, pg 9.

³⁶ Mulder P., *Transactional Leadership*,

<https://www.toolshero.com/leadership/transactional-leadership/> accessed on 11 October 2019.

theory of transactional leadership to interpret this state of affairs, it is clear that there exists an imbalance in need of remedy. The theory advocates for sanctions being applied to individuals for poor work or negative outcomes, until the problem is corrected.³⁷ Just as the Cabinet Secretaries are rewarded for their successes, they ought to be punished for their failures.

In conjunction with the theory of transactional leadership, this paper shall use an aspect of the theory of transformational leadership posited by Daniel Moynihan. Transformational leadership is a theory of leadership where a leader works with teams to identify needed change, creating a vision to change through inspiration and executing the change in tandem with committed members of a group.³⁸ Daniel Moynihan adds on to this theory by introducing the idea of using performance information to determine the efficacy of an individual in their designated work.³⁹

The use of performance information would entail establishing a system of monitoring and documenting the effectiveness with which workers execute their mandate in the workplace. According to this theory, the data will be used in the evaluation of the workers performance with special focus on the quality of work done and their efficiency.

Daniel Moynihan's take on the theory of transformational leadership is ideal for this study not only because it provides a framework for a better system of evaluation of Cabinet Secretaries' levels of performance. It is also suitable as it is compatible with Bernard Bass' theory of transactional leadership. One can envision a system in which performance information is used in the evaluation of the quality of work done in order to determine whether corrective measures ought to be taken against that individual or body upon combining the two theories.⁴⁰ Rewards and punishments must be administered on the basis of clear performance-based standards to work. The delivery of the

³⁷ Bass B, *Bass & Stogdill's Handbook of Leadership: Theory, Research & Managerial Applications*, 4th ed, The Free Press, 2008, p. 50.

³⁸ White S., *What is Transformational Leadership? A model for motivating innovation*, 2018. <https://www.cio.com/article/3257184/what-is-transformational-leadership-a-model-for-motivating-innovation.html> accessed on 7 October 2019.

³⁹ Moynihan D. & Hawes D., *Responsiveness to Reform Values: The Influence of the Environment on Performance Information Use*, *Public Administration Review* 72, 2012, pg 95-105.

⁴⁰ Moynihan D. & Pandey S., *The Big Question for Performance Management: Why Do Managers Use Performance Information?*, *Journal of Public Information Administration Research and Theory*, 2010, pg 849-866.

rewards and punishments cannot be arbitrary if any kind of improvement in the level of performance of the Cabinet Secretaries is to be realised.⁴¹

Maslow's Hierarchy of Needs is the final theory that this paper will apply in its analysis of the topic. It is a motivational theory in psychology comprising of a five-tier model of human needs, often depicted as hierarchical levels within a pyramid.⁴² The five tiers of the pyramid, from the bottom upwards, are: physiological needs, safety needs, belonging and love needs, esteem needs and self-actualization. This theory posits that in order for one to seek and achieve the higher tiers (or higher needs) they must first satisfy their needs in the lower tiers.⁴³ The use of this theory will be based on the assumption that Cabinet Secretaries in Kenya have satisfied the bottom three tiers of the pyramid. These are physiological, safety and belonging and love needs. The focal point of this theory as a lens to view the topic will be esteem and self-actualization tiers of the pyramid in Maslow's theory.

The esteem needs of a person revolves mainly around the ideas of prestige and feelings of accomplishment. Self-actualization, on the other hand, is achieving one's full potential. Be it in the effective completion of their mandate or in involvement in creative works. Should an individual fail to meet their esteem needs to a satisfactory extent then self-actualization will remain out of reach until they do so.⁴⁴ This theory is ideal for the analysis of the problem stated in this paper as it provides a different perspective as to why Cabinet Secretaries fail to fulfil their duties in favor of self-enrichment. It offers a means to analyze their actions at a deeper level beyond just labeling them "greedy" or "incompetent."

⁴¹ Peng T. & Peterson M., *Contingent and Noncontingent Social Rewards and Punishment From Leaders: Do US and Japanese subordinates make comparable distinctions?*, International Business Review, 1998, pg 69-87.

⁴² McLeod S., *Maslow's Hierarchy of Needs*, Simply Psychology, 2018
<https://www.simplypsychology.org/maslow.html> on 9 October 2019.

⁴³ McLeod S., *Maslow's Hierarchy of Needs*, Simply Psychology, 2018
<https://www.simplypsychology.org/maslow.html> on 9 October 2019.

⁴⁴ McLeod S., *Maslow's Hierarchy of Needs*, Simply Psychology, 2018
<https://www.simplypsychology.org/maslow.html> on 9 October 2019.

CHAPTER 3: A CASE STUDY OF THE APPLICATION OF MINISTERIAL RESPONSIBILITY IN AUSTRALIA

3.1 Introduction

This chapter aims to answer the first research question posed in the second chapter of this research paper. The implementation of the principle of ministerial responsibility in Australia will be used as a case study in the chapter to support the analysis of the principle of ministerial responsibility is applied in a democratic society. The application of the principle in Australia was chosen to be the subject of the case study due to the similarities in the structure of the Governments of Kenya and Australia.

Additionally, Australia has applied the principle from as far back as 1901 when they were still under British influence.⁴⁵ The country has seen the application of the principle of ministerial responsibility evolve in their government to cope with the changing styles of government. This evolution has ensured the principle did not become out-dated and was essential in keeping it relevant in the larger picture of holding the Prime Minister, ministers and public servants in Australia accountable for the decisions they made in the course of carrying out their duties.

3.2 What is the Principle of Ministerial Responsibility?

Ministerial responsibility is a fundamental constitutional principle in the Westminster parliamentary system according to which ministers are responsible to the parliament for the conduct of their ministry and government as a whole.⁴⁶ The principle of ministerial responsibility revolves mainly around the idea of ensuring that the Executive, ministers in particular, bare responsibility for the courses of action that they opt to take and for the failures of their ministries.

⁴⁵ Butler D, *Ministerial Responsibility: Lessons of the Scott Report*, Papers on Parliament, No.29, 1997.

⁴⁶ Smith DE, *Clarifying The Doctrine of Ministerial Responsibility as it Applies To The Government and Parliament of Canada*, Volume 1, p. 104.

⁴⁷ Munro A, *Ministerial Responsibility*, Encyclopedia Britannica, June 2013.

< <https://www.britannica.com/topic/ministerial-responsibility> >

The principle of ministerial responsibility has two levels to it:

1. **Individual ministerial responsibility** - every minister is responsible to Parliament for the actions taken under their authority, including in particular actions taken by the ministry for which they are responsible.⁴⁸
2. **Collective ministerial responsibility** - every minister shares responsibility for every decision taken by the Government.⁴⁹

According to standard constitutional doctrine, the principle of ministerial responsibility is a defining factor in any responsible government.⁵⁰ It lays the foundation for the establishment of a framework to enable the electorate, through their elected representatives, to hold government officials to account for the actions they take in the execution of their mandate. Ministerial responsibility has three dimensions:

1. It provides a means by which to establish what decisions were made and their effect.
2. It provides means to extract an explanation or a justification from the minister and other public servants for the decisions they made.
3. It provides means to impose sanctions upon the minister and other public servants.

The public's increased desire to know more about the workings of the government and hold officials accountable for shortcomings has been attributed to higher levels of education in Australia and the passing of Freedom of Information Laws.⁵¹

S.E. Finer writes that if ministerial responsibility means more than merely answerability to Parliament then it also carries an implication of liability. In this context, a liability to lose office if the minister loses the confidence of Parliament.⁵²

⁴⁸ Beale R, *Ministerial Responsibility for Administrative Actions: Some Observations of A Public Service Practitioner*, ANU Press, Volume 9, Number 4, 2002, p. 291.

⁴⁹ Beale R, *Ministerial Responsibility for Administrative Actions: Some Observations of A Public Service Practitioner*, ANU Press, Volume 9, Number 4, 2002, p. 291.

⁵⁰ Mulgan R, *Assessing Ministerial Responsibility in Australia*, ANU Press, 2012, P. 177.

⁵¹ Beale R, *Ministerial Responsibility for Administrative Actions: Some Observations of A Public Service Practitioner*, ANU Press, Volume 9, Number 4, 2002, p. 296.

⁵² Finer SE, *The Individual Responsibility of Ministers*, December 1956.

Views on the principle of ministerial responsibility have varied significantly over the years but the majority of them can be placed accurately between two popular views. The first being that of A.V. Dicey who is of the opinion that ministers ought only to take responsibility for *actions they took part in*.⁵³ The other being the opinion of John Howard who opts more for systematic accountability of ministers. That is, accountability for the overall administration of their ministries through policies and management along with their direct responsibility for their own actions.⁵⁴

The application of the principle of ministerial responsibility initially was based on strict vicarious responsibility. That is, the minister would take responsibility for the actions and short-comings of his subordinates as well as his own. It was a practical means of implementing the principle at the time as the Executive then was a fraction of the size it is now. As Governments evolved and the Executive continued to grow, there was an inevitable concession by government officials and the public that ministerial knowledge and action had proper limits. Departments, agencies and ministries had become so big and the activities so numerous that it was unreasonable to expect the minister to possess knowledge on all that was ensuing in his department.⁵⁵

This led to the formulation of the conceptions of the principle of ministerial responsibility posited by Albert Dicey, John Howard and others. The ministers ought to be held accountable for actions they took part in or that were carried out with their authority.

Over time, these conceptions of the principle began to become out-dated as they did not address, to a sufficient degree, actions taken by the subordinates of the minister without his knowledge. It was at this stage that the modern principle of ministerial responsibility was developed in Australia. It balanced the hesitation to hold ministers to account for actions they could not reasonably have known about or had control over and the need to hold someone who is in control and has knowledge accountable by increasing the accountability of individual public servants from the

⁵³ Beale R, *Ministerial Responsibility for Administrative Actions: Some Observations of A Public Service Practitioner*, ANU Press, Volume 9, Number 4, 2002, p. 292.

⁵⁴ Howard J, *A Guide on Key Elements of Ministerial Responsibility*, December 1998.

⁵⁵ Beale R, *Ministerial Responsibility for Administrative Actions: Some Observations of A Public Service Practitioner*, ANU Press, Volume 9, Number 4, 2002, p. 296.

secretary down.⁵⁶ The large number of public servants and the sheer size of the Executive necessitated the move towards this new conception of the principle of ministerial responsibility. Ministers no longer had direct control over all activities in their departments or ministries. Their mandate shifted more towards formulating policies for the governance of their departments and managing the department hence pushing more of the responsibility upon public servants lower along the hierarchy with regard to the implementation of the policies of minister and the day-to-day running of the department.⁵⁷

Ministerial responsibility places two duties upon those subject to it:

1. Informatory/ Explanatory duties
2. Amendatory duties⁵⁸

The explanatory duties entail reporting to Parliament, and to the electorate by extension, and providing reasons and explanations for the decisions they made and the actions they took as ministers or public servants. The amendatory duties entail remedying any mistakes exposed in the activities of the ministry or in the policy of the minister.⁵⁹ In Australia, failure to fulfil one's informatory or amendatory responsibilities as a public servant or a minister is likely to result in calls for the resignation of the individual from the public and Parliament.⁶⁰

In addition to holding the public servants working under the minister accountable for their actions, the Australian modern formulation of ministerial responsibility has resulted in a tendency towards holding the secretary of the department accountable for administrative failures. The secretary is the most senior public servant in a department after the minister. They bear a responsibility to the

⁵⁶ Beale R, *Ministerial Responsibility for Administrative Actions: Some Observations of A Public Service Practitioner*, ANU Press, Volume 9, Number 4, 2002, p. 296.

⁵⁷ Mulgan R, *Assessing Ministerial Responsibility in Australia*, ANU Press, 2012, P. 180.

⁵⁸ Beale R, *Ministerial Responsibility for Administrative Actions: Some Observations of A Public Service Practitioner*, ANU Press, Volume 9, Number 4, 2002, p. 294.

⁵⁹ Woodhouse D, *Ministers and Parliament: Accountability in Theory and Practice*, Oxford University Press, 1994, p. 17.

⁶⁰ Beale R, *Ministerial Responsibility for Administrative Actions: Some Observations of A Public Service Practitioner*, ANU Press, Volume 9, Number 4, 2002, p. 294.

minister to ensure that the performance of the department lives up to the expectations.⁶¹ They are thus considered to be in a better position than the minister to possess knowledge on the operations of the department and any administrative issues that need to be addressed as they are the highest administrator in the departmental hierarchy and other members of the departmental staff have a duty to keep them informed of any significant or sensitive issues in the department.⁶² This is the reason why they are held accountable for poor departmental performances. Secretaries are expected to understand the workings of the department and thus be in a position to inform the minister on any problems arising or any potential problems likely to arise so as to provide the minister with a chance to take remedial steps.

The minister's failure to remedy an issue due to lack of knowledge will always tend to result in the secretary being put under the spotlight first before investigations begin in a bid to determine which other public servants can be held accountable for the failure.

3.3 How is Ministerial Responsibility practiced?

In Australia, the main way in which the principle of ministerial responsibility manifests is through the Question Time sessions held in Parliament. It is the most sensational form of *ex post* monitoring of government decisions. Questions are put to the ministers and the Prime Minister (collectively known as the Government members) during Parliamentary sittings in the House of Representatives by members of the House.⁶³ The entirety of the discussions is broadcasted live for the general public to tune in and listen to the discussions.

Question Time lasts for at least forty five minutes and can run for well over an hour. It ordinarily commences with the leader of the opposition party in the House of Representatives posing a question to the Prime Minister. Upon the Prime Minister answering the question posed to him, a

⁶¹ Beale R, *Ministerial Responsibility for Administrative Actions: Some Observations of A Public Service Practitioner*, ANU Press, Volume 9, Number 4, 2002, p. 297.

⁶² Beale R, *Ministerial Responsibility for Administrative Actions: Some Observations of A Public Service Practitioner*, ANU Press, Volume 9, Number 4, 2002, p. 302.

⁶³ Larkin P, *Ministerial Careers and Accountability in the Australian Commonwealth Government*, ANU Press, 2012, P. 99.

member of the ruling party in the House of Representatives (also known as a Government backbencher) poses a question to the Prime Minister or the minister to whom the initial question was in reference to.⁶⁴ This is to afford the minister or Prime Minister a chance to give a speech to validate themselves and their actions in a bid to score political points in the public's eyes. Often these types of questions asked by the Government backbenchers are planned ahead of time. These pre-arranged questions are known as 'Dorothy Dixers.'⁶⁵

According to the Standing Orders of the Australian House of Representatives, the questions posed in Question Time ought to be Questions Without Notice. Questions Without Notice are oral questions posed to a certain Government member to which they are expected to give an answer immediately. Alternatively, a member of the House of Representatives may pose a question in written form. This is known as a Question On Notice. They are lodged by members and published in the Notice Paper which is the House's official agenda. Questions On Notice are used to acquire detailed information on government activities and administration. The responses are provided in writing.⁶⁶

The primary purpose of Question Time is to provide a forum on which government members can be held to account. It also doubles as a stage on which government members seek to maintain the confidence of the House of Representatives and offer the electorate the opportunity to determine if their performance is worthy of re-election.⁶⁷

⁶⁴ Harris I, Wright B & Fowler P, *House of Representatives Practice*, Canberra, Fifth edition, 2005, P. 530.

⁶⁵ Larkin P, *Ministerial Careers and Accountability in the Australian Commonwealth Government*, ANU Press, 2012, P. 100.

⁶⁶https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_1_-_Questions accessed on 15 November 2019.

⁶⁷https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_1_-_Questions accessed on 15 November 2019.

3.4 Challenges experienced in the implementation of the principle of ministerial responsibility

The application of ministerial responsibility is a heavily politicized issue in Australia. The decision to sanction or not to sanction a government member whose performance has been called into question is often based on political factors and hardly ever on merit.⁶⁸ There has never been a resignation from the position of minister in Australia that was as a direct result of failures in the execution of one's mandate as a minister. John Howard, a former Prime Minister, went so far as to state that "it has never been the ministerial principle that you resign if something goes wrong in your department."⁶⁹ This, naturally, leads the public to doubt the effectiveness of the principle as a whole as it would seem there does not exist any sanction for failing to fulfil ministerial duties.

It is argued that judging the efficacy of the principle of ministerial responsibility based on the number of ministers who have resigned is too crude a standard and is indicative of the public expecting far too dramatic a gesture.⁷⁰ Resignation as a sanction tends to be raised primarily in instances whereby a minister, after investigations on their conduct have been concluded, is deemed to be personally responsible particularly for matters of impropriety, incompetence, illegality or gross negligence.⁷¹

Parliament's role in the formation of the Government has also been considered to be a factor that has affected the proper implementation of ministerial responsibility. Commentators like Phil Larkin have questioned the Australian Parliament's ability to hold Government members accountable as many members of Parliament have a vested interest in ensuring that the Government members are portrayed in a positive light for the sake of the image of the ruling party.⁷² A conflict of interests clearly arises in this scenario as there is a need to hold the ministers

⁶⁸ Dowding K, Lewis C & Packer A, *The Patterns of Forced Exits from the Ministry*, ANU Press, 2012, P. 125.

⁶⁹ Mulgan R, *Assessing Ministerial Responsibility in Australia*, ANU Press, 2012, P. 181.

⁷⁰ Weller P & Grattan M, *Can Ministers Cope?: Australian Federal Ministers At Work*, 1981, P.202-203.

⁷¹ Mulgan R, *Assessing Ministerial Responsibility in Australia*, ANU Press, 2012, P. 178.

⁷² Larkin P, *Ministerial Careers and Accountability in the Australian Commonwealth Government*, ANU Press, 2012, P. 97.

and Prime Minister accountable for their shortcomings without damaging the reputation of the party in the public eye. As a result of party politics, holding the Government members accountable is often sacrificed in favor of preserving the party's image.

Individual ministerial responsibility, as a principle, fails to address collective failures in a department that result in poor performance. It is designed to attribute blame to individuals. As such, it is barely of any use in instances whereby the failure can be attributed to the acts and decisions of several individuals.⁷³ Responsibility for most collective failures lies with various individual members of the department and can also be influenced by the culture and processes in the department. Consequently, pinning blame on a single person in such an instance is notoriously difficult as several people are responsible for the undesired outcome but none of them can be deemed to bare responsibility for it as a whole. This renders the principle almost useless.⁷⁴

3.5 Conclusion

The principle of individual ministerial responsibility is a pervasive and subtle concept in the Australian Government. Roger Beale, a former secretary of the Department of Environment, is of the opinion that leaders in the Australian Government still feel the principle powerfully and personally.⁷⁵ For ministers, the principle is about responsibility to the Prime Minister and Cabinet for strategic political leadership of their departments. It entails providing policy guidance to their departmental staff, explaining policy to the people and Parliament, ensuring the department's systematic ability to do its job is maintained and demanding action if it is failing.⁷⁶ It is not about being accountable for every individual departmental failure, irrespective of ministerial knowledge of involvement.⁷⁷ In terms of holding Government members accountable, the principle is just one element in an extensive range of accountability mechanisms in place. The Ombudsman, judicial

⁷³ Mulgan R, *Assessing Ministerial Responsibility in Australia*, ANU Press, 2012, P. 182.

⁷⁴ Bovens M, *The Quest for Responsibility - Accountability and Citizenship in Complex Organizations*, Cambridge University Press, 1998, P. 47.

⁷⁵ Beale R, *Ministerial Responsibility for Administrative Actions: Some Observations of A Public Service Practitioner*, ANU Press, Volume 9, Number 4, 2002, p. 302.

⁷⁶ Beale R, *Ministerial Responsibility for Administrative Actions: Some Observations of A Public Service Practitioner*, ANU Press, Volume 9, Number 4, 2002, p. 302.

⁷⁷ Finer SE, *The Individual Responsibility of Ministers*, December 1956.

review of administrative actions, Parliamentary committees and government audits are all bodies and systems used to hold public servants more accountable to the public. The principle is applied in the operations of all the above. On its own, ministerial responsibility cannot provide comprehensive accountability for all government activities⁷⁸ and that is why it is integrated into the operations of other accountability mechanisms.

⁷⁸ Mulgan R, *Assessing Ministerial Responsibility in Australia*, ANU Press, 2012, P. 190.

CHAPTER 4: A COMPARATIVE ANALYSIS OF THE ACCOUNTABILITY MECHANISMS APPLIED IN KENYA AND AUSTRALIA

4.1 Introduction

The objective of this chapter is to respond to both the second and third research questions of this study. This chapter will analyze the accountability mechanisms applied to Cabinet Secretaries at the moment with the intention of identifying aspects that are barriers to the implementation of higher standards of accountability for ministry operations. Additionally, it will discuss the means by which ministerial responsibility can improve the standard of governance in Kenya.

4.2 Accountability mechanisms applied in Kenya

Cabinet Secretaries are the chief executive officers of ministries in Kenya. They are the highest ranking officials in the administrative hierarchy of a ministry and form part of the Cabinet in Kenya alongside the President, the Deputy President and the Attorney General.⁷⁹ The President nominates individuals for appointment as Cabinet Secretaries of various ministries. The individuals only come into office after being vetted and approved by the National Assembly.⁸⁰

The Constitution of Kenya (2010) states that Cabinet Secretaries are accountable individually, and collectively, to the President for the exercise of their powers and the performance of their functions.⁸¹

The National Assembly's capacity to hold Cabinet Secretaries to account is limited to instances whereby they:

1. Have committed a gross violation of a provision of the Constitution or any other law.⁸²
2. Are suspected of having committed a crime under national or international law;⁸³ or

⁷⁹ Article 152(1), *Constitution of Kenya* (2010).

⁸⁰ Article 152(2), *Constitution of Kenya* (2010).

⁸¹ Article 153(2), *Constitution of Kenya* (2010).

⁸² Article 152(6)(a), *Constitution of Kenya* (2010).

⁸³ Article 152(6)(b), *Constitution of Kenya* (2010).

3. Are guilty of gross misconduct.⁸⁴

Unlike the Australian Parliament's capability to hold ministers accountable for their actions, the National Assembly does not have the authority to hold Cabinet Secretaries responsible for underperforming in the execution of their duties. That is the sole prerogative of the President. This ideally means that if a Cabinet Secretary has the favor of the President then nobody else in Government can question them, nor legally sanction them, for neglecting to perform their mandate in a satisfactory manner.

Further, the Cabinet Secretaries are aware of this state of affairs and some even go so far as to publicly state that they are answerable solely to the President of Kenya for any alleged shortcomings in the way their Ministry is operating. The Cabinet Secretary in charge of the Ministry of Tourism and Wildlife, Najib Balala, openly stated in a press conference that the only person with the authority to question his decisions was the President.⁸⁵

He made that comment in the wake of a botched rhino translocation exercise being spearheaded by the Ministry of Tourism and Wildlife in collaboration with the Kenya Wildlife Service.⁸⁶ The purpose of the operation was to translocate eleven black rhinos to Tsavo National Park. The Kenya Wildlife Service advised against the translocation at that point in time in the report they presented, citing the high salinity levels of the water sources along the route the translocation was intended to be carried along. Najib Balala, even after receiving the report from the Kenya Wildlife Service, still gave the green light for the operation to proceed.⁸⁷ As fate would have it, nine out of the eleven rhinos died from saline poisoning and one of the two surviving rhinos died as a result of injuries sustained after an attack by lions during the translocation.⁸⁸ The media labeled the ill-fated operation a "disaster."

⁸⁴ Article 152(6)(c), *Constitution of Kenya* (2010).

⁸⁵ Mureithi K, *Tourism CS Najib Balala tells those blaming him for rhinos' deaths to 'go to hell,'* The Daily Nation Newspaper, 30 July 2018.

⁸⁶ Kahongeh J, *Tenth rhino dead in Kenya after disastrous transfer,* The East African Newspaper, 25 July 2018.

⁸⁷ Mwere D, *Ex-KWS board members blame Balala for rhino deaths,* The Daily Nation Newspaper, 24 August 2018.

⁸⁸ Kahongeh J, *Tenth rhino dead in Kenya after disastrous transfer,* The East African Newspaper, 25 July 2018.

With all the evidence for the cause of the failed operation pointing towards the directive given by the Cabinet Secretary, one would expect that he would concede fault at the very least. This was not the case. Najib Balala refused to take responsibility for the operation, claiming that it would be unreasonable to expect that he could have had foreseen that outcome.⁸⁹ No action was ever taken against him by the President. At the time of writing this paper, Najib Balala is still the sitting Cabinet Secretary for the Ministry of Tourism and Wildlife.

It would appear that Cabinet Secretaries operate under the impression that the primary purpose of the fulfilment of their mandate is to remain in the good books of the President and not, in fact, to uphold their constitutional oath to serve the people.⁹⁰

The President has a vested interest in seeing the Cabinet Secretaries perform well or, at the very least, not have their shortcomings exposed. Cabinet Secretaries are his appointees.⁹¹ As such, it is evidently problematic that he is the sole individual who can hold them liable for any under-performances while they are in office. Dismissing a Cabinet Secretary for not living up to what was expected of them would serve to offer the Opposition Party an opening to publicly question his judgment which, most definitely, is not in his interests.

When a Cabinet Secretary is dismissed, it is often for political reasons. Their performance is hardly ever a significant factor in the making of the decision to dismiss them.

Many a time, the Cabinet Secretaries are not dismissed but merely shuffled among the different ministries.⁹² The interesting thing to note about the President's decision to reshuffle the Cabinet Secretaries is that it does not require them to be re-vetted by the National Assembly.⁹³ The National Assembly is thus denied a chance to re-assess any under-performing Cabinet Secretaries and

⁸⁹ Mureithi K, *Tourism CS Najib Balala tells those blaming him for rhinos' deaths to 'go to hell,'* The Daily Nation Newspaper, 30 July 2018.

⁹⁰ Article 73, *Constitution of Kenya* (2010).

⁹¹ Ghai JC & Ghai YP, *Cabinet Secretaries: Role, Appointments and Tenure*, Katiba Corner, The Katiba Institute, 15 January 2018.

⁹² Wakaya J, *Echessa sacked in New Cabinet Reshuffle as Amina Moved From Education*, Capital News, 1 March 2019.

⁹³ Ghai JC & Ghai YP, *Cabinet Secretaries: Role, Appointments and Tenure*, Katiba Corner, The Katiba Institute, 15 January 2018.

question their ability to handle their new office following their unsatisfactory performance in the previous office. This practically grants the President the leeway to “solve” the problem, without having to dismiss the Cabinet Secretary, whenever questions begin to arise on the quality of their work and their service delivery.

The Constitution of Kenya categorizes Cabinet Secretaries as state officers.⁹⁴ The Leadership and Integrity Act of Kenya imposes a duty upon state officers to act efficiently, honestly and in a transparent and accountable manner.⁹⁵ It further binds them to maintain a high standard of performance in the fulfilment of their legally prescribed duties⁹⁶ but does not prescribe any sanctions or courses of action to be taken against state officers who do not uphold the aforementioned duties. The Constitution of Kenya prescribes accountability to the public for decisions and actions taken by state officers as one of the guiding principles of leadership and integrity.⁹⁷ In reality, no official mechanism has been established for the purpose of holding the state officers accountable to the public. The elected Members of Parliament, in the event that they are not meeting the set expectations, have no right to raise any issues with regard to the performance of a Cabinet Secretary’s mandate.

4.3 The contrast between the accountability mechanisms in Kenya and in Australia

This section of this chapter will primarily focus on comparing the accountability mechanisms of Australia and Kenya used to hold the heads of ministries to account to the public. The purpose of this analysis is to demonstrate the difference in terms of accountability to the public experienced by the heads of ministries in the two jurisdictions as a result of the application, or lack thereof, of the principle of ministerial responsibility.

There is a significant contrast between the two jurisdictions in terms of to whom accountability is legally owed. In Australia, Government members (the Prime Minister and ministers) are held

⁹⁴ Article 260, *Constitution of Kenya* (2010).

⁹⁵ Section 10, *Leadership and Integrity Act* (Act no.19 of 2012).

⁹⁶ Section 11, *Leadership and Integrity Act* (Act no.19 of 2012).

⁹⁷ Article 73, *Constitution of Kenya* (2010).

responsible for the decisions and actions they take in their official capacities by Parliament.⁹⁸ Kenya's situation varies quite significantly from that of Australia as Cabinet Secretaries are accountable solely to the President for the decisions and actions they take in the execution of their mandate⁹⁹ with the National Assembly's jurisdiction being limited to matters of suspected criminal conduct and violations of the Constitution.¹⁰⁰

Following the argument posed by Phil Larkin, that members of the Executive are essentially agents of the public, it is evidently problematic that the public in Kenya does not have a say on the discharge, or lack thereof, of Cabinet Secretaries' constitutional obligations.¹⁰¹ The public, being the principal in the posited agency relationship, should have the right to assess the performance of their agents through their elected representatives.

The Australian Government perfectly demonstrates the agency relationship between the Executive and the Legislature while still upholding the constitutional principle of the separation of powers. By acting as a check on the Executive's performance, the Australian Parliament ensures that the members of the Executive answer for any shirking of their responsibilities or unsatisfactory levels of performance in the discharge of their duties during the Question Time sessions held in Parliamentary sittings.

Article 153 of the Constitution of Kenya states:

“Cabinet Secretaries are accountable individually, and collectively, to the President for the exercise of their powers and the performance of their functions.”¹⁰²

Consequently, the agency relationship practically applies in Kenya with the President as the principal and not the electorate. It naturally follows that the National Assembly, who ideally should

⁹⁸ Smith DE, *Clarifying The Doctrine of Ministerial Responsibility as it Applies To The Government and Parliament of Canada*, Volume 1, p. 104.

⁹⁹ Article 153, *Constitution of Kenya* (2010).

¹⁰⁰ Article 152, *Constitution of Kenya* (2010).

¹⁰¹ Larkin P, *Ministerial Careers and Accountability in the Australian Commonwealth Government*, ANU Press, 2012, P. 97.

¹⁰² Article 153(2), *Constitution of Kenya* (2010).

represent the interests of the electorate, do not have an avenue by which to question the decisions and actions of Cabinet Secretaries as they are deemed to be outside the Principal-Agent relationship in place.

Alternatively, the electorate falls back upon social accountability mechanisms in an attempt to enforce standards of good performance on officials. Social accountability denotes an accountability process that relies on civic engagement. Citizens and civil society movements participate directly or indirectly in exacting accountability from government officials.¹⁰³ It is often not an effective means of seeking to enforce accountability as the government officials tend to only answer the public's cries in instances whereby they can score political points in the public eye as they know legal action cannot be taken against them for not heeding their call.

Due to the absence of an official mechanism that the electorate can use to assess the performance of Cabinet Secretaries in Kenya, a commonly used recourse open to the public is approaching their elected Members of Parliament to redress grievances and intervene in cases of inadequate action being taken by Government.¹⁰⁴ Even then, the problem is not guaranteed to be remedied as the Member of Parliament would have to use unofficial channels to draw the relevant Cabinet Secretary's attention to the issue raised by his constituents. With the above in mind, it is evident that Australian citizens have more of a say on the matter of government performance than their counterparts in Kenya.

Considering Kenya's hesitation to hold Cabinet Secretaries to account for their performance, one would assume that the same logic would be applied to their subordinates in the ministry. This is not the case. Like Australia, Kenya holds members of the Public Service accountable for their actions and decisions beyond just what may constitute criminal conduct but also with regard to how efficiently they execute their duties as public servants.

¹⁰³ Abuodha J, *Integrating Accountability Mechanisms in Local Government Service Delivery*, eKLR, 2011.

¹⁰⁴ Abuodha J, *Integrating Accountability Mechanisms in Local Government Service Delivery*, eKLR, 2011.

Australia achieves this by summoning the individual members of the Public Service who are under scrutiny before Parliament during Question Time to explain any questionable courses of action they may have taken.¹⁰⁵ Alternatively, they could be summoned before a Parliamentary Committee specially constituted for the purpose of investigating a particular matter concerning the operations of a particular Department.

In Kenya, Public Servants are not summoned before the National Assembly. Their conduct is the subject of investigation and questioning by the Commission on Administrative Justice. The Commission was established under the Commission of Administrative Justice Act to replace the Public Complaints Standing Committee.¹⁰⁶ Its mandate includes, among other things, to:

1. investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice .¹⁰⁷
2. investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector.¹⁰⁸
3. inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service.¹⁰⁹

The Commission on Administrative Justice is a Constitutional Commission¹¹⁰ and reports to the National Assembly on a bi-annual basis on the complaints investigated and remedial action taken.¹¹¹ The extent to which it is in line with Agent-Principal relationship posited by Phil Larkin is questionable as none of the members of the Commission can be elected Members of

¹⁰⁵ Dowding K, Lewis C & Packer A, *The Patterns of Forced Exits from the Ministry*, ANU Press, 2012, P. 125.

¹⁰⁶ Section 3, *Commission on Administrative Justice Act* (Act no. 23 of 2011).

¹⁰⁷ Section 8(a), *Commission on Administrative Justice Act* (Act no. 23 of 2011).

¹⁰⁸ Section 8(b), *Commission on Administrative Justice Act* (Act no. 23 of 2011).

¹⁰⁹ Section 8(d), *Commission on Administrative Justice Act* (Act no. 23 of 2011).

¹¹⁰ Section 4, *Commission on Administrative Justice Act* (Act no. 23 of 2011).

¹¹¹ Section 8(c), *Commission on Administrative Justice Act* (Act no. 23 of 2011).

Parliament.¹¹² As such, it would be a reach to state that the National Assembly is holding the members of the Public Service responsible for their actions and decisions. Their involvement in the assessment of the conduct of the members of the Public Service is limited to simply reviewing the report provided to them by the Commission.

It does not come as a surprise that the Commission on Administrative Justice Act explicitly prohibits the Commission from investigating proceedings or a decision of the Cabinet or a committee of the Cabinet.¹¹³ The Act essentially shields Cabinet Secretaries from liability for not performing up to scratch by barring any means of performance-based assessment but still leaves that avenue open for the assessment of the conduct of their subordinates.

4.4 Conclusion

The proper application of the principle of individual ministerial responsibility in Kenya would greatly improve the answerability of Cabinet Secretaries for matters concerning their mandate. Thus, better governance would follow as they would make decisions in their ministries knowing that they can personally be held liable for said decisions.

Typically, all members of an organization ought to be subject to some form of performance assessment in order to establish whether they are meeting their goals as individuals and to enforce corrective measures where necessary. Australia demonstrates this in how they hold both the ministers and members of the public service responsible for the decision they make in their official capacity. Accountability is necessary in all organizations not just to hold individuals liable for wrong-doing but also to enable an objective analysis of the progress the organization is making and plans to make by providing accurate data on pending and fulfilled duties.

Furthermore, accountability is an invaluable aspect in the assessment of the performance of an organization. It enables the top brass of the organization to accurately determine the flaws in their

¹¹² Section 10, *Commission on Administrative Justice Act* (Act no. 23 of 2011).

¹¹³ Section 30, *Commission on Administrative Justice Act* (Act no. 23 of 2011).

operations and implement remedial measures to resolve them. Ideally, this is made possible through the component aspects of the operation being properly and accurately accounted for.

Thus, it is unusual that the subordinates of a Cabinet Secretary are subject to assessment, with laws laying out how the investigations will be conducted and remedial actions implemented, and measures are actively put in place to shield the highest ranking official in the ministry from similar scrutiny.

The result of this meagre level of accountability being implemented is the blatant misappropriation of public funds and unsatisfactory implementation of government-sanctioned projects. For instance, the Ministry of Interior, under Dr. Fred Matiang'i had already spent Ksh. 3.8 billion on entertainment as of September 2019 of the 2019-2020 financial year. According to a report by the Controller of Budget, Stephen Masha, the Ministry of Interior had spent almost 35 times the amount it had spent at a similar point in time in the previous financial year.¹¹⁴

So long as the laws persist in the shielding of Cabinet Secretaries from liability for the failures, scandals concerning the misappropriation of billions of shillings and the botching of government programs will continue to be a norm in Kenya. Attaching more responsibility to Cabinet Secretaries for the substandard levels of performance in their work would go a long way in improving the quality of services delivered by them.

¹¹⁴ Igadwah L, *Matiang'i Ministry Budget for Entertainment up 35 Times*, Daily Nation, 19 September 2019.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The research findings of this study have led to an overall conclusion that the current legal regime in place governing the accountability of Cabinet Secretaries is inadequate and, in fact, creates a conducive environment for subpar performances of their mandate to go unpunished. The law seems to have almost been molded in such a manner so as to shield Cabinet Secretaries from liability for not satisfactorily discharging their obligations.

This critical flaw in the current Kenyan legal system can be attributed primarily to Article 152(6) of the Constitution of Kenya which limits the grounds on which the National Assembly may propose a motion requiring the President to dismiss a Cabinet Secretary. By drafting that particular article of the Constitution in a manner that has denied the National Assembly the power to assess the performance of Cabinet Secretaries, the drafters of the Constitution essentially legislated against the principle of Ministerial Responsibility.

At the onset, this study sought to analyze the effectiveness of individual ministerial responsibility in ensuring that members of the Executive are answerable for the decisions and actions they take while in office. In analyzing how the principle is applied in Australia, it became apparent that ministerial responsibility is a key aspect of the Government's accountability mechanism. It has been referred to as the hallmark of a responsible government¹¹⁵ and is the mainspring of the Australian Parliament's authority to assess the performance of ministers.

The accountability mechanisms that the Australian Parliament deploys vary from Parliamentary Committee investigations to interrogation sessions during Parliamentary sittings to even the judicial review of administrative action. However, the underlying principle that empowers Parliament to scrutinize the actions of the Executive arm of Government is ministerial responsibility.

¹¹⁵ Mulgan R, *Assessing Ministerial Responsibility in Australia*, ANU Press, 2012, P. 177.

5.2 Conclusion

This study was guided by three research questions. The first was, how is the principle of ministerial responsibility applied in a democratic society? Second, what is currently barring Cabinet Secretaries from being held to account for substandard performance of their duties? And third, how would the principle of ministerial responsibility improve governance in Kenya?

Additionally, the study sought to test two hypotheses. The first being that the establishment of a public accountability mechanism to hold members of the Executive responsible for the actions they undertake in the execution of their mandate will improve the level of their performance and, second, that a lacuna in the current Kenyan legal regime is the cause of the absence of accountability mechanisms around the actions taken by Cabinet Secretaries in their official capacity.

As was seen in Chapter Three, the principle of ministerial responsibility was established through British Parliamentary convention. Legislation has been drafted both in Britain and Australia utilizing the principle but none establishing it in law. It exists as an underlying aspect of the relationship between the Legislature and the Executive.

The case study conducted in Chapter Three responds to the first issue raised in the research questions. It demonstrated how the principle is applied in a democratic society by conducting an analysis of its application in the Australian Government. Question Time is the most popular means by which ministerial responsibility is implemented as it is a forum in which the elected Australian Members of Parliament ask questions of the ministers concerning the operations of their ministries. It is an avenue by which the electorate, via their elected representatives, holds the Cabinet responsible for the fulfilment of their mandate. During the Question Time sessions, the ministers and the Prime Minister are put in a position whereby they must explain the reason for any shortcomings in the operations of their ministries and the Cabinet as a whole to Parliament and consequently to the electorate as the sessions are aired live on the radio and television broadcasting networks.

Consequently, through the information garnered through the interrogation sessions conducted during Question Time, the public is in a better position to decide on whether or not they ought to re-elect the sitting Government in the next election or perhaps take a risk on the Opposition camp. In particularly glaring instances of inefficiency and incompetence in office, the Australian electorate can push for the resignation of the relevant ministers for the substandard performance of their ministry.

Chapter Three also crucially highlights the fact that the modern day application of the principle of ministerial responsibility is not limited solely to the conduct of ministers but extends to their subordinate staff as well in the ministries. As a result of the size of modern day ministries, it became unreasonable to expect ministers to possess knowledge on all the going-ons in the ministry. This, in addition to the fact that there has been a tendency for modern governments to outsource specialized services that they require, necessitated the attachment of personal responsibility to the public servants working in the ministries themselves and the subsequent application of ministerial responsibility to them as well.

However, despite all the good that has been achieved through this principle, the application of ministerial responsibility bears a significant challenge. That of politicization. Its use in the larger mechanisms of accountability has been criticized as the parties hardly ever use it to hold members of their own party, who are ministers, responsible.

Chapter Four of this study goes on to address the second issue raised in the research questions which concerned the barriers blocking Kenya's National Assembly from calling upon Cabinet Secretaries to answer for the performance of their ministries. An examination of the legislation governing the accountability mechanisms applicable to Cabinet Secretaries bring out the fact that the Constitution of Kenya, the Leadership and Integrity Act and the Commission of Administrative Justice Act essentially legislate against the application of ministerial responsibility to Cabinet Secretaries but go so far as to provide a framework for its application to members of the Public Service. The Constitution permits solely the President to take action against Cabinet Secretaries who are under-performing in their mandate and the Commission of Administrative Justice Act proscribes against the Commission investigating matters concerning the conduct of members of

the Cabinet. As a consequence, the Commission's jurisdiction is limited solely to matters concerning the conduct of subordinates of the Cabinet Secretaries.

These laws create a clear conflict of interests as it is unlikely that the same individual who appointed the Cabinet Secretaries to office is going to hold them accountable to a sufficient degree at the risk of harming his political reputation.

The final research question is responded to in Chapter Four as well. In summary, establishing an accountability mechanism to address subpar performances of ministries is likely to improve the standard of governance in Kenya as Cabinet Secretaries will go into office knowing that their jobs are on the line should they fail to meet the expectations set. Furthermore, an accountability mechanism based on the principle of ministerial responsibility will provide a means by which the public can hold ministers responsible albeit through their elected representatives. Ideally, this should contribute in a significant way to the doing away with the conflict of interests plaguing the Office of the President.

Invariably, the findings of this study have led to conclusions that have served to affirm the first hypothesis and negate the second. Ministerial responsibility has a high likelihood of improving the current levels of governance in Kenya if properly implemented for the reasons discussed above. However, the lack of accountability experienced in the Executive is not due to a gap in the law but due legislation molded specifically to deny the Legislature any sort of authority to hold Cabinet Secretaries responsible for matters that tie in with the fulfilment of their legal obligations.

5.3 Recommendations

With the matters discussed above in mind, it is evident that the accountability mechanisms applied to Cabinet Secretaries in Kenya are flawed and promote mediocre government performance. A significant step to remedy this state of affairs would be by integrating the principle of ministerial responsibility into the current legal regime. Establishing it through convention, in a similar way to Australia and the United Kingdom, would take far too long and is likely to be unsuccessful due to the legal positivist culture experienced in Kenyan legal system.

As such, this research paper recommends amending Article 152(6) of the Constitution of Kenya to include matters of incompetence, inefficiency and subpar performance of the legal mandate of Cabinet Secretaries as ground on which the National Assembly may propose a motion requiring the President to dismiss a Cabinet Secretary. This will grant the National Assembly the authority to assess the performance of Cabinet Secretaries with the view of determining if they are fit to continue performing their role and promote the constitutional principle of the Separation of Powers by establishing a means by which the Legislature can check the Executive's use of authority.

For the effective determination of what conduct constitutes inefficient and incompetent leadership, this study recommends establishing a periodic performance-based assessment framework to analyze the performance of ministries. In order to minimize any leeway for the politicization of the assessment, the objective standards applied in the assessment ought to be determined, established and regularly re-evaluated to maintain their applicability.

According to Article 255 of the Constitution, an amendment of this nature could possibly necessitate a referendum as it technically relates to the functions of Parliament.¹¹⁶ The question therefore is how far are Kenyans willing to go to obtain the standard of governance and service delivery from Government that they legally are entitled to?

¹¹⁶ Article 255(1)(h), *Constitution of Kenya* (2010).

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