

REPUBLIC OF KENYA



Paper laid on the
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Sen. Mutua Kibingo Jr.
on 14/05/2015

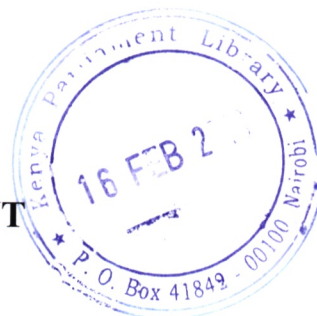
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THE STANDING COMMITTEE

ON

LEGAL AFFAIRS AND HUMAN RIGHTS

A REPORT ON THE FAIR ADMINISTRATIVE ACTION BILL,
NATIONAL ASSEMBLY BILL NO.10 OF 2015

HELD ON:

13TH MAY 2015

Approved

14/5/15
SEN

Clerk's Chambers,

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ABBREVIATIONS

SO	Standing Orders
SEN	Senator
CAJ	Commission on Administrative Justice
KICC	Kenya International Conference Centre

PREFACE

Establishment of the Committee

The Standing Committee on Legal Affairs and Human Rights is established pursuant to the Senate Standing Order 208 and mandated to consider all matters related to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics and integrity; and implementation of the provisions of the Constitution on human rights.

Membership of the Committee

The Committee is comprised of the following members;

1. Sen. Amos Wako - Chairperson
2. Sen. Stephen Sang' - Vice Chairperson
3. Sen. Kembi Gitura
4. Sen. Kiraitu Murungi
5. Sen. Fatuma Dullo
6. Sen. Kipchumba Murkomen
7. Sen. Hassan Omar Hassan
8. Sen. Mutula Kilonzo Junior
9. Sen. Judith Sijeny

Acknowledgement

The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to it in the conduct of the public hearings. The Committee also thanks members of the public who made submissions, both orally and in writing.

Mr. Speaker Sir,

It is my pleasant duty, pursuant to Standing Order 201, to present a Report of the Standing Committee on Legal Affairs and Human Rights on the public hearings held on 13th May, 2015, for consideration by the House on the Fair Administrative Action Bill, National Assembly Bill No.10 of 2015.


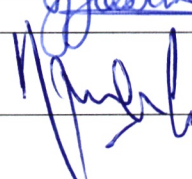

Signed.....

Date.....TH 14 MAY, 2015

SEN. STEPHEN SANG

VICE CHAIRPERSON.

ADOPTION OF THE REPORT OF THE
PUBLIC HEARING ON THE FAIR
ADMINISTRATIVE ACTION BILL (NATIONAL
ASSESEMBLY BILL NO. 15 of 2015)

NAME	SIGNATURE
Sen. Amos Wako	
Sen. Stephen Sang	
Sen. Hassan Omar	
Sen. Kembi Gitura	
Sen. Kiraitu Muriungi	
Sen. Kipchumba Murkomen	
Sen. Fatuma Dullo	
Sen. Judith Sijeny	
Sen. Mutula Kilonzo Jr.	

EXECUTIVE SUMMARY

Following the First Reading of The Fair Administrative Action Bill, National Assembly Bill No.10 of 2015, it stood committed to the Committee on Legal Affairs and Human Rights for facilitation of public participation. Subsequently, the Committee, Pursuant to Article 118 of the Constitution and Standing Order 130 (4), invited submissions from members of the public on the above Bills via an advertisement on the Standard and the People Daily Newspapers of Saturday, 9th May, 2015. The Committee received both oral and written submissions on the Bill during the public hearing held on 13th May, 2015 at Shimba Hall, Kenya International Conference Centre (KICC), Nairobi.

Committee observed those participating in the public hearing generally supported the Bill but had concerns on several clauses. Mr. Waweru Njoro, a member of the Public and Mr. Edward Okello, representing the Chairperson of the Commission on Administrative Justice (CAJ), presented their concerns to the Committee.

Mr. Njoro Waweru submitted to the Committee that the Senate should ensure that the contribution of the public is taken into account. He proposed an amendment with regard to the timelines provided in Clause 8. He stated that alternative dispute resolution mechanisms should be exhausted before parties go to court and that these should be clearly set out in the Bill.

Mr. Edward Okello from Commission on Administrative Justice made several proposals with regard to specific clause in the Bill including, clause 3, 5,7,8,9 and 10 among other proposals

The Committee extensively considered the proposals made by the participants and made observations and recommendations based on the contributions submitted.

The Committee recommends that the Senate adopts this report.

CHAPTER ONE INTRODUCTION

The Fair Administrative Action Bill, National Assembly Bill No.10 of 2015 was published and underwent the First Reading in the Senate. Under Standing Order 130(1) of the Senate Standing Orders, the Bill was committed to the Committee on Legal Affairs and Human Rights. Standing Order 130 (4) requires the Committee to facilitate public participation and to take into account the views and recommendations of the public when it makes its Report to the Senate.

1.0 THE FAIR ADMINISTRATIVE ACTION BILL, NATIONAL ASSEMBLY BILL NO. 10 OF 2015

The Fair Administrative Action Bill concerns County governments. It originated from the National Assembly and was sponsored by Hon. Aden Duale, the National Assembly Leader of Majority. The Bill was considered and passed by the National Assembly on 23rd April, 2015. It was forwarded to the Senate through a Message from the National Assembly dated 27th April, 2015.

The Bill was read a First Time in the Senate on 6th May, 2015, and committed to this Committee pursuant to Standing Order 130(1). The Bill is now before the Committee for consideration and to facilitate public participation as envisaged under Standing Order 130(4) of the Senate Standing Orders.

1.1 Timelines for the Bill

Pursuant to Article 261 as read with the 5th Schedule of the Constitution, the Bill was subject to a constitutional timeline of 27th August, 2014, but the timeline was extended by a period of nine months by the National Assembly pursuant to the provisions of Article 261(2) of the Constitution. The new Constitutional deadline is now 27th May, 2015.

1.2 The Objective of the Bill

The objective of the Bill is to give effect to the provisions of Article 47 of the Constitution on the right to fair administrative action and the review of such action by a court or an independent tribunal.

Article 47 of the Constitution states as follows-

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

1.3 Salient Provisions of each Part of the Bill

Part I of the Bill-

- (a) Contains the short title of the Bill
- (b) Provides for the interpretation section of the Bill

Part II of the Bill-

- (c) applies its provisions to all persons exercising administrative authority, or a judicial or quasi-judicial function, and requires that all such action be carried out in a procedural and efficient manner;
- (d) provides for the giving of notice to the person likely to be affected by the action;

- (e) provides for involvement of the public where the action is likely to affect the public; and
- (f) Requires an administrative authority to give reasons for a decision or administrative action to be taken.

Part III of the Bill-

- (g) provides for judicial review of administrative action by the High Court or by a tribunal, and gives instances in which such action may be reviewed;
- (h) outlines the orders that may be granted by a court in judicial review proceedings; and
- (i) provides for a right of appeal from the decision of the High Court to the Court of Appeal.

Part IV of the Bill-

- (j) clarifies that the provisions of the Bill are in addition to the general principles of common law and the rules of natural justice; and
- (k) repeals sections 8 and 9 of the **Law Reform Act**.

1.3.1 Provisions of the Law reform Act set to be repealed

Section 8 and 9 of the reform act provide:

8. Orders of mandamus, prohibition and certiorari substituted for writs

(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.

(2) *In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, (1 and 2, Geo. 6, c. 63) of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.*

(3) *No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.*

(4) *In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order, and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.*

(5) *Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.*

Section 9. Rules of court

(1) *Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court—*

(a) *prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;*

(b) *requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;*

(c) *requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.*

(2) *Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such*

shorter period as may be prescribed, after the act or omission to which the application for leave relates.

(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

CHAPTER TWO SUBMISSIONS FROM THE PUBLIC

The Committee during its meeting held on 13th May, 2015, received submissions on the The Fair Administrative Action Bill, National Assembly Bill No.10 of 2015. Submissions were received from Mr. Njoroge Waweru, a member of the Public and the CAJ.

2.0 Submissions from Mr. Njoroge Waweru, member of the Public

Mr. Njoroge Waweru, a resident of Kiambu County made submissions as a member of the public as follows:

1. It is noted that the response by the public to public participation is generally poor but it is still useful and the Senate Committees should continue calling for public participation. People do not believe that their contribution will be meaningful to the work of the Senate and therefore the Senate should ensure that the public's contribution is relevant.
2. The timeline provided in Clause 8 providing that proceedings should be instituted within 6 months is prohibitive and does not give enough time for the common citizen to institute proceedings. The Clause should be amended to extend the time.
3. Alternative mechanisms should be exhausted before court action and should be clearly set out in the Bill. Although no one should be barred from seeking recourse in court, it is a long and expensive process that is not accessible to all Kenyans. The court should not be an automatic recourse but instead should be preserved as a last resort.
4. It was noted that that in some cases people are arrested because they likely to commit a crimes, for example while picketing. Such people are never charged

while in some cases the charges are found to be defective. In such case the people deserve administrative action.

2.1 Submissions from Commission on Administrative Justice (CAJ)

The Commission on Administrative Justice presented oral and written memorandum to the Committee. The Commission noted several areas that required further consideration including:

1. Section 3 of the Bill extends the application of the Bill to non-state actors, yet the contents of the Bill relate to public administration. As an illustration, the definition of the word 'decision' under Section 2 makes reference to a decision under '**any written law.**' This may not apply to number of non-state actors.
2. The Bill does not clearly state how its application relates to the jurisdiction of the Commission on Administrative Justice. For instance, is the regime under the Commission on Administrative Justice Act parallel to that of the Bill? It is important also to appreciate that it was clearly a conscious design that the Commission is referred to as "the Commission on Administrative Justice", dealing with administrative justice matters and in the words of **S.26(c)**, "**adjudicating on the matters relating to administrative justice**". It logically follows that out of the three **A. 59** Commissions which oversee the implementation of the Bill of Rights Chapter, the Commission on Administrative Justice would be the body to oversee the implementation of **A. 47** on fair administrative action. Thus, it is not clear why it would be necessary to create another parallel regime for redress of administrative injustice.
3. The clause on the definition of Cabinet Secretary under Section 2 should be deleted since no other reference is made to a Cabinet Secretary in the Bill.

4. Section 3(1)(b) of the Bill extends its application to ‘any person performing a judicial function’ yet the definition of administrative action under section 2 does not expressly mention judicial function.
5. The Bill uses the term ‘Administrator’ ([Sec. 5(1), 7(2)(l)(iii) & (iv), 7(3)(a) and 10(1)(f), (g) & (h)], but has not defined it. It may be important to define the term in the Bill since it is not popularly used. It is proposed that the term should be substituted with ‘administrative authority’ in the clauses where it appears.
6. Part III of the Bill confuses **Judicial Review** with **Administrative Review** by juxtaposing the two and making them look as if they are in the alternative. While the Part is titled ‘Judicial Review,’ it contemplates that a ‘tribunal’ can entertain judicial proceedings for administrative action [see sec. 7(3) pp. 9]. It is instructive to note that tribunals are quasi-judicial bodies and, therefore, cannot entertain judicial review applications. This would amount to usurpation of jurisdiction by the tribunals and such proceedings could be declared null and void. In this regard, reference to tribunals in that section should be deleted. However, tribunals and competent authorities should be allowed to conduct review of administrative action as is the practice.
7. Further, the Bill confuses review and judicial review under section 7(3) by providing for similar grounds for action. It should be noted that grounds for review as provided under Order 45 of the Civil Procedure Rules are error or mistake apparent on the face of the record, and discovery of new evidence or important matter which was not available earlier. In this regard, the grounds under Section 7(3) are primarily for judicial review and not review. It is, therefore, proposed that the Bill provides for review separately (first since it can

be undertaken by the body making the administrative action) and judicial review in the subsequent parts. Further, some of the grounds in the Bill are similar and should be merged.

8. Whereas judicial review is a preserve of the courts, there is no clear body mandated to deal with administrative review of Article 47 breaches, which is a source of confusion in the Bill. Given the mandate of the Commission on Administrative Justice under the Commission on Administrative Justice Act, we propose that the Commission be made the primary body to deal with administrative review of actions or decisions of administrative authorities (see the definition of 'administrative action under Section 2 of the CAJ Act and Section 8(a), (b) and (c)]. It should be noted that empowering CAJ as the primary body in administrative review also brings in uniformity and certainty as well as accountability since it reports to Parliament annually, and National Assembly on bi-annual reports [Bi-annual reports will be sent to the Senate once CAJ Act is amended since a substantial number of complaints reported therein relate to County Governments.
9. In order to full operationalize the right, the Commission should be empowered to make Regulations in consultation with the Attorney General. The Regulations will incorporate matters that relate to County Governments to assist them set up structures to improve administrative justice.
10. The Bill in **S. 8(1)** provides that judicial review shall be instituted without unreasonable delay and not later than six months after the date of making of the decision. This is not the procedure in the Civil Procedure Act, Order 53 Rule 2 which restricts the six months' time limitation to applications for orders of Certiorari. In any event, the duration of six months is limiting and should be

removed in all instances. The test should be unreasonable delay to be determined by the Court on the basis of the circumstances of a matter before it.

CHAPTER THREE COMMITTEE OBSERVATIONS & RECOMMENDATIONS

3.1 Observations

The Committee makes the following observations:-

- i. The Committee noted that the idea of administrative action is to provide speedy justice. However, the Bill does not provide specific timelines for example in the case of when regulations should be enacted;
- ii. Pursuant to **Section 3** of the Bill which extends the application of the Bill to non-state actors as well as state actors, there should be a linkage between the Bill and CAJ with regard to handling complaints from the Public. In this regard the Committee noted that while the CAJ Act restricts the jurisdiction of CAJ to public bodies, Article 59 of the Constitution, on which is it based, can be interpreted to extend their mandate to non-state actors;
- iii. Judicial review should not be confused with review. There is no clarity in **Part III** of the Bill which appears to have used the word interchangeably. There is need for clarification. Judicial review is a preserve of the High Court and provisions that give subordinate courts and tribunals powers to entertain judicial review are erroneous. However, tribunals and competent authorities should be allowed to conduct review of administrative action as is the practice;
- iv. Similarly, the grounds for review provided in clause 7 (3) are similar to those that require judicial review. The Committee noted that grounds for review as provided under Order 45 of the Civil Procedure Rules are error or mistake apparent on the face of the record, and discovery of new evidence or important matter which was not available earlier. Order 45 , rule 1 provides

“ Application for review of decree or order [Order 45, rule 1.]

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

- v. The Committee noted other minor errors in the Bill, for example the inconsistent use of the word “administrator” in the Bill and that it should be defined. Whether administrative action includes the functions of quasi-judicial tribunals which have judicial authority under the Article 159 of the Constitution.
- vi. The Committee observed that generally, that the Bill needed to unbundle the provisions of the Constitution, for example in Clause 4 (1) which is the same as Article 47 (1) ;

- vii. The Committee noted that the Bill borrowed heavily from the Promotion of Administrative Action Act of South Africa¹ but the circumstance and legal regimes might be different in some cases;
- viii. The Committee noted positive amendments made to the original Bill by the National Assembly, for example inclusion of the Disciplined Forces within the ambit of the Bill. However, several areas still require amendment to improve the Bill further.

3.2 Recommendations

The Committee makes the following recommendations:-

1. On the proposal that there should be a link between the Commission on Administrative Justice (CAJ) and the proposed law, having observed that Clause 5(2)(a) of the Bill provides that of the Bill does not limit the power of any person to challenge an administrative action through the mechanisms provided for under the CAJ Act, there was no need to make further provision to link the CAJ with the Bill.
2. That the Bill should be amended to include specific timelines for the performance of specific administrative action. With respect to timelines for provisions of reasons for an administrative decision, the Committee proposed that this be limited to 30 days after receiving a request for reasons.
3. That disputes relating to administrative decision should be determined within 30 days of institution of the matter in court.
4. That Clause 8 of the Bill be amended to delete the requirement that judicial review proceedings should be instituted within six months as this requirement is too restrictive.

¹ <http://www.justice.gov.za/legislation/acts/2000-003.pdf> [accessed 13 May 2015]

5. That the Bill be amended to give the Cabinet Secretary the power to make regulations to give effect to the provisions of the proposed law. In this regard, the Cabinet Secretary would be given 3 months to develop the said regulations. Additionally, the regulations should be formulated by the Cabinet Secretary in consultation with the CAJ. The draft regulations would be approved by Parliament before they are published as is done with devolution laws touching on the transfer of functions.
6. That the Bill be amended at Part III so as to clearly distinguish between review of administrative action as provided for under Article 47(3) and Judicial Review as is undertaken by the High Court.
7. That the grounds for review of administrative action be rationalized so as to avoid unnecessary repetition. For example: Clause 7 (3) (a) (ii) on ‘excess jurisdiction’ needs to be rationalized with Clause 7 (3) (a) f (i) on ‘reasons not authorised’ ; Clause 7 (3) (a) (e) and Clause 7 (3) (a) f(ii) both refer to ulterior motive or purpose; Clause 7 (3) (a) (n) and Clause 7 (3) (a) (j) on ‘unreasonable’ administrative action are also similar; Clause 7 (3) (a) (r) on ‘abuse of power’ which is an illegality is catered for by Clause 7 (3) (a) (k) which refers to contravention of the law.
8. That the Bill be amended to include a requirement for exhaustion of internal dispute resolution mechanisms before a person invokes the jurisdiction of the Courts on judicial review matters.
9. That the Bill be amended to include transitional provisions so as not to affect matters that are already before court.
10. That the Bill be amended so as to remedy the inconsistencies in reference to an administrator, decision making authority and decision making authority.
11. That the Bill be amended generally by deleting and adding certain clauses especially with regard to timelines, editing and correction of typographical errors that could alter the intended meaning of certain provisions and any

further amendments in line with the observations and recommendations made by the Committee during the review of the Bill.

12. That the Senate adopts this report

**MINUTES OF THE 14TH SITTING OF THE STANDING COMMITTEE ON
LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON 13TH MAY, 2015 AT 9.30
A.M IN SHIMBA HILLS HALL ON FIRST FLOOR KICC**

PRESENT

1. Sen. Stephen Sang - Vice-Chairperson (Chairing)
2. Sen. Hassan Omar Hassan
3. Sen. Fatuma Dullo
4. Sen. Judith Sijeny

ABSENT WITH APOLOGY

1. Sen. Amos Wako - Chairperson
2. Sen. Kembi Gitura
3. Sen. Kiraitu Murungi
4. Sen. Mutula Kilonzo Junior
5. Sen. Kipchumba Murkomen

IN ATTENDANCE

SENATE

1. Mr. Mohamed H. Abdullahi -Committee Clerk
2. Ms. Gloria Wawira - Committee Clerk
3. Ms. Clare Jerotich - Researcher
4. Ms. Judy Ndegwa - Legal Counsel

MIN. NO. 70/2015 PRELIMINARIES

The Chairperson called the meeting to order at 10.30 a.m., followed by a prayer.

MIN. NO. 71/2015 ADOPTION OF THE AGENDA

The Agenda of the meeting was adopted after it was proposed by Sen. Sijeny and seconded by Sen. Omar

**MIN. NO. XX/2015 BRIEF ON THE FAIR ADMINISTRATIVE ACTION
BILL, 2015.**

The Chair called upon the Legal Counsel to brief the Committee members on the Bill.

Upon invitation the Counsel briefed the Committee as follows;

1. This is a Bill concerning County governments originating from the National Assembly and sponsored by Hon. Aden Duale, the National Assembly Leader of Majority.

2. The Bill was considered and passed by the National Assembly on 23rd April, 2015. It was forwarded to the Senate through a Message from the National Assembly dated 27th April, 2015.
3. The Bill was read a First Time in the Senate on 6th May, 2015, and committed to this Committee pursuant to standing order 130(1).
4. The Bill is now before the Committee for consideration and to facilitate public participation as envisaged under standing order 130(4) of the Senate Standing Orders.

Timelines

5. Pursuant to Article 261 as read with the 5th Schedule of the Constitution, the Bill was subject to a constitutional timeline of 27th August, 2014, but the timeline was extended by a period of nine months by the National Assembly pursuant to the provisions of Article 261(2) of the Constitution. The new Constitutional deadline is now 27th May, 2015.
6. In light of the short timelines, on 6th May, 2015, the Speaker of the Senate directed that the Bill be listed for Second Reading on Tuesday, 12th May, 2015 and its deliberations be expedited with the aim of having the Bill concluded in both Houses before 27th May, 2015.

1. The Objective of the Bill

7. The objective of the Bill is to give effect to the provisions of Article 47 of the Constitution on the right to fair administrative action and the review of such action by a court or an independent tribunal.
8. Article 47 of the Constitution states as follows-

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

2. Salient Provisions of each Part of the Bill

9. Part II of the Bill-

- (a) applies its provisions to all persons exercising administrative authority, or a judicial or quasi-judicial function, and requires that all such action be carried out in a procedural and efficient manner;
- (b) provides for the giving of notice to the person likely to be affected by the action;
- (c) provides for involvement of the public where the action is likely to affect the public; and
- (d) Requires an administrative authority to give reasons for a decision or administrative action to be taken.

10. Part III of the Bill-

- (a) provides for judicial review of administrative action by the High Court or by a tribunal, and gives instances in which such action may be reviewed;
- (b) outlines the orders that may be granted by a court in judicial review proceedings; and
- (c) provides for a right of appeal from the decision of the High Court to the Court of Appeal.

11. Part IV of the Bill-

- (a) clarifies that the provisions of the Bill are in addition to the general principles of common law and the rules of natural justice; and
- (b) repeals sections 8 and 9 of the Law Reform Act.

3. The Next Course Bill will take

12. Once the Committee tables its Report, the Bill will proceed in accordance with standing order 134(2)

MIN. NO. 72/2015 ANY OTHER BUSINESS

There being no any other business the meeting was adjourned at 9.40 am

SIGNED _____ DATE _____

(CHAIRPERSON)

MINUTES OF THE 15th SITTING OF THE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON 13th MAY, 2015 AT 10.30 A.M IN SHIMBA HILLS HALL ON FIRST FLOOR KICC

PRESENT

1. Sen. Stephen Sang - Vice-Chairperson (Chairing)
2. Sen. Hassan Omar Hassan
3. Sen. Fatuma Dullo
4. Sen. Judith Sijeny

ABSENT WITH APOLOGY

1. Sen. Amos Wako - Chairperson
2. Sen. Kembi Gitura
3. Sen. Kiraitu Murungi
4. Sen. Mutula Kilonzo Junior
5. Sen. Kipchumba Murkomen

IN ATTENDANCE

1. Mr. Mohamed H. Abdullahi
2. Ms. Gloria Wawira
3. Ms. Clare Jerotich
4. Ms. Judy Ndegwa

SENATE

- Committee Clerk
- Committee Clerk
- Researcher
- Legal Counsel

MIN. NO. 73/2015

PRELIMINARIES

The Chairperson called the meeting to order at 10.30 a.m., followed by a prayer.

MIN. NO. 74/2015

ADOPTION OF THE AGENDA

The Agenda of the meeting was adopted after it was proposed by Sen. Omar and seconded by Sen. Dullo

MIN. NO. 75/2015

SUBMISSION FROM THE PUBLIC ON THE FAIR ADMINISTRATIVE ACTION BILL, 2015.

Following a brief introduction of the Members of the Committee present, the Chair called upon the members of the public present to make their submission. Upon invitation the submissions were as follows;

SUBMISSION BY MR. WAWERU NJOROGE, A RESIDENT OF KIAMBU COUNTY.

The Bill is generally good but I proposed the Committee should consider amended the Bill as follows;

Section 8 of the Bill be amended by deleting the word, “or not later than six Months”

The committee shall considered to scrutinize and amend appropriately the various levels of seeking administrative redress so that the process is not an impediment to seeking of justice before the courts

The members of the public who are arrested for various petty offenses particularly arrest made by police during peaceful riots and picketing but which do not meet the threshold for prosecution shall be subjected to administrative actions before independent tribunals.

SUBMISSION BY MR. EDWARD OKELLO FROM THE COMMISSION ON ADMINISTRATIVE JUSTICE (OBUDSMAN).

Mr. Okello made the following submission on behalf of the Commission on Administrative Justice as follows;

We have examined the Bill and noted that a number of proposals made by the Commission to the National Assembly have been considered and incorporated in the Bill. However, we have noted the following areas that require further consideration:

1. Section 3 of the Bill extends the application of the Bill to non-state actors, yet the contents of the Bill relate to public administration. As an illustration, the definition of the word ‘decision’ under Section 2 makes reference to a decision under ‘**any written law.**’ This may not apply to number of non-state actors.
2. The Bill does not clearly state how its application relates to the jurisdiction of the Commission on Administrative Justice. For instance, is the regime under the CAJ Act parallel to that of the Bill? It is important also to appreciate that it was clearly a conscious design that the Commission is referred to as “the Commission on Administrative Justice”, dealing with administrative justice matters and in the words of S.26(c), “**adjudicating on the matters relating to administrative justice**”. It logically follows that out of the three **A. 59** Commissions which oversee the

implementation of the Bill of Rights Chapter, the Commission on Administrative Justice would be the body to oversee the implementation of A. 47 on fair administrative action. Thus, it is not clear why it would be necessary to create another parallel regime for redress of administrative injustice.

3. The clause on the definition of Cabinet Secretary under Section 2 should be deleted since no other reference is made to a Cabinet Secretary in the Bill.
4. Section 3(1)(b) of the Bill extends its application to 'any person performing a judicial function' yet the definition of administrative action under section 2 does not expressly mention judicial function.
5. The Bill uses the term 'Administrator' ([Sec. 5(1), 7(2)(1)(iii) & (iv), 7(3)(a) and 10(1)(f), (g) & (h)], but has not defined it. It may be important to define the term in the Bill since it is not popularly used. It is proposed that the term should be substituted with 'administrative authority' in the clauses where it appears.
6. Part III of the Bill confuses **Judicial Review** with **Administrative Review** by juxtaposing the two and making them look as if they are in the alternative. While the Part is titled 'Judicial Review,' it contemplates that a 'tribunal' can entertain judicial proceedings for administrative action [see sec. 7(3) pp. 9]. It is instructive to note that tribunals are quasi-judicial bodies and, therefore, cannot entertain judicial review applications. This would amount to usurpation of jurisdiction by the tribunals and such proceedings could be declared null and void. In this regard, reference to tribunals in that section should be deleted. However, tribunals and competent authorities should be allowed to conduct review of administrative action as is the practice.
7. Further, the Bill confuses review and judicial review under section 7(3) by providing for similar grounds for action. It should be noted that grounds for review as provided under Order 45 of the Civil Procedure Rules are error or mistake apparent on the face of the record, and discovery of new evidence or important matter which was not available earlier. In this regard, the grounds under Section 7(3) are primarily for judicial review and not review. It is, therefore, proposed that the Bill provides for review separately (first since it can be undertaken by the body making the administrative action) and judicial review in the subsequent parts. Further, some of the grounds in the Bill are similar and should be merged.

8. Whereas judicial review is a preserve of the courts, there is no clear body mandated to deal with administrative review of Article 47 breaches, which is a source of confusion in the Bill. Given the mandate of the Commission on Administrative Justice under the Commission on Administrative Justice Act, we propose that the Commission be made the primary body to deal with administrative review of actions or decisions of administrative authorities (see the definition of 'administrative action under Section 2 of the CAJ Act and Section 8(a), (b) and (c)]. It should be noted that empowering CAJ as the primary body in administrative review also brings in uniformity and certainty as well as accountability since it reports to Parliament annually, and National Assembly on bi-annual reports [Bi-annual reports will be sent to the Senate once CAJ Act is amended since a substantial number of complaints reported therein relate to County Governments]. T
9. In order to full operationalize the right, the Commission should be empowered to make Regulations in consultation with the Attorney General. The Regulations will incorporate matters that relate to County Governments to assist them set up structures to improve administrative justice.
10. The Bill in **S. 8(1)** provides that judicial review shall be instituted without unreasonable delay and not later than six months after the date of making of the decision. This is not the procedure in the Civil Procedure Act, Order 53 Rule 2 which restricts the six months' time limitation to applications for orders of Certiorari. In any event, the duration of six months is limiting and should be removed in all instances. The test should be unreasonable delay to be determined by the Court on the basis of the circumstances of a matter before it.

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ANY OTHER BUSINESS

There being no any other business the meeting was adjourned at 12.15 pm

SIGNED

DATE

(CHAIRPERSON)