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# The duty to give reasons under Kenya's Fair Administrative Action Act, 2015: Seven years later

Seth Wekesa\* and Nelson Otieno\*\*

## Abstract

*Article 47 of the Constitution of Kenya 2010 has constitutionalised the right to be given written reasons for administrative actions and decisions. The same has been set out in Sections 4 and 6 of the Fair Administrative Action Act 2015. Based on the amber light and public administration theories, this paper argues that the right to be given reasons for decisions taken by administrative authorities has not only been used as a tool to offer legal protection to individuals adversely affected by administrative action but also helps in enhancing good public administration in Kenya. On the one hand, courts of law have considered the right to be given written reasons both as a constitutional ground for judicial review of administrative action under Article 47 of the Constitution and as a remedy available in judicial review as stated in Section 11 of the Fair Administrative Action Act. It has provided affected individuals with a basis to challenge an administrative action and decision through a judicial review process that not only preserves but also develops and progresses relevant common law principles. On the other hand, courts of law have viewed the right to be given written reasons as a tool aimed*

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\* LLB (University of Nairobi); PGDL (Kenya School of Law); LLM (University of Nairobi); LLM (University of Pretoria); LLD (University of Pretoria).

\*\* LLB, (Kenyatta University); PGDL (Kenya School of Law); LLM Candidate (University of Dar es Salaam).

*at enhancing public administration by ensuring that public administrators reflect on the lawfulness, quality, rationality, and fairness of their actions. However, the objective of Section 6 of the Fair Administrative Action Act may not be fully achieved because it does not expressly require public administrators to give adequate reasons to persons whose rights have been adversely affected by administrative action. Besides, it does not provide the criterion to be used to determine when the departure from the requirement to provide reasons for administrative actions is reasonable and justifiable.*

**Keywords:** fair administrative action, public administration, Constitution of Kenya

## 1. Introduction

The law gives authority to administrative agencies to take administrative actions when implementing government policies and programmes. This authority is drawn from the Constitution, Acts of Parliament, delegated legislation and executive directives. The administrative agencies are managed by public administrators or public officers who make decisions that affect the rights and interests of individuals. In the process of making administrative decisions, the law requires public administrators to make decisions that are not only lawful, reasonable, efficient, expeditious and procedurally fair but also requires them to explain or justify their decisions by providing written reasons to the affected individuals.<sup>1</sup> In Kenya, it is a constitutional and statutory requirement that public administrators justify their administrative actions.<sup>2</sup> Public administrators need to provide reasons for their decisions because it enhances public confidence in the decision-making process as well as cushioning them from exposure to legal challenges for making unlawful decisions.<sup>3</sup>

This paper assesses the right to be given reasons under the Fair Administrative Action Act, 2015. It examines the duty to give reasons as a rule of natural justice under common law and how it was applied in Kenya before the 2010 Constitution was enacted. It further examines the contribution of the right to be given reasons under Article 47 of the 2010 Constitution and Section 6 of the Fair Administrative Action Act so far. Finally, it looks at the weaknesses of Section 6 of the Fair Administrative Action Act and makes appropriate recommendations to strengthen the Act for it to fully achieve its purpose of ensuring effective public administration and promotion of access to administrative justice in Kenya.

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<sup>1</sup> Constitution of Kenya (2010), Article 47.

<sup>2</sup> Constitution of Kenya (2010), Article 47; Fair Administrative Action Act (No 4 of 2015), Section 6.

<sup>3</sup> Migai Akech, *Administrative law*, Strathmore University Press, 2016, 41.

## 2. Duty to give reasons: From a common law principle to a constitutional right

This section examines the right to be given reasons during the pre and post-2010 Constitution eras in Kenya. It analyses the development of the duty to give reasons from a common law principle to a constitutional right. It examines the application of the principle of duty to give reasons under common law in Kenya. This is followed by a discussion on the transformative nature of Article 47 of the 2010 Constitution that elevated the principle of duty to give reasons to a constitutional right. Lastly, it assesses the right to be given written reasons under Section 6 of the Fair Administrative Action Act.

### 2.1 Pre-2010 Constitution: The common law position

The duty to give reasons for administrative decisions that adversely affect an individual was first recognised as one of the rules of natural justice under common law.<sup>4</sup> Natural justice refers to the rule against bias as well as a fair hearing.<sup>5</sup> The principles of natural justice require that parties to every case must be given adequate notice, afforded a fair hearing, presumed innocent and be subject to decisions and decision-making processes that are free from bias.<sup>6</sup>

Before 1964, common law did not recognise the duty to give reasons as a principle that binds administrative agencies. The principle was strictly applied to the activities of the judicial bodies.<sup>7</sup> With time, the requirement of natural justice developed to have broad limbs of fair

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<sup>4</sup> Jamela A Ali, 'Duty to give reasons: The way forward' 2(1) *The New Guyana Bar Review* (2008) 1.

<sup>5</sup> RJ Garland, 'The application and exclusion of natural justice: A review of some recent developments' 4(2) *The Law Teacher* (1970) 72.

<sup>6</sup> Garland, 'The application and exclusion of natural justice' 72.

<sup>7</sup> HL Kushner, 'The right to reasons in administrative law' 24(2) *Alberta Law Review* (1986) 309; For more information, see *Pure Spring Co. Ltd. v Ministry of National Revenue* (1947) IDLR 501 (Ex. Ct) and *Canadian Arsenal Limited v Can. Lab. Reins. Bd.*<sup>37</sup> that are cited by Kushner.

hearing before an unbiased tribunal. In 1964, the case of *Ridge v Baldwin*<sup>8</sup> marked a major shift from the previous position. For the first time, the House of Lords held that the principles of natural justice could be applied to administrative bodies thus extending it beyond the traditional subject of judicial power excesses. In the case of *Ridge v Baldwin*,<sup>9</sup> the House of Lords sets the test that if an administrative body exercises a public power with the potential of ripping someone's right to liberty or property, the exercise must be judicial, judicious and in tandem with the rules of natural justice.<sup>10</sup>

In 1994, it was recognised in the English Court of Appeal case of *R v Higher Education Funding Council ex parte Institute of Surgery*<sup>11</sup> that the duty to give reasons arises from the principles of natural justice. This duty was not general but depended on circumstances. In this case, the court noted that courts would consider the nature of the interest at stake, nature of the process as well as individual circumstances of each case.

The duty to give written reasons for administrative actions arises from a legal theory of good public administration.<sup>12</sup> The theory argues that there is a contract between the citizen and the domestic administrative bodies whose implied term is that administrators must exercise their discretion fairly.

In the pre-2010 Constitution era,<sup>13</sup> the application of the principle of duty to give reasons in Kenya was based on the provisions of the Judicature Act<sup>14</sup> which commenced operating in Kenya from 1st August 1967.

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<sup>8</sup> *Ridge v Baldwin* (1964) AC 40.

<sup>9</sup> *Ridge v Baldwin* (1964) AC 40.

<sup>10</sup> *Ridge v Baldwin* (1964) AC 40; JAG Griffith, 'Requirements of natural justice' 1(1) *Kashmir University Law Review* (1968) 37.

<sup>11</sup> *R v Higher Education Funding Council ex parte Institute of Surgery* (1994) 1 WLR 242.

<sup>12</sup> See dissenting judgment of Denning J in *Breen v Amalgamated Engineering Union* (1971) 2 QB 175.

<sup>13</sup> This is an era where there was neither Article 47 of the Constitution nor the Fair Administrative Action Act. Review of administrative action was guided by common law, Law Reform Act and Civil Procedure Rules.

<sup>14</sup> Judicature Act (Cap 8).

The Act allows the application of substance of common law in areas to which the written laws did not apply. The proviso under Section 3 of the Act was that the application was to the extent that circumstances and the inhabitants permit or otherwise render necessary.

Kenyan courts had an opportunity to consider instances where public administrators took administrative action without providing reasons for them. The approach taken in applying the principle of duty to give reasons for administrative action was not consistent. There were cases where it was disregarded. Besides, in instances where the courts recognised the duty to give reasons, it did not specify the form in which administrators should provide reasons to affected individuals. In some instances, the courts only enforced the duty in situations where the procedures recognised it. The authors attribute the phenomenon of inconsistency to two reasons. First, there was no constitutional stipulation for the right to fair administrative action under the Independence Constitution (now repealed). Secondly, the Judicature Act<sup>15</sup> ranked the principles of common law lower than the statutory law in the hierarchy of laws in Kenya's legal system. These reasons gave judges more room to interpret the law regarding what would be considered to be natural justice on a case-by-case basis. The deviations were possible for the judiciary that largely operated under a comparatively authoritarian pre-2002 regime of the Kenyan Government.

For instance, in the case of *Charles Kanyingi Karina v Transport Licensing Board*,<sup>16</sup> the Transport and Licensing Board suspended the driving licence of the applicant. The reason for the suspension was that the fitted speed governor was faulty. The applicant made an application for an order of *certiorari*. The court, in refusing to grant the orders, noted that the duty to give reasons was not automatic and orders of *certiorari* are discretionary. Similarly, in the case of *Doshi Ironmongers Ltd v Commissioner Customs & Another*<sup>17</sup> where the applicant sought the order of

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<sup>15</sup> Judicature Act (Cap 8).

<sup>16</sup> Miscellaneous Civil Application 1214 of 2004, Ruling of the High Court at Nairobi (2004) eKLR.

<sup>17</sup> Miscellaneous Civil Application 1016 of 2007, Judgement of the High Court at Nairobi (2007) eKLR.



*certiorari* in respect of demand notice for duties and taxes issued on 17 July 2007 by the Kenya Revenue Authority (KRA). One ground upon which the application was made was that KRA failed to provide reasons for uplifting of duties and taxes contrary to Section 122(2) of the East African Community Customs that imposed the duty to give reasons on KRA. The court admitted that a reason was given despite conceding that the same was given late. In so doing, the court also affirmed that the orders of *certiorari* are discretionary.

## 2.2 The transformative nature of Article 47 of the Constitution of Kenya 2010

Before the constitutional reform process that led to the enactment of the Constitution of Kenya 2010, public administration was viewed as a promoter of abuse of government authority. Post-independence regimes especially under former presidents Jomo Kenyatta and Moi regimes were condemned for abuse of government power.<sup>18</sup> They were also accused of interfering with avenues established to review administrative actions.<sup>19</sup> Administrative agencies had the tendencies of expanding and abusing statutory and discretionary powers.<sup>20</sup> The legislative process was utilised to increase discretionary powers for public officials and limit the scope of judicial review of administrative actions.<sup>21</sup> Thus, courts were not able to effectively check governmental power due to interference from the executive.<sup>22</sup> In addition, there were instances where the executive disregarded court decisions.<sup>23</sup> These attributes

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<sup>18</sup> JB Ojwang, 'Government and constitutional development in Kenya, 1895-1995' in Bethwell A Ogot and William Robert Ochieng' (eds), *Kenya: The making of a nation: A hundred years of Kenya's history, 1885-1995*, Institute of Research and Postgraduate Studies, Maseno University, 2000, 148-157.

<sup>19</sup> Patricia Kameri-Mbote and Migai Akech, *Kenya: Justice sector and the rule of law*, Open Society Foundations, 2011, 7-8.

<sup>20</sup> Kameri-Mbote and Akech, *Kenya: Justice sector and the rule of law*, 7-8.

<sup>21</sup> James Thuo Gathii, *The contested empowerment of Kenya's judiciary, 2010-2015: A historical institutional analysis*, Sheria Publishing House 2016, 201-202.

<sup>22</sup> Akech, *Administrative law*, 433.

<sup>23</sup> Kameri-Mbote and Akech, *Kenya: Justice sector and the rule of law*, 61.

undermined tenets of constitutional democracy such as protection of fundamental rights and freedoms and promotion of the rule of law in the country. It was against this backdrop that the constitutional reform process considered reforms relating to administrative law in Kenya to restore the independence of the judiciary and protect the judicial review process from interference from parliament and the executive.<sup>24</sup> This was achieved through the establishment of a constitutional right to fair administrative action under Article 47.

The Constitution elevated the duty to act fairly from a statutorily recognised common law principle under the Judicature Act to constitutional status. Article 47 provides that every person has a right to an administrative action that is expeditious, efficient, reasonable, lawful and procedurally fair.<sup>25</sup> Such recognition means that the provisions of Article 47 gain the supremacy of the constitution, thus, any law which contravenes the provisions is null and void to the extent of its inconsistency as envisaged under Article 2 of the Constitution.<sup>26</sup>

Article 47(1) provides for constitutional grounds for subjecting administrative action to judicial review.<sup>27</sup> It introduces new grounds for judicial review such as expedition and efficiency which were not recognised as grounds for judicial review under common law.<sup>28</sup> These two grounds were not recognised at common law. Expedition and efficiency are important grounds for judicial review because they ensure administrative actions are undertaken within a reasonable time and without delay. Article 47(1) also modifies some common law grounds for judicial review. It provides for lawfulness as a ground which was borrowed from illegality under common law. Lawfulness as a ground ensures public power is exercised within the scope of the enabling statutory provision. Other common-law grounds that have been constitutionalised include reasonableness and procedural fairness. Procedural

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<sup>24</sup> Peter Kaluma, *Judicial Review: Law, procedure and practice*, LawAfrica, 2012, 16.

<sup>25</sup> Constitution of Kenya (2010), Article 47(1).

<sup>26</sup> Constitution of Kenya (2010), Article 2(4).

<sup>27</sup> Constitution of Kenya (2010), Article 47(1).

<sup>28</sup> Thuo, *The contested empowerment of Kenya's judiciary, 2010-2015*, 35.

fairness was borrowed from the common law rules of natural justice. These rules of natural justice include the right to a fair hearing and the rule against bias.

Article 47(2) provides for the right to give written reasons for administrative action. It gives everyone who has been or is likely to be adversely affected by administrative action to be given written reasons for the action.<sup>29</sup> The requirement for reasons to be given in a written form is a significant improvement from the position under common law where oral reasons sufficed. Article 47(2) places an obligation to persons exercising public power to justify their administrative actions with written reasons to affected parties. The right to be given written reasons also borders on the provisions of Article 10 on values of transparency, accountability and good governance in the exercise of the administrative duties, which are mandatory national values and principles of governance that govern all public and state officers when they apply and implement the Constitution.<sup>30</sup>

Additionally, Article 47(2) has created a new constitutional ground for judicial review of administrative decisions. Courts and tribunals in Kenya have relied on this provision to review the decisions of public bodies. Further, courts have made it clear that the reasons provided have to be specific and clear for two reasons: first, it will promote the right to procedural fairness by enabling the affected individual to know what response to give. In *Geothermal Development Company Ltd v Attorney General*,<sup>31</sup> the High Court stated that the duty to give reasons forms an important component of administrative action and that information concerning administrative proceedings should be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be.<sup>32</sup>

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<sup>29</sup> Constitution of Kenya (2010), Article 47(2).

<sup>30</sup> Constitution of Kenya (2010), Article 10(2)(c).

<sup>31</sup> Petition 352 of 2012, Judgement of the High Court at Nairobi (2013) eKLR.

<sup>32</sup> *Geothermal Development Company Ltd v Attorney General*, Petition 352 of 2012, Judgement of the High Court at Nairobi (2013) eKLR para 30.

Second, it ensures public officials observe their duty to give adequate reasons for their administrative actions. As a result of the constitutional elevation, Kenyan courts have insisted that public administrators should provide written reasons to affected parties as a matter of right. For instance, in the case of *Priscilla Wanjiku Kihara v Kenya National Examination Council*,<sup>33</sup> the High Court stated that failure to provide reasons for administrative action may affect the outcome of a judicial review of administrative action.<sup>34</sup> Similarly in the case of *Judicial Service Commission v Mbalu Mutava & another*,<sup>35</sup> the Court stated that Article 47(2) of the Constitution intended that the reasons for the administrative decision be given as a matter of right. This means that it binds all administrative agencies whether taking a facilitative or active role in an administrative action

The provisions of Article 47 do not abolish the common law position. The common law view of the duty to act fairly is encompassed as one aspect of a fair administrative action under Article 47.<sup>36</sup> In the *Mbalu Mutava* case, Justice William Ouko found that the provisions of Article 47 are complementary to the common law provisions. The complementarity, therefore, invites courts and other decision-making bodies to consider the common law position when interpreting Article 47.<sup>37</sup>

Similarly, in the case of *Republic v National Police Service Commission ex parte Daniel Chacha Chacha*,<sup>38</sup> the High Court recognised that the constitutional right to written reasons was derived from common law. In this case, the applicant (Daniel Chacha Chacha) was declared as lacking integrity when he appeared before the National Police Service Commis-

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<sup>33</sup> Judicial Review Application 413 of 2016, High Court at Nairobi (2016) eKLR.

<sup>34</sup> *Priscilla Wanjiku Kihara v Kenya National Examination Council*, Judicial Review Application 413 of 2016 Judgement of the High Court at Nairobi (2016) eKLR para 19 and 21.

<sup>35</sup> *Judicial Service Commission v Mbalu Mutava & another*, Civil Appeal 52 of 2014, Judgement of the Court of Appeal at Nairobi (2015) eKLR.

<sup>36</sup> Constitution of Kenya (2010), Article 47(1).

<sup>37</sup> *Judicial Service Commission v Mbalu Mutava & another*, Civil Appeal 52 of 2014, Judgement of the Court of Appeal at Nairobi (2015) eKLR para 23; Constitution of Kenya (2010) Article 47(1); Judicature Act (Cap 8).

<sup>38</sup> Miscellaneous Application 36 of 2016, Judgement of the High Court at Nairobi (2016) eKLR.

sion (NPSC) without being afforded the specifics of such a finding by NPSC. The applicant also applied for a review of the decision by NPSC but the review was summarily dismissed without affording him any reasons for the same. The Court stated that the right to fair administrative action, which includes the right to be given written reasons, is a constitutional requirement.<sup>39</sup>

Despite the integration of the common law principles with Article 47 guarantees, the common law as a source of administrative law supplements the Constitution.<sup>40</sup> In the case of *Li Wen Jie & 2 others v Cabinet Secretary, Interior and Coordination of the National Government & 3 others*,<sup>41</sup> Justice John Mativo considered the petition against deportation of certain Chinese nationals. He supported the position that the judicial review of public power has been subsumed under the Constitution as posited in the cases of *Daniel Chacha Chacha* and *Mbalu Mutava*. The judge also went further to explain the extent of the relationship between the two sources of law. The judge underscored that the incorporation of the common law principles such as reasonableness, lawful and procedurally fair under Article 47 is only to the extent to which they continue to be relevant to the circumstances and situations in Kenya.<sup>42</sup> The Court further explained that as regards the fair administrative action, there are no longer two systems of law but only one system which is shaped by the Constitution as the supreme law with the common law applying by deriving from it.<sup>43</sup>

Lastly, Article 47(3) places the obligation on the Parliament to enact legislation to give effect to the right to written reasons.<sup>44</sup> The legislation should be aimed at promoting efficiency in public administration and

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<sup>39</sup> *Republic v National Police Service Commission ex parte Daniel Chacha Chacha*, Miscellaneous Application 36 of 2016, Ruling of the High Court at Nairobi (2016) eKLR para 47.

<sup>40</sup> The Constitution is the supreme law of Kenya. Constitution of Kenya (2010), Article 2; Judicature Act (Cap. 8), Section 3(1)(a).

<sup>41</sup> Petition 354 of 2016, Ruling of the High Court at Nairobi (2017) eKLR.

<sup>42</sup> *Li Wen Jie & 2 others v Cabinet Secretary, Interior and Coordination of the National Government & 3 others*, Petition 354 of 2016, Ruling of the High Court at Nairobi (2017) eKLR.

<sup>43</sup> *Li Wen Jie & 2 others*, Ruling of the High Court at Nairobi eKLR.

<sup>44</sup> Constitution of Kenya (2010), Article 47(3).

providing for the review of administrative actions by court or impartial tribunal.<sup>45</sup>

From the above analysis, Article 47 has been transformative in the provision for the right to be given reasons for administrative action in three main ways. First, the right is stated in the Kenyan Constitution which is the supreme law of the land. This is an improvement from the Independence Constitution (now repealed) that lacked provisions on fair administrative action. Secondly, is the fact that the provision of Article 47 is part of Kenya's Bill of rights and is therefore justiciable upon either actual or threatened breach or violation. Thirdly, the provision is an improvement on the common law principle of adequate reasons by imposing an obligation on the administrative bodies to ensure that the reasons are provided in a written form.

The First Schedule to the Constitution stipulated a time specification of four (4) years for the enactment of the contemplated legislation. In compliance with this constitutional obligation, Parliament enacted the Fair Administration Action Act No 4 of 2015.<sup>46</sup> Significantly, the Fair Administrative Action Act supports the complementariness of the common law position and the 2010 Constitution. Section 12 of the Fair Administrative Action Act states that the provisions of the Fair Administrative Action Act are an addition to and not a derogation from general principles of common law and rules of natural justice.<sup>47</sup>

The next section offers a critical review of the provisions of the Fair Administrative Action Act on the duty to give reasons, which elaborate on the right to be given reasons under Article 47.

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<sup>45</sup> Constitution of Kenya (2010), Article 47(3)(a)-(b).

<sup>46</sup> The Act commenced on 17 June 2015 with an objective of giving effect to Article 47 of the Constitution of Kenya.

<sup>47</sup> Fair Administrative Action Act (2015), Section 12.

### 2.3 Assessment of the duty to give reasons under the Fair Administrative Action Act

The Fair Administrative Action Act was enacted to give effect to the provisions of Article 47 of the 2010 Constitution. The purpose of the Act is to provide for review of administrative action by court or impartial tribunal and promote effective public administration. The Act borrowed heavily from the South African Promotion of Administrative Justice Act which was enacted to give effect to Section 33 of the South African Constitution. Section 33 of the South African Constitution is similar to Article 47 of the 2010 Constitution.<sup>48</sup> In the analysis of some of the provisions on duty to give reasons under the Fair Administrative Action Act, the Promotion of Administrative Justice Act of South Africa will be used as a comparator because the Fair Administrative Action Act has borrowed heavily from the Promotion of Administrative Justice Act and South Africa has similarly constitutionalised the right to administrative justice.

In general, the Fair Administrative Action Act has introduced six aspects that are important in enhancing access to administrative justice in Kenya. First, Section 3(1) has expanded the scope of judicial review to include the action of public and private bodies. This implies that it is not only the actions of public bodies that are subjected to judicial review but also actions of private actors that may be subjected to judicial review where they violate the rights or interests of affected individuals. Second, the Act has expounded on the constitutional grounds for judicial review and codified the grounds for judicial review under common law such as *ultra vires*, procedural fairness and reasonableness. Section 7(2) of the Act provides for the grounds upon which a court or tribunal may review an administrative action or decision.

Third, Section 9 of the Act outlines the procedure for judicial review. Under Section 9(2), an application for judicial review would be allowed only after exhausting all remedies available within the internal dispute resolution mechanisms. Fourth, the Act has given effect to the

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<sup>48</sup> Constitution of South Africa (1996), Section 33.



right to access information relating to administrative action or decision. This helps in the realisation of the right to access information under Article 35 of the Constitution.

Fifth, under Part IV of the Act (titled 'Miscellaneous'), it is stated that the provisions of the Fair Administrative Action Act are additional to and not derogations from the rules of common law and natural justice.<sup>49</sup> The acknowledgment of common law principles in review of administrative action has a significant impact on how Article 47 of the Constitution should be interpreted.<sup>50</sup> Courts that interpreted the Fair Administrative Action Act have continued to appreciate and apply the principles of common law in the post-2015 jurisprudence. Courts have further interpreted Article 47 and the Fair Administrative Action Act in a way that ensures common law principles and rules of natural justice are further developed.<sup>51</sup> Lastly, the Act has elaborated the right to be given written reasons for administrative action.

The requirement to give reasons for administrative action under the Fair Administrative Action Act has both substantive and procedural aspects. Substantively, Section 4(2) of the Fair Administrative Action Act recognises that every person has a right to be given written reasons for any administrative action that is taken against him/her.<sup>52</sup> This provision gives the court power to review administrative actions. This position was clearly stated in the case of *Suchan Investment Limited v Ministry of National Heritage and Culture*,<sup>53</sup> where the Court found that its power to statutorily review administrative action no longer flows directly from the common law, but *inter alia* from the constitutionally mandated Fair Administrative Action Act and Article 47 of the Constitution of Kenya 2010.

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<sup>49</sup> Fair Administrative Action Act (No 4 of 2015), Section 12.

<sup>50</sup> The fact that the provision of the complementariness between the Fair Administrative Action Act and the common law appears in the miscellaneous part of the Act does not mean that is less weighty at least from jurisprudence.

<sup>51</sup> See *Li Wen Jie & 2 others*, Ruling of the High Court at Nairobi, and *Judicial Service Commission v Mbalu Mutava & another*, Civil Appeal 52 of 2014 in Court of Appeal at Nairobi Court (2015) eKLR.

<sup>52</sup> Fair Administrative Action Act (No 4 of 2015), Section 4(2).

<sup>53</sup> Civil Appeal 46 of 2012, Ruling of the Court of Appeal at Nairobi (2016) eKLR.



Procedurally, the Fair Administrative Action Act expounds on how a request for reasons for administrative action can be made, modes of enforcing the right to be given reasons and the remedies that accrue for breach of the right. Section 6(1) of the Fair Administrative Action Act allows an individual adversely affected by administrative action to request certain information from public administrators to facilitate his/her application for review of that administrative action in court. The information requested includes reasons for the administrative action taken and any other relevant documents relating to the decision.

Section 6(3) of the Fair Administrative Action Act gives a public administrator thirty (30) days to provide written reasons after receiving a request for the same. Reasons provided orally would not suffice. Written reasons are more likely to be adequate because the administrator would have had sufficient time to properly consider the issues by taking into account relevant factors to enable him to justify his decision. This may not be the case if the administrator was allowed to provide reasons orally at the point of making the decision. The timeframe of 30 days looks reasonable because it gives an administrator sufficient time to properly consider the issues and take into account relevant factors and provide written reasons for administrative action. Comparatively, Section 5(2) of the Promotion of Administrative Justice Act of South Africa provides for ninety (90) days which may be viewed as too long and may undermine the right to enforce the duty to give reasons since the target activity may be overtaken by events.<sup>54</sup>

The test of adequate reasons which has been adopted in Kenya is that the reasons for the administrative action must be capable of informing the other person.<sup>55</sup> The purpose of the duty to give a reason is to justify the administrative action – to explain to the affected person why a particular action was taken. This makes the requirement for *adequate* reasons to be given to be important. The question of the adequacy of

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<sup>54</sup> Promotion of Administrative Justice Act (No 3 of 2000), Section 5(2).

<sup>55</sup> Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259, relied on in *J N N, (a minor) M N M, suing as next friend v Naisula Holdings Limited t/a N School*, Constitutional Petition 198 of 2017, Judgement of the High Court at Nairobi (2018) eKLR.

reasons given should be assessed from the point of view of the affected person rather than that of the public administrator.<sup>56</sup> When evaluating the adequacy of reasons given for administrative action, courts should ensure the reasons are unambiguous and intelligible to the person affected. They should be precise to enable the affected person to understand why and how the decision was reached. In the English case of *Re Posyer and Mills Arbitration*,<sup>57</sup> Megaw J stated that proper and adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible but will deal with substantive points that have been raised.<sup>58</sup> Migai Akech rightfully argues that the decision in *Re Posyer case* means that the reasons provided must not only be both adequate and intelligible but also rationally relate to the evidence and be comprehensible.<sup>59</sup>

The requirement to provide adequate reasons for administrative action is significant to public administration in two ways. First, it illustrates that proper consideration of the matter took place.<sup>60</sup> Second, adequate reasons help in setting standards that may serve as guidelines to be applied in treating similar administrative action in the future, thus enhancing consistency in the decision-making process.

The objective of Section 6(1) of the Fair Administrative Action Act appears to fall short of fully aligning to the test for two main reasons. Section 6 of the Fair Administrative Action Act does not expressly require public administrators to give adequate reasons to persons whose rights have been adversely affected by administrative action. Though Section 6(2) of the Fair Administrative Action Act appears to militate against this possible mischief, it does not provide clear assurance since the obligation of the administrators to provide reasons for their action is not couched in mandatory terms.<sup>61</sup> This legislative position has in-

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<sup>56</sup> DJ Brynard 'Reasons for administrative action: What are the implications on public officials' 44(3) *Journal of Public Administration* (2009) 643.

<sup>57</sup> [1963] 1 All ER 612.

<sup>58</sup> *Re Posyer and Mills Arbitration* [1963] 1 All ER 612.

<sup>59</sup> Akech, *Administrative law*, 41.

<sup>60</sup> Brynard, 'Reasons for administrative action,' 643.

<sup>61</sup> Fair Administrative Action Act (No 4 of 2015) Section 6(2) (unlike Section 6(3)) which used the word 'may include' and not 'shall'.

fluenced the decision of courts to exercise restraint in finding fault for administrative decisions which fail to analyse evidence.<sup>62</sup> Overall, the manner in which Section 6(1) is couched has given courts leeway to apply the pre-2015 standards and test of adequate reasons and thus fail to be progressive in cases of the automatic right to be given reasons.

Further, though Section 6(3) of the Fair Administrative Action Act provides glimpses of hope as to the provision of reasons, it does not serve the purpose which it sought to further since the mandatory duty to give reasons only arises in cases where requests are made.

Also, although Section 6(5) of the Fair Administrative Action Act allows public administrators to depart from the requirement to provide reasons if it is reasonable and justifiable in the circumstances and immediately inform the affected person of this deviation, FAAA fails to provide criteria for determining which circumstances are reasonable and justifiable to allow an administrator to deviate from this requirement. It leaves this open-ended and flexible for interpretation. Such failure to provide criteria may lead to administrators abusing this discretion to depart from the requirement to provide adequate reasons in writing for their administrative actions.

As a constitutional and a statutory right, the breach of the right to be given written reasons have various modes of enforcing it including internal dispute resolution mechanisms, constitutional petitions, lodging a petition with the Commission on Administrative Justice (CAJ) and the most notorious under the Fair Administrative Action Act, judicial review.

An aggrieved person who is not provided with written reasons for an administrative action can use internal mechanisms to address the grievance. Section 9(2) of the Act requires the aggrieved individual to exhaust all remedies available within the internal dispute resolution mechanisms before applying to court or tribunal for a review of administrative action.

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<sup>62</sup> *J N N, M N M, v Naisula Holdings Limited*, Ruling of the High Court at Nairobi.

The Fair Administrative Action Act recognises the original jurisdiction of subordinate courts, conferred in Article 22(3) to determine petitions on the enforcement of the Bill of Rights, such as Article 47. Therefore, any violation, threat, infringement or denial of the right to fair administrative action can be enforced through the institution of court proceedings in the form of a constitutional petition under Article 22 of the Constitution. Such proceedings are ordinarily instituted in the constitutional division of the High Court of Kenya. Article 23 of the Constitution mandates the constitutional court to offer the following remedies: a declaration of rights, injunction, conservatory orders, declaration of invalidity, compensation and order for judicial review.

Section 5 (2) of the Fair Administrative Action Act recognises the right of an aggrieved person to challenge any administrative action or decision in accordance with the procedure set out under the Commission on Administrative Justice Act, 2011.<sup>63</sup> Any person who is aggrieved by lack of written reasons for an administrative action taken by a public officer, state corporation or other body or agency of the state<sup>64</sup> can complain to the Commission on Administrative Justice personally or through a representative.<sup>65</sup> This can be done orally or in writing through the Secretary to the Commission.<sup>66</sup> The Commission shall then proceed to investigate or launch an inquiry into such a complaint of abuse of power according to its powers under Section 8(2) of the Commission on Administrative Justice Act. The Commission may then issue the summons, require statements to be given under oath and conduct a hearing.<sup>67</sup> The Commission has powers to recommend judicial redress, refer the complaint to a relevant agency or refer the matter to the Director of Public Prosecutions if the maladministration gives rise to the commission of the criminal offence.<sup>68</sup>

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<sup>63</sup> Fair Administrative Action Act (No 4 of 2015), Section 5(2)(a).

<sup>64</sup> Commission on Administrative Justice Act (No 23 of 2011), Section 29.

<sup>65</sup> Commission on Administrative Justice Act, Section 32.

<sup>66</sup> Commission on Administrative Justice Act, Section 33.

<sup>67</sup> Commission on Administrative Justice Act, Section 26.

<sup>68</sup> Commission on Administrative Justice Act, Section 41.

Section 7 of the Fair Administrative Action Act envisages the institution of judicial review proceedings as a remedy for breach of the right to be given written reasons.<sup>69</sup> The proceedings can be instituted before a court or a tribunal.<sup>70</sup> The High Court has the jurisdiction to hear the proceedings. In some circumstances, unlike the scenario in the pre-Fair Administrative Action Act regime, a magistrate may have the power to hear the judicial review applications.<sup>71</sup>

Generally, following judicial review proceedings, the court, according to Section 11 of the Fair Administrative Action Act, can grant myriads of orders (remedies), including the declaration of rights, restraining orders, and compelling orders, quashing orders, temporary interdict and award of costs.<sup>72</sup> From the remedies under Section 11 coupled with those in Article 23(3) of the Constitution, the most pertinent remedies available for a breach of the right to be given written reasons are those which set aside the administrative decision for lack of adequate and written reasons and those which direct the administrator to give reasons for the administrative action or decisions. Section 11(1)(e) of the Fair Administrative Action Act provides for a quashing order (order of *certiorari*) that has the effect of invalidating an administrative decision and remitting the matter to the administrator for reconsideration. Section 11(1)(c) of the Fair Administrative Action Act is an embodiment of the second school of thought which allows the court to direct the administrator to give reasons for an administrative decision where there was none.

Courts have recognised these two schools of thought in remedying the breach of the right to be given adequate and written reasons. The rationale for the first school of thought has been provided by courts in the cases of *County Government of Nyeri & Governor, Nyeri County v Cecilia Wangeci Ndungu*<sup>73</sup> and *K Mberia & Partners Advocates v Property Realty*

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<sup>69</sup> Fair Administrative Action Act, Section 7.

<sup>70</sup> Fair Administrative Action Act, Section 7.

<sup>71</sup> Fair Administrative Action Act, Section 9(1).

<sup>72</sup> Fair Administrative Action Act, Section 11.

<sup>73</sup> Civil Appeal 2 of 2015, Ruling of the Court of Appeal (2015) eKLR.

*Limited*.<sup>74</sup> The rationale was that the matter of failure to give reasons was a breach of a constitutional provision provided in Article 47 of the Constitution. This touched on the supremacy of the constitution as the document which binds all persons and all state organs in the course of performing their duties. The Court of Appeal in particular noted that such a failure compromises the rule of law and the integral value of the Bill of Rights to Kenya's democratic space.<sup>75</sup> According to the courts, the first school of thought draws heavily from the elevation of the right to be given written reasons to both as a constitutional right and a constitutional principle.<sup>76</sup>

One convincing reason to take the second school of thought is that some administrative decisions are borne out of the huge investment of human and financial capital and overturning them for lack of reasons alone, when in fact the reasons would have been sufficiently given, may be self-defeatist resource-wise. However, this approach has its fair share of challenges since it will mean loss of precious judicial time because courts will need to reconsider the reasons given by the administrative body and ensure that they meet the rationality and reasonableness tests as well as the procedural test should they be challenged again.

### 3. Conclusion

This paper assessed the right to be given reasons under the Fair Administrative Action Act. It examined the duty to give reasons as a common law principle and rule of natural justice and how it was applied in Kenya before the 2010 Constitution was enacted. It further examined the contribution of the right to be given reasons under Article 47 of the 2010 Constitution and Section 6 of the Fair Administrative Action

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<sup>74</sup> Reference Application 1 of 2018, Ruling of the High Court at Kajiado (2018) eKLR.

<sup>75</sup> *County Government of Nyeri & another v Cecilia Wangechi Ndungu*, Civil Appeal 2 of 2015, Ruling of the Court of Appeal (2015) eKLR para 33, 34 and 43.

<sup>76</sup> *K Mberia & Partners Advocates v Property Reality Limited*, Reference Application 1 of 2018, Ruling of the High Court at Kajiado (2018) eKLR.

Act. It also looked at the weaknesses of Section 6 of the Fair Administrative Action Act and made appropriate recommendations to strengthen the Act for it to fully achieve its purpose.

The right to be given reasons was recognised as part of the rules of natural justice under common law. It was elevated to a constitutional and statutory right by the 2010 Constitution and the Fair Administrative Action Act respectively.

The paper concludes that the right to be given reasons for administrative action has not only been used as a tool to offer legal protection to individuals adversely affected by administrative action but also helps in enhancing good public administration in Kenya. Courts have considered the right to be given written reasons both as a constitutional ground for judicial review of administrative action under Article 47 of the 2010 Constitution as well as a remedy available in judicial review as stated in Section 11 of the Fair Administrative Action Act. The right to be given reasons as a constitutional ground for judicial review has provided affected individuals with a basis to challenge an administrative action through a judicial review process. Courts have also considered the right to be given written reasons as a tool aimed at enhancing public administration by ensuring that public administrators reflect on the lawfulness, quality, rationality and fairness of their actions taken.

However, the paper has noted two challenges relating to Section 6 of the Fair Administrative Action Act. First, Section 6(3) of the Fair Administrative Action Act does not expressly require public administrators to give adequate reasons to persons whose rights have been adversely affected by administrative action. It only requires public administrators to give written reasons to affected individuals. The requirement to provide adequate reasons for administrative action is significant to public administration because it illustrates that proper consideration of the matter took place thus enhancing public confidence in the decision-making process. Second, Section 6(5) of the Fair Administrative Action Act fails to provide a criterion to be used in determining whether circumstances are reasonable and justifiable to allow an administrator to deviate from the requirement to provide reasons for



administrative actions. This may lead to administrators abusing this discretion to depart from the requirement to provide reasons in writing for their administrative actions.

The paper also noted that judicial decisions handed down after the Fair Administrative Action Act was enacted in 2015 showed that the Kenyan courts have under-utilised the remedy provided in Section 11(1)(c) of the Fair Administrative Action Act which allows the court to direct the administrator to give reasons for an administrative decision where there was none. This may be attributed to the two factors. First, it is the fact that most litigants do not make pleadings in respect of the enforcement of Section 11(1)(c) of the Fair Administrative Action Act. Secondly, advocates and litigants still prepare pleadings that focus on the traditional common law orders of *certiorari*, prohibition and *mandamus*. The majority of court decisions relating to the right to be given reasons have utilised the remedy provided in Section 11(1)(e) of the Fair Administrative Action Act which allows the court to issue a quashing order (order of *certiorari*) that has the effect of invalidating an administrative decision and remitting the matter to the administrator for reconsideration.

The paper makes specific recommendations to citizens, public administrators, lawyers, judiciary and parliament. To the citizens, the paper recommends that they develop and maintain the culture of requesting public administrators to explain or justify their administrative action by providing adequate and written reasons for their actions. This will facilitate an individual's application for review of an administrative decision by court or tribunal. It will also enhance transparency in the decision-making process by enabling citizens to evaluate, discuss and criticise government action.

The paper recommends that public administrators adapt to changes introduced by the 2010 Constitution and the Fair Administrative Action Act by providing reasons for their administrative action because it is an inherent constitutional and statutory requirement. This may protect them from legal challenges in court because the affected individuals are likely to accept a decision if they clearly understand why and how it



was taken. It will also enhance public confidence in the decision-making process.

Courts play a significant role in interpreting and giving appropriate meaning to the provisions of the 2010 Constitution and the Fair Administrative Action Act. When interpreting the meaning of adequacy, the paper recommends that courts assess the adequacy of the reasons given from the point of view of the recipient of the reasons rather than that of the public administrator. Courts should invalidate administrative decisions if the reasons given are ambiguous and unintelligible to the person requiring the reasons and the reasons given fails to provide the affected person a clear understanding of why and how the reason was arrived at including the factors that were taken into account in making the decision. However, where the public administrators fail to provide reasons for their administrative action, the paper recommends that courts should embrace the provisions of Section 11(1)(c) of the Fair Administrative Action Act, whenever it is pleaded, to allow administrators to give reasons for an administrative decision and thus facilitate effective public administration and to mark a transition from the pre-2015 focus on the prohibition of negative practices.

Before Parliament amends Section 6(5) of the Fair Administrative Action Act as proposed below, courts should also clarify the criterion to be used to determine an appropriate departure from the requirement to provide adequate reasons reasonable and justifiable. This will make the departure of public administrators from this requirement difficult to justify to promote an effective public administration and good governance as well as stronger legal protection of individuals adversely affected by administrative actions.

For lawyers, the paper recommends that they should appreciate and embrace the transformation introduced under Article 47 of 2010 Constitution and Section 6 of the Fair Administrative Action Act and advise their clients appropriately on the requirement to furnish written reasons for administrative actions to minimise exposure to adverse legal risks that may prove costly to administrative agencies in terms of legal fees paid to external counsels to represent them in court proceedings.

Also, lawyers should advise their clients and consider preparing pleadings that exploit the enforcement of Section 11(1)(c) of Fair Administrative Action Act.

The paper also recommends that Section 6 of the Fair Administrative Action Act be amended to expressly require public administrators to provide adequate and written reasons for administrative actions as well as set out the criterion to be used to determine when is the departure from the requirement to provide adequate reasons reasonable and justifiable. This will enable the Fair Administrative Action Act to achieve its purpose of requiring public administrators to provide reasons for administrative actions.



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