

**THE ROLE OF THE COMMISSION ON ADMINISTRATIVE JUSTICE IN
PROTECTING THE CONSTITUTIONAL RIGHT TO FAIR ADMINISTRATIVE
ACTION IN KENYA**



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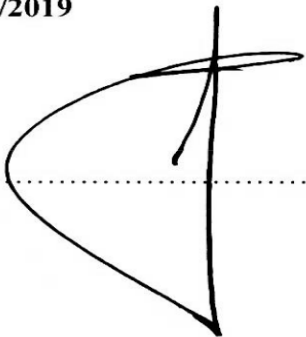
MARCH, 2021

DECLARATION

I, EDWARD WASWA ORINGE do hereby declare that this is my original work and that it has not been submitted for award of a degree or any academic credit in any other University.

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TABLE OF CASES

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC).

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Chairpersons' Association v. Minister of Culture and Arts 2007 (5) SA

Commission on Justice Administrative v. Attorney General & another [2013] eKLR

Commission on Administrative Justice v. Insurance Regulatory Authority & another [2017] eKLR

Commission on Administrative Justice v. Kenya Vision 2030 Delivery Board & 2 others [2019] eKLR

Commissioner of Customs and Excise v Container Logistics (Pty) Ltd 1999 (3) SA 771 (SCA).

Communications Commission of Kenya v Royal Media Services Limited [2014] eKLR (29 September 2014) (CCK).

Democratic Alliance v President of South Africa Republic 2013 (1) SA 248 (CC).

Democratic Alliance v. Speaker of the National Assembly and Others [2016] ZACC

Democratic Alliance v. Speaker of the National Assembly and Others [2016] ZACC 11

Democratic Alliance v. The South African Broadcasting Corporation Soc Limited (3104/2016; 18107/16)

Economic Freedom Fighters v Speaker of the National Assembly and Others [2016] ZACC

Economic Freedom Fighters v. Speaker of the National Assembly and Others and also in Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11

Gidani (Pty) Ltd v Minister of Industry and Trade [2015] ZAGPPHC 457.

In the Matter of Opinion of Advisory of the Supreme Court Constitutional Application No. 2 of 2011

In the Matter of Interim Independent Electoral Commission [2011] eKLR

In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Supreme Court Advisory Opinion Application No. 2 of 2012

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Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC).

Attorney General v Michael Mungai [2015] eKLR.

Education minister, Western Cape v Beauvallon Secondary School 2015 (2) SA 154 (SCA).

Machakos County Government & another v Nzamba Kitonga; Commission for Administrative Justice (Interested Party) [2019] eKLR

Pepcor Retirement Fund v Financial Services Board 2003 (6) SA 38 (SCA).

Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC).

Prof. Paul Musili Wambua v the Attorney General Nairobi Petition No. 542 of 2013

Public Protector v. Mail & Guardian Ltd and Others 2011 (4) SA 420 (SCA)

Public Protector v. Mail & Guardian Ltd and Others 2011 (4) SA 420 (SCA)

Republic v Commission on Administrative Justice and 2 Others Ex Parte Michael Kamau Mubea Miscellaneous Application No. 378 of 2015

Republic v Commission on Administrative Justice and 2 Others Ex-Parte Michael Kamau Mubea

Republic v Commission on Administrative Justice, Ex-Parte National Social Security Fund Board of Trustees.

Republic v Director of Public Prosecution Ex Parte Chamanlal Vrajlal Kamani [2015] eKLR (18 September 2015). S

Republic v Kenya Revenue Authority Ex Parte Funan Construction Ltd [2016] eKLR (1 March 2016).

Republic v the Commission on Administrative Justice ex-parte the National Social Security Fund Nairobi Judicial Review No. 304 of 2014

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Republic v. Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees [2015] eKLR

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Rita Biwott v. Legal Education council, Nairobi Miscellaneous Application No. 1122 of 1994

Broadcasting Corporation of South Africa Soc Limited V Democratic Alliance (393/2015) [2015] ZASCA 156

SOC (State Information Technology Agency) Ltd v Gijima Holdings (Pty) Ltd 2017 (2) SA 63 (SCA).

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Suchan Limited v Ministry of National Culture and Heritage and Three Others [2016] eKLR.

TSC v KNUT & 3 Others [2015] eKLR

The KNCHR -v- AG & Another Petition No. 132 of 2013; 2015 eKLR

The Matter of Opinion of Advisory of the Court Constitutional Application No. 2 of 2011

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LIST OF ABBREVIATIONS

ACRWC	- African Charter on the Welfare and Rights of the Child
ADR	- Alternative Dispute Resolution
CAJ	- Commission on Administrative Justice
CoK 2010	- Constitution of Kenya 2010
DPP	- Director of Public Prosecutions
EACC	- Ethics and Anti-Corruption Commission
EU	- European Union
ICCPR	- International Convention on Political and Civil Rights, 1966
ICESCR	- International Convention on Cultural and Social Rights
KNHREC	- Kenya National Human Rights and Equality Commission
NCIC	- National Cohesion and Integration Commission
OPP	- Office of the Public Protector
SA	- South Africa
SRC	- Salaries and Remuneration Commission
UDHR	- Universal Declaration on Human Rights

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For the CAJ to effectively deliver on its mandate and make its work smooth, there is need for a lot of cooperation with other agencies. These agencies assist in many areas, including but not limited to arrest of those who fail to heed to the CAJ’s summons so as to bring them to book. The respective agencies however should also be able to assist the CAJ in managing its work so as to achieve its duty under the Constitution of Kenya, 2010.....	86
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ABSTRACT

This study investigates the role of the Commission on Administrative Justice (hereinafter stated to as the CAJ) in protecting the right to fair administrative act under the 2010 Kenyan Constitution. It documents the successes, challenges, and opportunities that the CAJ has encountered in realizing its constitutional mandate. The study argues that although the CAJ has made some strides in guarding the right to fair administrative action, it nevertheless continues to face numerous challenges, which hinder it from fulfilling its mandate. As a result, this inadequacy of the Commission on Administrative Justice Act 2011 and the Fair Administrative Action Act, No. 4 of 2015 has restrained the operations of the CAJ hence the failure in promotion of fair administrative action in Kenya as defined for under the Constitution of Kenya 2010. It demonstrates that although some progress has been made, the absence of a policy on enforcement of decisions, political bureaucracy and impunity, limited accessibility, and lack of awareness of the public on the roles of the existence and mandate of the CAJ are some of the critical challenges that continue to greatly undermine the CAJ from fulfilling its mandate.

Although several scholars have written on the CAJ, to the best of my knowledge, no other study has evaluated the extent to which the CAJ has fulfilled its constitutional mandate of regulating administrative power in Kenya. This study also seeks to seal this gap by exposing the limitations of the CAJ caused by legislative gaps such as lack of enforcement mechanisms and different interpretations that prevent it from enforcing, realizing and enhancing the right to a fair administrative action. With a sole purpose of contributing to existing literature, this study in a bid to take away the execution role by parliament, among other recommendations, recommend the amendment of Section 8 and 54 of the Commission on Administrative Action Act, 2011 to assist the CAJ fulfil its desired mandate as envisaged in the 2010 Kenyan Constitution.

CHAPTER ONE

INTRODUCTION

“...due administration of Justice is the firmest pillar of good government....”¹

1.0 Background

The commission on Administrative Act of 2011 institutes the commission on Administrative Justice (CAJ) for Kenya, which is also recognized as the office of the Ombudsman. It is established to give effect to the Constitution of Kenya 2010,² and is an independent commission that cannot be directed or control by any person or authority. It is only subject to the law and not any other authority.³

The commission is mandated under the Act to uphold the right to fair administrative action⁴ in accordance with the constitution of Kenya 2010.⁵ This study seeks to evaluate the extent to which the CAJ has played this role, to make practical recommendations aimed at ensuring that there are effective regulations and monitoring of how public bodies entrench fairness in their administrative decisions.

Administrative powers are of a legislative and executive nature and are conferred on public bodies, agencies, authorities, or persons to give detailed effect to government policy.⁶ Kenyan courts have clarified that administrative action powers are subject to high scrutiny as compared to executive action powers which are measured upon less demanding restrictions placed upon by the principle of legality.⁷ These powers empower a public body or official to make rules and regulations that

¹ From George Washington to Edmund Randolph, (1789), available at <https://founders.archives.gov/documents/Washington/05-04-02-0073> last accessed on 25th February 2021.

² Constitution of Kenya 2010, Article 59 (4).

³ *ibid* Article 249 (2).

⁴ Commission on Administrative Justice Act 2011.

⁵ *ibid* n2 Article 47.

⁶ Currie I, (2007) *The promotion of administrative justice Act in context*, Cape Town: Siber Ink 10.

⁷ *Thirdway Alliance Kenya & Another another v Head of the Public Service-Joseph Kinyua & 2 others; Martin Kimani & 15 others (Interested Parties) [2020] eKLR Para 81.*

would be carried out in the generality of cases or specific rules that may be necessary to give effect to policy declared by the lawmaker.⁸ Administrative power also empowers public officials or agencies to render quasi-judicial decisions.⁹

Given the wide nature of administrative power, this study analyses the three types of powers namely; express administrative powers conferred by legislation; incidental administrative powers necessary to exercise express powers, and implied administrative powers, assumed as necessary, that administrative agencies exercise and how the Commission of Administrative Justice ensures the proper exercise of such powers.

This study hypothesizes that administrative power is limited either through the constitutional doctrine of implied limitations which regards the Constitution as the higher law thus limiting administrative absolutism; or by the judiciary through judicial review. This is considering that administrative action is the exercise of powers by public officials in the carrying out of goings-on and decision-making relating to the public sector. An administrative action is fair if it is lawful, rational, fair, reasonable and that considers only relevant factors.

This study presupposes that administrative action is fair also if it can be accessed and afforded by any individual, if it is not costly to society and if it is time sensitive in decision making based on a comprehensible explanation of the exercise of the administrative power.¹⁰ The administrative agency must also make it known to those to be affected by administrative decision of their rights to review the decisions. The individual also in the circumstance has the rights under Article 35 of the Constitution.¹¹

⁸ *Robertson V. Schein*, 305 Ky. 528 (Ky. 1947).

⁹ *ibid.*

¹⁰ Fair Administrative Action Act, 2015 Section 4

¹¹ All Persons have the right to access any information withheld by the Government.

Since independence, public administration in Kenya has constantly been riddled with accusations of maladministration, characterized by delay, injustice, incompetence, and lack of attention in service delivery.¹² Delivery of public services had become a favor rather than a right guaranteed by the laws of Kenya.¹³ Courts failed to address the wrongs of public officers and this therefore left the public with little hope as maladministration had been rampant with the majority of the citizens getting discouraged by the complexities, technicalities, and expenses involved in litigation.¹⁴

Furthermore, the legal system and even judicial process lacked remedies for administrative wrongs such as abuse of public office and illegitimate administrative action.¹⁵ This called for the introduction of an office, to facilitate receipt of complaints that were to be accessible, flexible, and inexpensive necessitating the establishment of the CAJ.¹⁶

Unfortunately, despite the existing legal, institutional and constitutional framework for the enforcement of effective administration of justice in Kenya, statistics,¹⁷ indicate continuous failures in the administration of justice as cases of maladministration and abuse of office continue despite having a progressive Constitution. The CAJ, as presently operationalized, has been tested and proved insufficient in terms of clarity on the enforceability of determinations of its decisions.

The requirement that the CAJ forwards its recommendations to the National Assembly robs CAJ of its independence. There are no laid-out structures and limitations within which the National

¹²CAJ, “*Laying Foundation for Administrative Justice in Kenya: Six years Later.*” Available at <https://africacheck.org/wp-content/uploads/2018/07/LAYING-THE-FOUNDATION-FOR-ADMINISTRATIVE-JUSTICE-IN-KENYA.pdf>. last accessed on 20th September 2020 at 11:20 a.m.

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ *ibid* n7 above.

¹⁷ Commission on Administrative Justice Annual Reports.

Assembly should operate while enforcing the recommendations leaving the reports to gather dust in the chambers and giving way for the same to be compromised. The foregoing trickles down to the failure of the CAJ thus reducing public trust in upholding and protecting the right to fair-minded administrative action in Kenya.

The need for an effective public administration watchdog can be traced back to post-independence Kenya when the evil of authoritarianism was rampant.¹⁸ Several amendments to the independence Constitution,¹⁹ led to a structure of government that was unaccountable and a situation where the President exercised unlimited powers contrary to the tenets of constitutionalism.²⁰

Walter Khobe Ochieng, in “*the Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya,*” reiterates that one of the concerns that animated the search for a new constitution in Kenya was how to build more effective mechanisms for accountability.²¹ The levels of impunity in the country and the general governance culture necessitate a constitutional body mandated to address complaints on delivery of service to the public should be equipped with mechanisms and resources to enable it to live up to its mandate.²² Towards this end, the Constitution of Kenya 2010 establishes constitutional commissions and independent offices in an attempt to dismantle and democratize the Kenyan state.²³

¹⁸ YP Ghai & JPWB McAuslan *Public Law and Political Change in Kenya: a Study of the Legal Framework of Government from Colonial Times to the Present*. (Nairobi: London, New York, Oxford University Press, 1970).

¹⁹ *Njoya & 6 Others v Attorney-General & 3 Others Kenya Law Reports, 1 (2004) 298-299*, See also G Muigai ‘Overhaul or Amend? A Discourse on the Future of Constitutional Change in Kenya’ (2006) 4 East African Journal of Human Rights & Democracy 10.

²⁰ The High Court in *Joseph Kimani Gathungu v. The Attorney-General & 5 Others, Mombasa High Court Constitutional Reference Application Number 12 of 2010*.

²¹ The Constitution of Kenya Review Commission Report, 2002. See also, and the 2005 - Bomas of Kenya Draft Report on Constitutional Review.

²² Constitution of Kenya 2010, Chapter 15.

²³ Walter Khobe Ochieng, (2019) “The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya,” *Kabarak Journal of Law and Ethics* 4 135-164.

The CAJ is mandated to address cases of mal-administration committed by public servants or public agencies.²⁴ For reason that there does not exist statistical reports showing satisfaction with operations of the CAJ, there is a need for severe intervention, legislative or otherwise, to ensure that it complies with the requirements of the law, especially Article 47 of the Constitution of Kenya, 2010, to bring sanity into decisions of state agencies and administrators. The situational analysis depicts a gleaming picture as there exist myriad challenges that hinder the CAJ from fully fulfilling its mandate to ensure enforcement of fair administrative action as envisaged in the Constitution of Kenya, 2010. It is therefore against this background that this study seeks to highlight the successes that the CAJ has so far attained, the challenges that impede it from protecting the right to fair administrative action, and the opportunities it can explore to fulfil its mandate.

1.1 Problem Statement

Although the CAJ has made some strides in protecting and enforcing this right in Kenya, it is, nevertheless, still unable to realize its potential due to the numerous challenges that it faces. Fair administrative action remains unattended to, leading to irrational decisions affecting ordinary Kenyans adversely. This study, therefore, demonstrates that more than ten years after the promulgation of the Constitution of Kenya, the challenges CAJ faces, coupled with the lack of exploration of existing opportunities, continue to undermine its mandate in Kenya.

1.2 Research Questions

The following research questions guides this study:

²⁴ Constitution of Kenya 2010, Article 59 (4); Chapter 15.

1. How has the CAJ fulfilled its constitutional mandate to protect the right to fair administrative action in Kenya?
2. How has the institutional and legislative framework governing the CAJ empowered it to enforce this right in Kenya?
3. What factors hinder the CAJ from enforcing and protecting this right in Kenya?
4. What can the CAJ learn from South Africa towards effective enforcement of this right in Kenya?

1.3 Study Objectives

This study:

1. Evaluates the extent to which the CAJ has fulfilled its constitutional mandate of protecting and enforcing the right to fair administrative action in Kenya.
2. Investigates the institutional and legislative framework for enforcing the right to fair administrative action.
3. Identifies the factors hindering the CAJ from enforcing the right to fair administrative action.
4. Documents the lessons that CAJ can learn to enforce the right to fair administrative action in Kenya.

1.4 Hypothesis

This study hypothesizes that;

- i. The right to fair administrative action has not been protected as envisaged in the Constitution of Kenya due to the numerous challenges which the CAJ faces and therefore

the CAJ has not fully attained its desired mandate as required the Constitution of Kenya, 2010.

- ii. The failure of the CAJ to explore the existing opportunities or maximize its potential has undermined the enforcement of the right to fair administrative action in Kenya. there exist opportunities that the CAJ can explore towards effective enforcement of the right to fair administrative action in Kenya.

1.5 Theoretical Framework

1.5.1 Kelsenian Pure Theory of Law

First, *Kelsen*, in, '*Pure Theory of Law*,'²⁵ makes an argument that holds the constitution as the basis law thus requiring all actions to be based on it especially government action or exercise of public powers. When every action of government bodies such as constitutional commissions is measured against the Constitution, then this is consistent with the Pure Theory of law. Therefore, the research paper bases its arguments on the theory that administrative justice should be enforced within constitutional bounds. The concept of administrative law in itself has its foundations in the Constitution.²⁶

Considering the Constitutionalization of administrative justice, then based on the pure theory of law, all legal instruments seeking to promote administrative justice should not powers of the CAJ as contemplated by the Constitution. The operation and interpretation of the laws should be in favour of the constitutional commissions.²⁷ As a result, the study takes into account the fact that

²⁵ Hans Kelsen, *Pure Theory of Law*, (University of California Press, 1967).

²⁶Article 47.

²⁷ *ibid* n20.

any mode of enforcement of the decisions of the CAJ must meet the constitutional test hence, consistent with the pure theory of law.

Indeed, it is a fact beyond peradventure that without legislative goodwill and progressive interpretation of statutes establishing constitutional commissions, the objectives of those commissions will not be met. A situational analysis of the operations of the CAJ shows that the Constitution of Kenya 2010 has not been implemented wholly, in terms of operationalizing constitutional commissions and this is against Hans Kelsen's pure theory of law. This theory helps us respond to the research question of whether the CAJ has fulfilled its constitutional mandate to enforce fair administrative action, within the existing legal framework.

Kelsen's Pure Theory of Law is relevant to this study because it gives an account of the general nature and functions of law in society. The theory turns on two aspects of law: the static and dynamic aspects. Through the "static aspect of law" which argues that all decisions should be judged against the law as it is,²⁸ This study is assessing whether the CAJ when scored against the Constitution, fulfils its mandate to enforce and protect the right to fair administrative action.

1.5.2 Legal Realism Theory

The theory of *realism* was espoused by *Oliver Wendell Holmes* in, '*The Path of Law*'.²⁹ This theory suggests that law should be shaped by the perception of the courts. In sum, the law is viewed as an engine for social change. At the core of laws, there are principles, values, and morals that the law seeks to inculcate in its subjects. The theory of realism, therefore, suggests that the law should be

²⁸ Shivakumar, D, "The Pure Theory as Ideal type: Defending Kelsen based on Weberian Methodology", Yale Law Journal, Vol. 105: 1383

²⁹ Oliver Wendell Holmes Jr, *the Path of Law*, (Oxford University Press, 1985).

regarded as an engine having purposes and values in itself. This theory, therefore, informs this study to the extent that the cases from courts around administrative justice indicate a failure in legislation.

The approach taken by courts in interpreting legislation establishing constitutional commissions should inform the direction that the state intends to adopt in enforcing effective public administration. Without proper interpretation of these statutes, then the principles anticipated to be enforced by the law will not be enforced. Therefore, the theory of legal realism posits that the Judiciary play a role in shaping the perception of laws, hence there is a need for enforcement of the commission's legislation. The CAJ Act and the Fair Administrative Act must therefore be given a broad interpretation, taking into consideration the discretion of courts in the interpretation of statutes.

To achieve the purpose of the law, the role of courts should never be underestimated. Judicial officers must therefore embrace this theory in their day-to-day disposal of cases relating to constitutional commissions. This study is therefore influenced by the theory of legal realism as espoused by Oliver Wendel Holmes.

This theory responds to the question of whether the existing legal framework is conducive for the CAJ to enforce its desired mandate. This is because the theory rightly states that changes in the law are not influenced by logic or pre-existing law but personal reasoning and experiences of judges.³⁰ This theory is relevant to this study because, a thorough review of the judicial precedents,

³⁰ Tumois, V, "Legal Realism & Judicial decision-making", *Jurisprudence*, 2012, (19) 4, 1331-61

also assess whether the courts have identified legislative gaps or other challenges that hinder the CAJ from realizing fair administrative action in Kenya.

1.5.3 Systems Theory

This study posits that administrative justice in the public sector is also informed by the systems theory developed by Luhmann and Teubner.³¹ This theory explains structural patterns to locate the problematic areas leading to miscarriage of justice in the legal system. This theory holds that it is problematic to expect the justice system to operate separately from other systems.³² The law also operates in a way that it has to create a legal environment in itself for it to function effectively. This theory to this end asks whether the Commission on Administrative Justice should operate independently or operate alongside other systems.³³

The systems theory enhances our understanding and exposes the weaknesses thereof. Further, this theory posits that there is a meaning of miscarriage of justice that is almost entirely internal to the legal system.³⁴ Where the courts err in law hence reaching a decision that jeopardizes the operation of constitutional commissions, then an appeal should be proffered based on a judge's conduct or that of other personnel. This theory asserts that failure to enforce public administration of justice has its causal origin in the procedures at other points in the justice system.³⁵

Administrative power is understood differently by various authors and scholars and practitioners. However, the golden thread that runs across all these conceptions is the requirement for public

³¹ King, "The Truth about Autopoiesis" (1993) 20 JLS 218.

³² *ibid.*

³³ *ibid* n12.

³⁴ *ibid.*

³⁵ *ibid.*

officers to lawfully exercise administrative power, and where there is a breach, redress should be available to the public.

This theory helps us respond to the question, what factors hinder the CAJ from enforcing the right to fair administrative action in Kenya. The theory argues that the law is a sub-system within the society and a self-establishing and reproducing system that communicates to the society. Since the law has internal challenges that undermine it, if it is to describe the society, it has to deal with its internal problems first.³⁶ This theory is therefore crucial to this study since it will identify the challenges that have beleaguered the CAJ and how these challenges can be annihilated to enable the CAJ to actualize its mandate to enforce fair administrative action as envisaged in the Constitution of Kenya, 2010.

1.6 Literature Review

This study is premised on literature done by various authors. Administrative justice is a subject that is uniform in all progressive societies. Therefore, there is a need to study literature to determine how various jurisdictions have handled administrative justice within the public sector. This part proceeds to review primary sources in the form of books and articles adopting a critical approach as it identifies the gaps that exist in this literature to ensure that the study suggests recommendations to fully realize the objectives of CAJ Act 2011.

After review of the existing literature, this study finds that broadly speaking, the literature can be divided into three main thematic areas: the first is Good governance and accountability, the second

³⁶ Mattheis, C, “the System Theory of Niklas Luhmann and the Constitutionalization of World Society”, Goettingen Journal, International Law, (2012) 2, 625-647

being attendant challenges and inevitability of the office of the ombudsman and the third being human rights and the independence of the office of the ombudsman.

1.6.2 Good Governance and Accountability

On the nature of the mandate of the CAJ and the legal framework governing public administration, **Merilee Grindle**, in “*Good Governance: The Inflation of an Idea*,”³⁷ posits that citizens of many developing countries would have done justice if they lived and operated under institutions with respect to good governance. This study is premised on the idea that equitable application of the law is the whole essence of the office of the ombudsperson.³⁸

The works of Merilee seek to rationalize the idea that in public service, each person and department has a role to play and that if these roles are faithfully executed, without regard to systemic failures and hurdles, then developing countries would improve the lives of their citizenry. The author thinks that for every public institution to achieve its objectives, there is a need for the institutions to operate within the provisions of the law and priority should be given to service delivery to the public.³⁹

The author's work then conforms to the main argument of this study that the work of the CAJ is to ensure that public service administration is done appropriately and where this is not done, appropriate stern action is taken to repulse non-compliance. It is this study's position that the Commission on Administrative Justice must also work in coordination with other government departments. This study agrees with the assertions of Merilee only to the extent that there is a need

³⁷ Merilee Grindle, *Good Governance: The Inflation of an Idea*, Harvard Kennedy School, Faculty Research, Working Paper Series at 2, available at <<https://research.hks.harvard.edu/publications/getFile.aspx?Id=562>>, accessed 28 December 2019.

³⁸ *ibid.*

³⁹ *ibid.*

to ensure that application of public power is within the limits of the law in the spirit of promoting good governance.

C. Odhiambo-Mbai, however, in “*Public Service Accountability and Governance in Kenya since Independence*,”⁴⁰ is of the opinion that provision of services to the public is undermined by lack of accountability in the public service.⁴¹ On these lines, the present research makes a case that absent mechanisms for recalling public officers that engage in maladministration defeats the essence of the office of the ombudsman.⁴² He moreover argues that accountability in the public service is hindered by a lack of political will as well as watchdog institutions that are ineffective.⁴³ He therefore makes a case for effective institutions that will deal with maladministration in public sector service delivery.⁴⁴ Additionally, he laments on absence of good political will which greatly undermines the institutions put in place to deal with maladministration.⁴⁵

On the issue of the institutional framework of the CAJ and fair administrative action, **Gregory & Giddings** in “*Righting Wrongs: The Ombudsman in Six Continents*”⁴⁶ opine that in any society, public officers are bound to commit wrongs. The office of the Ombudsman is therefore essential in handling public complaints and dissatisfaction on the abuse of administrative power. By redressing maladministration and ensuring that governments fulfil their obligations towards their citizens, the Ombudsman promotes good administration⁴⁷. Gregory & Giddings suggest that to ensure good governance, states must establish strong Ombudsman institutions with proper

⁴⁰ Odhiambo Mbai C, “Public Service Accountability and Governance in Kenya Since Independence,” (2003) Vol. 8.

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ *Supra* n8.

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ Gregory, R. Giddings, Ph. (2000). *Righting Wrongs: The Ombudsman in Six Continents*, International Institute of Administrative Sciences, IOS Press, Amsterdam, Netherlands, p. 12.

⁴⁷ *ibid.*

complaint handling procedures because it is against the promptness with which the complaints are handled that an assessment on how effective of the Ombudsman can be made

Furthermore, **John Hatchard** in “*Developing Governmental Accountability: The Role of the Ombudsman*,” is of the view that the Office of the Ombudsman enjoys a unique role in ensuring accountability of public officers, which role it fulfils in two ways.⁴⁸ Firstly, the Ombudsman occupies a privileged position as it can access confidential government documents and compel the public officials to testify before it. Secondly, the fact that the Ombudsman publishes reports of its findings compels public officers to be more cooperative because a swift resolution of complaints protects public officers against unfounded, malicious, and unfair attacks. This study agrees with Hatchard that the unique constitution of the CAJ coupled with independence from the executive has placed the CAJ at a better pedestal to hold public officials accountable thus enabling it to fulfil its constitutional mandate.

Lorena G. Volio in “*the institution of the Ombudsman: The Latin American Experience*,”⁴⁹ argues on the legal and institutional framework of ombudsman institutions, that the establishment of Ombudsman institutions in most countries was engendered by the inflexibilities and formalities that are inherent in the traditional judicial system. The author argues that the Ombudsman institution is best suited to ensure accountability in the public sector because it is not subject to the formalities that are inherent in the traditional judicial system.⁵⁰

⁴⁸ Hatchard, J, “Developing Governmental Accountability: The Role of the Ombudsman”, Third World Legal Studies, Vol. 2, Article 9

⁴⁹ Lorena Gonzalez Volio, “the Institution of the Ombudsman: The Latin American Experience “(2003) Revista IIDH, Vol. 37, 220-22, available at <http://www.corteidh.or.cr/tablas/R08066-5.pdf>

⁵⁰ *ibid.*

This study agrees with the views of Volio because the fact that the Ombudsman does not charge any fees or conduct its inquiries within the confines of legal rules of evidence ensures that citizens have more access to administrative law redress and that officials are more accountable for their actions. What needs to be done therefore is to make sure that the Commission invests awareness and its importance. This issue was addressed by Dr. Otiende Amollo in “*Insights in Enforcing Ombudsman Decisions-The Case of Kenya*,”⁵¹ where he stated that the annual reports from the commission undergo insufficient scrutiny by Parliament and may hence be unsuitable for informing mass media.⁵² One of the challenges facing the Commission on Administrative Justice is the fact that there is little understanding amongst Kenyans on the role played by the commission.⁵³ This is because there are deliberate efforts to depict the institution as unnecessary.⁵⁴ Though it presents reports of their milestones, these are never communicated to the public, hence minimal awareness of the function played by the institution.⁵⁵ To remedy this anomaly, there is, therefore, a need to create public awareness in fostering effective public administration.⁵⁶ The author thinks that the reports should undergo proper scrutiny for them to form an effective basis for mass information, which will, in turn, create an impact in terms of public appreciation of the role of the institution.⁵⁷ This study insists that for the CAJ to be perceived as having teeth to tackle public maladministration, there is a need for effective public awareness including advertising campaigns, sensitization programs, and media coverage of reports as its very vital.

⁵¹ Otiende Amollo, *Insights in Enforcing Ombudsman Decisions-The Case of Kenya*, A Presentation made at the Second Regional Colloquium of African Ombudsman Institutions on the Theme „Securing the Ombudsman as an Instrument of Governance in Africa“ held at the Safari Park Hotel, Nairobi, 20 February 2015, 6.

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ *ibid.*

1.6.6 Attendant Challenges and Inevitability of the office of the Ombudsman

Kevin Malunga, in “*20 Years of South African Constitutionalism; an assessment of the role and challenges of the office of the public prosecutor in asserting South Africa’s Transformative Constitutionalism*,”⁵⁸ observes that state corporations have at times perceived the Ombudsman with hostility. He however insists that good relations between the two can be a driver for voluntary cooperation with the Ombudsman and foster the manner in which its recommendations are complied with.⁵⁹

Malunga propounds the idea of having coordination among and within the institutions of government and is opposed to hostility which usually is as a result of unhealthy competition. This coordination, Malunga argues is critical in eliminating hostility.⁶⁰

This research agrees with Malunga and holds the view that cooperation and coordination with all the stakeholders is what the CAJ needs. The commission ought to be guided principally by cooperation and coordination.⁶¹

The research study moreover holds the firm view that cooperation and coordination as well as consultation is not sabotage and insubordination. The institutions have to work together without any controlling the other.⁶²

⁵⁸ Kevin Malunga, *20 Years of South African Constitutionalism; an assessment of the role and challenges of the office of the public prosecutor in asserting South Africa’s Transformative Constitutionalism*,” 2014, available at <<http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Malunga.pdf>> accessed 28 December 2019.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² *ibid.*

This study agrees that the foregoing challenges are identical to those facing the CAJ. This study, therefore, takes an incisive examination of the challenges, interrogates how they affect fair administrative action, and comes up with recommendations on annihilating the same.

Beqiraj J, Garahan S in *“Ombudsman schemes and effective access to justice: A study of international practices and trends,”*⁶³ argues that absence of research to access the status report and tasks undertaken prevent the ombudsman from interrogating the challenges that hinder it from dispensing its mandate. This study agrees that without an independent assessment of the effectiveness of the CAJ, it is almost impossible to ascertain whether the CAJ is fulfilling its constitutional mandate. This research intends to address this gap through interrogating the CAJ’s effectiveness in enforcing this right.

Lorne Sossin in *“Access to Administrative Justice and Other Worries,”*⁶⁴ argues that although the mandate of Ombudsman Institutions in terms of jurisdiction, rarely, the element of accessibility of the ombudsman is ever considered. Accessibility, Sossin argues, encompasses the location of the office of the Ombudsman, the procedure for lodging complaints, the number of fees charged, and how well the citizens have the mandate of its objectives. Despite the minimal importance that is placed on these factors, they, however, directly influence and impact those who are affected by administrative decisions.

This study adopts the views of Sossin,⁶⁵ and proposes that the CAJ has not fully fulfilled its role. First, since it is located in only 4 counties in Kenya, it is not easily accessible to a majority of

⁶³ J Beqiraj, S Garahan and K Shuttleworth, *Ombudsman schemes and effective access to justice: A study of international practices and trends*, International Bar Association, October 2018.

⁶⁴ Lorne Sossin, *Access to Administrative Justice and Other Worries*, 1, available at https://www.law.utoronto.ca/documents/.../adminjustice08_Sossin.pdf accessed on 22 September 2020.

⁶⁵ *ibid.*

Kenyans. Secondly, since the majority of the populace is not aware of the mandate of the CAJ and its strides it has achieved, it is difficult to assess its impact on enforcing the right to fair administrative justice. This study, therefore, argues that since accessibility is an important determinant in effecting the right, there is a need to make the CAJ more accessible to the public.

Nikos Vogiatzis in “The European Ombudsman and Good Administration in the European Union,”⁶⁶ argues that the mandate of the ombudsperson is to be found in treaties, statutes, and implementing provisions. Further, relationship of ombudsman institutions and other European Union national authorities, social organizations, and the people is discussed.

The author essentially argues for the institution of the Ombudsman by stating that the Union Courts have generally granted the ombudsman considerable discretion, which does not, nonetheless, amount to immunity. The author concludes that the institution of the ombudsman does not operate within the European Union ambit.

This study also seeks to identify how courts in Kenya have perceived the role of the Commission on Administrative Justice. It is important to make this determination because the Courts are responsible for the interpretation of the founding legislation to give effect to the operations of the institution. The courts also, through the interpretation of the relevant laws assess and expand the powers of the institution and empower the institution to also continue its operations within a favourable legal environment.

⁶⁶ Vogiatzis N. (2018) The Institutional and Constitutional Position of the European Ombudsman. In The European Ombudsman and Good Administration in the European Union. European Administrative Governance. Palgrave Macmillian, London.

1.6.8 Human Rights and the Independence of the office of the Ombudsman

Marten Oosting in “*The National Ombudsman of the Netherlands and Human Rights*,”⁶⁷ describes the importance of human rights law in resolving certain grievances made to the Netherlands Ombudsperson. The author reiterates that the institution has been key in the resolution of certain specific violations, because of the documenting and investigative role that is vested in the institution of the ombudsman in the Netherlands.⁶⁸

The author however fails to point out exactly how the institution has helped resolve these human rights violations within the public space. It is essential to detail some of the violations that have been resolved through the institution of the ombudsman. This study therefore analyses the CAJ’s place in dealing with violations of a human rights nature.

Professor McMillan in “Commonwealth Ombudsman, The Role of the Ombudsman in protecting Human Rights,”⁶⁹ is of the view that the office of Ombudsman is a specially constituted institution whose principal focus is the protection of administrative law rights.⁷⁰ While tracing the origin of the institution of the Ombudsman, Professor McMillan contends that the shortcomings of the legislative and judicial methods necessitated the establishment of an office that upholds administrative law rights without being stifled by inflexibilities and formalities that are inherent in litigation. Edward Joliffe,⁷¹ aligns his arguments with those of Professor McMillan. Joliffe insists

⁶⁷ Marten Oosting, (1992) *The Ombudsman and Human Rights Observations Based On the Experience of the National Ombudsman of the Netherlands*, OCCASIONAL PAPER No. 46.

⁶⁸ *ibid.*

⁶⁹ Professor McMillan, *Commonwealth Ombudsman, The Role of the Ombudsman in protecting Human Rights*, Conference on Legislatures and the Protection of Human Rights, University of Melbourne, Faculty of Law, 21 July 2006, available at http://www.ombudsman.gov.au/_data/assets/pdf_file/0016/31093/21-July-2006-The-role-of-the-Ombudsman-in-protecting-human-rights.pdf accessed on 22 September 2020.

⁷⁰ *ibid.*

⁷¹ *Supra* n52.

that the remedies that are available in traditional remedies available in the courts and the tribunals are mostly ineffective or impractical thus negating the importance of administrative law.⁷²

Linda Reif⁷³ posits that while addressing complaints of maladministration, the Ombudsman also protects and promotes rights since their violation of human rights is an almost intrinsic competence of maladministration.⁷⁴ Reif, further argues that irrespective of whether an ombudsman is classical or rights based, rights protection is a fundamental component in such an office.⁷⁵

This study illustrates that the Ombudsman in Kenya is hybrid because apart from playing the customary role of handling complaints of maladministration it promotes human rights. This is even though it's a separate institution, (KNCHR) is mandated to oversee and ensure that human right is promoted and protected in general. Further, guarding of human rights is one of major functions of the CAJ as stipulated under the relevant legislation.

A survey that was conducted by the OECD in 2017 revealed that most of the states in establishing the Ombudsman intended to achieve dealing with maladministration and protect the democratic space.⁷⁶

Linda C Reif in “*The International Ombudsman Anthology*,”⁷⁷ posits that the Ombudsperson is an entity meant to check on misuse of public power and also seeking to regain the public confidence against such ills.

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ Linda C Reif, *The Role of Ombudsman Institutions in Open Government*, available at <https://www.oecd.org/gov/the-role-of-ombudsman-institutions-in-open-government.pdf> accessed on 22 September 2020.

⁷⁷ Linda C Reif, (1999) *The International Ombudsman Anthology*, Brill, Nijhoff Publishers.

He also states that the openness and free will and from any interference from any public organ is very key for purpose of realizing its objectives. The does not however flesh out the mechanisms that are practical in nature which can be implemented to bring impartiality and independence.

Dean M. Gottehrer in “*Fundamental Elements of an Effective Ombudsman Institution,*”⁷⁸ argues that independence is the hallmark of Ombudsman-ship.⁷⁹ He argues that a Parliamentary Ombudsman who independently from the executive and other institutions that review it is more effective than a ministerial Ombudsman who is answerable to the executive.⁸⁰ He argues that a determined term of office, the possibility of reappointment, removal of the Ombudsman only on legally justifiable grounds, and immunity of the Ombudsman from liability for actions undertaken in fulfilment of its functions is factors crucial to ensuring that the ombudsperson is independent.⁸¹

This research suggests that the CAJ should maintain financial and operational independence. Lack of financial independence places the CAJ under the mercy and control of the financing entity. Operation independence includes security of tenure for key officers. Adverse acts such as intimidation however takes away the objectivity of the CAJ and its officers.

Reginald Nii Odoi in “*The Commission on Human Rights and Administrative Justice of Ghana in Retrospect,*”⁸² is of the opinion that institutions such as the CAJ are critical in particularly in the adversarial system. He considers courts as reactionary occasioning in ability to enforce rights.⁸³

⁷⁸ Dean M. Gottehrer, Fundamental Elements of an Effective Ombudsman Institution, Plenary Session II: Developing Working Methods and Tools of the Ombudsman, available on [file:///C:/Users/Nana%20PC/Downloads/Stockholm%20Conference 15.%20Plenary%20Session%20II Dear%20Gottehrer.pdf](file:///C:/Users/Nana%20PC/Downloads/Stockholm%20Conference%2015.%20Plenary%20Session%20II%20Dear%20Gottehrer.pdf) accessed on 22 September 2020.

⁷⁹ *ibid.*

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² Odoi Reginald, *The Commission On Human Rights and Administrative Justice of Ghana in Retrospect*, (Kwame Nkrumah University of Science and Technology, 2015).

⁸³ *ibid.*

This he posits justifies establishment of the CAJ. The CAJ to that end is establishment as purely a human rights institution to bolster the role of the court.⁸⁴ The present research study adopts these observations and argues for empowerment of the CAJ.

The Implementing of the principles and values enshrined in the Constitution is a foundation to respectable governance within the republic and therefore must be respected to the core.⁸⁵

This report however fails to detail the strategies that have been put in place to ensure that these commissions indeed enforce the democratic values and principles in public service as envisaged. This study, therefore, seeks to fill this gap accordingly, it seeks to establish that the mandate of the CAJ is way broader than currently perceived and that if enforced effectively, there is a huge chance that public administration will be improved to the optimum.

The works of the authors above support the central theme of this study that promotion of access to administrative justice is highly dependent on a vibrant CAJ. The commission requires and deserves the support of other relevant agencies to effectively deliver on its functions. This study, through literature analysed, seeks to make a case for an institution with both investigative and prosecutorial powers.

This study through the literature analysed present a case for the creation of special courts to deal with cases stemming from public administration, because this directly affects service delivery to the people of Kenya. Therefore, it is essential to also discuss the historical problems that the institution has faced that have derailed it from delivering its functions to the people.

⁸⁴ *ibid.*

⁸⁵ Article 86 of the Constitution states that the objects of Independent Commissions are provided for in Article 249 of the Constitution and include securing of the observance of democratic values and principles

The literature discussed shows that lack of implementation powers is a huge gap. Considering that the CAJ can only make recommendations upon conclusion of investigations due to limited enforcement powers is an apparent gap exposed by the literature discussed. The complaints handling structure is also ineffective as seen, because of lack of public awareness. There is also a gap in the fact that cases are prosecuted in ordinary courts, yet such cases should be treated differently as they touch on the integrity of officers who took the oath to serve. Like corruption, cases stemming out of public administration should be subjected to specialized courts for faster disposal and action against the officers, which will enhance public administration. It is against the analysed literature that this study bases its substance and makes a case for a revamped CAJ in Kenya that is citizen-centred, independent, and empowered enough to tackle the ills that exist in the current framework of public administration. There is no research that explores the challenges that hinder the CAJ from protecting the right to fairness and justice.

1.7 Justification of the Study

Constitution of Kenya 2010, a charter initially contemplated as a proverbial bridge allowing Kenyans to shift from a highly oppressive and authoritarian state to a decent democracy, set up structures for effective public administration. However, this has proved a futile exercise. The commission is crucial in protecting the right to fair administrative action. The public is the user of the CAJ's services. Nonetheless, since its establishment, no study has been undertaken to assess whether the CAJ is impacting the administrative justice landscape and more particularly whether it has achieved its mandate to protect and enforce the right to fair administrative action.

Although several scholars have written on the functions, powers, and mandates of the CAJ, until now, there is limited literature as regards the successes and challenges of the commission on the performance of its functions or potentials that the CAJ can explore to actualize the aforesaid right. This study, therefore, fills in the literature gap. This study also gives recommendations, which, if implemented, can help the CAJ to better enforce the right to perform its functions.

1.8 Methodology

The study employs a mixed methodological approach comprising both doctrinal and historical research. It also looks at best practices from other jurisdictions on enforcement of the right to fair administrative action. It also examines Constitution of Kenya, 2010, case laws, legislative framework such as the Commission on Administrative Action Act, 2011 Access to Information Act and the Fair Administrative Action Act, 2015. It also seeks to examine the Journal articles and reports.

More-so, due to its guiding principles of openness, freedom, accountability and equality, this paper borrows lessons and best practices from South Africa's Office of the Public Protector. The office is central in promoting good governance⁸⁶ and has played an important role in good governance and human rights protection thus informing a robust regime on Fair Administrative Action in Kenya.⁸⁷

⁸⁶ Dano M. & Nesbitt G., 'Background Paper: Public Protector South Africa' (2016) *Parliament of the Republic of South Africa, Research Unit*.

⁸⁷ Mubangizi C. John, 'The South African Public Protector, the Ugandan Inspector-General of Government and the Namibian Ombudsman: A Comparative Review of their Roles in Good Governance and Human Rights Protection' 45(3) (2012) *The Comparative and International Law Journal of Southern Africa*.

1.9 Limitations

The CAJ is mandated to among other functions; investigate the conduct of state affairs, or any act or omission in public administration, complaints of abuse of power, unfair treatment and unresponsive conduct within the public sector.⁸⁸This study has limited its scope to analysing whether the CAJ has achieved its mandate in protecting the right to fair administrative justice in Kenya, and the opportunities that it can explore to better undertake its mandate as dictated by the Constitution of Kenya, 2010.

1.10 Definition of Concepts

Administrative action- This refers to the manner in which actions and the making of decision done within the public space.

Administrative Justice- this is the administrative actions taken and their effects on the day to day lives of the people.

Fair administrative action- in this study, this refers to the neutrality, rationality and reasonableness in decision-making by public bodies and officers

Maladministration- in this study, these are the forms of failure in service or delay or inaction or incompetence or inadequacy or deficiency or discourtesy or indifference in the public sector

Ombudsman- the office set up to examine the conduct of public entities and officers in order to provide remedies or recommendations.

⁸⁸ Ibid, Section 8

1.11 Chapter Breakdown

Chapter One: Introduction

The study identified that the CAJ has been lacking the wherewithal to enforce its recommendations. As Walker Kobe puts it, due to the impunity and general governance culture in the Country, the Constitutional body mandated to address complaints on delivery of service to the public should be equipped with Operational mechanisms to create a shield against political interference and financial resources to avoid manipulation and enable it live up to its mandate.⁸⁹

Chapter Two: Historical Background of the Commission on Administrative Justice in

Kenya

Addressing the origin and/or reason for having an independent Commission to check on the violations of fair administrative action, incompetence, poor work ethic and abuse of public power, this Chapter finds that there was a disorganized system to check this abuse. The poor did not have a say on how power was exercised and this behaviour was inherited to the post-independence period even after the setting up of the Public Complaints Standing Committee, 2007. Being appointees of the President, the committee could not hold the legislature and/or the executive accountable as they were part of the government. Having come from a state of no policing of public power, only a strengthened and a fully independent Commission can be able to withstand the test of time to achieve the desired mandate.

⁸⁹ Supra, note 19

Chapter Three: Legal and Institutional Framework Governing Administrative Justice

While looking at the legal and the Institutional framework enacted to give effect to the right to Administrative action in Kenya; this Chapter notes that, with the intention to foster the independence of the Commission in a bid to enforce the right to Administrative Justice, the Commission was separated from the KNHCR. However, an overlap was created by directing the Commission to take the reports to Parliament for “further action”. This was indeed an overlap that was overlooked by the drafters of the Commission on Administrative Action Act and thus failure to guarantee the Commissions mandate as the implementation would entirely depend on the good will of the Politicians of the day. The question that arises would be, who will monitor the prefect? (Parliament). This Chapter thus concludes that lack of a functional independence has exposed the Commissions’ weakness as there is no autonomy in carrying out its mandate as seen above.

Chapter Four: Case Study on the CAJ

The Chapter analyse case laws pointing out glaring gaps that hinder the Commission from delivering on its Constitutional mandate. The Study analyses that failure to enforce the decisions of the Commission was a failure to guarantee the right to Administrative Justice and thus the same was left at the mercy of the Political class. Having looked at the historical problems, leaving this mandate with the political class is a step backwards to where we came from as a country thus questioning the independence of the Commission.

In regards to the Courts, the various interpretation also fails to give a clear indication as to how the recommendations would be guaranteed.

The overlap between the objective of the creation of the Commission and its functions thereof under Section 8 of the CAJ Act, 2011; the functional independence thus to operate free from any political influence, as is established and the condition under Section 54 of the CAJ Act to forward its recommendations to Parliament for implementation with the hope of fulfilling the Commissions Constitutional mandate is therefore a serious cause of Concern.

Chapter Five: Enforcing the Constitutional Right to Fair Administrative Action in South Africa: Lessons for Kenya

This Chapter looks at the Situation in South Africa and notes that Kenya can borrow a lot in realization of the right to fair Administrative Action. The advantage of independence of the Office of the Public Protector leaves the public with a lot of confidence as it has gone even as beyond as putting the President and Parliament on Notice. By putting the executive and legislature on notice, the public get some hope in the Independence structure. This is the complete opposite in the Kenyan Situation.

This Chapter therefore concludes that the Constitutional Commissions must be granted the functional, operational and financial independence to effectively enforce their mandate.

Chapter Six: Conclusion Findings and Recommendations

This provides Conclusion and recommendations aimed at enforcing the mandate of the commission and providing solutions to breathe life into it to realize its set Constitutional Mandate and address areas of Governance, accountability, necessity, human rights and independence. The Chapter provides recommendations aimed at Legislative reforms by the amendment of the Commission on Administrative Action Act, 2011, specifically Sections 8 and 54 of the CAJ Act, 2011 directing the Commission to forward its reports to Parliament; Articulate policy on Public

Administration and Institutional reforms such as creating an operational and financial Independence system for the Commission to guard it from any form of manipulation and allow it focus on its Constitutional Mandate among others.

CHAPTER TWO

**HISTORY OF FAIR ADMINISTRATIVE ACTION IN KENYA AND THE ROLE OF
THE COMMISSION ON ADMINISTRATIVE JUSTICE.**

2.0 Introduction

This Chapter aims at contextualizing the state of enforcement of this right in Kenya, long before the establishment of the Ombudsman. It critically investigates the practices by public authorities that are categorized as maladministration, towards establishing how the CAJ has performed its role.

The Chapter adopts six subtopics, covering: The state of fair administrative action during the pre-colonial; colonial; independence; post-independence; pre-2010, and post 2010 periods respectively. There is a consistent progression in asserting the need for a robust regime for the realizing fair administrative action, considering the 2010 Constitution seeks to be a bridge from a past that was shadowed with all manner of maladministration practices, which remained unchecked.

In assessing the role that the CAJ has played in entrenching fair administrative action in Kenya, this Chapter relies on several writings, including published reports such as the final report of the Constitution of Kenya Review Commission (CKRC). The Chapter also borrows highly from the Fair Administrative Action Guide. This background is important as it evaluates the gains made so far, to craft a perfect framework for the implementation of the right to fair administrative action for the people.

2.1 Pre-colonial Period

Kenya's state, before colonialism, was a fairly disorganized system, where no specific order or rules governing administrative action.⁹⁰ The informal system of governance at the grassroots level tended to favour only those who wielded the instruments of power then, being the owners of large herds, who were then considered as strong in society.⁹¹ The poor did not have a say in the way power was exercised, which then meant that fair administrative action was only a facade.⁹²

During this period, only the strong survived and only their decisions were enforced. This led to the concentration of administrative power in only a few people, who made decisions that violated principles of fair administrative action.⁹³ Generally, there was no mechanism to exercise organized exercise of public power because there existed no such institutions to enforce fair administrative action.⁹⁴

Therefore, during this era before the colonial period, the village elders and other wealthy individuals violated the principle of fair administrative action, by making decisions that affected the general public, without regard to their views, or even fairness.⁹⁵ As a result, the side-lined masses, who were the weak in society continued to suffer the ills of maladministration and there was no regard whatsoever for fair administrative action, a situation that led to society existing as

⁹⁰ AW Munene, 'The Bill of Rights and Constitutional Order: A Kenyan Perspective' (2002) 2(1) *African Human Rights Law Journal* 141.

⁹¹ *ibid.*

⁹² *ibid.*

⁹³ *ibid.*

⁹⁴ *ibid.*

⁹⁵ *ibid.*

an arbitral space, where power was abused without redress. It, therefore, means that there was a clamour for change, which would later culminate into the CAJ.⁹⁶

2.2 Colonial Period

This was the period before the 1960s when the colonial powers invaded Kenya and took control of all administrative and substantive leadership. During this period, Kenyans were subjected to several violations of the now highly sought-right to fair administrative action.⁹⁷ The oppressive colonial system dimmed all the hope that existed about fair administrative action.⁹⁸

During this period, decisions were made only with the colonial masters in mind and no one seemed to care about the impact that those decisions had on the lives of the ordinary Kenyans. The regime championed an undemocratic form of exercise of public power.⁹⁹ As a result of the deep-rooted superiority complex imposed on Kenyans by the colonial masters, Kenyans did not even experience any form of participation in the decisions that were made.

The colonial period saw the imposition of several oppressive policies, including arbitral decisions on payment of taxes and other royalties to the colonial masters. Other actions undertaken in relation to administrative justice included decisions on ownership of land. Since there was no complaint mechanism, Kenyans were moved from their native lands, which were fertile and productive to less productive areas. Other decisions included slavery policies and the application of customary law, which was also abolished in favor of imported laws from abroad. Kenyans also had no voice

⁹⁶ *ibid.*

⁹⁷ Constitution of Kenya 2010, Article 47.

⁹⁸ AW Munene 'The Bill of Rights and Constitutional Order: A Kenyan Perspective' (2002) 2(1) *African Human Rights Law Journal* 141.

⁹⁹ W Kaguongo 'Introductory Note on Kenya'

<http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf> accessed on 6th March 2019.

in the ruling structure that was imposed on them, which eventually led to resistance groups fighting for liberation.¹⁰⁰

2.3 Independence Period

The independence period, in 1963 saw some gains in terms of entrenchment of administrative rights in Kenya. This is because part of what the independent government sought was the exercise of power in favour of the Kenyan natives. This is unlike the pre-independence period where the exercise of power was arbitral and oppressive.¹⁰¹

At independence, Kenyans sought to abolish the authoritarian regime though without a clear legal framework to confront the abuse of public power.¹⁰² This led to later Kenyan leaders themselves making erratic decisions that affected fellow Kenyans negatively, because of the absolute power that they wielded.¹⁰³

The CKRC Report noted that the constitutional changes intended to give similar powers which the colonial governors had to the Presidents reinstated and reaffirmed that the new African masters had taken into the shoes of the whites thus progressing with maladministration.¹⁰⁴ This alone later led to the abuse of public power.¹⁰⁵

To curb abuse of public power and reinforce fair administrative action, the ideal scenario that Kenyans had hoped for was that the independence Constitution would establish a limited

¹⁰⁰ *ibid.*

¹⁰¹ YP Ghai & JPWB McAuslan *Public Law and Political Change in Kenya: a Study Of The Legal Framework of Government From Colonial Times to The Present.* (Nairobi: London, New York, Oxford University Press,1970).

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ Constitution of Kenya Review Commission Report, 2005.

¹⁰⁵ YP Ghai & JPWB McAuslan *Public Law and Political Change in Kenya: a Study Of The Legal Framework of Government From Colonial Times to The Present.* (Nairobi: London, New York, Oxford University Press,1970).

government, where power was not concentrated in one organ of government.¹⁰⁶ Where power is not concentrated, then administrative justice is assured.¹⁰⁷ However, this did not happen and therefore the clamour for the same rights to be enforced continued, leaving ordinary Kenyans vulnerable to the whims of those who were in power.¹⁰⁸

In a bid to distribute the way power is to be carried out, the independence constitution established three Arms of Government.¹⁰⁹ This quasi-federal structure of government adopted by the independence Constitution, therefore, introduced independent offices, being the office of the Attorney-General and that of the Controller and Auditor-General.¹¹⁰ The Constitution sought to govern the exercise of public power. Therefore, although not expressly, a form of checks and balances was introduced, and this was a positive state in realizing administrative Justice for Kenyans.¹¹¹

The Report of the Kenya Constitutional Conference 1962 shows that Constitution was aimed at creating a country which many would have confidence in and be assured of freedom across all borders.¹¹² This pronouncement by the 1962 Report showed that although there was no system of checking arbitral powers exercised by public authorities, Kenyans sought to enforce their administrative rights by holding those in power accountable for decisions they made because, in

¹⁰⁶ W Kaguongo 'Introductory Note on Kenya.' <http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf> accessed on 6th March 2019.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ The Independence Constitution, Schedule 2 of the Kenya Order in Council, Legal Notice No. 718 of 1973.

¹¹⁰ Independence Constitution, Sections 86 and 128.

¹¹¹ *ibid.*

¹¹² K Murungi 'Kenya's Constitutional Theory and the Myth of Africanity' in K Kibwana (ed.) *Law and the Administration of Justice in Kenya* (1992) 58.

long run, these decisions affected the general public more than they affected those who were in power.¹¹³

2.4 Post-Independence Period

During this period, the nature of public power kept shifting from what the independence Constitution had contemplated, to a complex situation that sought to immerse Kenyans into neo-colonial tendencies. First, as observed in *Njoya & 6 Others v Attorney-General & 3 Others*,¹¹⁴ the constitution had been amended 38 times aimed at empowering Presidency at the expense of other systems of governance.

The amendment No. 14 of 1986 to the Constitution abolished the office of Chief Secretary, which position was occupied by the head of the public service, and did away with the tenure security of the independent offices. Being the office of the controller, the auditor general and the attorney general. The Amendment No. 4 of 1988 the Constitution did away with security of tenure for the Public Service Commission and Judges.¹¹⁵

These amendments were tailored in a way to ensure that the accountability in governance concept remained fluid and elusive.¹¹⁶ The effects of the numerous amendments were that Kenya was now governed by a system that was grossly unaccountable and the President exercised unlimited

¹¹³ *ibid.*

¹¹⁴ *Supra note 17*

¹¹⁵ The Constitution of Kenya (Amendment) Act No 2 of 1990 restored the security of tenure to the judges.

¹¹⁶ B Sihanya 'Reconstructing the Kenyan Constitution and State, 1963-2010: Lessons from German and American Constitutionalism' (2010) 6(1) *The Law Society of Kenya Journal* 24.

powers, without the backing of proper elements of administrative power, hence defeating the essence of constitutionalism.¹¹⁷

The direct effects of the foregoing concerns are that since independence, public officers in Kenya constantly faced accusations of maladministration, characterized by failure in provision of services.¹¹⁸ Delivery of public services had become a favour rather than a right. This then meant that the independence Constitution, after the mutilation, could no longer assure Kenyans of administrative justice.¹¹⁹

Courts failed to address wrongs of public officers and Kenyans were confronted with inefficiencies with a majority of them getting discouraged by the complexities, technicalities, and expenses involved in litigation.¹²⁰ During this period, it was apparent that there was the arbitral exercise of power by the administrators, a situation which kept regressing for the worst, as people were subjected to unfair administrative actions.¹²¹

It is during this period that the need for action to reinstate enforcement of fair administrative action in Kenya was initiated. This was through the introduction of the office of an Ombudsperson after the recommendation by the Ndegwa Commission in 1971¹²² to curb poor services and laziness in the public sector.¹²³ This was a positive step towards the realization and enjoyment of the administrative rights by all Kenyans.¹²⁴

¹¹⁷ *Joseph Kimani Gathungu v. The Attorney-General & 5 Others, Mombasa High Court Constitutional Reference Application Number 12 of 2010.*

¹¹⁸ *ibid* n132.

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

¹²¹ *ibid.*

¹²² Commission of Inquiry (Public Service Structure and Remuneration Commission), 1971, also Ndegwa Commission, 1971.

¹²³ *ibid.*

¹²⁴ *Ibid*

Post-independence period was then marred with calls for reform, which led to uprisings and eventually a one-party state, which later plunged the country into the fight for multiparty democracy.¹²⁵ During this period, therefore, the attempts made at entrenching fair administrative action did not bear the desired fruits,¹²⁶ which led to the next phase below.

2.5 Pre-2010 Period

Fair administrative action, as a constitutional guarantee, did not materialize, until some steps failed first, which led to more conversations than before on the need for a framework to enforce it.¹²⁷ Before 2010 saw the debate on constitutional changes, to ensure that some of the values that the independence constitution sought to advance, such as administrative rights, were achieved.¹²⁸

This conversation led to a new constitutional order appreciating the fact that at this point, there was the need to confirm that power was exercised within constitutional bounds, hence a mechanism for its enforcement was required.¹²⁹ There was an apparent need to strengthen state institutions and ensure the integrity and accountability of government.¹³⁰ Kenya sought what is described as a constitution with constitutionalism.¹³¹

The fight for fair administrative action, as a right, among other reforms, saw Kenya, in 2010, promulgate a progressive Constitution that was perceived to transform Kenya into a country led

¹²⁵ Ibid n132.

¹²⁶ *ibid.*

¹²⁷ YP Ghai 'Creating a New Constitutional Order: Kenya's Predicament' in G Elizabeth *et al* (eds) *Governance, Institutions and the Human Condition* (2009) 13-14.

¹²⁸ *ibid.*

¹²⁹ *ibid.*

¹³⁰ YP Ghai 'Creating a New Constitutional Order: Kenya's Predicament' in G Elizabeth *et al* (eds) *Governance, Institutions and the Human Condition* (2009) 13-14.

¹³¹ CM Fombad 'Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) 59 *Buffalo Law Review* 1007.

by the rule of law.¹³² The efforts in regulating public power and ensuring enforcement of fair administrative action saw the birth of the Public Complaints Standing Committee in 2007.¹³³

2.5.1 Public Complaints Standing Committee

This was created within then the Ministry for Justice and Constitutional Affairs vide Gazette Notice No. 5826 of 2007.¹³⁴ This was a ministerial creature that sought to address maladministration.¹³⁵ Although with limited powers, the idea was to enforce fair administrative action in Kenya as it provided a mechanism for reporting complaints, in the purview of exercise of public power by authorities.¹³⁶

2.5.1.1 Composition and Tenure

The Committee consisted of a Chairperson, Vice-chairperson, three members, a Director of Secretariat and Members of the Committee. This was the initial idea behind modern Commission on Administrative Justice.¹³⁷

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ Gazette Notice No. 5826 of 2007

¹³⁵ *ibid.*

¹³⁶ *ibid.*

¹³⁷ *Supra* note 138. The Chair was appointed by the President; A Vice-chairperson elected by the members of the Committee from among its members; Not, more than three members appointed by the President on the recommendation of the Minister responsible for matters related to the administration of justice; The Director of the Secretariat who shall be also the Secretary to the Committee. Members of the Committee: except for the Director, who is an *ex-officio* member of the Committee, expected to hold office for three (3) years and be eligible for re-appointment for a further term of three (3) years only.

2.5.1.2 Functions

The function of the Committee was to check on maladministration and make sure that public offices were operated within the law.¹³⁸ These functions have been specialized and given a wider scope under the CAJ Act.

2.6 Post-2010 Period

The period post-2010 was a fresh of breath air in the government sector in Kenya. Gains were made and Kenyans contemplated new dawn, especially about administrative justice. The Constitution of Kenya 2010, through its bold provisions, was hailed as progressive, established independent institutions.¹³⁹

Independent institutions exercise public power as well, and this has to be considered in the context of practice and enforcement of the right on guaranteeing fair administrative action as is in Article 47 of the Constitution of Kenya 2010.¹⁴⁰

The aim of the institutions created by the Constitution of Kenya 2010 was to cultivate and inculcate the practice of regulated power to protect the people's will.¹⁴¹ This is by ensuring that all organs of the state obey and abide by democracy and constitutionalism.¹⁴² It also sought to regulate the exercise of state power and also ensure accountability by state officers.¹⁴³

¹³⁸ *ibid*

¹³⁹ Constitution of Kenya 2010, Chapter 15.

¹⁴⁰ *ibid* Article 47.

¹⁴¹ YP Ghai 'Creating a New Constitutional Order: Kenya's Predicament' in G Elizabeth *et al* (eds) *Governance, Institutions and the Human Condition* (2009) 13-14.

¹⁴² *ibid*, n156, Article 249(1).

¹⁴³ K Govender 'The Reappraisal and Restructuring of Chapter 9 Institutions' (2007) 22 *South African Public Law* 190; C Murray 'The Human Rights Commission *et al*: What is the Role of South Africa's Chapter 9 Institutions?' (2006) 9 (2) *Potchefstroom Electronic Law Journal* 122; LWH Ackerman 'The Obligations on Government and

The framework of the Constitution of Kenya 2010 envisages that these independent offices and commissions operate without external influence, hence constitutional bodies, separate from the government to defend the constitution.¹⁴⁴ This is the basis upon which the Kenya Constitution established the CAJ to check the exercise of administrative power in Kenya.

2.7 Conclusion

This chapter in its various parts has addressed the historical background of the right to fair administrative action. It has crystallized in ensuring accountability by state officers in Kenya, showing that the progress made can only be justified through ensuring an effective commission tasked with ensuring that maladministration is a thing of the past in Kenya.

This chapter has established that the weakening of constitutional commissions such as the CAJ as a historical problem. The six parts of this chapter have demonstrated the gaps in the manner in which public power is exercised. The Chapter has exposed the following historical gaps: Firstly, there was no keen interest in entrenching the administrative justice in Kenya. Secondly, there was a lack of political goodwill, since the ruling class which exercised power, sought to continue with their practices of impunity. Thirdly, even after the establishment of the Public Complaints Standing Committee, there was no independence, the same having been conceptualized as a ministerial department. Fourthly, there was slow progress in empowering the CAJ to enforce the right to fair administrative action, because the existing legislation did not provide adequate protection of the mandate of the CAJ.

Society in our Constitutional State to Respect and Support Independent Constitutional Structures' (2000) 3(1) *Potchefstroom Electronic Law Journal* 4.

¹⁴⁴ Committee of Experts on Constitutional Review, *Final Report of the Committee of Experts on Constitutional Review*, (2010) 52.

Firstly, it addressed the pre-colonial period and demonstrated that indeed there was no form of policing of public power. The second and third parts addressed the colonial and independence periods respectively and showed the transition from an oppressive regime to a more organized system, with a limited manner of enforcing accountability within government.

The fourth part analysed the post-independence period, whereby it established a structure of governance, keen on accountability. The fifth and sixth parts of this chapter addressed the pre-2010 and post 2010 periods respectively, which saw a transition from a passive form of regulation of public power to constitutionally entrenched commissions, including the commission on administrative justice, tasked with ensuring accountable governance in Kenya. This chapter has therefore established the historical background and shown the historical need for a strengthened Commission on Administrative Justice.

CHAPTER THREE
THE LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING ENFORCEMENT
OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION IN KENYA

3.1 Introduction

The Chapter explores existent laws and institutions regulating the exercise of administrative powers in Kenya, in enforcing fair administrative action.¹⁴⁵ The chapter will be handled in two parts, legislative framework and the other being the institutional framework. This chapter aims to assess the existent gaps in enforcement and in extension, realization of the right to fair administrative action in Kenya.

The legislative framework looks into various laws that have been enacted to advance the right to administrative Justice Kenya. The Chapter reviews the 2010 Constitution provisions on this right. Particularly, it evaluates effectiveness of these laws, especially the CAJ Act, the FAA Act and the Access to Information towards enforcing Administrative action right. This Chapter adopts a critical approach, in a bid to identify and address the weaknesses that exist at both the legal and institutional level.

3.2 Legislative Framework

This first part of this Chapter discusses in a strict sense, the laws governing the Commission on Administrative Justice and its role in enforcing fair administrative action in Kenya. Without proper and adequate laws, the institutional framework will not effectively address maladministration in

¹⁴⁵Constitution of Kenya 2010, Article 47.

Kenya. This is what makes this Chapter important, as it lays a firm foundation for the recommendations for reforms.

3.2.3 National Legal Framework

This part addresses the municipal law governing the right to fair administrative action and the mandate of the CAJ in enforcing the right. Being a constitutional commission,¹⁴⁶ the appropriate legal framework to empower the commission to promote fair administrative action in Kenya is as follows:

3.2.3.1 Constitution of Kenya, 2010

The right to fair administrative action is expressly guaranteed under the 2010 constitution.¹⁴⁷ Every person is entitled to fair administrative action, and this is the basis upon which the Commission on Administrative Justice was established.¹⁴⁸ Furthermore, it expressly underscores the right to access justice.¹⁴⁹ Access to justice is an umbrella term for fair administrative action and therefore, the laws in Kenya aim to enhance access to fair administrative action.

As the CAJ is mandated to check on maladministration in public offices and inefficiency in public offices;¹⁵⁰ the Constitution of Kenya, 2010¹⁵¹ breathes life and gives the CAJ the basis upon which to operate and protect the right every Person to Fair Administrative Action that is expeditious, efficient, lawful, reasonable and procedurally fair. The establishment of the CAJ therefore is as a

¹⁴⁶ Constitution of Kenya 2010, Article 59(4)

¹⁴⁷ Ibid Article 47.

¹⁴⁸ Commission on Administrative Justice Act.

¹⁴⁹ Constitution of Kenya 2010, Article 48.

¹⁵⁰ Supra, note 120

¹⁵¹ Supra Note 191

result of giving effect to Article 47 of the Constitution of Kenya, 2010 in advancement of the right to Fair Administrative Action.

The Constitution further embodies principles including good governance, integrity, transparency, and accountability.¹⁵² The importance these principles have cannot be overstated, as they epitomize the need to check public power in Kenya. Administrative action refers broadly to decisions taken by persons in a position of power, which affects the general public.

The Constitution also gives the sovereign power to the people.¹⁵³ This sovereign power is donated to among other organs, the judiciary, and independent tribunals.¹⁵⁴ Implicitly, the CAJ essentially exercises the sovereign power of the people in ensuring mal-administration excesses are checked within constitutional bounds.

The Bill of Rights is also applicable to and binds all organs of the state and all persons.¹⁵⁵ The importance of a well-established Bill of Rights, unlike in the independence Constitution has been heralded as a cornerstone of democracy. This, therefore, means that the right to fair administrative action as enshrined in the Bill of Rights is given more prominence than before and the role of the Commission on Administrative Action is also restated.

Without strong institutions, however, to ensure that the Bill of Rights is enforced, there is a danger that those holding administrative positions will turn to abuse of office unchecked, leading to obvious constitutional breaches. The CAJ is therefore important in enforcing and guaranteeing compliance with article 47 rights.

¹⁵² *ibid*, Article 10 (2) (c).

¹⁵³ *ibid*, Article 1(1).

¹⁵⁴ *ibid*, Article 1(3) (c).

¹⁵⁵ *Ibid* Article 20.

The Constitution establishes the CAJ as a constitutional commission requires the institution to enforce the right to fair administrative action, amongst other roles.¹⁵⁶ The separation of the commission from the initial KNHREC, sought to bring an independent constitutional commission focused on enforcing the right to fair administrative action.

Article 59 (5) (a) further provides that if Parliament enacts legislation restructuring the Commission, the assignment of functions shall be as per the legislation. The commissions that would then ensue will have equivalent powers to the KNHREC,¹⁵⁷ and will be a committee as per Chapter Fifteen with powers of a Commission as per the said Chapter.¹⁵⁸

The foregoing constitutional provisions are significant since they provide the basis upon which regulation of public power is possible and therefore empowering the commission to enforce the fair administrative rights. However, this mandate failed its purpose, considering that the commission as constituted has not utilized the constitutional powers vested upon it.

The provisions contemplate a fully operational commission, tasked with constitutional roles, duties, and responsibilities enshrined under Article 59. Therefore, failure to live up to the constitutional threshold is a thing that must cause worry, concern, and attract innovative solutions, towards actualizing the constitutional leitmotif.

From a constitutional standpoint, therefore, the commission as a champion for fair administrative justice is given roles that it must effectively play to guarantee and promote the protection guaranteed by the right, although the practical implications of this fact have not been felt.

¹⁵⁶Ibid, Article 59 (5) (a)

¹⁵⁷ Ibid, Article 59 (5) (b).

¹⁵⁸ ibid, Article 59 (5) (c).

3.2.3.2 Commission on Administrative Justice Act, 2011 (CAJ Act)

The Act that operationalizes the provisions of Article 59 the 2010 Constitution as discussed above. This Act provides the mode of operation of the CAJ, and stipulates its functions and powers of the Commission.

The mandate of the Commission covers both levels of government. First, the commission is mandated to deal with public sector maladministration. It thus investigates complaints on matters relating to administrative justice.¹⁵⁹

Section 42(3) and (4) of the CAJ Act underscores the remedial action available to the CAJ. Once the commission investigates and makes certain recommendations to a specific institution, it requires that the institution implements those recommendations.

If a corporate under investigation ignores the recommendations by the CAJ then it leads the to the preparation of a detailed report presented to Parliament stating the extent of failure to implement Commission's recommendation by that institution. Parliament is constitutionally mandated to take further action against that particular institution.

Therefore, as contemplated under the Act, proper implementation of the core mandate of the Commission is a matter reserved for Parliament, highly constituted by politicians, who at best are not expected to understand the spirit of the constitution in creating such a constitutional body of the magnitude of the CAJ, with full powers to take actions, even against Parliament as contemplated under the Act, towards checking public power.

¹⁵⁹ Commission on Administrative Justice Act, Section 8

3.2.3.3 Fair Administrative Action Act, 2015

With intentions to enhance and thus giving effect to Article 47, this Act provides a platform in which any person working with a body that makes an administrative action decision and is dissatisfied with it can challenge it.

The FAAA seeks to keep all actors within the law while undertaking any decisions or administrative actions to conform to Constitution of Kenya and common law. In the event the same is not adhered to, then one has a basis to seek for judicial review to challenge such omission or commission by the said body.¹⁶⁰ Judicial Review is based on the doctrine of one going beyond their powers as well as the general rules of natural justice which generally provides that one cannot go beyond their set mandate and/or any action must be done in a lawful and fair manner, to wit, according the affected party right of reply.¹⁶¹ This therefore means that there must be an aspect of Irrationality, illegality and impropriety of the said administrative action.

The FAAA expands the scope of Judicial Review to also include private bodies; provides for the provision of a written reason to the victim; information to be provided to the victim on the subject matter and outlines the steps on how to institute Judicial review.¹⁶²

3.2.3.4 Access to Information Act, 2016

This act gives effect to the right to access to information as recognized by Article 35. The Act gives the CAJ powers and functions for oversight and enforcement. Like most rights, access to

¹⁶⁰ Fair Administrative Action Act, 2015, Section 5(2)

¹⁶¹ Rita Biwott vs The Council of Legal Education, High Court Miscellaneous Application no. 1122 of 1994

¹⁶² Supra note 205, Sections 3, 6, 7(2), 9, and 12

information is not absolute and can be limited under Article 24 of the Constitution.¹⁶³ This right being a fundamental one mandates the CAJ to write to the complainant and communicate the outcome of the investigations.¹⁶⁴ The FAAA further demands that information be given to any person who wishes to use the same for an appeal. Such information must outline the reasons for the decision and any other relevant documents thereof.¹⁶⁵ This act has strengthened the urge in the realization of fair administrative right in Kenya.

3.3 Institutional Framework

This part covers the institutional framework for oversight institutions, especially the CAJ.

3.3.1 International Framework

There is no uniform international institution that is tasked with ensuring effective administrative justice. States have however adopted national mechanisms to ensure that administrative justice is realized. Therefore, this gap is left a void, by dint of the unique circumstances prevailing in each independent state. However, the United Nations, which is a global institution, continues to require institutions to adhere to best established international best practices in all areas, including human rights, which encompasses the need for effective enforcement of administrative justice.

In the absence of an international institution, therefore, the United Nations stands in the gap to see to it that power for the public is dealt with the requisite restraint and that there exist structures for redressing such violations as may exist within the international arena.

¹⁶³ Ibid article 24

¹⁶⁴ Commission on Administrative Justice Act, 2011, Section 43

¹⁶⁵ Fair Administrative Action Act, 2015, Section

3.3.2 Regional Framework

Regionally, there is no uniform institution that is tasked with ensuring compliance with standards of administrative justice. However, the ACHPR is usually called upon to adjudicate disputes where states have taken various administrative decisions that led to a dispute. Further, the African Union also has structures for fostering access to justice, through various policies.

3.3.3 Local Framework

Locally, the institution tasked with ensuring that maladministration in the public sphere is a thing of the past is the Commission on Administrative Justice. The institution is tasked with the following functions, which are not conclusive for reason that the institution has and continues to evolve as courts continue to interpret various laws and asserting the centrality and need for the institution of ombudsman to exist, to ensure that public power is checked appropriately. The functions have been briefly discussed as follows:

3.3.3.1 Maladministration

Maladministration refers to inefficient or dishonest administration or mismanagement.¹⁶⁶ The commission has powers to investigate any kind of maladministration.¹⁶⁷ Maladministration encompasses service failure, delay, inaction, inefficiency, ineptitude, discourtesy, and unresponsiveness. The Commission looks into allegations of such maladministration, with the

¹⁶⁶ Bryan Garner, *Black's Law Dictionary*.

¹⁶⁷ Fair Administrative Action Act 2015.

view of ensuring that there is no administrative injustice.¹⁶⁸ The foregoing includes an act or decision carried out by the Public Service or a failure to act when necessary.

3.3.3.2 Promotion of Special Rights

Special rights are those that grant rights to one or more groups that are not extended to other groups. Some of these special groups that benefit from special rights are women, who under Article 27¹⁶⁹ are afforded the right to affirmative action and non-discrimination to address past injustices. Article 53 and 55 also provide for the rights of children and the youth, which are in broad terms, special rights.

The CAJ seeks to ensure that these rights are realized in administration of the public. This also underscores its constitutional mandate of protection of human rights and freedoms in public administration.

3.3.3.3 Compliance by public officers to uphold the Rule of Law

As an emblem of hope and protector of the law, the CAJ seeks to make sure that all persons in public offices operate within the tenets of the laid down laws.¹⁷⁰

The CAJ has powers to that will guarantee compliance by public officers by making sure the officers uphold the rule of law while in public bodies by using their designated administrators.

3.3.3.4 Promotion of Constitutionalism

Constitutionalism refers to the ability of the constitution to be adhered to as the leading legislation holding all the rules that the country operates on. The CAJ, therefore, ensures that all organs of the

¹⁶⁸ *ibid.*

¹⁶⁹ Constitution of Kenya 2010.

¹⁷⁰ *ibid.*

state observe democratic and constitutional values and principles. This also includes the role of ensuring that the CoK is adhered to as the supreme law of the land by all public and private bodies.

3.3.3.5 Integrity

The CAJ is mandated to ensure that public officers maintain integrity. To that end, the commission investigates improper conduct, abuse of power, and misbehaviour in the public service.

3.3.3.6 Advisory Powers

The commission is empowered to provide guidance when it comes to policies meant to effect changes to align with its objectives. This may be done by way of giving opinions or by recommending to the supervisory bodies with the aim of making services available within the public service to Kenyans.¹⁷¹

3.3.3.7 Coordination Function

The Commission also has the power to work with different public institutions to promote resolving disputes through ADR. This is through promoting inter alia, negotiation, mediation, and arbitration.¹⁷²

It is against this backdrop that this paper is written, suggesting various reform areas as shall be discussed herein.

3.4 Analysis

There still exist several gaps in the law, local, regional and international, in ensuring that the CAJ operates effectively as envisioned by the Constitution of Kenya 2010. These gaps need to be

¹⁷¹ *ibid.*

¹⁷² *ibid.*

addressed to ensure that the laws are streamlined to get optimal results from these constitutional commissions.

Failure to address these gaps is an obvious oversight on the part of the state, which perhaps may be attributed to a hostile political environment that is not keen on ensuring that institutions operate independently.

3.5 Conclusion

This Chapter has discussed the legal and institutional framework governing the right to fair administrative action and the role of the Commission on Administrative Justice in promoting the same. In the various sub-paragraphs labelled Legal Framework and Institutional Framework, the Chapter discusses all laws and institutions applicable. Several gaps indeed exist, for instance, the fact that there is no international charter expressly providing for policies on the administrative rights. Similarly, at the regional level, there is no such legislative instrument directly guaranteeing fair administrative action.

In Kenya, the legal and institutional framework fails to respond to the promotion of this important right leading to impunity and disadvantaged ordinary Kenyans. The existing laws do not adequately guarantee independent and effective operations of the Commission on Administrative Justice, hence the need for reforms.

Next, the study interrogates in the following chapter a series of case laws with the intention to show how far we have come on the realization of the right to fair Administrative Justice is concerned. Several interpretations, shall be discussed and it will be clear as to the role Judges have

played whether in assisting or jeopardizing the mandate of the Commission in securing the Administrative action in Kenya.

CHAPTER FOUR
CASE STUDY OF THE CAJ AND THE RIGHT TO FAIR ADMINISTRATIVE ACTION
IN KENYA

4.1 Introduction

This faction of the study looks into the participation of the Commission on Administrative Justice in enforcing the right to fair administrative action in Kenya. The objective is to contra distinguish the radical approach in South Africa, to explore lessons from best practices.

4.2 Case Reviews

The cases discussed to highlight the state of Kenya's enforcement of the right to fair administrative action as follows:

About determining the participation of persons not satisfied with the administrative processes, the court in *Moses Chesang & 19 others v Cabinet Secretary Ministry of Education & 7 others*,¹⁷³ pronounced itself on the factors that a court should consider. The petition challenged the elections of the officials. The Ministry of Education had issued a circular directing the county and sub-county directors of education, principals, and headteachers of schools to conduct school, sub-county, and county parents' associations' elections.

The petitioners retained their positions and as such, they all qualified as delegates of the Parents Teachers Association with powers to take part in elections. The petitioners alleged that the ministry, without any care of the law, proceeded to convene a delegate meeting on October 5, 2016, and conducted elections of the officials.

¹⁷³ Petition No. 470 of 2016 [2021] eKLR

The petitioners also argued that they were not notified of the delegates' meeting or the elections. The petitioners sought for orders against the violation of their fundamental entitlements. The court noted the importance of every person's article 47 rights.¹⁷⁴

The court further stated that Administrative rights are a reflection of good governance and that all public officers were bound by the same law.¹⁷⁵ Furthermore, the court analysed the three categories within which a wrong can be committed under public law as follows:

i. Illegality

This mandates that the people making decisions must be able to understand the governing law and where the same was not followed, any decision thereto becomes illegal.¹⁷⁶ Where the maker of the decision has no such powers to so make the decision, the same is illegal.

ii. Fairness

Whenever a decision maker is acting on a subject then the same should be within the laid down procedure. For instance, one should be given time to respond to any allegations levied against them and be heard as the principle of natural Justice demands; also those listening to such a matter should not misuse their office in a way to deny the accused fair hearing.¹⁷⁷

iii. Irrationality and proportionality

Where it is considered demonstrably that a decision is manifestly unreasonable such that it constitutes any form of bias, courts have to intervene to quash a decision.¹⁷⁸ This is because the

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

¹⁷⁸ *ibid.*

impugned decision was an administrative action,¹⁷⁹ because the decision affects the legal rights and interests.¹⁸⁰ An administrative action should meet the constitutional and statutory threshold of, procedural fairness, rationality, and lawfulness.¹⁸¹

The court finally held that the actions of the Respondents were in violation of Article 47 in not according to the petitioners the opportunity to participate in the election.

In *Commission on Administrative Justice v. Kenya Vision 2030 Delivery Board & 2 others*,¹⁸² the court was confronted with a question as to whether or not the Commission on Administrative Justice peremptory power over any organization under its investigation. The **Eng. Judah Abekah** had applied for a position as a Director, however upon being successful he was not allowed to take up that position prompting him to make this report to the Minister in charge who directed that he be given the position; this never came to pass thus prompting a complaint with the CAJ. Upon filing this suit, the Court stated that the CAJ did not have Coercive powers and secondly that the CAJ could not direct the Board how to deal with their discretionary authority.¹⁸³

The Court stated that in light of Section 8, 26, 41 and 46 of the CAJ Act, the Commission did not have coercive powers and thus the best that they could do if an entity failed to follow its recommendation was to prepare a report and forward the same to the National Assembly which will later deal with the report.¹⁸⁴

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*

¹⁸² [2019] eKLR.

¹⁸³ *ibid.*

¹⁸⁴ *ibid.*

This decision highlights concerns over the powers of the CAJ concerning enforcement of its findings whereupon in extension is meant to protect Administrative rights. The Court subjected the enforcement of the mandate of the CAJ to the whims of Parliament by recommending that the CAJ can only present a report to Parliament for enforcement.

The High Court asserted that the CAJ has been given investigative powers but has not been given powers similar to those ones given to the Kenyan judiciary.¹⁸⁵ This thus explained why the commission's reports could not be tantamount to court judgements and to prevent the commission from being the prosecutor and the judge at the same time.¹⁸⁶ There is as such no compellable duty on governmental agencies to implement the recommendations.¹⁸⁷

This decision is significant because it set the pace for a keen interpretation of the role of the CAJ. However, aggrieved by the said decision, the CAJ Appealed confronting the Court with several questions, to wit, whether the CAJ had the mandate to intervene in the 3rd Respondent's complaint;¹⁸⁸ On 27th September 2019, the Court of Appeal allowed the Appeal declaring that the 3rd Respondents rights to fair administrative action was infringed. The Learned Judges of Appeal agreed with the trial Judge's finding only to the extent that the CAJ had the powers to investigate the 3rd Respondent's claim and make recommendations.

The Court overturned the High Court's findings in effect that the only remedy available to a beneficiary of CAJ's recommendation was parliament. The Court found that Article 254 of the Constitution is open and was flexible such that it was not just an article as it had the force of Law. The Court opined that since the decision of the Board was one that could be challenged by way of

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid.*

¹⁸⁸ Civil Appeal No. 141 of 2015 (2019) eKLR

Judicial Review then it fell within the meaning of Administrative Action and therefore the CAJ could direct the Board.

Not satisfied with the decision of the Appellate Court, the Board proceeded to the Supreme Court as of right. The Supreme Court stated that it was wrong that because the Board did not appeal the decision of the Minister in extending the 3rd Respondent's contract or CAJ's recommendations, then the CAJ's recommendations are binding on it.

Delivering its decision on 24th March, 2021, the Supreme Court allowed the Appeal in support of the High Court and against the Court of Appeal. The Court went ahead and noted that the question on implementation of recommendations to public entities from the Commission has been recurring in different cases before the Supreme Court and other Superior Courts. As such, it gave guiding principles to assist Courts when considering a matter concerning the nature of recommendations from Commissions or other public bodies, to wit, Any power to make recommendations ought to be specifically provided for in the Constitution or the law; Recommendations does not fall into conditional orders to the party whom it is addressed; A recommendation from a Commission is only binding upon a public entity where it has been specifically provided for in the Constitution or in law; The manner in which a recommendation is to be implemented by a public entity is discretionary; the exercise of discretion in implementing a recommendation may only be interfered maladministration; and that any recommendation by a Commission which is not implemented may be reported to parliament for any further action, if necessary.

In sealing its decision, the Court cleared that Commissions are supposed to act as watchdogs and co-operate and work with government arms. That it's the duty of parliament to implement reports from Commissions pursuant to Article 254(1) of the Constitution and Section 8 of the CAJ Act.

Commissions therefore cannot implement their own recommendations nor force a recommendation on a public body lest they usurp the role of Parliament, which is the Organ vested with the mandate to enforce implementation. The court went ahead to note that for any avoidance of doubt, a public office or body or state organ to whom a recommendation is made need not appeal such a recommendation for it not to be binding.

The above decision reaped the CAJ of that mandate thus exposing it and leaving its recommendation at the mercy of politicians who play politics and who in most instances will look at their interests before acting on certain reports. It's also important to note that these same politicians are the ones who make decisions as to allocation of revenue and thus risking the independence of the CAJ.

In, *Republic v Commission on Administrative Justice and 2 Others Ex Parte Michael Kamau Mubea*,¹⁸⁹ the Court considered the issue whether it was unreasonable and unjust for the Commission on Administrative Justice to conduct investigations and publish a report based on an 'anonymous' complainant whose complaint or account of the facts was never disclosed at any point during the investigation.

In terms of facts, the CAJ purported to conduct investigations on the Applicant's Remuneration, yet as the Applicant argued, it is not within the CAJ's power to conduct investigations on the remuneration of public officers and make recommendations as set out in the Impugned Report.

The Court interpreted the role of the Commission under Article 59(4). It also looked into the constitution article 10 of the Constitution on transparency, accountability as well as Article 50 on

¹⁸⁹ Miscellaneous Application No. 378 of 2015.

fair hearing.¹⁹⁰ The Court issued orders of prohibition and certiorari against the CAJ on the basis that there had been no full disclosure but insisted that the Commission was mandated to conduct such investigation, but in coordination with SRC to bring to the attention of the Respondent the fact of their approval.¹⁹¹

The Court reasoned in line with the constitutional duty of organizations to deal transparently, with necessary disclosure requirements for parties under investigation. The Court underscored the point that even though the Commission has latitude to investigate other bodies, it must remain truthful to due process.¹⁹²

In reaching its decision, the court looked at Article 59(4) and interpreted the Commission on Administrative Justice Act.¹⁹³ It reasoned that the Constitution requires transparency and accountability by public officials.¹⁹⁴ It is indeed with this reasoning that Article 59(4) of the Constitution envisages and creates a separate commission responsible for monitoring administration rights in Kenya.¹⁹⁵

It's this matters' illustration that CAJ, in checking and investigating maladministration must comply with the standards of administrative justice. This position is restrictive, as it interferes with the constitutional mandate of the Commission in enforcing fair administrative rights in the country.

¹⁹⁰ *ibid.*

¹⁹¹ *ibid.*

¹⁹² *ibid.*

¹⁹³ *ibid.*

¹⁹⁴ *Ibid*, Article 10

¹⁹⁵ *ibid.*

The Court while dealing with *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others*,¹⁹⁶ also the Bindingness or otherwise of SRC's advice to the TSC.¹⁹⁷

The court started by analyzing the establishment of the SRC. It reiterated that the SRC is established by the Constitution and therefore derived its powers from the grund norm.¹⁹⁸ under the Constitution. Counsel appearing for SRC argued that the Constitution provides that;

*“...If a function or power conferred on a person under this constitution is exercisable by the person only on the **advice** or recommendation, with approval or consent of, or on consultation with, another person, the function may be performed or the power exercised **only on that advice**, recommendation, with that approval or consent or after that consultation, except to the extent that this constitution provides otherwise...”¹⁹⁹*

Interpreting this provision, counsel argued that though the SRC and TSC are interdependent, they could consult with the aim of achieving their set mandate.²⁰⁰ However, the Court was of the opinion that SRC could not impose anything on TSC as the latter were not bound by their decision.²⁰¹

This decision struck a blow on mandate of Constitutional Commissions in Kenya. Where the statute requires consultation, then it follows that the advice of the TSC should have been accorded a level of consideration. Public resources should not be utilized to render an opinion that is merely on paper but is not considered.

¹⁹⁶ [2015] eKLR.

¹⁹⁷ *ibid.*

¹⁹⁸ *Constitution of Kenya*, Article 230 (1)

¹⁹⁹ *Ibid*, Article 259(11)

²⁰⁰ *ibid.*

²⁰¹ *ibid.*

In *Nzamba Kitonga v. Machakos County Government & another; Commission for Administrative Justice (Interested Party)*,²⁰² the court found that CAJ has a Constitutional mandate to assist and guide Machakos County in the putting in place of a rates management system that was effective and efficient.²⁰³

Nzamba Kitonga presented the case that Article 174 (a) and (b) binds the County Governments to be accountable in the discharge of their functions and promoting socio-economic rights. He also argued that Article 175 (b) speaks of revenue sources that are reliable, and Chapter 13 part 1 of the Constitution is devoted to outlining values of Public Service including efficiency, effectiveness, and economic use of resources.²⁰⁴

He also argued that public service should be responsive, prompt, transparent, and to be accountable for administrative acts and that Public Service must give fair accurate and timely information to the public. He cited Article 47 which he stated directs for the provision of fair, expeditious efficient and reasonable decision.²⁰⁵

It was held that the county was constrained to appreciate the Plaintiff's good suggestions but not to give him a cold shoulder and claim that it is independent and knows what it is doing. This decision plays a role in asserting the mandate of the CAJ in entrenching article 47 right at the county level, even though there is a level of independence expected to be exercised by the county leadership.²⁰⁶

²⁰² [2019] eKLR.

²⁰³ *ibid.*

²⁰⁴ *ibid.*

²⁰⁵ *ibid.*

²⁰⁶ *ibid.*

The Court in *Kenya National Commission on Human Rights versus Hon. Attorney*,²⁰⁷ underscored role of Constitutional Commissions in the exercise of legislative and executive power.²⁰⁸

The Court in *Lempaa Vincent Suyianka v. Commission on Administrative of Justice Selection Panel & another*,²⁰⁹ discussed the state of fair administrative action.²¹⁰

Briefly, the petition concerned the petitioner's demand for information from the CAJ concerning an advertisement for various positions the Commission inviting interested qualified persons who satisfied the provisions of the Constitution to apply for the said vacant positions. The petitioner was not successful and he sought information on why he was not shortlisted.²¹¹

He presented the petition arguing that he did not receive any response from the CAJ on the information sought thus filing a suit seeking remedies for the violation of various rights.²¹²

In analysing these rights, the Court stated that these are very important rights which allow the citizens to participate in their governance and therefore such a violation was a hindrance to enjoyment of the said right and thus a primary right upon which subsequent rights flow.²¹³

The Court in *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others*,²¹⁴ held as follows:

²⁰⁷ Petition No. 132 of 2013; 2015 eKLR.

²⁰⁸ *ibid.*

²⁰⁹ [2018] eKLR.

²¹⁰ *ibid.*

²¹¹ *ibid.*

²¹² Sought rights to access to information under Article 35(1) (3) (b) of the Constitution, right to fair administrative action under Article 47 and for contravention of Articles 1, 10, 27, 88(2) and 232 of the Constitution.

²¹³ *ibid.*

²¹⁴ (CCT16/98) 2000 (1) SA 1, at paragraphs 135-136

"...although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33 but also its content. The principal function of section 33 is to regulate the conduct of the public administration, and, in particular, to ensure that where the action taken by the administration affects or threatens individuals, the procedures followed to comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades..."

The Court, in the end, found that the petitioner wasn't entitled to any orders sought. This is because the CAJ demonstrated that it did not breach his right to fair administrative action, per the standards discussed in the case above, hence not liable.²¹⁵

On the issue of participation of the Commission in the decisions taken by other public institutions, the Court in *Republic v. Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees*,²¹⁶ asserted the role of the Commission in procurement processes at NSSF, a public body.

In the matter, the CAJ informed the NSSF on its intentions to conduct investigations over a project undertaken by NSSF. However, NSSF received a response to the effect that the same was under

²¹⁵ *ibid.*

²¹⁶ [2015] eKLR.

the EACC. However, this didn't go well with the CAJ as it insisted that it was under its whims to conduct such investigations. NSSF approached the Court so as stop the CAJ from proceeding.

The Court in deciding this matter sought to highlight the role of the independent commissions.²¹⁷ The Court while citing the decision of the Supreme *Re the Matter of the Interim Independent Electoral Commission*²¹⁸ stated as follows:

“...It is a matter of which we take judicial notice that the real purpose of the "independence clause", about Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear, or favor: this, indeed, is the purpose of the “independence clause...””

²¹⁷ *ibid.*

²¹⁸ [2011] eKLR.

The Court found in favor of the CAJ and the Application before the court failed.²¹⁹

The decision plays an important role in instilling the need for the CAJ to cooperate with other institutions with investigative powers, to ensure that the right to fair administrative action is effectively enforced and that the Constitution is promoted.

The court in *Republic v. The Commission on Administrative Justice & Another Ex-parte John Ndirangu Kariuki*,²²⁰ confirmed that the Commission on Administrative Justice has a role in regulating applicants who run for elective public office.

The CAJ had recommended to the IEBC that certain persons including the *ex parte* applicant be disqualified from running for elective public posts in the forthcoming general elections. The Applicant argued that before the said recommendation, he was not allowed to be heard and that the CAJ did not before making the said recommendation supply him with any reasons or notice to that effect. The *ex parte* applicant also argued that the action flies in the face of sound administrative justice as it violates the principles of legality and natural justice.²²¹

The CAJ reiterated that it is a Constitutional Commission established by the Act, 2011 mandated to promote constitutionalism and fair administrative action by public officers focusing on abuse of power, misbehaviour, improper conduct, and indifferent conduct in the public sector complementary to integrity issues under the law.²²²

While dismissing this Application, the Court stated that where a Commission makes determinations that are in most cases likely to interfere with another's rights then it would be

²¹⁹ *ibid.*

²²⁰ [2013] eKLR.

²²¹ *ibid.*

²²² *ibid.*

prudent to adhere to the principle of Natural Justice. This is a step in asserting the administrative right in Kenya. The CAJ therefore should do more to ensure that decisions affecting the rights of people are handled procedurally.

In the case of *Njoya & 6 Others -versus- Hon. Attorney General & Another*,²²³ the Court asserted that as long as a decision made an independent decision does not take away another individuals' rights then it's important that the said commission is left to complete its duty.²²⁴

4.3 Impact of the Sunset Clause

The KNHREC has the same sunset clause as the CAJ Act for amalgamation. This will affect the operations of the CAJ which is picking itself slowly in a bid to achieve its desired mandate under Article 47 of the Constitution of Kenya, 2010. It's important to note that the two Commissions are complementary and not competitive.²²⁵ For instance, the Right to access information is provided for in the Constitution. The Access to Information Act, 2016 goes into detail as to the disclosure of information by public bodies. The office of the Ombudsman has given the oversight and enforcement functions to the Access of Information Act; an assignment which does not negate having the KNHREC as well. The CAJ Act must therefore be allowed to have life to continue to operate with the existence of devolution. Once It's been devolved to every county then it will decongest the four counties which is Nairobi, Kisumu, Mombasa and Isiolo and now Uasin Gishu resulting to better service delivery in terms of monitoring delivery of public services in the Country as people will have a test of its actions.

²²³ [2004] 1 KLR 232.

²²⁴ *ibid.*

²²⁵ The Constitution of Kenya, 2010, Article 59(4)(5)

In allowing the CAJ to have a long life; in-turn it will be boosting and assisting devolution. The CAJ will ensure that public officers comply with Chapter Six(6) of the Constitution of Kenya, 2010 and are made accountable to serve selflessly. Many Counties delay to offer justice; for instance, police stations, since the Officers in those areas are “above the law” and have no one to check them and thus the need to allow the CAJ to be established across the Country to take up its role and give hope to the common citizen. The major challenge and threat to devolution is service delivery, the CAJ therefore if allowed to have a long life then it shall complement all actors that have good intentions of service delivery.

4.4 Conclusion

This Chapter has reviewed case law on the right to fair administrative action in Kenya and the role of the CAJ in enforcing the constitutional mandate. It has also made observations by stating the reasoning of the various courts, in interpreting the laws regulating the conduct of the CAJ in enforcing the right to fair administrative action.

The review above represents the data in terms of cases analysing the mandate of the commission. The cases have established a trend, that more needs to be done to ensure that the CAJ has the requisite capacity to administer the right to fair administrative action in Kenya. They also reiterate the need to empower the CAJ to enable it to deliver its constitutional mandate in ensuring effective fair administrative framework.

The next chapter looks at the Situation in South Africa with a similar Commission but known as the Office of the Public Protector. The Chapter Analyses how the said office has handled matters maladministration vis a vis Kenya and what we can borrow in order to strengthen the Kenyan maladministration watchdog; the CAJ.

CHAPTER FIVE

ENFORCING THE CONSTITUTIONAL RIGHT TO FAIR ADMINISTRATIVE ACTION IN SOUTH AFRICA: LESSONS FOR KENYA.

5.1 Introduction

This Chapter looks at the enforcement of the right to fair administrative action in South in a bid to make recommendations on best practices towards enforcement of the Constitutional right to fair administrative action in Kenya. The Chapter's main proposition is that the Commission on Administrative Action has the potential to make ground-breaking decisions, in the purview of fair administrative action, just like the Office for Public Protector in South Africa.

The first element that this Chapter study is the Contextualization and conceptualization of fair administrative action in South Africa. It looks into how the process of establishment of the Office of the Public Protector. The first part of this Chapter, which is the introduction, provides the organizational structure of the Chapter, which is a brief overview of the chapter's focus.

The second element that this Chapter delves into is an analysis of how the courts in South Africa have participated in shaping the enforcement of the right to fair administrative action in South Africa. The cases constitute the data that the study relies upon to respond to its problem statement and build upon its central theme. This second part, in sum, looks into the South African administrative justice.

The third part of this Chapter evaluates the situation in Kenya, in light of the enforcement of the right to fair administrative action. It focuses on limitations of FAA, specifically on its mandate. This Chapter concludes by summarizing the findings of the case study and lessons that may be borrowed from South Africa in revamping the CAJ.

5.2 Fair Administrative Action in South Africa

The office for the Public Protector traces its history from its predecessor, the ombudsman. Ombudsman originated from Sweden in 1809 following such appointment by King Charles XII. This was due to a loss in war to Russia in 1709, which forced the King to flee to Turkey for some years. This led to deterioration of administration in the country. In 1713, an official was selected by the King known as *Justitiekanslern* to monitor the administration and the judiciary, with a mandate to bring a case on any lawbreaker.²²⁶

Later, the 1809 Constitution saw the creation of the ombudsperson office with supervisory and prosecutorial duties. This spread to other jurisdictions whereby Finland and Norway became the second and third countries respectively to create this office about 1952. Denmark followed in 1955. By 1960s, most countries such as New Zealand and other commonwealth jurisdictions embraced this office as a measure of administering and ministering administrative decisions.²²⁷

In South Africa, this office was first known as the Advocate-General and it was established in 1979. In 1983, it changed its name to Ombudsman. Following multiparty negotiations before 1994, South Africa would have the office of the Public Protector. This was as a result of the King Report of 1992 on corporate governance.

The office was brought into force following a scandal that had occurred in South Africa. The core objective was to promote honesty in public administration and orderly government. The office was established in 1994 through the Public Protector Act 23 of 1994 that established the office and the governing principles of Public Protector.²²⁸

²²⁶Mbiada Tchawouo, 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa' 20(1) 2017

²²⁷Mbiada Tchawouo, 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa' 20(1) 2017

²²⁸Montesh Moses, 'The Functioning of Ombudsman (Public Protector) in South Africa: Redress and Checks and Balances?' 28 (2009) *Transylvanian Review and Administrative Sciences*.

The Office of the Public Protector is provided for in Chapter nine of the Constitution of 1996 as a state institution for supporting constitutional democracy and came into existence in 1995. The Constitution provides for the independence and impartiality of the office of the Public Protector. Additionally, it also assigns it its powers and functions.²²⁹ The mandate and powers of the Public Protector are expanded in the Public Protector Act 23 of 1994. The Public Protector has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial action.²³⁰ It cannot investigate the judicial functions of courts.

A number of judicial authorities have been cited to elaborate on the powers and function of the office of the Public Prosecutor. In the *Public Prosecutor vs. Mail & Guardian Limited and others*²³¹ the Supreme Court of Appeal observed that the Public Protector Act is clear that while the functions of the Public Protector include those that are ordinarily associated with the ombudsman, they go much beyond that. The office is not a passive adjudicator between the citizens and the state that requires evidence to arrive at a decision. Its role is an investigative one that requires much more public confidence that the truth has been discovered.

Also, in *SABC vs. DA and others*²³² the public protector ‘must be someone who is beyond reproach, a person of stature and suitably qualified’. In other words, this is a person who is of high

²²⁹ The Constitution of South Africa, 1996, Sections 181 and 182.

²³⁰ See the Public Protector Act 23 of 1994, Section 182. See also the Public Protector South Africa, at <<https://nationalgovernment.co.za/units/view/59/public-protector-south-africa>> accessed on 5th July 2021 whereby it was observed that the objective of the ‘Public Protector is to strengthen constitutional democracy in pursuit of its constitutional mandate by investigating, rectifying and redressing any improper or prejudicial conduct in state affairs and resolving related disputes through mediation, conciliation, negotiation and other measures to ensure fair, responsive and accountable public sector decision-making and service delivery.’

²³¹ 2011 (4) SA 420 (SCA).

²³² *SABC vs. DA and others* 2016 (2) SA 522 (SCA).

standard of professionalism and capable to carry out duties effectively, fairly and independently. Lastly, in *EFF vs. Speaker of the National Assembly and others; Democratic Alliance vs. Speaker of the National Assembly and others*²³³, the Constitutional Court described the Public Protector as a pillar to constitutional democracy which needs to be independent and impartial while exercising its duties.

The Constitution of South Africa,²³⁴ embodies the right to fair administrative action, in no uncertain terms. The right applies to all persons and organs of state, just like the constitutional and legislative provisions guiding fair administrative action in Kenya.²³⁵ Section 3 of the FAA Act 2015, covers applications of fair administrative action to both public and private persons or bodies.²³⁶ However, in terms of enforcement, Kenya has several lessons to learn from South Africa as explained below.

5.3 Lessons from the office of the Public Protector

5.3.1 Firm Judicial Interpretation

The leading driver of fair administrative action in South Africa is the constitutional court, responsible for the interpretation of the Constitution of South Africa 1996.²³⁷ The interpretation has been hailed world-over as being transformative and in line with the spirit of constitutionalism.

²³³ *EFF vs. Speaker of the National Assembly and others; Democratic Alliance vs. Speaker of the National Assembly and others* (2016) ZACC 112 whereby the office of the Public Protector was described as ‘one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in state affairs and for the betterment of good governance’.

²³⁴ Constitution of the Republic of South Africa, 1996, Section 33.

²³⁵ *ibid.*

²³⁶ Fair Administrative Action Act, Section 4; Constitution of Kenya 2010, Article 47.

²³⁷ *ibid.*

Through judicial interpretivism, the constitutional court has managed to breathe life into the provisions of the laws, hence ensuring fair administrative action.²³⁸

In the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,²³⁹ the court in South Africa sought to clarify the true position of fair administrative action in South Africa, it asserted that the principal function to fair administrative action in South Africa,²⁴⁰ , among others to check on maladministration and thus to make sure that the individual rights are protected by law.²⁴¹

The Fair Administrative Action Act, 2015 in Kenya emulates the South African position above. In essence, anyone facing an administrative body and in cause is worried that his/her rights might be infringed will be given fair hearing and allowed to put forward their case as demanded by natural justice.²⁴² If Kenya is to pick essential lessons from South Africa, then the Commission on Administrative Justice should ensure that the principle of Natural Justice is given priority especially where another -persons rights are likely to be affected.

In *Democratic Alliance v. Speaker of the National Assembly and Others and Economic Freedom Fighters v Speaker of the National Assembly and Others*,²⁴³ considered the power and duties of the Office of the Public Protector in South Africa.

The Courts interpreted the Constitution of the Republic of South Africa under Section 181 which provides for the Office of the Public Protector and held that the Public Protector is one of the most

²³⁸ Sang, O “The right to fair administrative action in Kenya: Lessons from South Africa's experience” (2013) 1 *Africa Nazarene University Law Journal* 83.

²³⁹ (CCT16/98) 2000 (1) SA 1.

²⁴⁰ Constitution of the Republic of South Africa, Section 33.

²⁴¹ *ibid*.

²⁴² Constitution of Kenya 2010, Article 47 (2).

²⁴³ [2016] ZACC 11.

invaluable constitutional gifts in the fight against corruption, unlawful enrichment, prejudice, and impropriety of State affairs and for the betterment of good governance.²⁴⁴

The reasoning was that the Constitution of the Republic of South Africa was conceived in a way to give even the poor and marginalized a voice and teeth that would bite corruption and abuse excruciatingly. It proceeded to assert that it is doubtful whether the fairly handsome budget, offices and staff all over the country and the time and energy expended on investigations, findings, and remedial actions taken, would ever make any sense if the Public Protector's powers or decisions were meant to be inconsequential.

The Court also stated that the constitutional safeguards in section 181 would be meaningless if institutions purportedly established to strengthen our constitutional democracy lacked even the remotest possibility to do so.²⁴⁵ The Court also reasoned on whether the remedial action of the Office of the Public Protector is optional. It noted that if compliance with remedial action taken were optional, then very few culprits, if any at all, would allow it to have any effect.²⁴⁶

The purpose of the office of the Public Protector is, therefore, to help uproot prejudice, impropriety, abuse of power, and corruption in State affairs, all spheres of government, and State-controlled institutions.²⁴⁷ The Public Protector is a critical and indeed indispensable factor in the facilitation of good governance and keeping our constitutional democracy strong and vibrant.²⁴⁸

²⁴⁴ *ibid.*

²⁴⁵ *ibid.*

²⁴⁶ *ibid.*

²⁴⁷ *ibid.*

²⁴⁸ *ibid.*

The decisions are significant because it restates the significance of the Commission on Administrative Justice, which is the same as the Office of the Public Protector in South Africa.²⁴⁹

Furthermore, in *Public Protector v. Mail & Guardian Ltd and Others*,²⁵⁰ the court was required to determine the Powers of the Public Protector in South Africa. It applied the Constitution of the Republic of South Africa,²⁵¹ while holding that the office of the Public Protector is an important institution which is often the last defence against bureaucratic oppression, and against corruption and malfeasance in public office that is capable of insidiously destroying the nation.

The Court considered the constitutional role of the office of the Public Protector. It is considered the fact that democracy needs strong institutions to check public power. It is essential for the office to effectively play an oversight role over public administration.²⁵²

The Court had to interpret the scope of Section 181 of the Constitution of the Republic of South Africa. In reaching its decision, it considered why the drafters of the constitution deemed it fit to constitutionalize the office of the public protector.²⁵³ Therefore, based on the history of public administration in South Africa, the Court held that the public protector plays a central role in checking maladministration by public officials.²⁵⁴

This is a very progressive determination by the court, to the extent that it gives the office of the public protector the so much sought independence, hence public confidence. The decision plays a role in asserting the importance of independent institutions according to the Constitution. The

²⁴⁹ *ibid.*

²⁵⁰ 2011 (4) SA 420 (SCA).

²⁵¹ Section 181.

²⁵² *ibid.*

²⁵³ *ibid.*

²⁵⁴ *ibid.*

Commission on Administrative Justice is thus a fundamental institution that should be strengthened and allowed to perform its duties.

Democratic Alliance v. The South African Broadcasting Corporation Soc Limited,²⁵⁵ where the court found that the reports of the Office of the Public Protector in South Africa as a result of complaints received from former employees of SABC relating to alleged irregular appointments by Motsoeneng and systemic maladministration, had the force of law.²⁵⁶

5.3.2 Public Confidence

Kenya needs to borrow this important factor from South Africa. Its decisions against the mighty including the President has exposed the office of the Public Protector as a very progressive and serious Commission willing and ready to protect its people and democracy. For instance, in *Economic Freedom Fighters v. Speaker of the National Assembly and Others* and also in *Democratic Alliance v Speaker of the National Assembly and Others*²⁵⁷ the Constitutional Court affirmed that the remedial action against President Zuma were binding since they were done within the law. This case brings out the Office of the Public Protector as a very fearless Commission and such actions give hope to the common Citizen.

In the *South African Broadcasting Corporation Soc Limited V Democratic Alliance*,²⁵⁸ the role of the public protector in South Africa in ensuring that the reports cover even senior officers in public administration, including the president, was reiterated. This is because it is considered the last defence against bureaucratic oppression, and corruption, and malfeasance in public office.²⁵⁹

²⁵⁵ (3104/2016; 18107/16).

²⁵⁶ *ibid.*

²⁵⁷ [2016] ZACC 11.

²⁵⁸ (393/2015) [2015] ZASCA 156.

²⁵⁹ *ibid.*

5.3.3 Accessibility

For the public to be able to visit any institution, the same should be easily accessible and not hostile in any way. The Office of the Public Protector has gained confidence and thus been exposed to the general public. Unlike the CAJ, it only exists in Nairobi, Kisumu, Mombasa, Isiolo and now Uasin Gishu. The CAJ needs to decentralize and public awareness to be conducted so that people may be able to know and understand the importance of the CAJ. This is a very important lesson which Kenya can borrow from South Africa.

5.3.4 Co-operation with other Agencies

Another important lesson to be learnt from South Africa is that the CAJ should be able to Co-operate with other Agencies and vice versa. For the Office of the Public Protector to operate swiftly and even arrest the senior Government officers; co-operation is Key. This also boils down to having the political good will and a state free from Government tyrannical control. The Police need not to have a hard time to effect the arrest orders of any party. This is a very serious challenge as Kenya has had a problem with this matter. There have been many instances where complaints have been filed that the Police force have favoured certain quarters against another and thus for us to come out of this problem then reforms in the police force are inevitable.

In terms of the letter of the constitution, it is true to say that the wording Article in 47²⁶⁰ resembles the provisions of the Constitution of South Africa, which guarantees just administrative action.²⁶¹ Fair administrative action therefore must be viewed from the constitutional litmus, which is the exercise of power, within the powers given by law to the person or body that has taken the action.

²⁶⁰ Constitution of Kenya 2010.

²⁶¹ Administrative Justice in Kenya: Learning from South Africa's Mistakes, *Journal of African Law*, Volume 62, Issue 1, February 2018, pp. 105 – 128 available at <https://doi.org/10.1017/S0021855318000025> last accessed on 22nd January 2021.

5.3 Conclusion

South Africa provides a solid example as can be seen from the cases discussed above, of how the right to fair administrative action can be enforced for the benefit of ordinary citizens and to enhance public service delivery. Authors have suggested that the best approach is to link fair administrative action to the rights in Article 43, covering health, education, water and sanitation, food, housing, and social security. The state has to act positively to achieve these rights.²⁶²

Comparative analysis as discussed above, reveals that Kenya has not actively enforced the right to fair administrative action, like South Africa's office of the Public Protector. There is, therefore, a need to adopt the South African approach, in ensuring the constitutional right to FAA is enforced.

Recommendations of the Commission on Administrative Justice should be enforced as binding decisions of the commission, after keen analysis of surrounding facts and within the limits of the law. Further, the comparative jurisprudence of South Africa also asserts that the constitutional commissions must be empowered with tools and resources to effectively enforce their mandate.

This chapter concludes by reiterating that the Commission on Administrative Justice in Kenya should borrow lessons from the Office of the Public Protector in South Africa, to guide the enforcement of the right to fair administrative action. By the Commission on Administrative Justice exercising a constitutional mandate, then there is a need for resources to be allocated to ensure that the right to fair administrative action is enforced strictly.

²⁶² Jill Cottrell Ghai, (2017) Fair administrative action and service delivery, Katiba Institute, available at <https://katibainstitute.org/fair-administrative-action-and-service-delivery/> last accessed 29th January 2021.

Chapter six below proceeds to make concluding remarks and make recommendations aimed at ensuring that the constitutional right to fair administrative action is enforced by the Commission on Administrative Justice.

CHAPTER SIX

CONCLUSION FINDINGS AND RECOMMENDATIONS

6.1 Introduction

The paper posited the argument that despite the existing constitutional legal and institutional framework for the enforcement of effective public administration in Kenya, in terms of enforcement, there is still an apparent gap that needs to be bridged. This is through legislative intervention, to permanently entrench the independence of the Commission on Administrative Justice and also guarantee a robust enforcement framework on the right to fair administrative action in Kenya.

6.2 Conclusion

In light of the subsequent chapters discussed, therefore, this paper draws the following substantive conclusions aimed at enforcing the mandate of the Commission on Administrative Justice in enforcing the right to fair administrative action in Kenya.

6.2.1 Ombudsman and Good Governance

The paper concludes that the right to fair administrative action is part of the grander objective of enhancing good governance. Without effective checks on the exercise of public power, public officials will continue to wield absolute power, hence inculcating the culture of impunity further. Good governance depends on strong institutions, ready, willing, and able to call out public officials and take stern action when they fail to respect the right to fair administrative action.

6.2.2 Ombudsman and Accountability

The paper concludes that the need for an effective CAJ stems from calls for accountability, which is a national value and principle of good governance. The exercise of public power requires high levels of accountability, to justify decisions made in the course of the exercise of that power. This is the hallmark of fair administrative actions.

6.2.3 Ombudsman as A Necessity

The Constitution of Kenya 2010 designates constitutional commissions as free from interference from any state organ or person. The CAJ is truly indispensable as it provides an avenue for public complaints against public officials who fail to enforce the fair administrative right.

6.2.4 Ombudsman and Awareness

The CAJ plays a role in creating awareness of its role and therefore the need for Kenyans to understand that the power belongs to them and once it is donated to people in public offices, it should be exercised legitimately. Therefore, the CAJ plays a very vital role so as citizens may be able to enjoy this right; the CAJ is therefore an important tool in educating the masses on this front.

6.2.5 Ombudsman and Attendant Challenges

The CAJ has faced several challenges, including financial, capacity, lack of support and political goodwill, inadequacy in legislation, and lack of policies on the implementation of the right to fair administrative action. These challenges have hampered the operations of the CAJ, which to date, is perceived as a paper commission that has failed in its mandate to enforce the right to fair administrative action in Kenya.

6.2.6 Inevitability of Ombudsman

The paper concludes that progressive democracies like South Africa have made institutions like the CAJ part and parcel of their governance structures and empowered them to enforce the right to fair administrative action. The CAJ, therefore, is an inevitable institution that should be supported to deliver on its constitutional mandate to enforce the right to fair administrative action.

6.2.7 Ombudsman and Human Rights

The role of the CAJ in protecting fundamental freedoms and rights of the people can no longer be gainsaid. Therefore, there is a need to reformulate the mandate of the CAJ to cover more aspects of the promotion of human rights. The CAJ can be empowered to work with other institutions engaged in human rights advocacy, thereby contributing to entrenching the right to fair administrative action in Kenya.

6.2.8 Ombudsman and Independence

The effectiveness of constitutional commissions lies in guaranteed independence, which is a constitutional threshold, involving both functional and financial aspects. The CAJ has not been empowered on this aspect, hence weak structures, which is a factor that has affected its ability to enforce the right to fair administrative action.

6.2.9 Ombudsman and Quasi-Judicial Powers

Decisions of the CAJ should have the force of law, to the extent permissible. This will facilitate the enforcement of the right to fair administrative action, by the CAJ issuing sanctions for violations.

6.2.10 Ombudsman Strides

Since its establishment, the CAJ's performance of its mandate to enforce the right to fair administrative action has not met the expected constitutional standard. This has caused Kenyans to suffer at the behest of public officials who have no regard for fairness in their actions. The strides made so far, have not contributed to inculcating the culture of administrative justice in Kenya.

The further substantive conclusions, therefore, are as follows:

- i. That the current legal framework does not effectively guarantee the enforcement of the right to fair administrative action, especially by the Commission on Administrative Justice.
- ii. That to guarantee the right to fair administrative action, courts in Kenya must boldly make determinations on issues of maladministration, in all sectors.
- iii. That the Constitution should be enforced and strengthened through ensuring financial and technical independence of the Commission on Administrative Justice in enforcing the right to fair administrative action.
- iv. That fair administrative action is a concern for all citizens, as it affects the rights of people, hence the need for effective checks on the exercise of public power.

6.3 Recommendations

This chapter makes the following recommendations based on the conclusions above and the previous Chapters:

6.4.1 Legislative Reforms

The Commission on Administrative Justice should be granted coercive powers through legislative reforms, to ensure that the right to fair administrative action is achieved. The legal and institutional framework governing the Commission needs an overhaul, to specifically guarantee the right to fair administrative action in Kenya.

6.4.1.1 Amendment of the Commission on Administrative Justice Act 2011

In terms of the FAA right and its enforcement, the CAJ Act does not contain a framework that is clear on actions that the Commission should take. The constitutional guarantee on the right to fair administrative action requires robust legislative action, for a procedure of enforcement to be entrenched.

Article 59(4) of the Constitution of Kenya 2010 anticipates an empowered Commission responsible for the redress of public wrongs. This is where the Commission on Administrative Justice stems. However, in terms of powers, the Act limits the Commission to investigative roles, rendering its operations subservient to the goodwill of parliament.

There is a need to amend Sections 8 and 54 of the CAJ Act, 2011 directing the Commission to forward its reports to Parliament; and having looked at the historical background where the political class controlled everything would be a step backwards and therefore there is need to take that serious responsibility from Parliament.

6.4.1.2 Overlap of the Law and Behaviour

In order to ensure compliance and avoid the discrepancy between the Law in the books and action; there is need for an interaction between the rules and behaviour. This can be done, for example,

by strengthening the negative social norms like the list of shame and being barred from holding office by invoking the integrity Chapter of the Constitution. Citizens should therefore be able to adopt good behaviour as this will make it easier to deal with this matter. Personal discipline should be something that as a people should be able to practice without any trouble and need to be pushed around.

6.4.1.3 Accessibility and awareness

The CAJ should conduct public awareness of the existence of the Commission, its functions and exercise its duties to gain the public confidence. The should make the offices accessible to all Kenyans by decentralizing the offices in all the forty-seven (47) counties. Once this is able to get into the villages and assist those in the interior then we should be able to have a discussion as to whether the CAJ has indeed fulfilled its mandate under Article 47 in protecting and realizing the right to Fair Administrative Justice in Kenya. As it stands, there are offices of the CAJ in Nairobi, Mombasa, Kisumu, Isiolo and now recently in Uasin Gishu. The decentralization should be fast-tracked as it will not only play the role of safeguarding the right to Fair Administrative Justice but also protect revolution; the enemy of devolution is poor and or lack of deliver. This means that the CAJ will play a very big role in keeping all public officers on toes.

6.4.1.4 Sufficient Funding

The Executive and Parliament should empower the CAJ by funding it appropriately so that it may be able to decentralize in all the 47 Counties and have enough manpower to undertake its duties. By doing this, Parliament and the Executive will be sure that public officers are kept on check and therefore will have the moral authority even to question the CAJ's annual reports in Parliament as to the discharge of their duties and in extension they will have allowed the general public to enjoy their fundamental right to Access Justice and better services and thus feel the value for their votes.

6.4.1.5 Political good will

For every democracy to grow and implement fully the Constitution, then there must be political good will. The Political class should be sincere in implementing the Constitution by, for example, providing the CAJ and other Commissions with the required resources, not interfering with the discharge of their mandate and offering the necessary support that it requires to see that it achieves its desired mandate as envisaged in the Constitution. In regards to the reports tabled in parliament, the Politicians should discharge their mandate to discuss the reports faithfully as required of them and offer the necessary assistance to the complainants. As they will be gaining the public confidence in discharging their duties, the CAJ will also be gaining the same.

6.4.1.6 Full Independence

Without independence, the CAJ will not be able to effectively hold neither the legislature nor the Executive accountable as they will act, in most cases with fear of their budget being cut or the office holders being intimidated. The CAJ needs to have both the Functional, Operational and Financial independence. The CAJ needs to exercise its free will without any bias from any organ or body; without any manipulation and without any political interference. There is therefore the need to mend the overlap between the Constitution²⁶³ and Sections 8 as read with 54 of the CAJ Act which mandates the CAJ to hand over its report to Parliament for implementation.

6.4.1.7 Co-operation with other Agencies

For the CAJ to effectively deliver on its mandate and make its work smooth, there is need for a lot of cooperation with other agencies. These agencies assist in many areas, including but not limited to arrest of those who fail to heed to the CAJ's summons so as to bring them to book.

²⁶³ Constitution of Kenya 2010, Article 249 (2)(b)

The respective agencies however should also be able to assist the CAJ in managing its work so as to achieve its duty under the Constitution of Kenya, 2010.

6.4.1.8 Firm and Progressive Judicial Interpretation

As seen in South Africa, the Office of the Public Protector undertakes its duties without looking at who is being questioned because the South African Constitutional Court has been very firm with the rule of Law. It has been firm since it understands that it's the last resort towards protecting and/or guarding the South African Constitution. Kenyan Judiciary needs to borrow a leaf and be firm whenever a question regarding the rule of law either on a state organ, officer or head of state is Concerned. By doing this, the public will be gaining the lost confidence and also make the CAJ become more relevant and known by many Kenyans. In the long run matters maladministration will reduce tremendously thus leaving Kenyans to enjoy their fundamental right to Fair Administrative Action.

6.4.1.9 Articulate Policy on Public Administration

Nowadays, there is a protracted need for an audit of the effectiveness of laws in sectors such as the public sector, where it is established that challenges in administration as still prevalent. The audit then informs possible areas that need the development of a policy. Laws cannot be made without an articulate policy to back them, otherwise, they are bound to be ineffective.

There is a need for Kenya to enact an effective enforcement policy for public administration. This will give effect to leadership and integrity. This is the missing link in enforcement of the mandate of the Commission on Administrative Justice in the context of the right to fair administrative action. The policy can be implemented by the establishment of a monitoring and evaluation department in the Commission. Such a policy will guide the enforcement of the laws governing

the Commission.

6.4.2 Institutional Reforms

6.4.2.1 Empowering the Commission on Administrative Justice to Ensure Fair Administrative Action

There is a need to identify the specific issue of failure to enforce the right to fair administrative action by the Commission as a question of concern. This will inform the need to empower the commission to be prepared to counter the inability to enforce the right to fair administrative action.

This study recommends that the institution be financially empowered through the establishment of a fund, unique to the Commission. This will ensure that threats of budgetary cuts are curtailed, hence leading to a situation where the Commission on Administrative Action can pursue the right to fair administrative action without fear of political consequences.

The study identifies and recommends that the Commission on Administrative Justice should mirror the Office of the Public Protector in South Africa, to assert dominance in enforcing the right to fair administrative action.

BIBLIOGRAPHY

BOOKS

1. Hatchard J et al., *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press, London 2004).
2. K Murungi 'Kenya's Constitutional Theory and the Myth of Africanity' in K Kibwana (ed.) *Law and the Administration of Justice in Kenya* (1992)
3. Mugenda O M and Mugenda AG, *Research Methods* (Acts Press, 1999 Revised 2003).
4. Reif L C (ed), *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* (Martinus Nijhoff Publishers 1999).
5. Reif L C, *The Ombudsman, Good Governance, and the International Human Rights System*, (Leiden: Martinus Nijhoff Publishers 2004).
6. YP Ghai & JPWB McAuslan *Public Law and Political Change in Kenya: a Study Of The Legal Framework of Government From Colonial Times to The Present*. (Nairobi: London, New York, Oxford University Press, 1970).
7. YP Ghai 'Creating a New Constitutional Order: Kenya's Predicament' in G Elizabeth *et al* (eds) *Governance, Institutions and the Human Condition* (2009) 13-14.

JOURNAL ARTICLES

1. AW Munene 'The Bill of Rights and Constitutional Order: A Kenyan Perspective' (2002) 2(1) *African Human Rights Law Journal*
2. B Sihanya 'Reconstructing the Kenyan Constitution and State, 1963-2010: Lessons from German and American Constitutionalism' (2010) 6(1) *The Law Society of Kenya Journal* 24.
3. C Murray 'The Human Rights Commission *et al*: What is the Role of South Africa's Chapter 9 Institutions?' (2006) 9 (2) *Potchefstroom Electronic Law Journal* 122
4. Case and Comment, "The Government versus the Ombudsman: What Role for Judicial Review?" (March 2010) *Cambridge Law Journal*, 69(1).
5. CM Fombad 'Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) 59 *Buffalo Law Review* 1007.
6. G Muigai 'Overhaul or Amend? A Discourse on the Future of Constitutional Change in Kenya' (2006) 4 *East African Journal of Human Rights & Democracy* 10.
7. Hatchard J, "Governmental Accountability, National Development and the Ombudsman: A Commonwealth Perspective", *Denning Law Journal*, Vol. 6 (1991).
8. Joliffe E B, „The Inevitability of the Ombudsman“, (1966-1967) *Administrative Law Review*.
9. K Govender 'The Reappraisal and Restructuring of Chapter 9 Institutions' (2007) 22 *South African Public Law* 190
10. LWH Ackerman 'The Obligations on Government and Society in our Constitutional State to Respect and Support Independent Constitutional Structures' (2000) 3(1) *Potchefstroom Electronic Law Journal* 4.

11. Macleod I G, „The Ombudsman“, (1966-1967) 19 *Administrative Law Review*.
12. Maloney A, „The Ombudsman Idea“, *British Columbia Law Review* (1979).
13. Marcelo S, „Philippines Ombudsman, Challenges to the Coercive Investigative and Administrative Powers of the Office of the Ombudsman“, (2003-4) *Philippines Law Journal*, Vol.78.
14. ML Dudziak ‘Working Towards Democracy: Thurgood Marshall and the Constitution of Kenya’ (2006) 56(1) *Duke Law Journal*
15. Odhiambo-Mbai C, Public Service Accountability and Governance in Kenya since Independence, “ (2003) *African Journal of Political Science* Vol. 8 No.1.
16. Rudolph H, The Ombudsman and South Africa“, *South African Law Journal* Vol. 100 No.1 (February 1983).
17. Rukwaro G K, Redress of Grievances: The Case for an Ombudsman in Kenya“, 9 *East African Law Journal*, Vol.9, Issue 1, (1973).
18. Satyanand A Growth of the ombudsman concept“ (1993) 3/1 *Journal of South Pacific Law*
19. Walter Khobe Ochieng, (2019) “The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya,” *Kabarak Journal of Law and Ethics*

REPORTS

1. Commission on Administrative Justice Investigative Reports

https://www.google.com/search?q=Commission+on+Administrative+Justice+Investigative+Reports+Kenya&rlz=1C1GCEU_enKE941KE941&oq=Commission+on+Administrative+Justice+Investigative+Reports+Kenya&aqs=chrome..69i57j0j1&sourceid=chrome&ie=UTF-8

2. Committee of Experts on Constitutional Review, *Final Report of the Committee of Experts on Constitutional Review*, (2010) 52.
3. Kenya Law Reports, 1 (2004) 298-299

INTERNET SOURCES

1. Assembly at the Official Launch of the Strategic Framework of the Commission on Administrative Justice held at the Inter-Continental Hotel on 21st February 2013, available at <<http://www.ombudsman.go.ke/2013/02/21/2241/>>
2. Commission on Administrative Justice, Office of the Ombudsman, available at <<http://www.ombudsman.go.ke>.>
3. Gichuhi J, Constitutionalisation of Administrative Justice in Kenya, available at <http://www.academia.edu/7052956/John_Gichuhi_Constitutionalisation_of_Administrative_Justice_in_Kenya_2014>
4. Grindle M, Good Governance: The Inflation of an Idea, Harvard Kennedy School, Faculty Research Working Paper Series. Available at <<https://research.hks.harvard.edu/publications/getFile.aspx?Id=562>>.

5. Malunga K, Deputy Public Protector, A Paper for Address: Twenty Years of South African Constitutionalism, An assessment of the role and challenges of the Office of the Public Protector in asserting South Africa's transformative constitutionalism," (November 2014), Available at <<http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Malunga.pdf>>
6. W Kaguongo 'Introductory Note on Kenya' <http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf>