

Fair Administrative Action

Does it matter – especially for service delivery?

Constitution

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

Main promise

- Towards a fairer society
- Deepens democracy
- Strengthens accountability

“Daily interactions that citizens have with bureaucrats in many African countries are often fraught with delays broken promises, extortion and abuse of power.” - Migai Akech

Where does it come from?

- Has a history in the prevention of government abuse of power over the centuries
- But is not limited to “you have no power to do that under the law”
- Built on ideas developed for courts and applied them to many public decision making contexts
 - And even to private bodies that affect people’s lives and livelihoods
- We picked it up from South Africa’s Constitution
- But have further expanded it

How does it relate to the delivery of services?

- Licencing
- Water
- Education
- Health
- Sanitation
- Agricultural services
- Lighting
- Roads

Highlights

- Administrative action must be:
 - Legal
 - Procedurally fair
 - Rational (or reasonable)
- Now it must also:
 - Respect constitutional values
 - Including human rights

Legality

- The right person (or body)
- With the power
- Depends on the notion that a conscious decision is made to give a power to a person because of their expertise etc.
- If the person is not right or the power is not there
 - A court will send it back to the decision maker – do it right this time!

Procedural

- Follow the procedure in the law
- Consider each case
- Give a fair hearing to anyone affected
 - Tell them what is happening and what factors will affect the decision
 - Give them enough time
 - Listen to what they say
- Give them reasons for the final decision
- Treat them in a way that respects rights
 - E.g dignity
- Consultation and public participation
- No unreasonable delay
- Efficient

Factors affecting the actual decision

- Bear in mind the purpose of the power
- Take the right factors into consideration
- And not the wrong factors
 - Including do not discriminate on the basis of personal characteristics
- Don't be irrational
- If affecting rights, ensure that this is proportional to the aims to be achieved
- If (lawful) promises have been made, respect the expectations they give rise to.
- Public interest does not automatically trump personal interests

How is it working?

- Dominance of wealthy and middle class interests in the cases
 - Potential lawyers not admitted to the Kenya School of Law
 - Professional disciplinary hearings
 - Challenging revocation of land titles
 - Demolition of buildings
 - Destruction of advertising hoardings
 - Refusal of liquor licences
 - Citizenship for foreign spouses

Have been a few more about wananchi

- Challenging evictions
 - Of roadside nursery in Westlands
 - Of hawkers in Mombasa
 - From housing
- Challenging expulsion from school

What is the potential?

- Speedy decisions
- Based on public input
- Based on the needs of those affected
- Based on evidence and rational thinking
- Not discriminatory
- BUT –
 - Most useful for situations where there is a service but it is poor and decisions are defective
 - And for the wealthier

So

- To deal with the absence of services, needs to work in conjunction with Article 43
 - Right to health, education, housing, food, sanitation, water and social security
- Maybe the Ombudsman is a better route for the ordinary citizen?