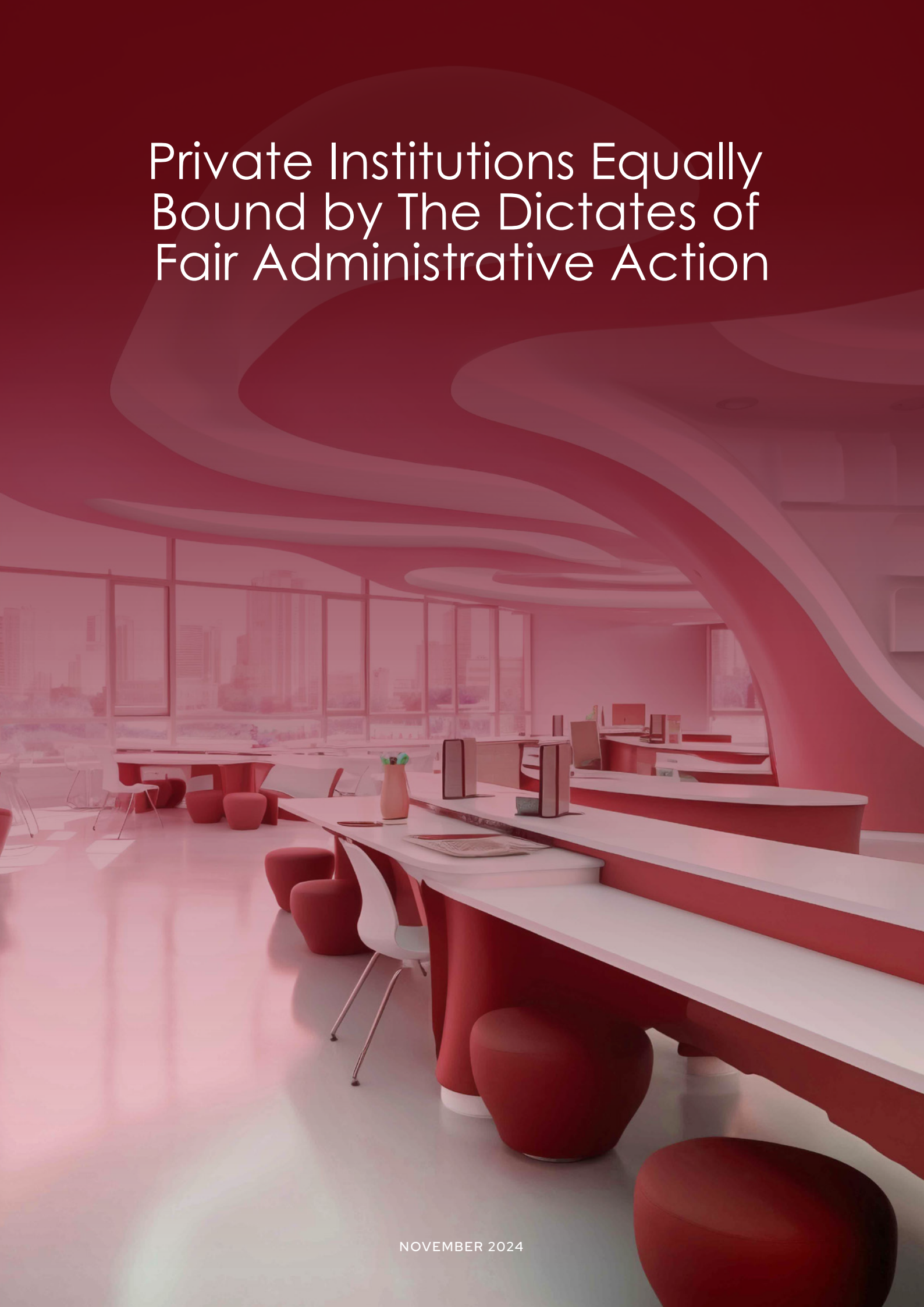


Private Institutions Equally Bound by The Dictates of Fair Administrative Action



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The article will analyze Kenya's legal position on administrative action, with a particular focus on the responsibilities of private bodies within this legal framework. Through the case of ***FW (Suing on Behalf Of AWW, A Minor) V Board Of Directors Of St Hannah's Girls School & Another [2024] KEHC 10048 (KLR)***, the High Court of Kenya has cemented and clarified Kenya's long standing legal position on administrative actions undertaken by private institutions as they relate to individual rights and protections as enshrined in Kenya's Constitution, 2010. This client alert is intended to appraise all persons on the criteria against which any administrative action will be measured for illegality.

Administrative Action

The right to Fair Administrative Action is principally governed by the **Constitution** of Kenya, 2010 (hereinafter the **Constitution**). In tracing its justification, one would principally refer to **Article 2(1) of the Constitution** which binds all persons, and state organs to the dictates of the Constitution, connoting an application to both public and private bodies. In specifically addressing this right, **Article 47 of the Constitution** grants all persons the positive right to be subject only to expeditious, efficient, lawful, reasonable, and most importantly, procedurally fair administrative action. This same provision further mandates that reasons must be given to a person who is likely to or will suffer administrative action which will infringe on any of their fundamental principles. Finally, **Article 47 of the Constitution** tasked the

National Assembly with the implementation of an Act to effectuate these principles.

By passing the **Fair Administrative Actions Act (the Act)**, the National Assembly gave specific guidelines to administrators, which are intended to protect the rights of all persons who might be subject to any such action. Administrators are people who take administrative actions or who make administrative decisions.

Court's finding in 'fw (suing on behalf of aww, a minor) v board of directors of st hannah's girls school & another'

This case is premised on the expulsion of two girls on accusations of improper conduct by St. Hanna's Girls School (the **school**).

The brief facts of this case are as follows:

- The justiciable issue arose when the initial report was made by some teachers at the school to the headmaster that two girls were engaged in behavior that was contrary to the established school code of conduct to which both parents and students had acquiesced.
- The principal summoned both the students and after subjecting them to interrogation, instructed them to record their written statements; wherein they denied the said accusations.
- After these statements were written by the two accused students, the principal then decided to suspend the students and called their parents on the same evening instructing them to pick up their children from school.

1 Article 10(1) Constitution of Kenya 2010.

2 Section 2, Fair Administrative Actions Act, 2015

3 [2024] KEHC 10048 (KLR)

- Later on, the students' parents were invited for a meeting at the school which they attended. In attendance on behalf of the school were the principal, school director.

- The parents were informed that their children were suspended indefinitely justifying this decision as a measure to protect other students from such influence. After the Petitioner filed suit, the court posited that the School violated various tenets of the students' right to Fair Administrative Action, specifically highlighting:

- The absence of written reasons from the school to the affected parents and students justifying their decision to suspend the students indefinitely in light of the enshrined right to education under Article 43(1)(f) of the Constitution of Kenya.

- The lack of a meaningful effort to provide the students an opportunity to explain themselves after recording their initial statements, especially because they had denied the allegations leveled against them.

The court concluded that "there was blatant violation of Constitutional and Statutory principles on the right to fair administrative action" Most significantly, the Court noted that it cannot condone indiscipline in schools and it would have upheld the management's decision had due process been observed prior to implementing punitive measures. However, where such decisions lack fairness, the Court is compelled to intervene to safeguard the rights and interests of learners.

Aiding by The Tenents of The Fair Administrative Action Act

The application of this Act is unlimited and is applicable to both state and non state organs who are either; exercising administrative authority, performing judicial or quasi judicial functions under the Constitution or any other written law, and any person whose action, omission or decision affects the legal rights or interests of any person whom such action, omission or decision relates. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:

- prior and adequate notice of the nature and reasons for the proposed administrative action;

- an opportunity to be heard and to make representations in that regard;

- notice of a right to a review or internal appeal against an administrative decision, where applicable;

- a statement of reasons pursuant to Section 6;

- notice of the right to legal representation, where applicable;

- notice of the right to cross-examine or where applicable;

- information, materials and evidence to be relied upon in making the decision or taking the administrative action.

- The administrator shall accord the person against whom administrative action is taken an opportunity to— attend proceedings, in person and/or in the company of an expert of his choice;
- be heard;
- cross-examine persons who give adverse evidence against him; and
- request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

Where there is a failure in abiding by such criteria in undertaking an administrative action against a person who is likely to have their rights infringed, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.

The right to Fair Administrative Action is not only procedurally qualified but equally entails substantive justification for the administrative action intended to take place. In the absence of substantive reasons occasioning the administrative process, such process, although legally compliant, will be negated and rendered unfair; exposing the administrator and related persons to high pecuniary liability.

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