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REPORT OF THE COMMITTEE ON
**THE REVIEW OF THE RATIONALE FOR
THE ESTABLISHMENT OF TRIBUNALS
IN KENYA**



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December 20th, 2015



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THE REPORT ON THE REVIEW OF THE RATIONALE FOR THE ESTABLISHMENT OF TRIBUNALS IN KENYA

20th December, 2015

Hon. Prof. Githu Muigai, EGH, SC
Attorney-General of the Republic of Kenya

NAIROBI

LETTER OF TRANSMITTAL

We, the members of the Committee on the review of the rationale for the establishment of Tribunals, were appointed in accordance with your instructions to the Kenya Law Reform Commission (KLRC) vide your letter dated 23rd June 2014. The Committee was duly constituted with all the relevant stakeholders and started work immediately after appointment.

In considering opportunities to consolidate the regime relating to Tribunals in Kenya, the Committee has been guided by an intensive comparative analysis of other jurisdictions which has emphasized the need to reform the tribunal system. Despite the fact that the tribunal reform process comes at the wake of numerous constitutional changes, the Draft Tribunals Bill, 2015 lays emphasis on the importance of ensuring access to justice for users of tribunal. This along with lessons that have been illustrated in other jurisdictions that have consolidated the Tribunals regime, have formed the foundations of our recommendations.

We have recommended that a consolidation, abolishment and mergers of Tribunals should be pursued by an independent body, referred to as 'The Council' in this Report. This will indeed improve access to justice for the people of Kenya and provide a 'one-stop shop' for minor disputes and review of administrative decisions. This view is strongly supported by experiences in other jurisdictions which have found that access to justice has improved as a result of tribunal consolidation, especially for people in regional and rural locations.

Although the Committee has not received sufficient evidence to determine the most preferable method for consolidation, we are confident that the proposed Council will be well-equipped to do so. We have made this recommendation in the knowledge that the task is immense and involves multiple complexities. The process of developing an effective consolidated Tribunals system involves matters of law and policy that are highly technical and involve a wide variety of stakeholders. The Committee notes that currently there is no policy framework on Tribunals. The Council is strongly encouraged to put in place a sustainable policy framework as it begins its work.

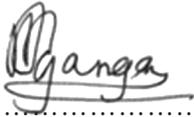
We are especially grateful to the individual Tribunals that made submissions to this Committee. Just to mention, the Cooperatives Tribunal, the Standards Tribunal and the Kenya Medical and Dentist



Practitioners Board, for the efforts they made in order to explain to the Committee their jurisdiction, priorities and client base. The Council should use this valuable evidence to inform its work.

This Report also makes recommendations to ensure that Tribunals in Kenya are regulated under a unified body. Moreover, the proposed Bill streamlines the appointment of members and chairpersons of Tribunals to ensure that these appointments comply with Chapter 6 of the Constitution. It also addresses issues of access to justice and good governance.

Yours Sincerely,



Mbage Ng'ang'a

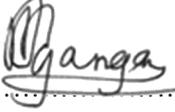
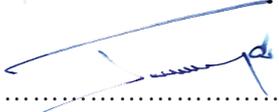
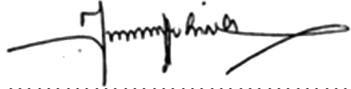
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Joash Dache, MBS

SECRETARY/CEO

COMMITTEE MEMBERS

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Member |  |
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Member |  |
| 5. | Edward Okello | Representative of CAJ,
Member |  |
| 6. | Protus Saende, Advocate | Representative of ICJ,
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ACKNOWLEDGEMENT

On behalf of the Commission, I would like to acknowledge the time and considerable effort that stakeholders invested in this project, through submissions and hearings and provision of additional information, especially by taking time out of their busy schedules.

I express my thanks to my colleagues for their thoughtful contributions to the Committee. Our role has benefited greatly from both your individual perspectives and cooperative approach. I also thank the staff of the Commission secretariat for their continued professional support.

The delivery of the mandate of the Commission has often been encumbered by financial resource constraints. This state of affairs specifically, led to a delay in the Project's start up. Despite this, we were able to proceed with the support of our partners. In this regard, our greatest gratitude goes out particularly to the Danish International Development Agency (DANIDA) and the USAID through International Law Development Organization (IDLO) for the invaluable financial and logistical support. The Commission also acknowledges the support of the Kenya Judiciary and the United Nations Development Programme (UNDP) for their valuable technical and logistical support respectively.

This Report which is indeed the first step to the Tribunal reform process, will form a basis for the long term transformation of Tribunals system in Kenya.



Mbage Ng'ang'a

Chairperson, Kenya Law Reform Commission

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LIST OF ABBREVIATIONS

ADT	The Administrative Decisions Tribunals
AG	Attorney General of Kenya
CS	Cabinet Secretary
CTTT	Consumer, Trader and Tenancy Tribunal
DANIDA	Danish International Development Agency
FY	Financial Year
IDLO	International Development Law Organization
IRC	Industrial Relations Commission
IT	Information Technology
JSC	Judicial Service Commission
JWCT-T	Judiciary Working Committee on the Transition and Restructuring of Tribunals
KEPSA	Kenya Private Sector Alliance
KLRC	Kenya Law Reform Commission.
LSK	Law Society of Kenya
MDA	Ministries, Departments and Agencies
NGO	Non-Governmental Organization
NSW	New South Wales
UNDP	United Nations Departmental Programme
USAID	United States Agency for International Development

1.0 INTRODUCTION

Following the promulgation of the Constitution of Kenya 2010, local Tribunals were incorporated into the mainstream administration of justice system pursuant to Article 169(1) (d). Subsequently, *vide* a letter Ref.No.ES.121/13/01/53 dated 9th day of June 2014, the National Treasury transferred ten Tribunals and their budgetary allocations for the FY 2014 to the Judiciary. National Treasury explained that their action was in line with the constitutional provisions under Articles 159(1) and 169(1) which places Tribunals under the legal system. This presented the need to examine the status of Tribunals in Kenya.

In order to spearhead the process to examine the status of Tribunals in Kenya, the Hon. Attorney-General *vide* a letter dated 23rd June 2014 to the Kenya Law Reform Commission (KLRC) requested it to coordinate a Committee to undertake a comprehensive status analysis of Tribunals with a view of seeking the possibility of merging or creating one Appeals Tribunal.

The Commission upon receipt of the Reference from the Attorney-General, constituted a Committee with representation from various stakeholders who were drawn from both State and non-State actors. Concurrently, the Chief Justice Hon. Dr. Willy Mutunga upon receipt of the transfer by the National Treasury of certain Tribunals to the Judiciary, established the Judiciary Working Committee on the Transition and Restructuring of the Tribunals (JWCT-T) with a directive to prepare a comprehensive transition plan to undertake the exercise of ensuring a structured transition of the Tribunals from the Executive into the ambit of the Judiciary.

The two Committees though established independently, worked together on several occasions principally in the development of the Draft Tribunals Bill, 2015. This was a decision reached upon realization that the mandates of two Committees intertwined and considering that both were focused on reform of the Tribunals system, prudence dictated that the Committees at some point hold joint meetings to build consensus.

1.1 Background Information

It is generally agreed that in most Commonwealth jurisdictions, the growth of Tribunals has not occurred in accordance “with any great theory of administration”. Instead, Tribunals have grown and continue to grow on *ad hoc* basis, to deal with specific problems in an area attracting regulation.

In Kenya, the development of Tribunals has not been any different. Our Tribunals are set up on statute by statute basis without any common characteristics. On a conservative estimate, there are probably over sixty Tribunals in existence in Kenya today (see Appendix II).



An examination of the various Tribunals existing in Kenya today show an area mired in confusion and uncertainty. There exist many Tribunals each independent of the other, appointed and constituted differently, operating on different procedural rules and with different degrees of accountability. This raises fundamental questions whose answers must impact greatly on the ability of Tribunals to deliver justice to Kenyans.

To begin with the nomenclature is inconsistent and confounding. Some are called “Tribunals”, others “Boards”, others “Commissions”, others “Committees”, others “Authorities”, others “Bureaus”, others “Councils”, etc. This inconsistency in names is not a mere aberration; it mirrors greater inconsistencies in more fundamental issues touching on Tribunals which would otherwise demand standardization and consistency.

The Tribunals are all set up by different statutes. Members of these Tribunals are appointed and constituted differently. Some members of the same Tribunal are appointed by the President and the rest by the Cabinet Secretary. In other Tribunals, all the members are appointed by the Cabinet Secretary. The Cabinet Secretary appoints some members at their own discretion, others on “advice”, “consultation”, or “nomination” by specified institutions. In yet other Tribunals, the appointment is by different authorities such as the Chief Justice. Some members of Tribunals are elected by specified organizations or sectors. Members of different Tribunals enjoy different remuneration and terms of office. Members of some enjoy a measure of independence and security of tenure whilst others serve at the pleasure and discretion of the Cabinet Secretary.

All these Tribunals exercise different powers. They operate on different procedural rules. Parties before some are allowed representation by advocates whilst others are not. The decisions of some are final whilst those of others are appealable either to the Cabinet Secretary, to other Tribunals, to subordinate courts or to the High Court. Even in those Tribunals where appeals are allowed to the High Court, some are allowed only on questions of law, others on both questions of law and fact. In some Tribunals, the decision of the High Court on appeal is final whilst in others further appeals to the Court of Appeal are allowed. The right of appeal is exercisable within different periods: some within 14 days, others within 28 days, others within 30 days, others within 60 days and others within 90 days.

Lately, the Treasury has transferred budgetary responsibility of some Tribunals to the Judiciary thus shifting their reporting lines. Amidst all this confused jungle of variations, we cannot possibly talk of equal justice before Tribunals, when some Tribunals operate as part of Government Ministries, Departments and Agencies (MDAs) whilst others operate as independent quasi-judicial bodies, when some litigants have the advantage of counsel whilst other do not, when litigants before some Tribunals have the advantage of audience in an appellate court, whilst others do not.

To determine reasons behind this inconsistent scenario, the Committee was appointed on the 23rd day of June 2014, to review the rationale of establishment of Tribunals in Kenya. The essential object of the review was to adopt a participatory approach by engaging stakeholders in consultation as required by the Constitution to come up with a Bill that would put in place a framework to govern Tribunals in Kenya. The purpose for the legal framework is to address all shortcomings identified in the operations of Tribunals and further meet the needs of the communities or stakeholders and the sector in order to ensure that Tribunals discharge their mandates more effectively.

1.2 Context and Legal Justification

Tribunals normally address issues of administrative justice, which would otherwise end up for adjudication and resolution by ordinary courts. To the extent that Tribunals are an important alternative forum to the regular courts for remedying citizens' grievances and addressing administrative justice issues, there is need for consistency and certainty in their legal framework and operations.

Tribunals are now accepted as a fact of life. Virtually each new statute that Parliament enacts sets up a Tribunal of one type or another to consider applications for licences, to enforce professional and ethical standards and discipline, to adjudicate on disputes arising from administration or application of the statute, etc. They enjoy obvious advantages over the regular courts, which make them quite appealing. To begin with, they are more accessible to a greater part of the population. Their proceedings are far much cheaper and speedier. They tend to apply simpler procedures, are less technical and have the ability to foster informal justice. More importantly, they have capacity to evolve specialisation and expertise in their field of jurisdiction.

These advantages notwithstanding, the inconsistencies in the regulatory and administration of Tribunals are caught up in disorder. For instance, some Tribunals, such as the Kenya Board of Mental Health are purely regulatory and advisory. Others such as the Rent Tribunals adjudicate disputes between citizens. Yet others like the Income Tax Tribunals hear disputes between citizens and public bodies. Some like the Medical Practitioners and Dentists Board register professional practitioners and exercise disciplinary control over them. Others, such as Liquor Licensing Tribunals have first instance jurisdiction to consider and approve applications for licences. Others such as the Agriculture Appeal Tribunal have only appellate jurisdiction from decisions of public officials or regulatory bodies.

The Committee determined the need to address the following questions in reviewing the status of Tribunals in Kenya. Are Tribunals in Kenya part of the Executive machinery, the Judiciary or are they independent adjudicatory bodies? How are members of the Tribunals appointed? What are their terms of service and how are they removed from office? How independent and impartial are these Tribunals? How accountable, transparent, competent are they? Why are the decisions of some Tribunals final whilst others are appealable to other Tribunals or the High Court? Why do different Tribunals have different rules of procedure, some adopting procedures akin to those of regular courts whilst others are quite informal? Why do some Tribunals expressly allow representation by counsel whilst others are silent on the issue? How does this dichotomy impact on the ability of Kenyans to access justice and to what extent does our present tribunal system ensure or guarantee equal justice for all Kenyans? Is the present state of affairs desirable or should we adopt common standards and procedures for all Tribunals?

The Committee therefore sought to resolve these challenges by firstly proposing a new legal framework for Tribunals in Kenya. The objective of the framework among other things is to ensure that Tribunals will begin to operate in a transparent manner. It includes accountable governance systems, uniform appointment structures, and appropriate financing framework for Tribunals. Most importantly is the fact that it ensures that the existence of Tribunals in Kenya is aligned with the

Constitution. The Committee also noted the need to establish a strong institutional framework and the need to anchor Tribunals on a suitable policy framework.

1.3 Terms of Reference for the Committee

The overall mandate of the Committee was to undertake a comprehensive status analysis of existing Tribunals with a view to seeking the possibility of merging or creating one Appeals Tribunal. The Committee unbundled the Terms of Reference as follows:

- Prepare a detailed work plan indicating the detailed milestones and timelines;
- Examine the meaning of Article 169(1)(d) of the Constitution in relation to placement and operations of Tribunals;
- Undertake studies and make proposals for a framework for appeal of decisions of Tribunals;
- Commission studies or researches as are necessary for the effective execution of its mandate and examine the system and operation of Tribunals;
- With reference to specific provisions of the Constitution, collect and collate public view on the status of Tribunals with a view to seeking the possibility of merging or creating one Appeals Tribunal;
- Undertake stakeholder and public consultation and propose ways of standardizing the establishment, powers and operations of Tribunals;
- Recommend policy frameworks to ensure the independence, efficiency, accessibility and accountability of Tribunals;
- Develop a framework for appeal of decisions of Tribunals;
- Develop a draft legislation for Tribunals for consideration for enactment.

2.0 METHODOLOGY

In undertaking its work, the Committee adopted a consultative approach which included use of questionnaires, desk reviews, focus groups discussions, Committee plenary meetings and stakeholders' consultative workshops in line with the constitutional requirement of public participation which took many forms, including face-to-face deliberations, consensus building discussions, oral and written public comments at workshops. A validation workshop was also held at the end of the exercise.

2.1 Desk Review

Desk reviews was the first activity for this stage in the Committee's work. A concept paper was put together by the Committee which proved useful in understanding the status of Tribunals in Kenya. The purpose was to independently assess the subject area from at least three different sources of information or methods of information collection; these included, existing literature, public views and key informants. The review was to raise new questions about the overall scope of work and about the evaluation methodology to be used by the Committee. Most importantly, it was also expected to generate information on best practices both locally and internationally that would be used in developing the new Bill.

Consequently, the results of the desk review were used to formulate focal issues for stakeholder consultation and auxiliary activities of the Committee.

2.2 Use of Questionnaire

For operational efficiency and timeliness in the delivery of expected outputs, the Committee developed a matrix which was administered in the form of a questionnaire to all the Tribunals. The matrix highlighted the challenges faced by Tribunals and it was administered to Tribunals to give their comment and input. Members of Tribunals who filled out the matrix agreed that the challenges highlighted in the matrix were a true reflection of their practical daily practical experiences. Some Tribunals went ahead to give suggestions on how the challenges ought to be addressed. The Committee agreed that the challenges would be the basis for drafting the legislative proposal.

2.3 Committee Plenary Meetings

The Committee held a series of plenary meetings. Some of these meetings were in the form of drafting retreats which resulted in the development of at least seven drafts. The meetings were working sessions which sometimes went throughout the night. The convened meetings sought to consider, deliberate on and where appropriate, modify findings to the Draft Tribunals Bill 2015 for input into the overall review process. They were also used to monitor and evaluate the progress of the development of the Bill and agree on the mode and speed of the work.



2.4 Stakeholder Workshops

Public participation is a tool for engaging those who may be affected, or have an interest in a matter of public interest. It helps in gaining insights from many sectors of the community. Public participation is also a constitutional requirement which is pivotal to sustainable policies. Specifically, the Committee engaged stakeholders who have an interest in existence and operation of Tribunals in Kenya, or may have the ability to affect a decision or outcome. The Committee achieved this by engaging participants from other Government Ministries, Departments and Agencies, the Private Sector, NGOs and the Tribunals. A total of three participatory stakeholder workshops were organized as follows:

- (i) Consultative forum with all Tribunals to discuss issues affecting Tribunals in Kenya held on the 17th February 2015 at the Hilton Hotel;
- (ii) Consultative forum to review the proposed Draft Tribunals Bill 2015 held on the 14th and 15th day of October, 2015 at Sarova Panafric Hotel; and
- (iii) Stakeholder Validation Workshop to validate the Draft Tribunal Bills 2015 held on the 6th November, 2015 at Kenyatta International Convention Centre.

At each of the workshops, presentations were given by the Committee on the background to the task and a presentation on the Draft Tribunal Bills 2015 to set the agenda. The Committee appointed one member to moderate the discussions to ensure that the presentations of participants were focussed on the agenda of the forum and each participant was given audience to give views. Participants were given opportunities to make oral and written presentations in a plenary environment as the



Committee receives feedback from stakeholders

Secretariat and other Committee members recorded the views. Those who did not give written presentations and still wished to give inputs were urged to do so through written memoranda. The views were then collated into a Committee Report named *Stakeholders Report*. Such Reports were then used to refine the Draft Tribunals Bill further.

A validation workshop was held at Kenyatta International Convention Centre on 6th November 2015 to validate the collated findings and receive further inputs to ensure that all the views were captured, processed and incorporated in the proposed Bill.

3.0 PRESENTATIONS, KEY FINDINGS AND EMERGING ISSUES

3.1 Summary of Presentations

The presentations that were made at the workshops are summarised as follows:

3.1.1 Presentations during the Consultative Fora

The presentation however identified core issues of previous perceived functional conflicts, powers, governance, administration, general operating environment and the need for a national coordination mechanism in relation to Tribunals. The issues were summarized as follows:

- Need to transition Tribunals from their line ministries and provide a link to the Judiciary in accordance with Article 169(1)(d);
- Need to understand the nature and scope of work undertaken by the various Tribunals;
- Provision of a clear roadmap for transition;
- Need to outline the operational and structural issues facing Tribunals;
- Need to rationalize Tribunals and reduce the number to enable them to function effectively;
- Need to standardize and harmonize the legal and operational framework for Tribunals; and
- The role of the Judiciary to facilitate Tribunals to be more effective in bridging the gap between Tribunals and the Executive.

3.1.2 Collation and Discussion of the Views

The key findings of the Committee were collated from the stakeholders views collected during the public consultation processes and desk review. They include:



(a) Lack of Infrastructural, Financial and Human Resources

It was established that Tribunals have no courtroom facilities to hear and adjudicate their matters. Moreover, they have no registries or file and storage retrieval systems and lack computers, furniture, stationeries among other essential infrastructural needs. They also lack essential support systems such as library services for purposes of research and data and IT support systems.

In addition, the Committee further established that Tribunals have inadequate human resources. Most staff are not permanent with a few qualified for the job. Those who have legal training are few in number. It was noted that a vast majority of Tribunals rely heavily on staff employed by parent ministries.

The reasons given for the above highlighted challenges is attributed to the fact that most Tribunals sittings are *ad hoc* and do not have continuous flow of business that may require optimal utilization of resources. Further, it is not economically prudent to commit substantial resources to Tribunals. Similarly, it's difficult to work out optimal levels of resources for each tribunal since it's impossible to tell how many disputes will be brought before them within any accounting period.

The Committee nonetheless, noted that the lack of resources had incapacitated most Tribunals who are unable to deliver outcomes that are fair, credible, accessible and proportionate. Most Tribunals are forced to rely entirely on support from parent ministries hence compromising their independence.

(b) Lack of a Unified Legal Framework Governing Eligibility Requirements for Chairpersons and Members of Tribunals

The Committee carefully examined the statutes that establish Tribunals and noted the following:

- (i) the statutes set different eligibility requirements for Members and Chairpersons of Tribunals;
- (ii) the statutes that establish Tribunals failed to recognise institutional competition;
- (iii) statutes that establish Tribunals leave room for appointment of Members and Chairpersons of Tribunals on the basis of cronyism and political patronage;
- (iv) statutes that create Tribunals do not put in place mechanisms for ensuring appointment of Members and Chairpersons of Tribunals comply with the constitutional provisions espoused under Chapter 6 of the Constitution of Kenya, 2010.

Consequently, the academic qualifications and experience of Chairpersons and Members of Tribunals vary greatly from one tribunal to another. In some Tribunals, Chairpersons and Members are appointed by Judicial Service Commission (JSC) while in other cases they are appointed by parent ministries. In a number of cases Chairpersons and Members of Tribunals are appointed on grounds of cronyism or political patronage. Some Chairpersons and Members of Tribunals allegedly do not meet constitutional integrity standards.

(c) Lack of Accountability Mechanisms

The Committee noted that the statutes that create Tribunals do not establish systems of accountability. There were no systems of regular audit of the performance of Tribunals to ensure they not only deliver on their mandate but also dispense justice. There is no framework for supervision of Tribunals. Consequently, Tribunals are not supervised by either parent ministries or the Judiciary, they are not accountable to any institution. Owing to this lack of accountability and supervision, the quality of justice delivered by some Tribunals is below requisite standards.

(d) Terms and Conditions of Service are not Harmonised

It was noted that Tribunals established by statute do not fix the terms and conditions of service for the Members and Chairpersons. Terms and conditions of service are agreed upon between each Tribunal and the sponsoring ministry. Some Tribunals operate on full time basis while some operate on part time. Some Chairpersons and Members are paid better than others. Some Chairpersons and Members are retained on more attractive terms and conditions of service than others. Moreover, Tribunals whose Members and Chairpersons are not treated well do not take their work seriously.

(e) Relationship with the Courts and other Tribunals is not Defined

The Committee took note that statutes that establish Tribunals do not define how they relate with the courts and other Tribunals. There is no law that regulates the distribution of judicial work as between Tribunals and the courts or as between one tribunal and another. Moreover, Tribunals are not formally incorporated into the mainstream administration of justice system. Owing to lack of a mechanism that permit a better distribution of work between Tribunals and courts and the fact that many people do not know about the existence or jurisdiction of Tribunals, a number of matters that could be handled by Tribunals are being handled by courts which congests the court dockets.

(f) No Spatial Distribution

The Committee established that Tribunals in Kenya are concentrated in Nairobi. Moreover, there is no established mechanism through which users of Tribunals services who reside in other parts of the country can access the Tribunals with ease. Most Tribunals are only located in Nairobi with the result that those who live far away from Nairobi do not utilize their services. They all use courts instead.

(g) Lack of Uniform Operational Systems

It was established that different Tribunals have different levels of administrative support, different operational and case management systems. All these stated differences, have had a negative impact on the delivery of justice.

(h) Lack of Appellate Processes within the Tribunals System

The Committee established that statutes that set up Tribunals do not provide an appeals system for decisions that come from the Tribunals. Moreover, there is no restriction on the grounds upon which appeals may be lodged from the decisions of Tribunals. There is also no limit to the extent to which the judicial review process may be used to interfere with decisions of Tribunals. There is need to insulate Tribunals from undue interference by courts. All litigants who are aggrieved with the decisions of Tribunals proceed straight to the High Court by way of either appeal or judicial review. This congests the court dockets and also interferes with the overall effectiveness and efficiency of Tribunals. It is unnecessary to have Tribunals if virtually all matters handled by them still find their way into the High Court.

(i) Lack of Standard Operating Procedures

Statutes that establish Tribunals give them power to make their own rules, rules that then have to be gazetted either by the Chief Justice or the Parent ministry. Because some statutes that create Tribunals give the Tribunals power to apply whatever procedures they deem proper while others provide for the making of detailed rules for a particular tribunal, it is not possible to have standard operating procedure for all Tribunals. Some Tribunals apply procedures similar to those used by formal courts which make tribunal proceedings too complex and technical for unrepresented litigants. Some Tribunals operate without any proper rules of procedure and practice, and this affect delivery of justice. Where the rules do not exist it's difficult for the users of Tribunals to present their cases effectively.

(j) Lack of Public Awareness

The Committee noted statutes that establish Tribunals do not usually provide a mechanism for ensuring the public is made aware of the existence of Tribunals and of their jurisdiction. Since most Tribunals are established by legislation and very few members of the public regularly scrutinize new legislation to see whether they have created Tribunals, very few people (apart from lawyers) are aware of the existence of many Tribunals. Many Tribunals are not used by potential litigants who then file their cases in formal courts. This renders the Tribunals idle while at the same time congesting the court dockets.

(k) Vague or Unclear Jurisdictions

The Committee noted that statutes creating Tribunals sometimes do not clearly define the scope of the tribunal's jurisdiction. Even where the jurisdiction of the Tribunal is clearly defined, there is no harmony in jurisdictional scope as between one tribunal and another. Consequently, the primary objective of most statutes that create Tribunals is usually not the establishment of the tribunal but something else and because the creation of Tribunals by those statutes is usually a collateral issue, little attention is given to the tribunal. Accordingly, sometimes important matters such as questions of jurisdiction do not get adequate attention. Some Tribunals lack the power to make awards of damages while others have no power to issue

injunctions. This creates a cumbersome situation where litigants have to shuffle between Tribunals and courts. To avoid this inconvenience, some litigants choose to avoid Tribunals and go to court direct.

(l) Lack of Independence

It was established that statutes that set up Tribunals do not generally insulate them from the influence of the parent ministry or from direct Executive interference. Tribunals as a habit are not legally granted the financial autonomy or protect the security of tenure for the members and Chairpersons. Considering most Tribunals are created to further some identified policy goal on behalf of the government, or to resolve administrative disputes, and because Tribunals are generally funded by ministries, and finally because statutes that establish Tribunals are sponsored by the Executive, they always find it to be in their interest to control the Tribunals. The fact that some Tribunals owe allegiance to, and always want to please their appointing authorities (the parent ministries), affect their independence. Lack of independence affects the overall efficiency of Tribunals and causes potential users of Tribunals to shun them.

(m) Enforcement Difficulties

It was further established that statutes establishing Tribunals do not typically provide an effective system for enforcement of the Tribunals' orders and decisions. This is for the reason that most Tribunals operate outside the Judiciary, and because the relationship between them and the Judiciary is not well defined, they regularly have difficulties in enforcing their orders. Owing to the difficulties involved in enforcing the orders of Tribunals, many potential users of Tribunals avoid them and use the formal courts instead.

(n) Using Nomenclature

Nomenclatures used in reference to Tribunals vary. The Committee noted that the statutes establishing Tribunals refer to them in different names (Tribunals, Appeals Board and Committees etc). Owing to the fact that various Tribunals are created at different times and in different statutes, it has not been possible to stick to a consistent terminology or nomenclature. Many potential users of Tribunals and the public generally are not able to tell a tribunal from another organ that is not a Tribunal.

(o) Lack of a Unified Framework

The Committee noted that there was no unified legal framework that governs the creation of Tribunals and no unified legal framework that governs how a tribunal can cease to exist and how pending matters can be dealt with in such a situation. Owing to the absence of a legal framework that guides the process of establishing Tribunals, Tribunals have been created in an *ad hoc* manner without any attention paid to the question of whether an existing tribunal can effectively deal with the disputes in respect of which a new tribunal is being created. There are too many Tribunals with jurisdictional overlaps. Moreover, several Tribunals handle basically the same or similar disputes.

(p) Lack of Effective Systems for Reporting of Tribunal Decisions

For the reason that Tribunals basically operate in silos, little attention is paid to the extent to which decisions of tribunals can be used to guide future decisions by the same tribunal or by other Tribunals. For this reason reporting of tribunal decisions for purposes of jurisprudential development has largely been ignored. Many decisions made by Tribunals are not published and therefore not known by the public. Accordingly, the public does not order their affairs in accordance with those decisions nor do the advocates use those decisions to advise their clients' or to argue their clients cases before those Tribunals. This affects the overall efficiency of Tribunals.

(q) Lack of Clarity on the Extent to which Evidence Law Governs Adjudication by Tribunals

Owing to the fact that some members of tribunals are non-lawyers and that one of the primary goals of Tribunals is to promote access to justice by ordinary members of the public, reliance on complex and technical rules of evidence may be self-defeatist. That is why strict application of rules of evidence is usually avoided. Some statutes establishing Tribunals leave all evidentiary matters to be determined in accordance with the discretion of the Tribunals. Depending on the personal idiosyncrasy of the Chairperson, some Tribunals apply evidence law so strictly and end up making the proceedings too complex for unrepresented litigants while some Tribunals are too lax on the same thereby encouraging the use of evidence of low credibility or reliability. This compromises the quality of decisions by some Tribunals.

(r) Lack of Clarity on Whether Litigants should Pay Filing Fees

Most statutes that create Tribunals are silent on the question of whether litigants before Tribunals should pay filing fees or not. While in some Tribunals litigants pay filing fees, in others they do not pay any fees.

(s) Lack of Research Facilities and Training Opportunities

Most statutes that establish Tribunals are completely silent on the twin issues of research and training for tribunal Chairpersons and Members of Tribunals. Owing to lack of research facilities and absolutely no training, the quality of decisions made by Tribunals sometimes fall below expectations.

3.2 Emerging Issues to be Addressed by the Proposed Bill

After a lengthy examination of the challenges facing Tribunals in Kenya, the Committee deliberated and recommended that the Legislative proposal should ideally entail the following:

1. Establishment of a line budget for Tribunals to cater for the financing of Tribunals;

2. Establishment of a Council of Tribunals to oversee issues of policy, standards of procedure, appointments, terms and conditions of service. This is to include the composition of the Council; the Chairperson of the Council is to be the Chief Justice;
3. Creation of the office of Secretary/Chief Executive Officer of the Council. Provisions to include:
 - (a) Qualifications;
 - (b) Appointment procedure;
 - (c) Relationship with the Chief Registrar of Judiciary; and
 - (d) Secretariat functions of the office.
4. To give practical effect to the conceptual framework, the Committee proposed the development of The Draft Tribunals Bill, 2015, with the following as the essential pillars:
 - (a) Prescribe a standard definition of 'Tribunal';
 - (b) Provide for Administration of Tribunals. This is to include:
 - (i) Composition – number of members;
 - (ii) Qualification of chairperson and members;
 - (iii) Appointment procedure;
 - (iv) Appointing Authority; and
 - (v) Secretariat.
5. Provide for the functions of the Council. The Council shall be given responsibilities that broadly include:
 - (a) To rationalize Tribunals;
 - (b) To determine the kind of Tribunals to be established;
 - (c) To monitor the standards of Tribunals etc;
 - (d) Provide for clustering or classification of Tribunals and incorporate a transition period for doing this;
 - (e) Provide for decentralization of services of Tribunals e.g. countrywide sittings for Tribunals. In this regard the Council is to make provisions for Tribunals in terms of the staff and filing of cases e.g. liaise with the Judiciary to set aside court rooms for Tribunals where cases may be filed;
 - (f) Provide for categorization of Tribunals in terms of specialization.
6. Establishment of a Tribunals Fund if necessary to be overseen by the Council with the Secretary/CEO as the Accounting Officer;

7. Establish a standard way to approach Tribunals and prescribe the procedure to be followed when one is aggrieved by the decision of a Tribunal;
8. Creation of a fused structure under one body i.e. the Registrar to determine when Tribunals can sit; and make provision for centralization of secretariat for all Tribunals i.e. filing to be done at one place;
9. Prescribe a framework for harmonization of standard procedures for Tribunals so that they observe minimum standards for justice while retaining its uniqueness. In other words, let each Tribunal adjust standards appropriately to cater for its unique work;
10. Provide for improvement of quality of justice delivered by Tribunals by embracing alternative dispute resolution mechanisms (Article 159 of the Constitution). Include a provision that mandates courts to send cases to Tribunals at initial stages if the Tribunal has jurisdiction to entertain a certain matter;
11. Discourage use of court procedures. The adversarial system which relies on the use of advocates is too complicated and expensive. There is need to clarify that Tribunals will not be bound by the adversarial system. In most instances cases may be presented individually or through advocates but should be open to other forms of representation i.e. any recognized agent approved by the Tribunal. This is in line with the spirit of Articles 33, 48 and 258 of the Constitution which allows receipt of grievance from any person not necessarily the aggrieved;
12. The Council to come up with standards for minimum filing fees keeping in mind specific status of each Tribunal;
13. Provide for an appeal process. The current process of appealing decisions of Tribunals to the High Court does not ease the burden courts already have. Considering that Tribunals investigate if due (administration) process is followed, there is need to provide for an Administrative Appeals Forum outside the jurisdiction of the courts. Further appeal may then be sought at the High Court which provides for a sifting process. This is to ease the courts of unnecessary burden of hearing matters that lack substance;
14. Proposed relationship between Tribunals, Judiciary and parent Ministry. For the Tribunals to get entrenched as part of the administration of justice system, it is critical to create a synergy between them and other State organs responsible for policy directions to Tribunals. In so doing, the following are necessary in cementing that relationship:
 - (i) Grant parent ministries powers to nominate members. This is premised on the fact that key government policies are developed by ministries and thus understand them best;
 - (ii) The Judiciary will provide for administrative functions of Tribunals through the Registrar of Tribunals;
 - (iii) The Judicial Service Commission to appoint members from a list of nominees from parent ministries;

- (iv) Tribunal Chairperson to be a lawyer with a background in the specific area of expertise;
 - (v) The Council to provide oversight to Tribunals in relation to compliance with set standards;
 - (vi) The Council to also oversee awareness and advocacy functions of Tribunals.
15. To prescribe a system on the establishment of new Tribunals. To avoid duplication of roles and to control the establishment of Tribunals going forward, it is important to provide a framework for regulating the same. To manage establishment of Tribunals, the following will be taken into consideration:
- (i) The Council to give clearance before a Tribunal is established based on criterion that may include;
 - (a) Evaluation of whether there exists a regulatory regime that raises new or unique challenges that will require expertise in conflict resolution; and
 - (b) Evaluation of the economic sustainability of the Tribunal.
16. Consider a clear and smooth transition to the proposed new legal framework. Upon deliberation by stakeholders and members of the Committee, the transition period in the proposed new legal framework was generally agreed to be for a duration of eighteen (18) months. This was evaluated in four areas and the following consensus was arrived at:-

(a) Membership

Serving members would be given eighteen (18) months upon commencement of the new legal regime. Thereafter, any term that will flow over the stipulated period would be revoked.

(b) Staff

In the new legal regime, the proposal was to have a centralized secretariat. In transitioning staff, the following will be considered:-

- (i) Allow the Registrar priority to competitively pick staff from existing staff to complement in the Tribunals;
- (ii) Seconded members of staff from the ministries to be reabsorbed back to their respective ministries; and
- (iii) Remainder of staff will be absorbed by parent agencies of respective Tribunals.

(c) Cases

In relation to cases, the following was proposed as the way forward:-

- (i) Cases in progress will be transferred to the new legal regime but will have to be determined within eighteen (18) months;



- (ii) Cases awaiting hearing or determination will be completed;
- (iii) A further extension of six (6) months may be granted in the event that cases are not concluded within the stipulated eighteen (18) months.

(d) Assets and Liabilities

On assets and liabilities, the following arrangement was proposed:-

- (i) On assets, the Registrar to be granted authority to dispose of assets not required by the secretariat with respective ministries getting priority.
 - (ii) All debts will be liquidated by the Tribunals within the transition period failure to which liabilities will be transferred to the respective state agencies;
 - (iii) No debt shall be carried forward to the Judiciary in the new legal dispensation.
17. Consider a mechanism where decisions by Tribunals are published. Current rulings and determinations by Tribunals are not published, leave alone reported. Going forward, it may be prudent for decisions of Tribunals to be reported especially where they raise substantial issues of law and are precedential in nature. Reporting modalities may take different dimensions some of which were proposed as follows:-
- (i) The Tribunals may themselves report their own decisions; and
 - (ii) There may be need to impose responsibility on the Registrar to make Rulings and Decisions available to the public by use of an online platform.
18. Training is key in any forward-looking society. To improve the quality of decisions by Tribunals, training is of great import. Matters of training will be the responsibility of the Council to ensure training of all Tribunal Members and staff is of adequate quality and standard. Training will be carried out in collaboration with the Judiciary through The Judiciary Training Institute.
19. It is envisaged that Tribunals are part and parcel of the administration of justice system. To unclog courts, decisions by these quasi-judicial bodies should be final. To give this the force of law, it is critical that decisions by these Tribunals are observed without requirement of external enforcement procedures.

The above issues formed the basis of Drafting Instructions on which the contents of the Draft Bill are premised.

3.3 Development of The Draft Tribunals Bill, 2015

The development of the Draft Tribunals Bill commenced on the 30th day of July 2015. The Bill then went through a series of changes which resulted to the review of six drafts. During the development of this Bill, stakeholder meetings were also held to ensure greater sectoral participation and ownership. This was to satisfy the constitutional requirement for stakeholder participation in the making of laws. The validation meeting was held at the Kenyatta International Convention Centre on the 6th day of November 2015. It brought together critical stakeholders to consider the draft Bill with a view to confirming that their views had been adequately considered in the revised Draft of the Bill.

3.4 General Features of the Proposed Tribunals Bill

The principal objective of the Bill is to give effect to Articles 1(3) (c), 20 (4), 47 (3), 159 (1) and 169 of the Constitution in relation to the governance and administrative framework of Tribunals in Kenya. Pursuant to this objective, the Bill proposes to reform the Tribunal system in Kenya by *inter alia*, establishing the Council of Tribunals, providing for the structure and membership of the Council, establishment of the Tribunals Appeals Board and administration and functions of Tribunals. The Bill is divided into seven (7) parts, namely: Preliminary, the Council of Tribunals, Administration of Tribunals, Appeals Board, Financial Provisions, General Provisions and Transitional Provisions.

The key proposals for reform contained in the draft Bill relate to the following areas:

(i) A Single Unified Structure of Tribunals

The Tribunals Bill seeks to bring all Tribunals under one unified structure. To this end, Tribunals will be administered by a body to be known as a Council of Tribunals which shall be chaired by the Chief Justice and whose membership shall comprise of the Attorney-General, the Chief Registrar, two (2) persons nominated by Tribunals among others members. The key functions of the council shall be to develop policies for the regulation of Tribunals and Appeals Board as well as to rationalize and recommend to Parliament Tribunals to be established and to evaluate and recommend the necessity for establishment, merger or abolition of Tribunals.

(ii) Appointment of Chairpersons and Members of Tribunals

The Bill proposes that appointments to all Tribunals should be merit-based. They should include requirements of clear criteria, advertisement, and interview. These guidelines should apply to all state appointments to Tribunals and should cover re-appointment processes also.

(iii) Rules of Procedure

The Bill proposes a requirement that all Tribunals conduct hearings with as little formality as is consistent with a fair and efficient process and a just and quick determination of

the matter before the Tribunal. Tribunals should have the power to receive as evidence any statement, document, information, or matter which may assist the tribunal to deal effectively with the matter before it, whether or not the same would be admissible in a court of law.

(iv) Appeals

The Bill introduces an appellate body known as the Tribunals Appeals Board, which comprises of a chairperson and three (3) expert persons as members. The Tribunals Appeals Board shall hear appeals from Tribunals as a matter of right. However, further appeals from the Board are to be lodged at the High Court and only on a point of law.



KLRC Chair Mbage Ng'ang'a consulting with Commissioner CIC Dr. Kibaya Laibuta, with Legal Officer Annette Omwoyo looking on

4.0 GUIDELINES ON RATIONALIZING TRIBUNALS IN KENYA

4.1 Background

The committee compiled a list of all the Tribunals in Kenya. The list which was not exhaustive had at least sixty Tribunals listed in the Concept Paper. After close examination of the workings of the Tribunals, it became evident to the committee that a trend had emerged in the recent legislation from 2014, where every new statute attempted to put in place a Tribunal. Moreover, some Tribunals had an overlapping mandate. Also, some sectoral Tribunals had operational challenges due to the existence of different tribunals within the same sector. For instance, in the environmental sector, one of the stakeholders expressed the challenge of having a separate Water Tribunal yet water by its very nature is an integral aspect in the environment. It was brought to the attention of the Committee that some Tribunals would work better if they were merged.

The Committee then tasked the secretariat together with one of the Committee members Ms. Lilian Matagaro to put together a Discussion Paper on the guidelines to be used in rationalizing Tribunals. The committee begun by conducting comparative analysis.

4.2 History of Consolidating Tribunals in Australia

Over the past few decades, various jurisdictions in Australia have been grappling with whether and to what extent they should consolidate their Tribunals. The Australian Government pioneered the 'Super Tribunal' in 1976, by creating the Administrative Appeals Tribunal where the majority of review rights against government agency decisions are exercised.

Jurisdictions such as Victoria, Western Australia, the Australian Capital Territory and most recently Queensland have established variations on the concept of the consolidated Tribunal – attempting to group together matters that could be dealt with under one large consolidated Tribunal. These Tribunals are outlined later in this Chapter. The idea of consolidating Tribunals is not new to New South Wales. The Administrative Decisions Tribunal (ADT) advised the Committee that its establishment in 1998 was considered at the time to be the first stage of a plan that would lead to a super Tribunal.

In 2002, the NSW Parliament's Committee on the Office of the Ombudsman and the Police Integrity Commission conducted a review of the operation and jurisdiction of the ADT and recommended that the Tribunal's jurisdiction required further consolidation. However, this did not eventuate. Similarly, the creation of the Consumer, Trader and Tenancy Tribunal (CTTT) in 2002 was another step along the road to consolidation, bringing together separate residential and fair trading tribunals in New South Wales. More recently, the Government and Related Employee Appeal Tribunal and the Transport Appeals Board were merged into the Industrial Relations Commission NSW (IRC) in 2010.

4.2.1 South Africa

The appeal system of Tribunals in South Africa is divided into the first-tier Tribunal and the upper Tribunals, the first-tier act as the court of first instance. Notable the Tribunals in South Africa are further clustered with the first-tier having Tribunals being: General regulatory Tribunal, Social Entitlement Tribunal, Health Tribunal, Education Tribunal, Tax Tribunal and Immigration and Asylum Tribunal. A concept that Kenya should try adopting to ensure that matters are handled in a neat manner and there creating easy accessibility to justice because being the court of the first instance they will be handling so many matters.

To ensure that the decisions given are of high quality and standardized, the presidents of the Tribunals are judges. A concept that has been adopted in the Kenyan system to instill public confidence in the way their matters will be handled by competent people. Further, the judges are appointed by the Judicial Appointment Commission, a body that is equivalent to the Kenyan Judicial Service Commission.

The first-tier is allowed to review its decision and correct accidental errors in the decision or in a record of decision and either correct the decision or it a side.

UPPER TRIBUNALS

This is the Appeals Tribunals. Like the first-tier, it is also divided into Administrative Appeals Tribunals, Tax Tribunals, Chancery Chamber, the Land Chamber and Immigration and Asylum Chamber.

4.3 The Concept of Rationalizing Tribunals in Kenya

The Committee recognized that there are two main aspects to rationalization:

- (1) The question of the number and size of the Tribunals in Kenya; and
- (2) The question of how the Tribunals (whatever their number) collaborate to ensure that minority interest subjects are not duplicated across the system, and how they ensure that the Tribunals do not all pursue the same detailed specialism.

In the opinion of the Committee, the following aspects need to be taken into account by the Council while rationalizing Tribunals:

- (i) Rationalization is about delivering quality, it is not about cutting costs;
- (ii) Rationalization would reduce the costs to the taxpayer;
- (iii) Rationalization will give Tribunals an opportunity to pool resources and collaborate in procurement;
- (iv) Rationalization gives an opportunity for proper discussion with those affected; and
- (v) Rationalization was a great avenue to improve quality.

After lengthy discussions on the need to rationalize, the Committee was convinced that the proposed Council would be sufficiently capable of actualizing the task of rationalization.

Before beginning the actual process, it is proposed that the Council should start by conducting research. The main objective of the research is to identify the bodies that arguably meet the definition of Tribunals and their specific functions. The objective of the research is for the council to:

- (i) To determine the total number of Tribunals;
- (ii) To establish the number of cases handled by each Tribunal;
- (iii) To identify the powers, procedures in appropriate cases and the uniqueness of each procedure;
- (iv) To identify the membership of each Tribunal;
- (v) To establish the number of Tribunals that are temporary and those that are permanent; and
- (vi) To establish how they conduct their appeals.

One of the ways to rationalize would be for the Council to consider the concept of clustering. This concept allows for mergers and or abolishment of Tribunals.

4.4 The Concept of Clustering of Tribunals

The Committee also considered at length the concept of clustering of Tribunals. Tribunals can be clustered into the following sets: administrative, civil or judicial Tribunals. During clustering it would be wise to consider the following: independence of the Tribunals, resources available, quality of decisions given by the Tribunals, work load and credibility expected in the decisions of the Tribunals. This concept has further been elaborated by Baxter who states that:

“.....The idea of a cluster does not compel any particular level of integration or sharing of Services. Rather, the cluster model can be designed in a nuanced way, reflecting the level of connectedness that is desired for each different cluster. We stress too that the extent of connection need not be the same for each cluster within the reform. There may, for example, be one cluster where the tribunals are closely connected in terms of common membership and procedures. This cluster may even merge some of the individual tribunals’ jurisdictions. On the other hand, another cluster could be a far looser grouping, with individual tribunals maintaining their own identities, sharing fewer members and having greater procedural variance among themselves.....”

Clustering of Tribunals enables one to establish whether to abolish some Tribunals or merge them. The main objective of merger of Tribunals is that large Tribunals are seen as better suited to provide more efficient and better quality in professional management. Further, they better respond to the opportunities for economies of scale with the freed resources being utilized for serving other pressing issues in judicial reform.

Further merging the Tribunals will ensure that there is better specialization. However, in merging Tribunals or abolishing some, the Council should ensure that they consider the uniqueness of each Tribunal such that they do not end up merging with different procedure. Or, in abolishing some Tribunals, they should ensure that they consider the work load of each cluster such that in future, Tribunals do not come up with bad precedence or there be backlog of cases due to lack of time during the hearing process and writing of judgments.

Advantages of Merger/Abolishing of Some Tribunals

- (i) it avoids overlap;
- (ii) Ensures efficient and effective delivery of justice;

- (iii) Enables consolidation of resource;
- (iv) Enables coding of best practices and administrative guidance of Tribunals;
- (v) Standardization of the Tribunals system in Kenya;
- (vi) Ensures that there is a strong and clear leadership structure in the Tribunals system;
- (vii) Ensures good governance, integrity, transparency and accountability in the Tribunals system; and
- (viii) Encourages access to justice with fewer technicalities.

4.5 Steps to be considered in Rationalizing Tribunals

After conducting research, the Council should follow the steps illustrated:

Step 1

The Council should give a written notice to the Tribunals in question of the intention to merge them or abolish them. When merging Tribunals it is also important to notify the specific Tribunals of the intention to merge.

Step 2

Publish a notice inviting comments from the public and giving the reasons for the proposed merger in one or more newspapers circulating.

Step 3

Give the Tribunals in question and any other interested persons an opportunity to make representations within a period of not less than 90 days from the date of the notice referred to in Step 2.

Step 4

Consider the representations received from the Tribunals and any other interested persons.

Step 5

Hear possible appeals against the decision.

Step 6

Ensure that there is put in place an employee assistance programme to support the transition.

Step 7

Conduct an assessment of approaches and other potential challenges.

Step 8

Ensure that all Tribunals are registered. The Council should provide for the procedures to follow regarding the management of all assets, liabilities, rights and obligations of the tribunals that are merged.

Step 9

Monitor and evaluate the outcome of the merger process. Make additional recommendations to the Chief Justice.

Step 10

Publish the merger of the two or more Tribunals by notice in the Kenya Gazette.



5.0 CHALLENGES

5.1 Interpretation of Article 169 (1)(d) of the Constitution

The taskforce grappled with the multiple interpretations emerging out of Article 169 (1)(d) of the Constitution which provides that the subordinate courts include any other court or local Tribunals as may be established by an Act of Parliament. The issue arising was whether Article 169(1)(d) contemplated that local Tribunals are a part of the Judiciary as opposed to being independent adjudicatory bodies.

Discussions with some of the Tribunals during the stakeholder engagements revealed that there was the general perception that the technical nature and independence of Tribunals would be threatened by bringing Tribunals under the ambit of the Judiciary.

The Committee sought to address this ambiguity created by the multiple interpretations of Article 169(1)(d) by creating a unified structure of the Tribunal system led by a Council whose chair is the Chief Justice. Moreover, whose membership comprised of nominees from Tribunals themselves among others. It was intended that this would create a linkage between the Judiciary and the Tribunals.

The Committee submits further that there is need for policy guidance on the real interpretation of Article 169(1)(d). The lack of a policy framework on Tribunals during this process posed a great challenge to the work of the Committee as it encountered various grey areas where a policy would have offered guidance. Also, the absence of an Executive order specifically touching on the issue was a challenge. At some point along the process, the Committee experienced resistance from Tribunals, with most failing to respond to memoranda seeking information from them. A number of them later boycotted attendance of the stakeholder engagement fora convened for the purpose of discussing the legislative proposals.

Specifically, the meaning of the term Tribunals and their domicile in regard to their independence was a challenge as the Constitution itself is not explicit on how independent these quasi judicial bodies should be. Where they need have a stand alone organized structure or remain as part of the Executive or form part of the Courts Structure were some of the questions that needed policy direction. Different stakeholders were persuaded by diverse perceptions. Lack of a Policy Framework to Guide the Operations of Tribunals.

5.2 Inadequate Financial Resources

Funding was a major obstacle in carrying out activities of the Committee. There were start-up delays, arising out of the failure to secure funding early enough as the reference from the Hon. Attorney-General was not accompanied by requisite financial resources. Global practice dictates that whenever instructions of this nature are given to a Law Reform Agency, resources are subsequently made available to carry out the task.

This notwithstanding, the Committee sought funding from various institutions with the Danish International Development Agency (DANIDA) through the International Development Law Organization (IDLO) coming through with their generous financial support which made this project possible albeit not to the desired levels as unbundled by the Committee through its Terms of Reference. At some point, due to the close interaction with the Judicial Working Group on Tribunals, the UNDP also gave support.

5.3 Time Constraints

The Committee held its first meeting on 30th July 2014 and was expected to deliver its mandate on or about 30th August 2015. Owing to the large number of Tribunals in Kenya, and the complexity of issues raised by the stakeholders which needed to be addressed by the Committee, the time frame of one year was not enough to satisfactorily address all the issues affecting Tribunals.

5.4 Resistance due to Misconceptions

In Kenya today, there are more than 100 Tribunals all established under different pieces of legislations and operating under various administrative structures. The Committee encountered a lot of resistance from most of the Tribunals who were not very appreciative of the proposed reforms.

5.5 Agreed way forward

1. A concept paper titled '*Reforming Tribunals in Kenya – The Case for Reform of Tribunals in Kenya*' was prepared by the Kenya Law Reform Commission secretariat as a basis for justification for rationalization of these quasi-judicial bodies. The Committee opines that the Concept can serve as a basis for a policy brief. The paper has been instrumental to the Committee in development of the Draft Bill.
2. Upon examination of reforms and proposed reforms in other jurisdictions, it is certain that there is need for a number of options available in streamlining the structure and governance of Tribunals in the country today.
3. In addition to the proposed standardized and a unified Tribunals system, there is need to introduce structural and governance measures in management of the quasi-judicial bodies. To achieve this, the Committee recommended the following as guidelines toward the rationalization process:-

- Carry out an in-depth evaluation of the Tribunals system to establish their actual number, resource requirement and what is available and case load for each. In doing so, further understand each tribunal's powers, procedures and uniqueness and mandate through the established legislation. Establish whether members are retained on a permanent or part time basis;
- Secondly, there will be need to carry out stakeholder engagements to seek feedback and prepare them for the envisaged changes that rationalization will introduce; and
- The outcomes of the above steps will then inform clustering, merging and abolishing certain Tribunals. In effecting this, the landscape of the known Tribunals system will change with a lot of movements, some affecting individuals, taking place. In regard to this, there will be need for a strong support structure in form of a policy framework to help birth and stabilize the outcome of the rationalization.



Draft Bill introspection

6.0 CONCLUSION AND RECOMMENDATION

6.1 Conclusion

Reform of the Tribunals system may not be popular in all circles but the public interest demands a more systematic, more efficient and better structured system.

The development of the Draft Tribunals Bill is in line with this reform momentum. It seeks to position the Tribunals appropriately to effectively and efficiently deliver on their mandates. The Draft Bill will, among other provisions, provide for: the composition and structure of the members of Tribunals, administration (leadership and management) and inter-agency relationship with the justice sector.

To guarantee that these reforms are sustained, it is important to ensure that they are owned internally within the Tribunals system in Kenya. In this regard, each officer involved, from the highest to the lowest ranks, and every member of a Tribunal in Kenya has a role and an input to make towards the achievement of these reforms. They must be part of this process, because unless they see the need for reform, they may be obstacles to change.

Similarly, external stakeholders are critical to the reform and transformation of the tribunal system. This is because they influence and impact on the operations of the Tribunals in various ways. It is imperative therefore that they be incorporated in the reform process so as to support it and be transformed by it. The Committee is also convinced that stakeholder ownership is particularly imperative in generating and sustaining the momentum needed to bring meaningful change in the tribunal system.

Finally, the Committee is hopeful that the Government of Kenya will provide leadership and commitment by supporting the proposed reforms through policy and legal framework development as well as financial and human resources.

6.2 Recommendations

1. **THAT** the Judiciary spearheads the establishment of an office to address Tribunal issues and that an office is set up to be referred to as the Tribunal Liaison Office. The office is to be situated within the Judiciary which will essentially act as a link between the Judiciary and the Executive;
2. **THAT** a clear nexus is established for both the Executive and Judiciary with regards to Tribunals during the transition period. We propose that the Executive should facilitate the Tribunals to carry out their mandates while the Judiciary should ensure that the Law is upheld and observed;
3. **THAT** the Judiciary provides the appropriate infrastructure for the operations of the Tribunals;
4. **THAT** there be rationalization of Tribunals. There should be merging of Tribunals especially those performing similar functions to avoid duplicity. This should be done by

the proposed Council. This report has provided for guidelines for the proposed Council to consider in Chapter four (4) of this report;

5. **THAT** a more consultative fora with stakeholders comprising of representatives of Tribunals be held to ensure a buy-in into the reform process;
6. **THAT** there is established Committees namely; Rules Committee and Rules of Procedure for the Tribunals;
7. **THAT** the National Treasury and Parliament is engaged extensively with the aim of facilitating the Tribunals which are already operational to carry on their mandate; and
8. **THAT** in addition to the above interim administrative measures, the Committee recommends the enactment of the attached Draft Bill.

6.3 Specific Recommendations

6.3.1 The Judiciary

The Judiciary should accord the proposed Council financial independence even though the budget for Tribunals remains a line budget in the Judiciary.

6.3.2 Office of the Attorney-General and Department of Justice

The Committee experienced immense resource challenges that delayed most of its activities. More so, it was not possible for the Commission to carry out the rationalization process as conceptualized initially, owing to a challenge with inadequate resources.

Even though IDLO funded the process eventually, the resources available were not adequate to fund the activities of the Committee to the desired levels. The donor was working with a strict budget considering their programme cycle was coincidentally coming to an end.

In future, it will be prudent for the Hon. Attorney-General to resource legal reform instructions to the Commission considering that legal reform is an expensive exercise. The practice globally is to ensure that even as the Executive gives instructions; it is paramount to ensure that the proposed project is well resourced to enable its smooth running to avoid unnecessary delays.

6.3.3 Policy Framework

The Committee had a difficult time interpreting provisions of the Constitution in regard to independence of Tribunals and, specifically, whether they should form part of subordinate courts. In this regard, it is critical to have a policy framework in place to address the grey areas that may be experienced in implementing the legislative framework for Tribunals.

6.3.4 The Council

For the streamlining of the Tribunals system to effectively work, it is recommended that the Council in the shortest time possible, upon constitution, commence a rationalization exercise as per guidelines proposed in this Report.

ANNEX 1

THE DRAFT TRIBUNALS BILL, 2015

ARRANGEMENT OF CLAUSES

Clauses

PART I — PRELIMINARY

- 1—Short title and commencement
- 2—Interpretation
- 3—Objects and purposes of the Act
- 4—Application of the Act

PART II —THE COUNCIL OF TRIBUNALS

- 5—Establishment and composition of the Council
- 6—Tenure of members
- 7—Vacancy of office
- 8—Functions and powers of the Council
- 9—Conduct of business and quorum
- 10—Delegation of powers
- 11—Committees
- 12—Office of the Secretary
- 13—Responsibilities of the Secretary
- 14—Removal of Secretary
- 15—Secretary’s power to delegate
- 16—Temporary vacancy of the office of the Secretary
- 17—Common Seal

PART III —ESTABLISHMENT AND ADMINISTRATION OF TRIBUNALS

- 18—Procedure for establishing Tribunals
- 19—Procedure before Parliament
- 20—Appointment of chairpersons and members of Tribunals
- 21—Qualifications for appointment of chairperson and members
- 22—Disqualifications
- 23—Tenure of members of a Tribunal
- 24—Vacancy in the office of chairperson or member of a Tribunal
- 25—General principles
- 26—Quorum
- 27—Tribunal may seek advice
- 28— Jurisdiction of Tribunals
- 29— Power to review own decision
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PART IV — APPEALS BOARD

- 32— Establishment of the Tribunals Appeals Board
- 33—Qualifications for appointment as chairperson and members
- 34—Quorum
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— **CONDUCT OF BUSINESS OF THE COUNCIL**

SECOND SCHEDULE

— **RULES OF PROCEDURE OF TRIBUNALS**

THIRD SCHEDULE

— **OATH/AFFIRMATION OF THE OFFICES OF**

**CHAIRPERSON AND MEMBERS OF THE COUNCIL,
APPEALS BOARD, TRIBUNAL AND SECRETARY**

THE TRIBUNALS BILL, 2015

A BILL FOR

An Act of Parliament to give effect to Articles 1(3)(c), 20(4), 47(3), 159(1) and 169 of the Constitution regarding Tribunals; to establish the Council of Tribunals; to provide for the structure, membership and functions of the Council; to establish the Tribunals Appeals Board; to rationalize and regulate the administration and functions of Tribunals; and for connected purposes.

ENACTED by Parliament as follows —

PART I — PRELIMINARY

Short title and commencement.

1. (1) This Act may be cited as the Tribunals Act, 2015 and shall come into force on such date as the Cabinet Secretary may by notice in the Gazette appoint and different dates may be appointed for different provisions.
- (2) Despite subsection (1), the Act shall come into operation within six months of assent.

Interpretation.

2. In this Act—

“Appeals Board” means the Tribunals Appeals Board established under Section 32;

“Cabinet Secretary” means the Cabinet Secretary responsible for justice;

“Chairperson” means the chairperson of the Council, Appeals Board or Tribunal;

“Commission” means the Judicial Service Commission established by Article 171 of the Constitution;

“Council” means the Council of Tribunals established under Section 5;

“Deputy Registrar” means a Deputy Registrar seconded to the Council;

“Fund” means the Tribunals Fund established by the Council;

“Member” means a member of the Council, Appeals Board or Tribunal;

“Secretary” means the Secretary to the Council;

“Rules Committee” means the Tribunal Rules Committee; and

“Tribunal” means a Tribunal established by an Act of Parliament.

Objects and purposes of the Act.

3. The objects and purposes of this Act are to provide a legislative framework —
- (a) to rationalize and regulate Tribunals;
 - (b) to streamline the governance and operations of Tribunals;
 - (c) to provide for a reasonable standard for the establishment of Tribunals;
 - (d) to set appropriate qualifications for chairpersons and members of Tribunals;
 - (e) to bring all Tribunals under a single administrative regime and coordinate the functions of Tribunals;
 - (f) to ensure expeditious settlement of disputes by Tribunals;
 - (g) to enhance access to justice; and
 - (h) to improve quality of service delivery by Tribunals.

Application of the Act
No.4 of 1995
/No. 11 of 2009

4. This Act shall apply to all Tribunals except those established by the Constitution and arbitral Tribunals established under the Arbitration Act.

PART II —THE COUNCIL OF TRIBUNALS

Establishment and composition of the Council.

5. (1) There be established a Council to be known as the Council of Tribunals.
- (2) The Council shall be a body corporate with perpetual succession and a common seal and shall in its corporate name be capable of —
- (a) suing and being sued;
 - (b) acquiring, holding, charging and disposing of movable and immovable property; and
 - (c) doing or performing all such other things or acts for the proper discharge of its functions under this Act or any written law, as may be lawfully done or performed by a body corporate.
- (3) The members of the Council shall comprise—
- (a) the Chief Justice who shall be the Chairperson;
 - (b) the Attorney-General;
 - (c) the Chief Registrar of the Judiciary;
 - (d) one person nominated by the Law Society of Kenya;
 - (e) one person nominated by the Kenya Private Sector Alliance;
 - (f) two persons nominated by the Tribunals;
 - (g) one person nominated by the Cabinet Secretary responsible for youth affairs;
 - (h) one person nominated by the National Council for Persons with Disability; and
 - (i) the Secretary who shall be the Chief Executive Officer of the Council.
- (4) The chairperson and members of the Council shall be appointed by the President.

- (5) The agencies nominating persons under subsection (3) (d) to (h) shall—
- (a) submit the names of the nominees to the President within 21 days of the commencement of this Act;
 - (b) ensure that the nomination process is competitive;
 - (c) forward to the President, four names representing both genders; and
 - (d) ensure the persons nominated meet the requirements of Chapter Six of the Constitution.
- (6) The President shall appoint the members of the Council under subsection (3) within fourteen days of receipt of the names from the nominating agencies.
- (7) The procedure for nomination and appointment of members under subsection (3) (d) to (h) shall be prescribed by the Cabinet Secretary.
- (8) The headquarters of the Council shall be in the capital city, but the Council may establish offices and Tribunals at any other place in Kenya.
- (9) The Council shall ensure access to its services in all parts of the Republic in accordance with Article 6(3) of the Constitution.
- Tenure of members. **6.** Members appointed under section 5 (3) (d) to (h) shall be appointed for a term of three years and shall be eligible for re-appointment for one further term of three years.
- Vacancy of office. **7.** (1) The office of the chairperson or a member shall become vacant if the holder—
- (a) dies;
 - (b) resigns from office by notice in writing addressed to the appointing authority;
 - (c) is convicted of a felony;
 - (d) completes the term of office;
 - (e) is absent from three consecutive meetings of the Council without good cause; or
 - (f) is removed from office on any of the following grounds —
 - (i) gross violation of the Constitution or any other written law;
 - (ii) gross misconduct or misbehaviour;
 - (iii) inability to perform functions of the office arising out of physical or mental infirmity;
 - (iv) incompetence or neglect of duty; or
 - (v) bankruptcy.
- (2) A vacancy under this section shall be filled within three months.

Functions and powers of the Council.

8. (1) The functions of the Council shall be —
 - (a) to develop policies for the regulation of Tribunals and the Appeals Board;
 - (b) to ensure the enhancement of a fair, efficient and accessible Tribunal system and jurisprudence;
 - (c) to evaluate, rationalize and recommend to Parliament Tribunals to be established, merged or abolished;
 - (d) to regulate and oversee the functioning of the Tribunals;
 - (e) to set standards and monitor the compliance with the standards by Tribunals in their functioning and service delivery;
 - (f) to develop a Code of Conduct for Tribunals and the Appeals Board;
 - (g) to ensure that Tribunals and the Appeals Board adhere to the provisions of the law, regulations, policies, Code of Conduct, rules or guidelines;
 - (h) to provide strategic direction to Tribunals and Appeals Board;
 - (i) to facilitate training programmes for members and staff of the Council, Appeals Board and Tribunals;
 - (j) to prepare and submit reports to Parliament on the status of the implementation of its functions and obligations under this Act or any other law;
 - (k) to facilitate law reporting on decisions of Tribunals and the Appeals Board in consultation with the National Council for Law Reporting;
 - (l) to facilitate public education on the role of Tribunals; and
 - (m) to perform any other function as may be necessary for the proper discharge of its responsibilities under this Act.
- (2) The Council shall have all powers incidental to and necessary for the effective discharge of its functions under this Act and any other written law.
- (3) Despite subsection (1), the Council shall within three years of the commencement of this Act —
 - (a) formulate and adopt guidelines for evaluation and rationalization of Tribunals; and
 - (b) undertake the first evaluation and rationalization exercise and recommend to Parliament the Tribunals to be established, merged or abolished.
- (4) The Council shall from time to time, publish an inventory of Tribunals for purposes of public information.
9. (1) The business and affairs of the Council shall be conducted in accordance with the First Schedule.
- (2) Except as provided in the First Schedule, the Council may regulate its own procedure.
- (3) Any five members present at a meeting of the Council shall constitute a quorum.

Act No. 11 of 94

Conduct of business and quorum.

Delegation of powers.

10. The Council may by resolution either generally or in any particular case, delegate to any committee of the Council or to any member, officer, employee or agent of the Council, the exercise of any of the powers or the performance of any of the functions or duties of the Council under this Act.

Committees.

11. (1) The Council may, for the effective discharge of its functions, establish committees.
(2) The Council may co-opt into the membership of a committee established under subsection (1), any person whose knowledge and skills are considered necessary for the effective discharge of the functions of the Council.

Office of the Secretary.

12. (1) There is established the office of the Secretary to the Council.
(2) The Council shall appoint a suitably qualified person to be the Secretary through an open, transparent and competitive recruitment process.
(3) A person shall be qualified for appointment as the Secretary to the Council if the person—
(a) is a citizen of Kenya;
(b) holds a postgraduate degree from a university recognized in Kenya;
(c) has had at least five years proven experience at management level; and
(d) meets the requirements of Chapter Six of the Constitution.
(4) The Secretary shall serve on such terms and conditions as the Council may determine.
(5) The Secretary shall hold office for a term of five years but may be eligible for re-appointment.
(6) The Secretary shall be the chief executive, accounting officer and ex-officio member of the Council.
(7) The Secretary shall be responsible to the Council in the execution of duties and responsibilities of office.

Responsibilities of the Secretary.

13. (1) The Secretary shall perform the functions and exercise the powers conferred on the Secretary under this Act or other written law.
(2) The Secretary shall be responsible for the day to day management of the secretariat and affairs of the Council.
(3) The Secretary shall oversee the general issues of administration of the Council, Appeals Board and Tribunals.

- (4) The Secretary shall in particular be responsible for—
- (a) the establishment of registries of Tribunals and the Appeals Board;
 - (b) the transmission and custody of documents in relation to Tribunals and the Appeals Board;
 - (c) implementation of decisions of the Council, Appeals Board and Tribunals;
 - (d) causing to be kept records of the proceedings and minutes of the meetings of the Council, Appeals Board and Tribunals and such other records as the Council may direct;
 - (e) managing the assets and finances under this Act;
 - (f) preparing proposals on the staffing needs of the secretariats of the Council, Appeals Board and Tribunals;
 - (g) coordinating recruitment and supervision of staff of the Council, Appeals Board and Tribunals; and
 - (h) undertaking any other duties, in relation to the regulation and management of Council, Appeals Board and Tribunals, assigned by the Council under this Act or any other written law.

Removal of
Secretary.

- 14.** (1) The Secretary may be removed from office by the Council for—
- (a) inability to perform functions of the office arising out of physical or mental infirmity;
 - (b) gross misconduct or misbehaviour;
 - (c) incompetence or negligence of duty;
 - (d) gross violation of the Constitution or any other written law;
 - (e) bankruptcy; or
 - (f) any other grounds specified in the terms and conditions of service of Secretary.
- (2) If the question of the removal of the Secretary under subsection (1) arises, the Council shall —
- (a) inform the Secretary in writing of the reasons for the intended removal; and
 - (b) give the Secretary the opportunity to be heard in accordance with the principles of fair administrative action prescribed under Article 47 of the Constitution.

Secretary's power to
delegate.

- 15.** Except as provided under this Act or any other law, the Secretary may delegate to a Chief Executive Officer of a Tribunal or a Deputy Registrar, any of the powers or responsibilities vested in the Secretary.

Temporary vacancy of the office of the Secretary.

16. Where the Secretary is temporarily absent from office, the Council may designate a Deputy Registrar to exercise any of the powers or perform any of the duties vested in or assigned to the Secretary by or under this Act or any other written law.

Common Seal.

- 17.** (1) The seal of the Council shall be kept by the Secretary and shall not be used except on order of the Council.
- (2) The seal shall be authenticated by the signature of the chairperson or any other member authorized in that behalf by a decision of the Council and the Secretary.
- (3) The seal shall be officially and judicially noticed and unless the contrary is proved, any order or authorization by the Council under this section shall be presumed to have been duly given.

PART III — ESTABLISHMENT AND ADMINISTRATION OF TRIBUNALS

Procedure for establishment of Tribunals.

- 18.** (1) Where a Ministry, Department or Government Agency intends to establish a Tribunal, the responsible Cabinet Secretary shall submit to the Council, a written request for the proposed establishment of the Tribunal.
- (2) The request of the responsible Cabinet Secretary shall be accompanied by—
- (a) a detailed statement justifying the proposed establishment of the Tribunal; and
 - (b) a feasibility assessment report for the purpose of ascertaining—
 - (i) the strategic viability of establishing the proposed Tribunal;
 - (ii) the practicability of the mandate of the proposed Tribunal being conducted by an existing Tribunal; and
 - (iii) whether or not there is need to establish a new Tribunal.
- (3) The Council shall consider the request and feasibility assessment report submitted to it under subsection (2) and shall submit its decision, in writing, to the relevant Cabinet Secretary and to the Cabinet Secretary to the National Treasury, within thirty days of receipt of the report.
- (4) Where the Council recommends the proposed establishment of the Tribunal, the Cabinet Secretary to the National Treasury shall submit the request together with the views of the National Treasury on the financial implications of establishing the Tribunal and the decision of the Council to the Cabinet for consideration and approval.

- (5) Upon approval by the Cabinet, a Tribunal shall be established through an Act of Parliament.
- (6) Nothing under this section shall preclude the Council from recommending the appointment of an *ad hoc* panel of experts to enquire into and determine a dispute arising out of an emergency and in respect of which no Tribunal has competent jurisdiction.
- (7) A panel constituted under subsection (6) shall subject to regulations made under this Act, have the powers of a Tribunal.
- (8) Notwithstanding the provisions of any other law, no Tribunal shall be established without the recommendation of the Council.
- (9) The Council may prescribe the manner and procedure for the evaluation under subsection (8).

Procedure before Parliament.

19. Where legislation introduced for enactment in Parliament proposes to establish a Tribunal, Parliament shall consider the recommendations of the relevant Committee which shall be informed by—
 - (a) the Cabinet Secretary for the National Treasury;
 - (b) the responsible Cabinet Secretary; and
 - (c) the Council.

Appointment of chairpersons and members of Tribunals.

20. (1) Every Tribunal shall consist of—
 - (a) five members, one of whom shall be the chairperson; and
 - (b) a Deputy Registrar.
- (2) Subject to subsection (3), the chairperson of a Tribunal shall be appointed by the Commission.
- (3) A Cabinet Secretary responsible for the administration of an Act of Parliament which establishes a Tribunal shall through a competitive process, select three and eight suitable nominees for the positions of chairperson and members respectively, and forward their names to the Commission for appointment.
- (4) The Commission shall appoint one of the three and four of the eight nominees as selected under subsection (3) as chairperson and members of the Tribunal.
- (5) In nominating and appointing chairperson and members of a Tribunal under this section, a Cabinet Secretary and the Commission shall respectively take cognizance of the provisions of the Constitution relating to regional and other diversities of the people of Kenya.
- (6) The members of the Tribunal shall elect a vice-chairperson from amongst themselves and the chairperson and the vice-chairperson shall be persons of the opposite gender.
- (7) The provisions of the Judicial Service Act relating to discipline of judicial officers shall apply with necessary modifications to members of a Tribunal.

Qualifications for appointment of chairperson and members of Tribunals.

- 21.** (1) A person shall be qualified for appointment as the chairperson or a vice-chairperson of a Tribunal if that person—
- (a) is a Kenyan citizen;
 - (b) holds a degree in law from a university recognized in Kenya and is an advocate of the High Court of Kenya;
 - (c) has not less than ten years post qualification experience; and
 - (d) meets the requirements of Chapter Six of the Constitution.
- (2) A person shall be qualified for appointment as a member of a Tribunal if that person—
- (a) is a Kenyan citizen;
 - (b) holds a degree from a university recognized in Kenya;
 - (c) has knowledge and experience of not less than five years in the respective field; and
 - (d) meets the requirements of Chapter Six of the Constitution.

Disqualifications.

- 22.** A person shall not be qualified for appointment as the chairperson or as a member of a Tribunal if the person—
- (a) is of unsound mind;
 - (b) is an undischarged bankrupt;
 - (c) is convicted of a felony; or
 - (d) has been removed from any office for gross violation of the Constitution or any other written law.

Tenure of members of Tribunals.

- 23.** (1) The chairperson of a Tribunal shall be appointed for a term of four years and shall be eligible for re-appointment for one more term of four years.
- (2) A member of a Tribunal shall be appointed for a term of three years and shall be eligible for re-appointment for one more term of three years.
- (3) A chairperson or member of a Tribunal may serve on full or part time basis.
- (4) A chairperson or member of a Tribunal shall, unless ex-officio or part-time, not hold any other public office.

Vacancy in the office of chairperson or member of a Tribunal.

- 24. (1)** The office of the chairperson or member of a Tribunal shall become vacant if the holder —
- (a) dies;
 - (b) resigns from office by notice in writing addressed to the appointing authority;
 - (c) is convicted of a felony;
 - (d) completes their term of office;
 - (e) is absent from three consecutive meetings of the Tribunal without good cause; or
 - (f) is removed from office on any of the following grounds—
 - (i) gross violation of the Constitution or any other written law;
 - (ii) gross misconduct or misbehaviour;
 - (iii) inability to perform functions of the office arising out of physical or mental infirmity;
 - (iv) incompetence or neglect of duty; or
 - (v) bankruptcy.

(2) A vacancy under this section shall be filled within three months.

General principles.

- 25.** Subject to this Act or any other law, a Tribunal seized of a matter shall—
- (a) conduct its proceedings with minimum formality;
 - (b) hear and determine the matter expeditiously;
 - (c) not be bound by the rules of evidence and procedure;
 - (d) encourage mediation, arbitration and other forms of alternative dispute resolution;
 - (e) undertake investigation of fact if the Tribunal is of the opinion that such investigation is necessary for the ends of justice; and
 - (f) act according to equity, good conscience and the substantial merits of the case without undue regard to legal technicalities.

Quorum.

- 26. (1)** The chairperson of a Tribunal shall preside at all sittings of the Tribunal at which the chairperson shall be present and in the absence of the chairperson, the vice-chairperson shall preside.
- (2) The quorum of a Tribunal shall be three members including the chairperson or the vice-chairperson as the case may be.



Tribunal may seek technical advice.

- 27.** (1) A Tribunal may seek technical advice from persons whose specialized knowledge or experience may assist the Tribunal in its proceedings.
- (2) A person whose advice is sought under subsection (1) shall disclose any interest they may have in the matter before the Tribunal or any subsequent interest acquired relating to the matter in question.

Jurisdiction of Tribunals.

- 28.** (1) Except as provided by law, every Tribunal shall have jurisdiction to hear and determine any matter provided under the law establishing the Tribunal.
- (2) The jurisdiction of a Tribunal shall not include the trial of any criminal offence.
- (3) A Tribunal shall have power to grant equitable relief including injunctions, penalties, damages and specific performance.
- (4) A Tribunal may in appropriate cases hear and determine a complaint before it arising under Articles 23(2) and 47(3) of the Constitution, the Fair Administrative Action Act or any other written law.
- (5) Despite subsection (1), disputes governed by dispute settlement mechanisms under international instruments to which Kenya is a party may only be settled under such systems.

Act 4 of 2015.

Power to review own decision.

- 29.** Any person who considers themselves aggrieved—
- (a) by a decision of a Tribunal from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decision of a Tribunal from which no appeal is allowed by this Act, may apply for a review of the decision to the Tribunal which made the decision, and the Tribunal may make such order thereon as it thinks fit.

Enforcement of decisions.

- 30.** A decision of a Tribunal shall be executed and enforced in the same manner as that of a court of law.

Secretariat.

- 31.** (1) There shall be a secretariat of a Tribunal as shall be determined by the Council.
- (2) The secretariat under subsection (1) shall consist of—
- (a) A Chief Executive Officer competitively recruited by the Council;
 - (b) such judicial officers as may be seconded by the Commission upon request by the Council;
 - (c) such public officers as may be seconded by the Public Service Commission upon the request by the Council; and
 - (d) such technical and administrative officers and support staff as may be appointed by the Council under this Act;
- (3) The officers and staff under subsection (2) shall be appointed upon such terms and conditions of service as the Council may on the advice of the Salaries and Remuneration Commission, determine.
- (4) Persons seconded by the Commission under subsection (2) shall comprise such Deputy Registrars as may be necessary for the performance of judicial functions of the Tribunal.
- (5) The Chief Executive Officer appointed under this section shall be the head of the secretariat of a Tribunal.
- (6) The provisions of sections 12 to 16 shall apply with necessary modifications to the Chief Executive Officer of a Tribunal.

PART IV — TRIBUNALS APPEALS BOARD

Establishment
of the Tribunals
Appeals Board.

- 32.** (1) There is established an independent Tribunals Appeals Board whose function shall be to hear appeals from decisions of Tribunals.
- (2) Subject to subsection (3) the Appeals Board shall comprise the following members appointed by the President on the recommendation of the Commission—
- (a) two lawyers of whom one shall be the chairperson; and
 - (b) three other expert persons from other disciplines.
- (3) The Commission shall through a competitive process nominate and forward to the President the names of —
- (a) three persons for the post of chairperson; and
 - (b) nine expert persons for the posts of members.

- (4) The President shall appoint one person as chairperson and three other persons as members of the Appeals Board within fourteen days of receipt of the names from the Commission.
- (5) A Deputy Registrar as designated by the Council shall be the secretary to the Appeals Board.
- (6) The provisions of the Judicial Service Act relating to discipline of judicial officers shall apply with necessary modifications to the appointment of members of the Appeals Board.
- No.1 of 2011. (7) In addition to its jurisdiction under subsection (1), the Appeals Board may hear and determine appeals arising out of decisions of other public administrative bodies.
- Qualifications for appointment as chairperson and members. **33.** (1) A person shall be qualified to be chairperson of the Appeals Board if that person is qualified to be appointed as a judge of the Court of Appeal.
- (2) A person shall be qualified to be a member of the Appeals Board if that person has a minimum of ten years post qualification experience in the field relevant to the jurisdiction of the Tribunal and meets the requirements of Chapter Six of the Constitution.
- (3) The procedure for appointment of judicial officers under the Judicial Service Act shall apply with necessary modifications to members of the Appeals Board.
- No.1 of 2011.
- Quorum. **34.** The quorum of the Appeals Board shall be three members.
- Appeals. **35.** (1) A person aggrieved by a decision of a Tribunal may appeal to the Appeals Board within thirty days from the date of such decision.
- (2) Upon the hearing of an appeal under this section, the Appeals Board may—
- (a) confirm, set aside or vary the decision or order in question;
- (b) remit the proceedings to the relevant Tribunal with such instructions for further consideration, report, proceedings or evidence as the Appeals Board may consider necessary;
- or
- (c) make such other order as it may consider just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Appeals Board.
- (3) Subject to section 37, the decision of the Appeals Board shall be final.
- (4) The Council may make rules to govern the appeals process under this section.

Procedure of the Appeals Board.

- 36.** (1) The Appeals Board shall meet as and when there is need to exercise its jurisdiction under this Act.
- (2) Unless a unanimous decision is reached, a decision on any matter before the Appeals Board shall be by a majority of the members present.
- (3) The Appeals Board shall conduct its proceedings without procedural formality and observe the rules of natural justice.
- (4) Except as provided under this Act, the Appeals Board shall regulate its own procedure.

Further appeal to the High Court.

- 37.** (1) A person aggrieved by the decision of the Appeals Board may with leave appeal against the decision to the High Court within thirty days of such decision.
- (2) A determination of the High Court under this section shall not be subject to question in, or review by, any court.

PART V — FINANCIAL PROVISIONS

Funds of the Council.

- 38.** (1) The funds of the Council shall consist of—
- (a) such monies as may be provided by Parliament for the purposes of the Council;
- (b) such monies or assets as may accrue to or vest in the Council in the course of the exercise of its powers or the performance of its functions under this Act;
- (c) such sums as may be payable to the Council pursuant to this Act or any other written law, or pursuant to any gift or trust; and
- (d) any other monies provided for, donated or lent to the Council.
- (2) There shall be paid out of the funds of the Council, Appeals Board and Tribunals all expenditure incurred by the Council in the exercise of its powers or the performance of its functions under this Act.
- (3) The Council may establish a fund to be known as the Tribunals Fund for the administrative expenses of the Council, Appeals Board and Tribunals and for such other purposes as may be necessary for the discharge of the functions of the Council.

Financial year.

- 39.** The financial year of the Council shall be a period of twelve months ending on the thirtieth day of June in each year.

Annual estimates.

- 40.** (1) Before the commencement of each financial year, the Secretary shall cause to be prepared estimates of the revenue and expenditure of the Council, Appeals Board and the Tribunals for that year.
- (2) The annual estimates shall make provision for all the estimated expenditure of the Council, the Appeals Board and Tribunals for the financial year concerned and in particular provide for—
- (a) payment of salaries, allowances, gratuities, pensions and other charges in respect of the members of the Council, Appeals Board, Tribunals and staff of the secretariat of the Council, Appeals Board and Tribunals;
 - (b) maintenance of buildings and grounds of the Council, Appeals Board and the Tribunals; and
 - (c) funding of training, research and development of activities in relation to the organization and functioning of the Council, Appeals Board and Tribunals.
- (3) The annual estimates shall be approved by the Council before the commencement of the financial year to which they relate and shall be submitted by the Secretary for tabling in the National Assembly.
- (4) The annual estimates, once approved by the Council, shall not be amended before being tabled in the National Assembly.
- (5) No expenditure shall be incurred for the purposes of the Council, Appeals Board or Tribunals except in accordance with the annual estimates approved under subsection (3).

Accounts and audit.

- 41.** (1) The Secretary shall cause to be kept proper books and records of account of the income, expenditure, assets and liabilities of the Council, Appeals Board and Tribunals.
- (2) Within a period of three months after the end of each financial year, the Secretary shall submit to the Auditor-General the accounts of the Council, Appeals Board and Tribunals in respect of that year together with—
- (a) A statement of the income and expenditure during that year; and
 - (b) A statement of the assets and liabilities on the last day of that financial year.
- (3) The annual accounts of the Council, Appeals Board and Tribunals shall be prepared, audited and reported upon in accordance with the law relating to public audit.

- Annual report.
- 42.** (1) At the end of each financial year, the Secretary shall prepare an annual report on the activities of the Council, the Appeals Board and Tribunals.
- (2) The annual report shall be submitted for tabling in the National Assembly not later than one month after the submission of the Auditor-General's report.
- (3) The annual report shall contain—
- (a) the financial statements of the Council, the Appeals Board and Tribunals;
 - (b) a description of the activities and outcomes of functioning of the Council, the Appeals Board and Tribunals; and
 - (c) any other information that the Council may consider relevant.
- Bank accounts.
- 43.** The Secretary may in accordance with the law relating to the management of public finance, open bank accounts on behalf of Tribunals and the Appeals Board and shall, as the accounting officer, be responsible for the proper management of the finances of Tribunals.
- Remuneration of chairperson and members.
- 44.** The chairperson and members of the Council, Appeals Board and Tribunals shall be paid such salaries or allowances as the Commission may on the advice of the Salaries and Remuneration Commission, determine.

PART VI — MISCELLANEOUS PROVISIONS

- Tribunal Rules Committee.
- 45.** The Council shall establish a Tribunal Rules Committee to develop rules and procedures for Tribunals in the areas specified in the Second Schedule.
- Oath of office.
- 46.** Members of the Council, Appeals Board and Tribunals shall on appointment, subscribe to the oath contained in the Third Schedule.
- Protection from personal liability.
- 47.** Nothing done by a member of the Council, Appeals Board or a Tribunal or by any person working under the instructions of the Council, Appeals Board or Tribunal, shall if done in good faith for the purpose of executing the powers, functions or duties of the Council, Appeals Board or Tribunal under the Constitution, this Act or any other relevant law, render such member or officer personally liable for any action, claim or demand.

Conflict of interest.

- 48.**(1) The chairperson or a member of the Council, who has a direct or indirect personal interest in a matter being considered or to be considered by the Council, shall as soon as reasonably practicable after the relevant facts concerning the matter have come to their knowledge, disclose the nature of such interest.
- (2) A disclosure of interest made under subsection (1) shall be recorded in the minutes of the meeting and the chairperson or member shall not take part in the consideration or discussion on or vote during any deliberations on the matter.
- (3) A person who fails to make the requisite disclosure under this section commits an offence.
- (4) A member of the Appeals Board or Tribunal shall excuse themselves from proceedings before the Appeals Board or Tribunal in which they have apparent or perceived conflict of interest.

Confidentiality.

- 49.** (1) A member or staff of the Council, Appeals Board or Tribunal may not without the consent in writing given by, or on behalf of, the Council, publish or disclose to any person otherwise than in the course of the person's duties the contents of any document, communication, or information which relates to, and which has come to the person's knowledge in the course of the person's duties under this Act.
- (2) The limitation on disclosure referred to under subsection (1) shall not be construed to prevent the disclosure of criminal activity by a member or staff of the Council, Appeals Board or Tribunal.

Duty to cooperate.

- 50.** A person responsible for a matter in question before the Council, Appeals Board or Tribunal shall co-operate with the Council, Appeals Board or Tribunal and shall in particular—
- (a) respond to any inquiry made by the Council, Appeals Board or Tribunal;
- (b) furnish the Council, Appeals Board or Tribunal with a report in respect of the question raised; and
- (c) provide any other information that the Council, Appeals Board or Tribunal may require in the performance of its functions under the Constitution, this Act or in any other written law.

Offences.

- 51.** (1) A person who—
- (a) obstructs, hinders or threatens a member, an officer, employee or agent of the Council, Appeals Board or Tribunal acting under this Act or disregards an order of a Tribunal or the Appeals Board;
 - (b) submits false or misleading information to the Council, Appeals Board or Tribunal; or
 - (c) makes a false representation to, or knowingly misleads a member, an officer, employee or agent of the Council, Appeals Board or Tribunal acting under this Act, commits an offence and shall be liable, on conviction, to a fine of not less than two hundred thousand shillings or to imprisonment for a term of not less than one year, or both.
- (2) Any person who violates or fails to comply with any provision of this Act for which no other penalty is provided, commits an offence, and shall be liable on conviction to a fine not exceeding Kenya shillings two hundred and fifty thousand or imprisonment for a term not exceeding six months, or both.

Regulations.

- 52.** (1) The Cabinet Secretary shall in consultation with the Council make regulations for the better carrying into effect of the provisions of this Act.
- (2) Regulations made under this Act may provide for—
- (a) the framework for appointment of the other members of the Council under section 5;
 - (b) rationalization, clustering or classification of Tribunals, including categorization of Tribunals in terms of specialization;
 - (c) decentralization of services of Tribunals, including their sitting anywhere in the country;
 - (d) terms of and conditions of service of staff;
 - (e) a framework for harmonization of standard procedures and rules for Tribunals;
 - (f) the minimum standards of justice to be observed by Tribunals;
 - (g) enhancement of access to justice and expeditious disposals of disputes;
 - (h) alternative dispute resolution mechanisms;
 - (i) power to conduct investigations;

- Act No. 11 of 1994
- (j) mechanisms that mandate the courts to send cases to a Tribunal at initial stages if the Tribunal has jurisdiction to entertain a certain matter and vice versa;
 - (k) reporting modalities made in consultation with the National Council for Law Reporting and ensuring accessibility of those reports to the public;
 - (l) management and administration of the Tribunals Fund;
 - (m) Code of Conduct and Ethics for Tribunals;
 - (n) appointment and procedures of *ad hoc* panels of experts; and
 - (o) standards of training for members and staff of the Council, Appeals Board and Tribunals.
- (3) Provisions of any regulations or rules made under this Act may—
- (a) apply generally or be limited in its application;
 - (b) apply differently according to different kinds and status of Tribunals;
 - (c) authorize any matter or thing to be done from time to time; or
 - (d) do any combination of (a), (b) and (c).

Act to prevail.

53. Where the provisions of any Act under which a Tribunal is established conflicts with this Act, the provisions of this Act shall prevail.

Extension of time.

- 54.** (1) Subject to subsection (2), the Cabinet Secretary may, on the recommendation of the Council, by notice in the Gazette, extend the period specified in respect of any matter under this Act by a period not exceeding twenty-one days.
- (2) Despite subsection (1), the Appeals Board or Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before the Appeals Board or Tribunal upon such terms and conditions, if any, as may appear just and expedient.

PART VII —TRANSITIONAL PROVISIONS

Tenure of members of Tribunals.

- 55.** (1) Subject to subsection (2), every person, who immediately before the commencement of this Act was a member of a Tribunal, shall remain in office for unexpired term or a period of eighteen months whichever is earlier.
- (2) The Cabinet Secretary may make regulations on the procedure to be followed with regard to pending cases or proceedings before Tribunals.

Transfer of staff.

- 56.** (1) Within a period of eighteen months from the commencement of this Act, the Council shall employ staff to the secretariats of Tribunals from amongst persons who, immediately before the commencement of this Act were public servants serving in Tribunals.
- (2) Despite subsection (1), the public servants shall upon the commencement of this Act, be given an option to elect whether to serve in the Council or to be redeployed to their respective ministries, departments or agencies.
- (3) Before appointing or employing a person to whom subsections (1) or (2) apply, the Council may —
- (a) require such person to make an application for employment or appointment to the Council; and
 - (b) using the criteria prescribed by the Council, determine the suitability of the person to ensure that the person is fit and proper to serve in the position applied for as a member of staff of the Council.
- (4) An applicant who fails to meet the suitability criteria under subsection (3) shall not be employed or appointed by the Council.

Disposal of assets.

- 57.** The Council may, where applicable, within a period of eighteen months from the date of commencement of this Act—
- (a) conduct an assessment of assets and liabilities of Tribunals;
 - (b) in consultation with the relevant ministries, departments or agencies dispose of the assets not required by the Tribunals in accordance with the law relating to procurement and disposal of public assets; and
 - (c) liquidate all debts of Tribunals, failing which liabilities are transferred to the respective ministry, department or agency.

Determination of pending matters.

- 58.** (1) Subject to subsection (2), proceedings awaiting hearing or determination before any Tribunal shall be completed within a period of eighteen months upon commencement of this Act.
- (2) A further extension of six (6) months may in exceptional circumstances, be granted by the Council in the event that proceedings before any Tribunal are not concluded within the eighteen months.

Existing laws.

- 59.** (1) Subject to Section 53, all law establishing Tribunals immediately in force on or before the commencement of this Act shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Act.
- (2) This section shall cease to apply upon alignment of the laws establishing Tribunals with this Act.

FIRST SCHEDULE (s. 9) — CONDUCT OF BUSINESS AND AFFAIRS OF THE COUNCIL

- | | |
|--|---|
| Meetings | 1. The Council shall meet as often as may be necessary for the dispatch of its business but there shall be at least four meetings of the Council in any financial year. |
| Election of vice-chairperson | 2. At the first meeting, the Council shall elect a vice-chairperson amongst their number who shall be a person of opposite gender to that of the chairperson. |
| Time and place of meetings | 3. A meeting of the Council shall be held on such date and at such time and place as the Council may determine. |
| Special meetings | 4. The chairperson shall, on the written application of one-third of the members, convene a special meeting of the Council. |
| Quorum | 5. The quorum for the conduct of business at a meeting of the Council shall be the chairperson or vice-chairperson and any four members. |
| Voting | 6. The chairperson shall preside at every meeting of the Council at which the chairperson shall be present and in the absence of the chairperson at a meeting, the vice-chairperson shall preside and in the absence of both the chairperson and the vice-chairperson, the members present shall elect one of their number who has, with respect to that meeting and the business transacted thereat, have all the powers of the chairperson. |
| Decisions of the Council | 7. Unless a unanimous decision is reached, a decision on any matter before the Council shall be by concurrence of a majority of all the members present and voting at the meeting. |
| Vacancy | 8. Subject to paragraph 5, no proceedings of the Council shall be invalid by reason only of a vacancy in its membership. |
| Signification of instruments and decisions of the Council. | 9. Unless otherwise provided by or under any law, all instruments made by and decisions of the Council shall be signified under the hand of the chairperson. |

SECOND SCHEDULE (s. 45) — RULES OF PROCEDURE OF TRIBUNALS

Tribunal Rules Committee to develop Rules.

1. The Tribunal Rules Committee may develop rules for Tribunals in the following areas —
 - (i) filing of cases;
 - (ii) the standards for minimum filing fees and other fees pro-rated in accordance with the value of the subject matter;
 - (iii) principles governing hearings;
 - (iv) evidentiary powers;
 - (v) parties;
 - (vi) representation;
 - (vii) costs;
 - (viii) appeals;
 - (ix) power to cure irregularities;
 - (x) correction of mistakes;
 - (xi) review of Tribunal decisions;
 - (xii) authorizing someone to take evidence;
 - (xiii) enforcement of decisions and orders;
 - (xiv) accessibility of evidence; or
 - (xv) any other area the Council considers necessary.

**THIRD SCHEDULE (s. 46) — OATH/AFFIRMATION OF THE OFFICES OF
CHAIRPERSON AND MEMBERS OF THE COUNCIL, APPEALS BOARD, TRIBUNAL AND
SECRETARY**

I..... having been appointed (the Chairperson/Member or Secretary) to the (Council/ Tribunals Appeals Board / Tribunal,) do swear/ solemnly affirm that I will at all times obey, respect and uphold the Constitution of Kenya and all other laws of the Republic; that I will faithfully, fully and impartially and to the best of my knowledge and ability, discharge the trust, perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, or prejudice. (SO HELP ME GOD).

Sworn/Declared by the said

Before me this day of

Chief Justice

MEMORANDUM OF OBJECTS AND REASONS

The principal objective of this Bill is to give effect to Articles 1(3) (c), 20 (4), 47 (3), 159 (1) and 169 of the Constitution in relation to the governance and administrative framework of Tribunals in Kenya. Pursuant to this objective, the Bill proposes to reform the Tribunal system in Kenya by *inter alia*, establishing the Council of Tribunals, providing for the structure membership and functions of the Council, establishment of the Tribunals Appeals Board and administration and functions of Tribunals. The Bill is divided into seven parts, namely: Preliminary, the Council of Tribunals, Establishment and Administration of Tribunals, Appeals Board, Financial Provisions, Miscellaneous Provisions and Transitional Provisions.

Part I on Preliminaries provides for the short title and commencement, interpretation of certain terms used, objects and purposes and application of the Act. Given the administrative arrangements required to operationalize the Act, the commencement date will be by Notice in the Gazette though the publication of the Notice must be done within six (6) months of assent. The application of the Act does not cover Tribunals established by the Constitution and arbitral tribunals set up under the Arbitration Act.

Part II on the Council of Tribunals provides for the establishment and composition of the Council which comprises the Chief Justice as Chairperson with the Attorney-General and Chief Registrar of the Judiciary and representatives of the Law Society of Kenya (LSK), Kenya Private Sector Alliance (KEPSA), National Council of Persons With Disabilities, the Youth and nominees of the Tribunals themselves will be the other members to be appointed by the President. The Council is the highest policy and decision making organ in the administration of Tribunals. Also canvassed extensively in this part are powers and functions of the Council which includes rationalization of the Tribunal regime in Kenya. The functions of the Council also include setting of standard operating procedures and development of policies to guide Tribunals. This part also creates the Office of Secretary and Chief Executive and Accounting Officer of the Council who sits therein as an ex-officio member. This part further seeks to create jurisprudence on decisions of the Tribunals by requiring the Council to have these reported by the National Council for Law Reporting.

Part III on Establishment and Administration of Tribunals provides for the procedure to be followed by the Executive, Parliament and the Council in establishing Tribunals. The procedures seek to include all arms of government in the establishment of Tribunals considering their quasi-judicial nature and also to ensure transparency in the process. The Part further provides for the procedure for the appointment of chairperson and members of Tribunals and the required qualifications for appointment. The appointment of members of Tribunals is a joint function between the respective Cabinet Secretaries and the Judicial Service Commission (JSC) which process creates the desired linkage with the Judiciary. Significantly, this part also seeks to ensure the professional independence and specialized expertise of Tribunals is maintained while recognizing their importance in the administration of justice. Of the staff to be seconded by the JSC to Tribunals, will be Deputy Registrars who will perform judicial functions of Tribunals which will also cement the requisite linkage with the Judiciary. Also recognized is the power of a Tribunal to review own decision and method of enforcing a decision of a Tribunal as that of a court of law.

Part IV on the Tribunals Appeals Board provides for its establishment, qualifications for appointment as chairperson and members. The members of the Appeals Board are appointed by the President on the recommendation of JSC. The part allows a person aggrieved by the decision of the Appeals Board a window for further appeal to the High Court but with leave of the Court. The decision of the High Court under this part will not be amenable to further review by any court of law.

Part V on Financial Provisions provides for the funds of the Council, the financial year of the Council, annual estimates, accounts and audit, annual report, bank accounts and the remuneration of chairperson and members of the Council, Appeals Board and Tribunals as may be determined on the advice of the Salaries and Remuneration Commission. This part also proposes the establishment of a Tribunals Fund by the Council as a future contingency measure.

Part VI on Miscellaneous Provisions provides for the establishment of the Tribunals Rules Committee which will be the technical arm of the Council to make rules for Tribunals on a number of areas identified in a Schedule. Other standard provisions are those relating to protection of members and staff from liability, prohibition of conflict of interest, confidentiality, a person's duty to cooperate in a matter in question before the Council, Appeals Board or Tribunal. Issues around offences, penalties and the power of the Cabinet Secretary and Council to make regulations are also contained here. For avoidance of doubt, this part provides that the provisions of this Act will prevail where there exists conflicts with other laws of matters of Tribunals.

Part VII on Transitional Provisions provides for the unexpired tenure of current members of Tribunals, transfer of staff, disposal of assets, determination of pending matters and the place of existing laws under which Tribunals are established.

The enactment of this Act will occasion additional expenditure of public funds.

Githu Muigai

Attorney-General

Dated.....2015

ANNEX 2

CONCEPT PAPER ON TRIBUNALS REFORM

I.0 PREAMBLE

This concept paper sets out guidelines for the Committee in the execution of its mandate with regards to Tribunals. It also seeks to consider Tribunals as enshrined under Article 169(1)(d) of the Constitution of Kenya 2010 and provide the Committee with the understanding the current status of Tribunals in Kenya, and whether there is need for reforms. This paper seeks to clarify the roles and responsibilities of Tribunals and the challenges. It also provides a comprehensive summary of best practises in other alternate jurisdictions.

Living in a period when Kenyans are striving to reform the Judiciary, among other institutions, it is paramount to ensure greater access to justice for majority of the citizens. Moreover, it is imperative that a thorough examination is conducted on how Tribunals have fared in resolving disputes either between citizens *inter se* or between citizens and government departments in Kenya.

Consequently, in evaluating the need to assess how Tribunals have discharged their critical mandate, the Hon. Attorney-General referred this task to the Kenya Law Reform Commission. The Commission was asked to form a Committee and propose recommendations among other things, the consideration of mergers among Tribunals.

In carrying out the above function, the established Committee will consider Tribunals in the following manner:

- i. the exercise of their original jurisdiction;
- ii. the number and nature of the existing decision making boards and Tribunals in Kenya;
- iii. conduct an administrative review of functions of the various Tribunals, ministerial and public officials and some of the courts; and among others;
- iv. enumerate various advantages of a generalised tribunal which would address structural deficiencies in the existing *ad hoc* system.

2.0 BACKGROUND

Tribunals normally address issues of administrative justice, which would otherwise end up for adjudication and resolution by the ordinary courts. To the extent that Tribunals are an important alternative forum to the regular courts for remedying citizens' grievances and addressing administrative justice issues.

Tribunals are now accepted as a fact of life. Virtually each new statute that Parliament enacts sets up a Tribunal of one type or another to consider applications for licences, to enforce professional and ethical standards and discipline, to adjudicate on disputes arising from administration or

application of the statute, etc. They enjoy obvious advantages over the regular courts, which make them quite appealing. To begin with, they are more accessible to a greater part of the population. Their proceedings are far much cheaper and speedier. They tend to apply simpler procedures, are less technical and have the ability to foster informal justice. More importantly, they have capacity to evolve specialisation and expertise in their field of jurisdiction.

These advantages notwithstanding, an examination of the various Tribunals existing in Kenya today will show an area mired in confusion and uncertainty. There exist many Tribunals each independent of the other, appointed and constituted differently, operating on different procedural rules and with different degrees of accountability. This raises fundamental questions whose answers must impact greatly on the ability of Tribunals to deliver justice to Kenyans.

Some of these questions include: Are our Tribunals part of the Government machinery, the Judiciary or are they independent adjudicatory bodies? How are members of the Tribunals appointed? What are their terms of service and how are they removed from office? How independent and impartial are our Tribunals? How accountable, transparent, competent are they? Why are the decisions of some Tribunals final whilst others are appealable to other Tribunals or the High Court? Why do different Tribunals have different rules of procedure, some adopting procedures akin to those of regular courts whilst others are quite informal? Why do some Tribunals expressly allow representation by counsel whilst others are silent on the issue? How does this dichotomy impact on the ability of Kenyans to access justice and to what extent does our present tribunal system ensure or guarantee equal justice for all Kenyans? Is the present state of affairs desirable or should we adopt common standards and procedures for all Tribunals?

These are some of the issues that led to the establishment of this Taskforce.

Tribunals: An Overview

Definition and Characteristics

The Committee on Administrative Tribunals and Enquiries (the Franks Committee) in Britain defined Tribunals as “machinery provided by Parliament for adjudication rather than as part of the machinery of administration”¹. The Franks Committee had been appointed in 1954 to address complaints about the operation of Tribunals in Britain. It reported in 1957 and among its key recommendations was that Tribunals were part of the adjudication machinery, which must operate independently of Government Departments. In this respect, the Committee observed:

“We consider that Tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned...and the intention of Parliament to provide for the independence of Tribunals is clear and unmistakable.”²

As part of the adjudication machinery, the Franks Committee further recommend that Tribunals must satisfy three fundamental principles of openness, fairness and impartiality:

¹ Cmnd 218/1957 Para 40

² Ibid.

“In the field of Tribunals, openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decisions; fairness to require the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require the freedom of Tribunals from influence, real or apparent, of Departments concerned with the subject-matter of their decisions”³.

There are many different types of Tribunals in Kenya, as in many other Commonwealth countries. They exercise administrative or quasi-judicial powers. Some, such as the Kenya Board of Mental Health are purely regulatory and advisory. Others such as the Rent Tribunals adjudicate disputes between citizens. Yet others like the Income Tax Tribunals hear disputes between citizens and public bodies. Some like the Medical Practitioners and Dentists Board register professional practitioners and exercise disciplinary control over them. Others, such as Liquor Licensing Tribunals have first instance jurisdiction to consider and approve applications for licences. Others such as the Agriculture Appeal Tribunal have only appellate jurisdiction from decisions of public officials or regulatory bodies.

Arising from the fundamental differences in Tribunals, the following have been identified as the general characteristics of Tribunals: - ⁴

- (i) they are statutory bodies;
- (ii) they are established to deal with particular types of cases or a number of closely related types of cases on a permanent basis as opposed to being set up for a one-off inquiry and do not have jurisdictions covering much wider range of subject matters like courts do;
- (iii) they are independent of the administration and decide cases before them impartially ;
- (iv) they reach binding decisions in the cases they hear;
- (v) their decisions are usually made by a panel or bench of members rather than by a single adjudicator;
- (vi) members often do not serve full-time and are not professional judges or even lawyers; and;
- (vii) they adopt a procedure similar to, but more flexible and simpler than a court of law.

3.0 RATIONALE FOR ESTABLISHMENT OF TRIBUNALS

One of the reasons put forward to explain the phenomenon growth and expansion of Tribunals is the great degree of regulation of economic and social activities witnessed in the welfare state. As virtually every sphere of economic and social life was regulated by statute or subsidiary legislation – landlord and tenant relationships, agricultural production, land use, delivery of professional services, urban planning, licensing of businesses, betting, gaming and gambling, etc- Tribunals became an ideal tool for addressing disputes and other issues that arose from the regulation. These included, for example, determination of who is qualified for specified licences, who is entitled to practice certain professions, the manner in which discretion is exercised in making those decisions, etc.

³ Ibid, Para 42

⁴ This list is borrowed from the New Zealand Law Commission, *Delivering Justice For All*, Report No 85, March 2004, P. 286

Even with the privatisation of much of the public sector, the importance and number of Tribunals have not diminished.

Advantages

The resilience of Tribunals is primarily attributable to their advantages over ordinary courts of law. Prof S A de Smith has enumerated the advantages of Tribunals in the following terms:-

“A tribunal may be preferred to an ordinary court because its members will have (or soon will acquire) specialised knowledge of the subject-matter, because it will be more informal in its trappings and procedure, because it may be better at finding facts, applying flexible standards and exercising discretionary powers, and because it may be cheaper, more accessible and more expeditious than the High Court. Occasionally dissatisfaction with the over-technical and allegedly unsympathetic approach of the Courts towards social welfare legislation has led to a transfer of their functions to special Tribunals...”⁵

The Franks Committee expressed itself in similar terms on the advantages of Tribunals. It noted as follows:-

“Tribunals have certain characteristics which often give them advantages over the courts. These are cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject. It is no doubt because of these advantages that Parliament once it has decided that certain decisions ought not to be made by normal executive or departmental process, often entrusts them to Tribunals rather than ordinary Courts”⁶.

Over and above the advantages noted above, Tribunals have additional advantages. Frequently the issues at stake may have adverse effects on a citizen, and yet be not justiciable in the strict legal sense. The aggrieved citizen may not have *locus standi* in the matter in the strict legal sense. The conduct that has aggrieved a citizen may not strictly speaking amount to a violation of the law, or no judicial remedies may be available. In all these instances where an aggrieved citizen may not obtain assistance from the regular courts, the Tribunals offer an appealing alternative.

4.0. PROBLEM STATEMENT AND CHALLENGES

It is generally agreed that in most Commonwealth states, the growth of Tribunals has not occurred in accordance “with any great theory of administration”. Instead, Tribunals have grown and continue to grow on *ad hoc* basis, to deal with specific problems in an area attracting regulation.

In Kenya the development of Tribunals has not been any different. Our Tribunals are set up on statute by statute basis without any common characteristics. On a conservative estimate, there are probably more than sixty Tribunals in existence in Kenya today.

An examination of some of these Tribunals discloses startling differences and variations. To begin with the nomenclature is inconsistent and compounding. Some are called “Tribunals”,⁷ others “Boards”,⁸

⁵ S A de Smith, *Judicial Review of Administrative Action*, 2nd ed (London, Stevens & Son Ltd, 1968) p 14

⁶ Cmnd 218/1957 Para 38

⁷ For example, the Agricultural Appeals Tribunal under S 193 Cap 318

⁸ For example, the Land Control Board under S 5 Cap 302

others “Commissions”,⁹ others “Committees”,¹⁰ others “Authorities”,¹¹ others “Bureaus”,¹² others “Councils”,¹³ etc. This inconsistency in names is not a mere aberration; it mirrors greater inconsistencies in more fundamental issues touching on Tribunals which would otherwise demand standardization and consistency.

The Tribunals are all set up by different statutes¹⁴. They are appointed and constituted differently. Some members of the same Tribunal are appointed by the President and the rest by the Cabinet Secretary¹⁵. In other Tribunals, all the members are appointed by the Cabinet Secretary¹⁶. The Cabinet Secretary appoints some members at his own discretion, others on the “advice” of, “consultation” with, or “nomination” by specified institutions. In yet other Tribunals the appointment is by different authorities such as the Chief Justice¹⁷. Some members of Tribunals are elected by specified organisations or sectors¹⁸. Members of different Tribunals enjoy different remuneration and terms of office. Members of some enjoy a measure of independence and security of tenure whilst others serve at the pleasure and discretion of the Cabinet Secretary¹⁹.

All these Tribunals exercise different powers. They operate on different procedural rules. Parties before some are allowed representation by Advocates whilst others are not. The decisions of some are final whilst those of others are appealable either to the Cabinet Secretary²⁰, to other Tribunals²¹, to subordinate courts²² or to the High Court²³. Even in those Tribunals where appeals are allowed to the High Court, some are allowed only on questions of law²⁴, others on both questions of law and fact. In some Tribunals, the decision of the High Court on appeal is final whilst in others further appeals to the Court of Appeal are allowed²⁵. The right of appeal is exercisable within different periods, some within 14 days²⁶, others within 28 days²⁷, others within 30 days²⁸, others within 60 days²⁹ and others within 90 days.³⁰

Amidst all this confused jungle of variations, we cannot possibly talk of equal justice before Tribunals, when some Tribunals operate as part of Government ministries and departments whilst others operate as independent quasi-judicial bodies, when some litigants have the advantage of counsel whilst other do not, when litigants before some Tribunals have the advantage of audience in an appellate Court, whilst others do not. This Committee seeks to consider the need to modernise procedures and practices designed to standardise Tribunals in Kenya.

⁹ For example, the Advocates Complaints Commission under S 53 Cap 16

¹⁰ For example, the Lands Disputes Appeals Committee under S 9 of the Land Disputes Tribunals Act

¹¹ For example, the Water Resources Authority under S 19 Cap 372

¹² For example, the Kenya Bureau of Standards under S 11 Cap 496

¹³ For example, the National Standards Council under Cap 496

¹⁴ See the list in the Annex

¹⁵ For example, the Transport Licensing Appeals Tribunal under S 19 Cap 404

¹⁶ See for example, the Hotels and Restaurants Appeals Tribunal under S 10 Cap 494

¹⁷ For example, the Auctioneers Licensing Board under S 3 of the Auctioneers Act

¹⁸ For example, the Tea Board of Kenya under 23 Cap 343

¹⁹ See S. 32(2), VAT Act, Cap 476 for an example of members who serve at the Cabinet Secretary's discretion

²⁰ See for example, the Radiation Protection Board under Cap 243

²¹ For example, the Kenya Sugar Board under the Sugar Act

²² See for example, the Roads Board under Cap 399

²³ See for example, the Pharmacy and Poisons Board under Cap 244

²⁴ For example, the Seeds and Plants Tribunal under Cap 326

²⁵ For example, the Advocates Disciplinary Committee under S 55 Cap 16

²⁶ For example, S.33(2) of the VAT Act, Cap 476

²⁷ S.19 Valuers Act, Cap 532

²⁸ For example, S 18 Survey Act, Cap 299

²⁹ S. 8(9) Land Disputes Tribunals Act, No 18 of 1990

³⁰ S. 33(1) Accountants Act Cap 531

5.0 CASE STUDIES ON THE CHALLENGES FACING EXISTING TRIBUNALS IN KENYA

The following examples illustrate the great variation and differences in Kenyan Tribunals.

(i) *The Teachers Service Appeal Tribunal*

This Tribunal is set up under the Teachers Service Commission Act³¹ to hear appeals from persons denied registration as teachers or deregistered from the register of teachers by the Teachers Service Commission. It is made up a Chairperson and between 2 and 4 other members³². All are appointed by the Cabinet Secretary without any consultation save for only one member who must be a registered teacher appointed in consultation with the organisation representing teachers.

The Secretary is a public officer appointed by the Cabinet Secretary. The Cabinet Secretary also enjoys the power to "appoint such other public officers to act as staff of the Tribunal as he may consider necessary"³³. The Tribunal has an assessor who is an advocate of not less than 5 years standing, appointed by the Tribunal with the approval of the Cabinet Secretary. The term of office is determined by the Cabinet Secretary but should not exceed three years, although it is renewable.³⁴ The Cabinet Secretary determines the suitability of a member to continue in office and is empowered to declared the office vacant.

The rules regulating the practice and procedure of the Tribunal are made by the Cabinet Secretary³⁵. Its proceedings are heard in private³⁶ and an appellant before the Tribunal may only be represented by an Advocate with the leave of the Tribunal³⁷. Its decisions are final and not subject to appeal³⁸.

A casual examination of this Tribunal raises serious doubts about its independence, openness and fairness. The Cabinet Secretary assumes over it such prominent powers that it operates more like a government department rather than an independent adjudicatory mechanism. For a body whose decisions are final, it is difficult to see why representation by an advocate should be at the discretion of the Tribunal or more importantly why its proceedings must be held in camera. It is difficult to hold that such a Tribunal, purely from the way it is constituted fulfils the fundamental principles of openness, fairness and impartiality.

(ii) *The Radiation Protection Board*

This Tribunal is set up under the Radiation Protection Act³⁹. Its functions are regulatory and advisory. More importantly, it also licenses dealers in irradiating devices or radioactive material⁴⁰. It is made up of a maximum of ten members. The chair is appointed by the Cabinet Secretary without any consultation or any stipulated qualifications. Four members are civil servants appointed by the Cabinet Secretary on the nomination of other ministries. One member is appointed by the Cabinet

³¹ Cap 212, S. 11

³² S. 11(2)

³³ Schedule 2 Reg 7

³⁴ Schedule 2 Reg 1

³⁵ S. 12 (1)

³⁶ Reg 2 of the Teachers Service Commission (Appeals Tribunal) Practice and Procedure) Rules

³⁷ Reg. 3

³⁸ S. 11(1)

³⁹ Cap 243 S. 4

⁴⁰ S 11

Secretary on nomination by the National Council for Science and Technology and a maximum of two members are appointed by the Cabinet Secretary on account of their special knowledge in the safe handling of radiation sources. Two others, the Director of Medical Services and the Chief Radiation Protection Officer are members by virtue of their offices in the civil service⁴¹.

Decisions of the Board refusing, suspending or cancelling grant or renewal of licences are appealable to the Cabinet Secretary within 30 days and his decision is final⁴². The Board is empowered to regulate its own procedure and no regulations have been made on the right to be heard before cancellation or suspension of the licence, the nature of the hearing and the right to representation by counsel.

Again, in this Board the overwhelming influence of the Cabinet Secretary is too plain to emphasise. He virtually appoints all the members of the Board, the great majority of whom are civil servants and hence an integral part of the government administration. The Cabinet Secretary's influence over the Board is completed when he has to hear appeals from decision of his appointees.

(iii) Value Added Tax Appeals Tribunal

Section 32(1) of the Value Added Tax Act⁴³ empowers the Cabinet Secretary, by order published in the Gazette to appoint an Appeals Tribunal for any area for purposes of hearing appeals from decisions of the Commissioner of Value Added Tax. The Tribunal is made up of a chairperson and not less than two and not more than five other members all appointed by the Cabinet Secretary. They hold office "for such period and upon such terms and conditions as the Cabinet Secretary may determine"⁴⁴. The Act does not stipulate their qualifications.

The Act specifically confers upon the Tribunal the powers of a subordinate court to summon witnesses, to take evidence upon oath or affirmation and to call for production of documents.⁴⁵ If it deems fit, it may take affidavit evidence and administer interrogatories and may call for evidence which would otherwise be inadmissible in law. Parties have an express right to legal representation⁴⁶ and the Tribunal is empowered to award costs in proceedings before it. There is a right of appeal to the High Court within 14 days of notification of the tribunal's decision.⁴⁷

Whilst in this Tribunal the influence of the Cabinet Secretary in appointment of the members is clear, nevertheless this is mitigated by the express recognition of the right to legal representation and a right of appeal to the High Court, which is not limited to questions of law only as is the case in some other Tribunals. Whilst the Tribunal enjoys powers akin to those of a court of law, it is surprising that there is no requirement that any of its members should have legal knowledge.

(iv) Transport Licensing Appeals Tribunal

Created by the Transport Licensing Act⁴⁸, this Tribunal hears appeals from Transport Licensing Boards mandated to license motor vehicles and ships for hire or reward, trade or business or carriage of goods and passengers. It is made up of the chairperson and four other members. The chair is

⁴¹ S. 5

⁴² S. 15

⁴³ Cap 476

⁴⁴ S. 32(2)

⁴⁵ S. 34(1)

⁴⁶ S. 34(6)

⁴⁷ S. 33(2). The right of appeal is however subject to conditions relating to depositing with the Commissioner half of the assessed tax

⁴⁸ Cap 404 S 19

appointed by the President whilst the other members are appointed by the Cabinet Secretary⁴⁹. The members hold office "for such term and under such conditions as the Cabinet Secretary may determine"⁵⁰.

An appeal has to be filed within 21 days from the date of the decision appealed against. The right of parties to be represented by advocates is expressly guaranteed and the decision of the Tribunal is final and conclusive⁵¹.

(v) District Roads Board

These bodies are created by the Public Roads and Roads of Access Act⁵² to hear applications for construction of roads of access and to consider cancellation or alteration of roads of access. The Board is made up of five members appointed by the Cabinet Secretary for a term not exceeding two years renewable. It uses employees of the civil service to discharge its duties. Appeals by aggrieved parties are heard by a Subordinate Court of 1st Class sitting with two assessors. The Act is silent on the qualification of members of the Board or the right to legal representation before it.

(vi) Tourism Appeals Board

This Board is set up under the Tourist Industry Licensing Act⁵³ to hear appeals by parties whose applications for licences are refused or whose licences are cancelled or varied. It is made up of three members, the Permanent Secretary of the Ministry as the chairperson and two other members appointed by the Cabinet Secretary, one of them having knowledge of the tourism industry. An aggrieved party has 14 days from the date of the decision to file a written statement of appeal. The Board considers and determines the appeal without hearing any of the parties⁵⁴, although it may call either party or witnesses if it considers it necessary.

Under this statute, the licensing officer responsible for issuance of licences is appointed by the Cabinet Secretary⁵⁵ and his decision is appealable to a Board composed exclusively of the Cabinet Secretary's appointees. Of greater concern is the value of an appeal where as a general rule, the tribunal is required not to hear any of the parties.

(vii) Agricultural Appeals Tribunal

This Tribunal is constituted slightly differently from the others and illustrates an attempt to standardise appeals from various Boards. It set up under the Agriculture Act⁵⁶ to hear appeals under that Act as well as from the Cotton Board of Kenya⁵⁷, the Kenya Dairy Board⁵⁸, the Pyrethrum Board of Kenya⁵⁹, the Coffee Board of Kenya⁶⁰, Tea Board of Kenya⁶¹, the National Irrigation Board⁶² and the

⁴⁹ S. 19(2)

⁵⁰ S.19 (3)

⁵¹ Reg. 35 of the Transport Licensing Regulations and S. 19(8) of the Act

⁵² S.3 Cap 399

⁵³ S. 9, Cap 381

⁵⁴ Reg. 8(2) of the Tourist Industry Licensing Regulations

⁵⁵ S. 7(1)

⁵⁶ Cap 318, S.193

⁵⁷ Cap 335, S.3

⁵⁸ Cap 336 S.4

⁵⁹ Cap 340, S.4

⁶⁰ Coffee Act No 9 of 2001 S.3

⁶¹ Cap 343, S.3

⁶² Cap 347, S.5

Pig Industry Board⁶³. The Tribunal is made up of three members, a chairman appointed by the Chief Justice, being an Advocate of not less than seven years standing and two members with knowledge or experience in agriculture appointed by the Cabinet Secretary. Before assuming their offices, the members are supposed to subscribe to an oath for due execution of office. Points of law are pronounced upon exclusively by the chairman who may state a case on a question of law for the opinion of the High Court. Otherwise the determination of the Tribunal is final and conclusive.

The Chairman with the approval of the Cabinet Secretary makes the rules of the Tribunal. In its proceedings the Tribunal is not bound by any rule of law on evidence save the rules made under the foregoing provision. Proceedings of the Tribunal take place in public.

For unfathomable reasons, appeals, where allowed under other statutes dealing with agricultural issues do not lie to the Agriculture Appeals Tribunal but to other separate Tribunals. Examples include appeals under the Seed Plants Varieties Act⁶⁴, Canning Crops Act⁶⁵, National Cereals and Produce Board Act⁶⁶, the Sisal Industry Act⁶⁷ and the Sugar Act⁶⁸.

(viii) The Auctioneers Licensing Board

This Tribunal is set up by the Auctioneers Act⁶⁹ and is charged with exercising general supervision and control of the business and practice of auctioneers. In particular the Tribunal is responsible for licensing and disciplining auctioneers. Apart from its members being appointed differently from other Tribunals, it has a very large membership – seventeen – emphasising the great variations in Tribunals in Kenya. The majority of the members are appointed by the Chief Justice with the Cabinet Secretary playing no role at all. The Tribunal is made up of a chairperson appointed by the Chief Justice from among persons qualified for appointment as judge of the High Court or Court of Appeal, a Chief Magistrate also appointed by the Chief Justice, one representative of each of the eight provinces appointed by the Chief Justice, the Permanent Secretary responsible for provincial administration, two advocates of at least ten years standing nominated by the Law Society of Kenya, two auctioneers of not less than five years standing nominated by the National Association of Auctioneers and Court Brokers, one nominee of the National Chamber of Commerce and Industry and one nominee of the Kenya Bankers Association⁷⁰. The Secretary is a public officer also appointed by the Chief Justice⁷¹.

The rules of procedure for the Tribunal are made by the Chief Justice⁷². The Tribunals' proceedings take place in public⁷³. The Act is silent on the right to legal representation but the Tribunal is supposed to maintain a record of its proceedings. A party aggrieved by a decision of the Tribunal has a right of appeal to the High Court within 30 days of notification of the decision. The decision of the High Court is final⁷⁴.

⁶³ Cap 361, S 3

64 Cap 326
65 Cap 327
66 Cap 338
67 Cap 341
68 Act No 10 of 2001
69 Act No 5 of 1996, S 3
70 S. 3(1)
71 S. 7
72 S. 30
73 Reg. 39 of the Auctioneers Rules, 1997
74 S. 25

6.0 Best practices to consider in the Reform of Tribunals in Kenya

The United Kingdom

We have already noted the work of the Franks Committee in the United Kingdom in the quest to reform Tribunals. As a result of the report of the Committee, various reforms were initiated to improve operations of Tribunals in UK.

Chief among these reforms was the enactment of the Tribunals and Inquiries Act, 1958. The Act created the Council on Tribunals as an advisory body with oversight over specified Tribunals and Inquiries. It was made up of lawyers and non lawyers, the latter being in the majority to ensure that “the guiding principles shall be the ordinary man’s sense of justice and fair play, freed so far as possible from legal technicality”⁷⁵. Its powers did not extend to appointing members of Tribunals but it was empowered to keep under review the constitution and working of the specified Tribunals and to report on any other question touching on Tribunals referred to it. It could make general recommendations on the membership of those Tribunals and more importantly, it had to be consulted before new procedural rules or regulations were made for the Tribunals. This was a big step towards standardization of Tribunals. Its annual reports are tabled in Parliament.

Another important change brought by the Act was the requirement that members of specified Tribunals be appointed by their ministries only from panels nominated by the Lord Chancellor and could not be terminated without the consent of the Lord Chancellor, who was constituted one of the Ministers responsible under the Act. The specified Tribunals became obligated to give reasons for their decisions if requested. In addition, the right of appeal to the High Court on points of law was guaranteed to the specified Tribunals and a power to bring other Tribunals under the Act by ministerial order was granted.

It has been noted that these reforms did go a long way in standardizing the work of Tribunals, they did not go as far as the Franks Committee had recommended. They did not for example allow appeals on questions of fact and merit, but restricted the right only to questions of law⁷⁶.

More recent steps have been taken in the United Kingdom to further reform Tribunals. In May 2000, the Lord Chancellor appointed a Committee under Sir Andrew Leggatt *inter alia* to review the delivery of justice through Tribunals to ensure that they are fair, timely, proportionate and effective arrangements for handling disputes and further that performance standards of Tribunals are coherent, consistent, public and with effective measures for monitoring and enforcing standards.

The Committee reported in March 2001 and made recommendations which sought to attain four main objectives. The first was to make the different Tribunals into one Tribunal System, the second to render Tribunals independent of their sponsoring ministries and departments through administration by one Tribunal Service, third to enhance the training of members of Tribunals and lastly to enable unrepresented users to participate effectively in the Tribunal proceedings⁷⁷.

New Zealand

Similar recommendations have been made in New Zealand for Reform of Tribunals. In its March 2004 Report entitled *Delivering Justice for All*, The New Zealand Law Commission made recommendations

⁷⁵ H W R Wade, *Administrative Law*, Oxford University Press, 5th ed P 797

⁷⁶ H W R Wade, *ibid*.

⁷⁷ The full Report of the Committee is found at <http://www.Tribunals-review.org.uk>

for a unified tribunal framework entailing the rationalisation and integration of Tribunals and their membership and processes.

The unified structure would have judicial leadership by being headed by a judge as President, with two legally qualified deputies. The system is expected to build up a core of experienced tribunal members who could sit in the various constituent Tribunals, with others possessing particular skills and expertise in specific areas. It recommended further that “future Tribunals should be established only in accordance with principle and in conformity with fixed guidelines” and save in exceptional cases new ones should be integrated in the unified structure.

To ensure independence, all Tribunals in the unified structure would be administered by the Ministry of Justice. Appeals from the unified Tribunals would go to a panel made up of the President or Deputy President, a member of the Tribunal in question and a member from another Tribunal. The appeal would be on matters of fact and/or law and a further appeal only by leave of the High Court on a matter of law only.

Western Australia

Western Australia, a state within the Commonwealth of Australia has also in recent years made far-reaching proposals for reform its Tribunal System⁷⁸. The basic reform proposal is the establishment of a general administrative Tribunal to be known as the State Administrative Tribunal.

In March 2001 the Attorney-General for Western Australia appointed a Committee to examine and develop a model of a civil and administrative tribunal for consideration by the Government. The Committee was specifically requested to consider the structure of the tribunal, its scope or jurisdiction and its relationship with the courts and other Tribunals separate from it.

The Committee submitted its report on the establishment of a State Administrative Tribunal in May 2002. It recommended among other things the establishment of a new State Administrative Tribunal to exercise original jurisdiction of many of the existing decision making boards and Tribunals and to assume the administrative review functions of the various Tribunals, ministerial and public officials and some of the courts. The Committee enumerated various advantages of a generalised tribunal which would address structural deficiencies in the existing *ad hoc* system. These included:

- (i) access by citizens to a single one-stop tribunal instead of a variety of existing Tribunals
- (ii) an easily identifiable point of contact for all citizens on review of administrative decisions instead of the existing plethora of boards, Tribunals, courts etc.
- (iii) easily available information to citizens on making of applications, hearings and reasons for decisions
- (iv) development of a more flexible and user-friendly system
- (v) availability of a wide range of experts and experienced members serving in various panels
- (vi) more effective and systematic recruitment and training of members of the Tribunal
- (vii) original decision making and administrative review decision making would be conducted on a more cost-effective basis
- (viii) administrative review functions would be easily assigned to an existing and experienced tribunal instead of creating an *ad hoc* review body.⁷⁹

⁷⁸ For a detailed historical examination of reform of Tribunals in Australia, see M L Barker and R L Simmonds, “Delivering Administrative Justice: The Role of Tribunals”, paper prepared for the Australasian Law Reform Agencies Conference, Wellington, New Zealand, 13-16 April 2004

On the structure of the Tribunal, the Committee recommended senior judicial leadership, with the President being a Supreme Court judge and two Deputy Presidents being District Court judges. The rest of the members were to have legal and other specified qualifications or experience so that the tribunal would have a membership of persons with judicial experience, general legal experience and special qualifications and experience relevant to the various areas of jurisdiction of the tribunal.

On powers, practice and procedure of the Tribunal, it was recommended that the Tribunal should be guided by the need to advance the interests of the people, the right of the people to know the reasons for decisions, speedy and correct resolution of matters and the duty to act fairly in all proceedings. Specifically it was recommended that the Tribunal:

- (i) should be bound by the rules of natural justice and procedural fairness;
- (ii) should be unfettered by rules of evidence, practice and procedure applicable to courts;
- (iii) should conduct and determine proceedings with little formality and technicalities and with promptness;
- (iv) should regulate its own procedure.

Conclusion

The inevitable conclusion is that Tribunals play a critical part in adjudication and resolution of disputes. They enjoy great advantages over regular courts of law which make them an important vehicle for delivering administrative justice. More importantly, due to their informality, simpler procedures and cheapness, Tribunals are better placed than regular courts to ensure that the majority of citizens access justice.

However in Kenya today Tribunals are incapable of delivering quality administrative justice to the people. The plethora of Tribunals is confusing and compounding even to the lawyer, let alone the ordinary Kenyan. Ironically, the whole justification of the Tribunal system is to enable citizens to access administrative justice easily, speedily, cheaply and fairly. The present system does not foster these core values of an administrative justice system. The Tribunals are constituted and operate as part of the administration whose decisions are normally called into question before them. They lack independence and impartiality. They enjoy wide discretion without adequate mechanisms for accountability, leading to great variations in decision making. So many fundamental differences defying rational justification exist between the Tribunals that the principle of equal access to justice is undermined.

A casual examination of developments in the United Kingdom, New Zealand and Australia shows concerted efforts being undertaken to address similar concerns with Tribunals. The recommendations are against the proliferation of *ad hoc* Tribunals and the creation of a unified tribunal framework. Perhaps it is time that we took a hard and deeper look at our Tribunals than this paper is able to do at present.

The Kenya Law Reform Commission and the established Committee purpose to undertake a thorough study of the Tribunal systems in Kenya with a view to making recommendations for reforming the same to ensure a measure of independence and impartiality, professionalism, standardisation, openness and efficiency.

* * *



APPENDIX

SOME OF THE TRIBUNALS IN KENYA

(*This list is not exhaustive)

	Tribunal	Act	Functions	Appointing Authority	Right of Appeal
1	Advocates Complaints Commission	Advocates Act, Cap 16, S.53	Inquires into complaints against Advocates	The President	No right of appeal
2	Advocates Disciplinary Committee	Advocates Act, Cap 16, S. 55	Exercises disciplinary powers over Advocates	Members are the AG, SG, or a person deputed by the AG, 6 members elected by the LSK and 3 other members, not being advocates appointed by the AG on the recommendation of the LSK.	Right of appeal to High Court with a further appeal to the Court of Appeal
3	Board of Review	Prisons Act, Cap 90, S. 48	Advisory	The President	No right of appeal
4	Teachers Service Appeals Tribunal	Teachers Service Commission Act, Cap 212 S. 11	Hears appeals from teachers denied registration or deregistered	The Cabinet Secretary	Decision is final
5	National Museums Board of Governors	National Museums Act, Cap 216, S.4	General Management and Development of Museums	The chair is appointed by the Cabinet Secretary upon consultation with the President. 6 other members are appointed by the Cabinet Secretary and 2 members represent Ministries	No right of appeal is provided
6	Radiation Protection Board	Radiation Protection Act, Cap 243, S.4	Advisory and licensing	All members are appointed by the Cabinet Secretary. 2 are members by virtue of the Public office they hold	Right of appeal to the Cabinet Secretary
7	Pharmacy and Poisons Board	Pharmacy and Poisons Act, Cap 244, S.3	Registration and discipline of pharmacists	All members are appointed by the Cabinet Secretary	Right of appeal to High Court

	Tribunal	Act	Functions	Appointing Authority	Right of Appeal
8	Kenya Board of Mental Health	Mental Health Act, Cap 248, S.4	Advisory and regulatory	All members are appointed by the Cabinet Secretary	No right of appeal
9	Medical Practitioners and Dentists Board	Medical Practitioners and Dentists Act, Cap 253, S.4	Registers Medical Practitioners and Dentists and exercises disciplinary jurisdiction over them	6 are appointed by the Cabinet Secretary, 5 are elected by practitioners and 3 are members by virtue of their offices	No right of appeal to the High Court
10	Rent Restriction Tribunals	Rent Restriction Act, Cap 296, S.4	Resolving disputes between landlords and tenants	All members are appointed by the Cabinet Secretary	Limited right of appeal to the High Court
11	Land Surveyors' Board	Survey Act, Cap 299, S. 7	Examines, registers, licenses and disciplines surveyors	7 are appointed by the Cabinet Secretary, 4 are elected by surveyors and 1 is a member by virtue of office	Right of appeal to the High Court on disciplinary matters
12	Business Premises Tribunal	Landlord and Tenant (Shops, Hotels & Catering Establishments Act), Cap 301, S.11	Resolves disputes between landlords and tenants	All members are appointed by the Cabinet Secretary	Right of appeal to the High Court from references only
13	Land Control Board	Land Control Act, Cap 302, S.5	Hears and sanctions transactions affecting agricultural land	All members are appointed by the Cabinet Secretary	Right of appeal to Provincial Land Control Appeals Board
14	Provincial Land Control Appeals Board	Land Control Act, Cap 302, S. 10	Hears appeals from Land Control Boards	All members are appointed by the Cabinet Secretary	Appeals to Central Land Control Appeals Board
15	Central Land Control Appeals Board	Land Control Act, Cap 302, S.12	Hears appeals from Provincial Land Control Appeals Board	Members are 5 Cabinet Secretaries and the AG by virtue of their offices	Decision final and conclusive
16	Gold Mines Development Loans Board	Gold Mines Development Loans Act, Cap 311, S.3	Considers applications for development loans by owners of gold mines	Two members are appointed by the Cabinet Secretary and two others are members by virtue of their offices	Right of appeal to Cabinet Secretary whose decision is final

	Tribunal	Act	Functions	Appointing Authority	Right of Appeal
17	Agricultural Appeals Tribunal	Agriculture Act, Cap 318, S.193	Hears appeals from the decision of the Cabinet Secretary under the Act making a land preservation order and from several other Boards established under different Acts	C J appoints the chair and the Cabinet Secretary appoints the other members	Decision final and conclusive save for the power to state a case on a question of law for the opinion of the High Court
18	The Seeds and Plants Tribunal	Seeds and Plant Varieties Act Cap 326, S.28	Hears appeals a decision of the Cabinet Secretary refusing to include or exempting a plant variety in the index of names of plant varieties, allowing or refusing to grant plant breeder's rights, cancelling such grant, allowing or refusing licences	All members are appointed by the Cabinet Secretary	Right of appeal to the High Court on points of law
19	Canning Crops Board	Canning Crops Act, Cap 328, S.4	Promotes the scheduled crops canning industry, licensing and inspecting canning industries, licensing growing and cultivation of scheduled crops, cancelling such licences etc	10 members are appointed by the Cabinet Secretary, the other is a member by virtue of office	Right of appeal to the Cabinet Secretary whose decision is final
20	Cotton Board of Kenya	Cotton Act, Cap 335, S.3	Promotes the cotton industry in Kenya and licenses and controls ginners and persons dealing with cotton	The President appoints the Chair, 5 are members by virtue of their offices, 4 are appointed by the Cabinet Secretary and 4 are elected by growers	Right of Appeal to the Agricultural Appeals Tribunal
21	Kenya Dairy Board	Dairy Industry Act Cap 336, S.4	Regulates production, marketing and distribution of dairy produce and registers primary producers	All the 12 members are appointed by the Cabinet Secretary	Right of Appeal to the Agricultural Appeals Tribunal

	Tribunal	Act	Functions	Appointing Authority	Right of Appeal
22	National Cereals and Produce Board	National Cereals and Produce Board Act, Cap 338, S.3	Regulates and controls marketing, distribution and supply of maize, wheat and specified agricultural produce, licenses and cancels the licences of millers	The President appoints the chair, 6 members are appointed by the Cabinet Secretary whilst 3 others are members by virtue of their offices	No right of appeal save in a dispute over grading of specified produce where the miller may appeal to the Cabinet Secretary
23	Pyrethrum Board of Kenya	Pyrethrum Act, Cap 340, S.4	Promotes the pyrethrum industry, licences pyrethrum growers and purchases, sorts, grades processes and sells pyrethrum	11 are appointed by the Minister whilst 3 others are members by virtue of their offices	Right of appeal against refusal of license to the Agricultural Appeals Tribunal
24	Sisal Board	Sisal Industry Act Cap 341, S.3	Promotes the advancement and welfare of the sisal industry, advises the Cabinet Secretary and conducts research, licenses sisal factories and registers sisal growers	The chair and 9 members are appointed by the Cabinet Secretary whilst 1 is a member by virtue of office	No right of appeal is provided
25	Coffee Board of Kenya	Coffee Act, No 9 of 2001, S.3	Promotes the production, processing and marketing of coffee and regulates the industry, registers and regulates growers, millers, marketers, parkers etc, licenses pulping stations, millers, exporters etc.	12 members are elected by various sectors whilst the remaining 3 are members by virtue of their offices	Right of appeal to the Agricultural Appeals Tribunal
26	Kenya Sugar Board	Sugar Act, No 10 of 2001, S.3	Regulates, develops and promotes the sugar industry, licenses sugar and jaggery mills and registers millers	12 members are elected by various sectors whilst the remaining 3 are members by virtue of their offices	Disputes are adjudicated by the Sugar Arbitration Tribunal
27	Sugar Arbitration Tribunal	Sugar Act, No 10 of 2001, S.31	Arbitrates disputes between parties under the Sugar Act	The members are appointed by the Cabinet Secretary in consultation with the AG	No right of appeal is provided

	Tribunal	Act	Functions	Appointing Authority	Right of Appeal
28	Tea Board of Kenya	Tea Act, Cap 343, S. 3	Promotes the tea industry, licenses tea factories, registers tea growers and dealers, regulates, controls and improves cultivation and processing of tea	13 members are elected or nominated by specified bodies whilst two are members by virtue of their offices	A party aggrieved by a decision of the Board to deny, suspend or cancel a licence or permit has a right of appeal to the Agricultural Appeals Tribunal
29	Pest Control Products Board	Pest Control Products Act, Cap 346, S.5	Assesses and evaluates pest control products, considers applications for registration of pest control products and advises the Cabinet Secretary	The President appoints the Chair, 10 members are appointed by various Cabinet Secretaries and 4 are members by virtue of their offices	A decision of the Board denying registration or suspending or revoking certificate of registration is appealable to the Cabinet Secretary whose decision is final
30	National Irrigation Board	Irrigation Act, Cap 347, S.3	Responsible for development, control and improvement of national irrigation schemes in Kenya, plans and co-ordinates settlement on irrigation schemes	The Cabinet Secretary appoints the Chair and 7 other members whilst 6 others are members by virtue of their offices	Right of appeal to the Agricultural Appeals Tribunal
31	The Pig Industry Board	The Pig Industry Act, Cap 361, S.3	Promotes and advances the pig industry, licenses butchers and bacon factories and advises the Cabinet Secretary on the industry	The Cabinet Secretary appoints the chair and 5 other members. Another is a member by virtue of office	Right of appeal to the Agricultural Appeals Tribunal
32	Water Resources Management Authority	Water Act, No 8 of 2002, S.7(1)	<i>Inter alia</i> develops principles, guidelines and procedures for allocation of water resources, monitors and reassess the national water reserve management strategy, receives and determines applications for permits for water use, cancels, varies or revokes permits, regulates and protects water resources	The chair is appointed by the President and the other ten members are appointed by the Cabinet Secretary	Appeals to the Water Appeals Board

	Tribunal	Act	Functions	Appointing Authority	Right of Appeal
33	Water Services Regulatory Board	Water Act, No 8 of 2002, S.46(1)	<i>Inter alia</i> licenses provision of water services, sets standards for water suppliers, regulates licensees, sets procedures for handling consumer complaints against licensees	The chair is appointed by the President while the other ten members are appointed by the Cabinet Secretary	Appeals to the Water Appeals Board
34	Water Service Boards	Water Act, No 8 of 2002, S.51	Responsible for the efficient and economical provision of water services authorised by a licence.	All members are appointed by the Cabinet Secretary	No right of appeal provided
35	Water Appeal Board	" S 84	Hears appeals by any holder of a proprietary right or licence affected by a decision of the Water Resources Management Authority, the Cabinet Secretary or the Water Services Regulatory Board concerning a permit or licence under the Act	The chair is appointed by the President on the recommendation of the Chief Justice, while other two members are appointed by the Cabinet Secretary	Decision is final though an appeal lies to the High Court on a matter of law
36	Wildlife Conservation and Management Service Appeals Tribunal	Wildlife (Conservation and Management) Act, Cap 376, S. 65	Hears appeals by parties aggrieved by refusal of grant or issue or cancellation or suspension of any licence or permit as well as appeals on compensation made or denied under the Act	All the members are appointed by the Cabinet Secretary	No right of appeal is provided
37	Tourist Appeal Board	Tourist Industry Licensing Act, Cap 381, S.9	Hears appeals by parties whose application for licence is refused or whose licence is cancelled or varied	The Cabinet Secretary appoints 2 members whilst the other is a member by virtue of office	No right of appeal is provided

	Tribunal	Act	Functions	Appointing Authority	Right of Appeal
38	Road Boards	Public Roads and Roads of Access Act, Cap 399, S.3	Hears applications for construction of roads of access and are empowered to cancel or alter the alignment of roads of access	The Cabinet Secretary appoints all the members	Appeals by aggrieved parties go to a subordinate Court of 1 st Class sitting with two assessors
39	Kenya Roads Board	Kenya Roads Board Act, No. 7 of 2000, S.4	Oversees the road network in Kenya and coordinates its development, rehabilitation and maintenance	The President appoints the chair, the Cabinet Secretary appoints 8 from nominees of specified organisations and five are members by virtue of their offices	No right of appeal is provided
40	Transport Licensing Appeal Tribunal	Transport Licensing Act, Cap 404, S.19	Hears appeals from Transport Licensing Boards which are empowered to license motor vehicles and ships for carriage of goods, passengers, hire or reward, trade or business	The President appoints the chair whilst the Cabinet Secretary appoints the other 4 members	Decision of the Tribunal is final and conclusive
41	State Corporations Appeals Tribunal	State Corporations Act, Cap 446, S.22	Hears appeals by persons aggrieved by surcharges or disallowance of accounts by the Inspector General, Corporations	The President appoints the chair and the Cabinet Secretary appoints two members	Right of further appeal to the High Court whose decision is final
42	Value Added Tax Appeals Tribunal	Value Added Tax Act, Cap 476, S. 32	Hears appeals from decisions of the Commissioner of Value Added Tax	All members are appointed by the Cabinet Secretary	Right of appeal to the High Court
43	Capital Markets Tribunal	Capital Markets Authority Act, Cap 485, S. 35	Hears appeals by any person aggrieved by a decision of the Authority refusing a licence, imposing restrictions on a licence, suspending trading of a security on a securities exchange, etc.	All members are appointed by the Cabinet Secretary	No right of further appeal is provided

	Tribunal	Act	Functions	Appointing Authority	Right of Appeal
44	Insurance Appeals Tribunal	Insurance Act, Cap 487, S. 169	Hears appeals under the Insurance Act and from decisions of the Commissioner of Insurance	All members are appointed by the Cabinet Secretary	Right of appeal on issues of law to the High Court
45	Co-operatives Tribunal	Co-operative Societies Act, Cap 490 as amended by Act No 2 of 2004	Hears disputes concerning the business of a Co-operative Society	3 members are appointed by the Cabinet Secretary on nomination, 1 on discretion and 3 on consultation	Right of appeal to the High Court whose decision is final
46	Hotels and Restaurants Appeals Tribunal	Hotels and Restaurants Act, Cap 494, S.10	Hears appeals by parties aggrieved by decisions of the Hotels and Restaurants Authority refusing a licence, attaching any conditions on a licence or suspending or cancelling a licence	All members are appointed by the Cabinet Secretary	No right of appeal provided
47	Kenya Bureau of Standards	Standards Act, Cap 496, S.11	Promotes standardization in industry and commerce	Members are appointed by the National Standards Council, itself appointed by the Cabinet Secretary	Appeals to the Cabinet Secretary
48	Restrictive Trade Practices Tribunal	Restrictive Trade Practices, Monopolies and Price Controls Act, Cap 504, S.20	Hears appeals by persons aggrieved by an order by the Cabinet Secretary requiring them to desist from committing a restrictive trade practice	All the members are appointed by the Cabinet Secretary	Further right of appeal to the High Court, whose decision is final
49	Board of Registration of Architects and Quantity Surveyors	Architects and Quantity Surveyors Act, Cap 525, S.4	Registers architects and quantity surveyors and exercises disciplinary jurisdiction over them	The chair and 3 members are appointed by the Cabinet Secretary whilst 4 others are nominated by the professional association and approved by the Cabinet Secretary	A person aggrieved by a decision of the Board has a right of appeal to the High Court

	Tribunal	Act	Functions	Appointing Authority	Right of Appeal
50	Auctioneers Licensing Board	Auctioneers Act, 1996, S.3	Exercises general supervision and control of the business and practice of auctioneers	The chair and 9 members are appointed by the CJ, one is a member by virtue of office and 6 are nominated by specified bodies	A person aggrieved by the decision of the Board has a right of appeal to the High Court whose decision is final
51	Engineers Registration Board	Engineers Registration Act, Cap 530, S.3	Registers engineers and exercises disciplinary jurisdiction over them	4 members are appointed by the Cabinet Secretary and 3 others by the professional association	A person aggrieved by a decision of the Board has a right of appeal to the High Court
52	Registration of Accountants Board	Accountants Act, Cap 531, S.11	Registers accountants and exercises disciplinary jurisdiction over them	All the members are appointed by the Cabinet Secretary	A person aggrieved by a decision of the Board has a right of appeal to the High Court
53	Valuers Registration Board	Valuers Act, Cap 532, S 3	Registers valuers and exercises disciplinary jurisdiction over them	All the members are appointed by the Cabinet Secretary	A person aggrieved by a decision of the Board has a right of appeal to the High Court
54	Estate Agents Registration Board	Estate Agents Act, Cap 533, S.3	Registers estate agents and exercises disciplinary jurisdiction over them	All the members are appointed by the Cabinet Secretary	A person aggrieved by a decision of the Board has a right of appeal to the High Court
55	Registration of Certified Public Secretaries Board	Certified Public Secretaries of Kenya Act, Cap 534, S.11	Registers Certified Public Secretaries and exercises disciplinary jurisdiction over them	All the members are appointed by the Cabinet Secretary	A person aggrieved by a decision of the Board has a right of appeal to the High Court
56	Electricity Regulatory Board	Electric Power Act, No. 11 of 1997	Regulates the generation, transmission and distribution of electric power in Kenya and considers applications for licences under the Act and makes recommendations to the Cabinet Secretary	The President appoints the chair whilst the Cabinet Secretary appoints the other 5 members	Appeals go to the Cabinet Secretary with a further appeal to the High Court. Where the appellant is the Government, appeals go to the High Court

	Tribunal	Act	Functions	Appointing Authority	Right of Appeal
57	Land Disputes Tribunals	Land Disputes Tribunals Act, No 18 of 1990	Hears disputes of a civil nature regarding division of land, determination of boundaries, claims to occupy or work land and trespass to land	The Cabinet Secretary appoints a panel of elders from which the District Commissioner selects the chair and 2 or 4 elders to constitute a Tribunal	Right of appeal to the Land Disputes Appeals Committee whose decision is final, unless on an issue of law, where a further appeal to the High Court lies
58	Land Disputes Appeals Committee	Land Disputes Tribunals Act, S.9	Hears appeals from decisions of Land Disputes Tribunals	The chair is appointed by the Provincial Commissioner from a panel appointed by the Cabinet Secretary. The Cabinet Secretary appoints the other 5 members	Decision is final save on an issue of law where an appeal lies to the High Court
59	Non Governmental Organizations Co-ordination Board	Non Governmental Organizations Co-ordination Act, No 19 of 1990	Registers, co-ordinates and regulates activities of NGOs	The President appoints the chair, the Cabinet Secretary appoints 7 members at his discretion and 5 on recommendation whilst the other 6 are members by virtue of their offices	An NGO aggrieved by a decision of the Board to deregister it has a right of appeal to the Cabinet Secretary whose decision is final
60	National Environment Tribunal	Environmental management and Co-ordination Act, No 8 of 1999, S.125	Hears appeals by parties aggrieved by refusal of a licence, imposition of conditions, revocation, suspension or variation of licence or imposition of an environmental restoration or improvement order	The chair is nominated by the Judicial Service Committee, one member is nominated by the Law Society of Kenya and 3 others are appointed by the Minister	Right of appeal to the High Court whose decision is final

ANNEX 3

SCHEDULE OF COMMITTEE MEETINGS

DATE	VENUE	AGENDA	OUTCOME
30 th July 2014	KLRC Board room, 3 rd Floor	<ul style="list-style-type: none"> ▪ Setting the Agenda, ▪ Deliberations on the interpretation of Article 169 (1) (d) of the Constitution ▪ Development of terms of reference 	<ul style="list-style-type: none"> ▪ Terms of reference developed
28 th October 2014		<ul style="list-style-type: none"> ▪ Review of the concept note ▪ Review of the terms of reference, work plan and budget ▪ Formation of committees 	<ul style="list-style-type: none"> ▪ Adoption of the concept note ▪ Development of a work plan ▪ Adoption of a one year time frame
28 th November 2014		<ul style="list-style-type: none"> ▪ Discussion and adoption of the issues to be tackled by the task force ▪ Formation of sub-committees 	<ul style="list-style-type: none"> ▪ Formation of the technical subcommittee and the budget committee
22 nd January 2015		<ul style="list-style-type: none"> ▪ Reports from the subcommittees ▪ Consultations with tribunals and other stakeholders 	<ul style="list-style-type: none"> ▪ It was agreed that a one day consultative meeting with stakeholders will be held in Nairobi
17 th February 2015	Hilton Hotel	<ul style="list-style-type: none"> ▪ Consultative forum with Tribunals and other stakeholders on the review for the establishment of Tribunals in Kenya 	<ul style="list-style-type: none"> ▪ Receipt of views from Tribunals
20 th April 2015	KLRC	<ul style="list-style-type: none"> ▪ Mandate of the committee ▪ Constitutional meanings of Tribunals ▪ Legislative construction 	<ul style="list-style-type: none"> ▪ Clarification of the meaning of Tribunals ▪ Adoption of the proposed legislative framework

DATE	VENUE	AGENDA	OUTCOME
27 th April 2015		<ul style="list-style-type: none"> ▪ Challenges affecting Tribunals ▪ Mechanisms to address the challenges 	<ul style="list-style-type: none"> ▪ Identification of the main challenges affecting Tribunals ▪ Proposal to develop the Tribunals Bill
29 th April 2015	KLRC	<ul style="list-style-type: none"> ▪ Deliberations on how to address appeals from Tribunal decisions ▪ Proposed relationship between parent Ministries, Judiciary and Tribunals 	<ul style="list-style-type: none"> ▪ Establishment of a link between Tribunals and parent Ministries, Judiciary and Tribunals
10 th June 2015	KLRC	<ul style="list-style-type: none"> ▪ Adoption of the technical sub-committee report ▪ Report on the status of funding ▪ Memorandum to Tribunals seeking their views (public participation) ▪ Preparation for the drafting retreat scheduled for 28th June 2015- 2nd July 2015 	<ul style="list-style-type: none"> ▪ The report of the technical sub-committee was adopted with modification ▪ Part funding for the committees activities by IDLO is confirmed
28 th June 2015- 2 nd July 2015	Sarova Lion Hill Lodge, Nakuru	<ul style="list-style-type: none"> ▪ Development of the 1st Draft of the Tribunals Bill 	<ul style="list-style-type: none"> ▪ 1st Draft of the Tribunals Bill ▪ Report
8 th - 12 th September 2015	Great Rift Hotel, Naivasha	<ul style="list-style-type: none"> ▪ Development of the 2nd Draft of the Tribunals Bill 	<ul style="list-style-type: none"> ▪ 2nd Draft of the Tribunals Bill ▪ Report
14 th October 2015	Sarova Panafric Hotel	<ul style="list-style-type: none"> ▪ Stakeholder consultation forum 	<ul style="list-style-type: none"> ▪ Incorporation of stakeholders views into the Bill
15 th October 2015	Sarova Panafric Hotel	<ul style="list-style-type: none"> ▪ Stakeholder consultation forum 	<ul style="list-style-type: none"> ▪ Incorporation of stakeholders views into the Bill
21 st -24 th October 2015	Mt. Kenya Safari Club	<ul style="list-style-type: none"> ▪ Development of the 3rd draft of the Tribunals Bill 	<ul style="list-style-type: none"> ▪ 3rd draft Tribunals Bill ▪ Report
6 th November 2015	KICC	<ul style="list-style-type: none"> ▪ Validation workshop 	<ul style="list-style-type: none"> ▪ Final draft of the Bill



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