THE CHANGING CHARACTER OF JUDICIAL REVIEW JURISDICTION UNDER THE CONSTITUTIONAL AND STATUTORY ORDER IN KENYA

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Abstract

On August 27, 2010, the people of Kenya adopted, enacted and gave a constitution to themselves and to their future generations. The said Constitution came with certain guarantees for the people of Kenya. It was, further, fully fitted with a raft of legislations that parliament was expected to enact within specified timeframes to supply derivative principles and guidelines to the principles spelt out in the Constitution.

Self-evidently, a lot has happened in the institutional and normative aspects of the legal order in Kenya following the promulgation of the Constitution of Kenya, 2010. It is necessary for legal practitioners, judicial officers, legal academics, law students and even the general public to be acquainted with and reflect upon these changes in the legal system for a number of reasons. There is need for reflection on the content of the changes of rules of themselves for the sake of knowledge. The purpose of this reflection is to minimize the incidence and degree of ignorance on the rules. There is also the need for reflection on the constitutionality of these rules. There is need to understand the impact of these changes on jurisdiction of various courts, tribunals and quasi-judicial bodies tasked with interpretation and enforcement of the various provisions of these rules. There is need for reflection on this rule for purposes of enhancing reform discourses, that is, whether there is need for further reform and if so, the probable content of this reform. The above least is not, in any event, exhaustive.

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Before the enactment of the Constitution of Kenya, 2010, there appeared to be a clear divide between public law and private law. Judicial review of administrative actions was a remedial appendage to the large body of public law known as administrative law. The jurisdiction to entertain applications for judicial review remedies was vested in the High Court. The remedies in the judicial review stream of the High Court of Kenya were three, namely; certiorari, prohibition and mandamus. The grounds upon which one could base an application for judicial review were of common law origin. The practice of the courts exercising judicial review powers was largely borrowed from the United Kingdom and order 53 of the Civil Procedure Rules. The question is what has happened in this arena of law following the promulgation of the Constitution of Kenya 2010 and the body of laws and rules arising out of the Constitution of Kenya, 2010? It is this question that this paper seeks to answer.
**Introduction**

Are remedies in the nature of Judicial Review in Kenya available as against public officials and entities or are they remedies as against private persons and entities? Further still, could they possibly be remedies as against both public entities and private entities? What exactly are the specific remedies available in the judicial review stream of the jurisdiction of Kenyan courts? On what grounds may one found an application for judicial review in Kenya? Is there still a distinction between judicial review remedies as hitherto understood being the remedial appendage of administrative law on the one hand and constitutional remedies on the other hand in Kenya’s legal system today? Have the courts been consistent in their answers to these questions? These are the questions that this article desires to respond to by way of an academic inquiry.

**Legal Basis for Judicial Review of Administrative actions in Kenya**

Prior to the promulgation of the Constitution of Kenya, 2010, there was a two-tier legal basis for judicial review jurisdiction of the Kenyan courts. The two critical references in search for answers to this question were Sections 8 and 9 of the Law Reform Act which constituted the substantive basis for judicial review of administrative actions on the one hand, and, order 53 of the Civil Procedure Rules which was the procedural basis of judicial review of administrative actions on the other hand.

The promulgation of the Constitution of Kenya, 2010 and the legal developments thereafter have brought into focus other legal bases of jurisdiction for judicial review of administrative actions in Kenya. A legal practitioner, judicial officer, student or other researcher in the realm of judicial review as a remedial stream of our courts has to take all this into account for completeness sake.
Constitutional Basis for Judicial Review of Administrative Actions in Kenya

There is a direct and indirect relationship between judicial review as a facet of the jurisdiction of courts, on the one hand, and constitutional law. Michael Fordham has opined that “judicial review is the court’s way of enforcing the rule of law: ensuring that public authorities’ functions are undertaken according to law and that they are accountable to law. Ensuring, in other words that public bodies are not ‘above the law’”\textsuperscript{4}. It is, therefore, arguable that the constitutional stipulations for the rule of law provide an important foundation of an administrative law remedy of judicial review. In this article, this is what is regarded an indirect relationship between the constitution and judicial review of administrative actions.

On the other hand, there are circumstances where the remedies of judicial review, the jurisdiction for the grant of the remedy of judicial review as well as the recognized grounds for judicial review are expressly provided for in the constitution. This article regards this latter stipulations as constituting the direct relationship between the constitution and the remedy of judicial review of administrative actions.

The preamble to the constitution of Kenya 2010 indicates that the said constitution was founded on recognition of “the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy social justice and the rule of law (emphasis added).

The national values of principles of governance in Article 10 of the Constitution of Kenya, 2010 provide the overarching values that bind “all state organs, state offices, public officers and all persons” whenever any of them:

(a) Applies or interprets the constitution;

(b) Enacts, applies or interprets any law;
(c) Makes of implements public policy decisions.

Among the national values and principles of governance is the rule of law. The constitution of Kenya also provides the manner of its interpretation which includes advancement of the rule of law.\(^5\)

To the extent that judicial review is ‘the rule of law in motion’, the foregoing provisions of the Constitution provide an indirect relationship between the supreme law and judicial review of administrative actions.

There are also instances of direct recognition of judicial review remedies, jurisdiction and grounds in the body of the Constitution. Article 23 of the Constitution is the remedial appendance to article 22 of the Constitution. Article 22 vests courts with jurisdiction for enforcement of fundamental rights and freedoms set out in or recognized by the Bill of Rights. Among the reliefs available in proceedings for enforcement of fundamental rights and freedoms is an order of judicial review.

Article 47 of the constitution codifies every person’s right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.\(^6\) Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.\(^7\) Each of these prescriptions fit the recognized grounds for judicial review of administrative actions.

Article 165 of the Constitution establishes and vests jurisdiction in the High Court. Part of the jurisdiction vested in the High Court is: “supervisory jurisdiction over the subordinate courts and over any person, body or authority

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\(^7\) Article 47(2) of the Constitution of Kenya, 2010.
exercising a judicial or quasi-judicial function ...” There is explicit judicial review content in this normative prescription of jurisdiction.

Similarly, Article 89(10) of the Constitution entitled any person to apply to the High Court for review of a decision of the Independent Electoral and Boundaries Commission made under the Article. This is in relation to the Commission’s exercise of its power of delimitation of electoral boundaries. This position is bolstered by the decision of the Court of Appeal in the case of Ex-Chef Peter Odoyo Ogada & Others v Independent Electoral and Boundaries Commission & 14 Others,

Seen in the context of boundaries delimitation, the High Court had the power to look back on what IEBC had done regarding the boundaries of these 2 constituencies. The course taken by the IEBC via public and consultative meetings, the representations made whether orally or by memoranda in respect of historical, geographical, economical, cultural, logistic and such other aspects the IEBC took to arrive at its decision, appreciating that it alone had the resources, time, expertise and the mandate to decide and give the names of the 2 electoral areas. And if an error, fault or omission was found by the court in the whole process, then it could render an order that the decision was faulty and therefore not in accord with the mandate given to IEBC under Article 89. Alternatively, the High Court could as well find no merit in the application to review and say so by dismissing the matter. If a fault was found by the High Court and we have already said that it did not so find in its judgment, then the correct course to take was so to advise the IEBC and direct it to go back and do the exercise afresh or take such other action as directed by the court.

Our reading of Article 89 does not yield or point to authority or jurisdiction of the High Court, while exercising the power of review under that Article to substitute the decision of the IEBC with its own. With due respect to the High Court, we hold that it was in error to substitute its own opinion, as a decision to supplant the decision of the IEBC, which had been lawfully and procedurally arrived at following the public hearings, consideration and adoption by Parliament, all the way to the publication in the Gazette. All that lies within the province of IEBC and no other organ. It has been given that mandate by the Constitution as other organs like the High Court has been given under Article 165, except that the High Court has also been given the power to review a decision of the IEBC. That power of review, according to us, is limited to the prayers in the application under Article 89 (10), if the applicants demonstrate that indeed a fault featured in the manner IEBC went about delimiting electoral boundaries. And as we have stated earlier, in the event the High Court should

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8Court of Appeal at Nairobi, Civil Appeal No. 307 of 2012 [2013]eKLR
so find, it should direct the IEBC to go back and do the correct and proper thing.

The question that we grapple with in the face of these provisions is whether judicial review of administrative actions is a constitutional law remedy or an administrative law remedy.

There is an inconclusive piece of jurisprudence on this question in the case of **Masai Mara (SOPA) Limited Vs Narok County Government**,9

54. **On the issue of the application of Order 53 of the Civil Procedure Rules to a constitutional petition where a party seeks judicial review reliefs, I must hasten to point out that since the promulgation of the Constitution in 2010, administrative law actions and remedies were also subsumed in the Constitution. This can be seen in the eyes of Article 47 which forms part of the Bill of Rights.** It is safe to state that there is now substantive constitutional judicial review when one reads Article 47 as to the right to fair administrative action alongside Article 23(3) which confers jurisdiction, on the court hearing an application for redress of a denial or violation of a right or freedom in the Bill of rights, to grant by way of relief an order for judicial review.

55. **Order 53 of the Civil Procedure Rules do not consequently apply to Constitutional Petitions where the court is expected to exercise a special jurisdiction which emanates from the Constitution and not a statute.**

56. I consequently decline to accede to the Respondent’s contention that the Petitioner ought to be denied the reliefs sought on the basis that the Petition was filed more than six months after the action complained of took place.

We refer to this jurisprudence as inconclusive for a number of reasons. First is its silence on a number of aspects of judicial review jurisdiction in Kenya. Whereas it focuses on constitutional provisions on judicial review of administrative actions, it is totally silent on a myriad of statutory provisions on the same branches of law. Second is the decision’s internal contradictions. The most manifest contradiction is where the decision makes a conclusion that the entire body of administrative law and judicial review remedies were subsumed in the constitution by instrument of articles 23 and 47 of the Constitution. The court, in the same decision appears to suggest that this incorporating of administrative law and judicial review remedies is limited to situations of

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9Nairobi High Court Petition Number 336 of 2015
“Article 47 as to the right to fair administrative action alongside Article 23(3) which confers jurisdiction, on the court hearing an application for redress of a denial or violation of a right or freedom in the Bill of rights, to grant by way of relief an order for judicial review.” This latter point is made even more poignant when the judge limits the inapplicability of Order 53 of the Civil Procedure Rules to constitutional Petitions where the court is expected to exercise a special jurisdiction which emanates from the Constitution and not a statute. Effectively, this leave Order 53 applicable to causes commenced otherwise than by way of Petitions and which seek administrative law remedies in the nature of judicial review. If this is so, it would be hard to justify the contention that the entire body of administrative law and its remedial appendages were subsumed under constitutional law by the promulgation of the Constitution of Kenya, 2010.

The Statutory Basis of Judicial Review Remedies in Kenya
There are a number of statutes in Kenya that make provision for judicial review of administrative actions.

Article 47(3) of the Constitution enjoins Parliament to enact legislation to give effect to rights in clause(1). The rights in clause one are covered under the rubric right to fair administrative action. The said right is internally defined by the provision to entail administrative action that is has the following attributes: expeditious, efficient, lawful, reasonable and procedurally fair.

Clause (3) of Article 47 of the Constitution sets out the normative content that the intended legislation had to cover, namely;

(a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
(b) Promote efficient administration.

The Fair Administrative Action Act, 2015
The Fair Administrative Action Act, 2015 is a statute that was enacted “to give effect to Article 47 of the Constitution, and for connected purposes”\(^{10}\). The said statute defines “administrative action” to include

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relate

By stating that this definition is inclusive, it necessarily means that the elements of what constitutes administrative action are not exclusively the listed ones.

There is a detailed discussion of this statute and its normative content in the themes that follow below.

**The Law Reform Act**

It is curious that although the Law Reform Act at Sections 8 and 9 was undisputedly the substantive basis for Judicial Review of Administrative Actions in Kenya as at the time of enactment of the Fair Administrative Actions Act, 2015, the said statute was not mentioned by name at all in the transitional and consequential provisions of the latter law. However, there is provision in the Transition provisions of the Fair Administrative Actions Act that:

(1)In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of the coming into force of this Act, the provisions of this Act shall apply, but without prejudice to the validity of anything previously done. (2) Despite subsection (1)(a) if, and in so far as it is impracticable in any proceedings to apply the provisions of this Act, the practice and procedure obtaining before the enactment of this Act shall be followed\(^{11}\)

\(^{10}\)Long title to the Fair Administrative Action Act, 2015.

\(^{11}\)Section 14 of the Fair Administrative Action Act, 2015.
It is arguable that by subject all pending proceedings to the new statute, the law had impliedly repealed the pending action save only to unforeseen circumstances where “it is impracticable in any proceedings to apply the provisions” of the latter Act. Even in this limited set of circumstances, what was saved was “the practice and procedure obtaining before the enactment” of the latter Act, and not the substantive law. It may, therefore, be argued that Section 8 and 9 of the Law Reform Act continue to subsist in our statute books for the limited purposes of awaiting a formal repeal.

**Order 53 of the Civil Procedure Rules**

As indicated above, in the legal regime predating the coming into operation of the Constitution of Kenya, 2010 and its consequential legislation, the procedural regime governing Judicial Review of Administrative Actions was Order 53 of the Law Reform Act. This regime of law is still in force because, as a piece of procedural law, no rules expressly or impliedly repealing it have been promulgated. There, however, would appear to be a clear statutory intention to repeal and replace these rules. Order 53 of the Civil Procedure Rules was made by the Rules Committee established under Section 81 of the Civil Procedure Act. The clear intention of the Fair Administrative Action Act, 2015 is to have a regime of rules made by the Chief Justice governing judicial review of administrative actions. It provides:

> The Chief Justice may make rules of practice for regulating the procedure and practice in matters relating to judicial review of administrative action\(^\text{12}\)

This statutory pointer indicates a clear statutory intention to have a regime of procedure governing judicial review of administrative action that is distinct and independent of the existing procedural provisions on constitutional litigation of fundamental rights and freedoms and which provides for fair administrative action rights and judicial review remedies in constitutional litigation.

- **Commission on Administrative Justice Act, 2011**

\(^{12}\) Section 10(2) of the Fair Administrative Action Act, 2015.
The Common Law Basis of Judicial Review of Administrative Action in Kenya

Judicial Review – A remedy against public entities or both public and private entities?
Wade and Forsyth have advanced what they describe as the two approximations to a definition of administrative law. First, they look at administrative law as the law relating to the control of governmental power. Second, they define administrative law as the body of general principles which govern the exercise of powers and duties by public authorities.13 There is an inbuilt public law character from this definition of administrative law. To the extent that judicial review of administrative actions is the remedial appendance to administrative law, it too would have a trait of public law.

Michael Fordham regards judicial review as the rule of law in action and a central control mechanism of administrative law (public law) by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities.14

Who is subject to jurisdiction for judicial review of administrative actions? Has the Fair Administrative Action Act, 2015 brought private entities into the purview of Judicial Review?

3. Application. (1) This Act applies to all state and non-state agencies, including any person (a) exercising administrative authority; (b) performing a judicial or quasi-judicial function under the Constitution or any written law; or (c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

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Legal Basis for Judicial Review

Pre-2010 position
Sections 8 and 9 of the Law Reform Act
Order 53 of the Civil Procedure Rules

Pre-2010 Jurisprudence in Judicial Review

This issue arose in the case of Republic Vs Kenya Roads Board ex parte John Harun Mwau. The case sprang from the enactment of the Kenya Roads Board Act, No. 7 of 1999. The Act, among other things, established a body known as the Kenya Roads Board and committees known as District Roads Committees. The applicant, a public spirited tax payer, commenced proceedings by way of Judicial Review seeking a prohibitory order prohibiting the implementation of the Act and declarations that the Act is unconstitutional. The applicant’s argument was that the Act was unconstitutional and violated Section 82 of the Constitution in that the Act provided for only certain societies and organizations that may nominate representatives to be appointed members of the Board. It was further the applicant’s case that that part of the Act which provided for sitting members of Parliament to be members of the District Roads Committees was unconstitutional since it conferred executive powers on legislators contrary to the doctrine of separation of powers and that it was unconstitutional for legislators to enact and enforce the laws. The respondents took issue with the procedural propriety of the proceedings, particularly the capacity of the court to subject legislative enactments to Judicial Review of administrative actions. In determining this issue, the court held that:

“The remedy of Judicial Review is available as a procedure through which the applicant can come to court for the determination of any Constitutional issue including striking down of legislation which may be unconstitutional. Judicial Review has an entirely different meaning in Commonwealth countries, which have adopted the written supreme Constitutional system. ... Judicial Review in this sense means the power to scrutinize laws and executive acts, the power to test their conformity with the Constitution and the power to strike them down if they are found to be inconsistent with the Constitution. I am convinced that the Kenyan courts have been given such jurisdiction vide sections 60, 84 and 123(8) of the Constitution.”
In the case of Republic Vs Hon. Chief Justice of Kenya & Others Ex Parte Roseline Naliaka Nambuye, the applicant, a judge of the High Court whose conduct was a subject of investigation by a tribunal, challenged the Constitutional propriety of her investigation. Her challenge was mounted in the nature of a judicial review application to quash the decision subjecting her to disciplinary proceedings. In dismissing her application, the court made a finding that:

“The applicant has contended that there is a breach of her fundamental rights and freedoms under Section 77(10) and (11) of the Constitution. ..... For any alleged breach to be properly articulated an application by way of an Originating Summons is required by the Rules made under the Constitution and this is not what the applicant has done here – where the applicant purports to enforce such rights by way of a Notice of Motion seeking Judicial Review Orders of certiorari, mandamus and prohibition. Such an application is clearly defective under the law. Any relief under the Constitution should have been sought by way of Originating Summons as stipulated in Section 84 (1) and the Rules made under Section 84(6).

The applicant has failed to demonstrate that he has properly brought the application in accordance with the aforesaid or that what he seeks to achieve is amenable to judicial review. I find that there is no cause of action under the Constitution for the above reasons and the prayers sought must fail on this ground as well.”

Republic Vs Judicial Commission of Inquiry into the Goldenberg Affair Ex parte Hon Professor George Saitoti. The applicant sought judicial review orders to quash certain sections of the report of the Judicial Commission of Inquiry into the Goldenberg Affair. The said sections had adversely mentioned the applicant for involvement into a mega corruption scandal at a time when the applicant served as the Minister for Finance. The report had made recommendations that the applicant be investigated and prosecuted for his involvement in the mega scandal. Among the grounds raised by the applicant was that his right to a fair trial as protected by Section 77 of the Constitution was likely to be violated. On this contention, the court found that:

“We concur with the applicant’s counsel on their argument that there cannot now be a trial of the Applicant unaffected by the report and by the said errors and breaches of law by the Commissioners, which errors and breaches have been widely and serially publicized nationally as truth and law in the past three
years. No fair trial can result. In a way, this has resulted in some shift of burden before the actual charging and has also seriously and adversely affected the presumption of innocence. This in our view violates Section 77(1) of the Constitution.”

**JURISDICTION**

Section 7. (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to (a) a court in accordance with section 8; or (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

Section 9 (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

**Grounds for Judicial Review**

Previously derived from common law – ultra vires, illegality, irrationality, unreasonableness

Post 2010 – Based on constitutional provisions, common law and Statute.

**Section 7(2)** A court or tribunal under subsection (1) may review an administrative action or decision, if (a) the person who made the decision

(i) was not authorized to do so by the empowering provision;
(ii) acted in excess of jurisdiction or power conferred under any written law;
(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;
(iv) was biased or may reasonably be suspected of bias; or
(v) denied the person to whom the administrative action or decision relates,
(a) reasonable opportunity to state the person’s case;
(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
(c) the action or decision was procedurally unfair;
(d) the action or decision was materially influenced by an error of law;
(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
(f) the administrator failed to take into account relevant considerations;
(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
(h) the administrative action or decision was made in bad faith;
(i) the administrative action or decision is not rationally connected to the purpose for which it was taken; (ii) the purpose of the empowering provision; (iii) the information before the administrator; or (iv) the reasons given for it by the administrator; (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law; (k) the administrative action or decision is unreasonable; (l) the administrative action or decision is not proportionate to the interests or rights affected; (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates; (n) the administrative action or decision is unfair; or (o) the administrative action or decision is taken or made in abuse of power.

**Statutory Time-Frame for determination of Judicial Review Applications**

An application for the review of an administrative action or an appeal under this Act shall be determined within ninety days of filing the application.

**Exhaustion of all alternative remedies**

Section 9 (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under
sub-section (1).
(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

**Rules of Practice and Procedure** – are we on course to doing away with order 53 of the Civil Procedure Rules?

10. Rules. (1) An application for judicial review shall be heard and determined without undue regard to procedural technicalities.
(2) The Chief Justice may make rules of practice for regulating the procedure and practice in matters relating to judicial review of administrative action.

**Remedies in Judicial Review**

11. (1) In proceedings for judicial review under section 11 (1), the court may grant any order that is just and equitable, including an order
(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;
(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;
(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;
(d) prohibiting the administrator from acting in particular manner;
(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;
(f) compelling the performance by an administrator of a public duty owed in law
and in respect of which the applicant has a legally enforceable right;
(g) prohibiting the administrator from acting in a particular manner;
(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;
(i) granting a temporary interdict or other temporary relief; or
(j) for the award of costs or other pecuniary compensation in appropriate cases.

(2) In proceedings for judicial review relating to failure to take an administrative action, the court may grant any order that is just and equitable, including an order
(a) directing the taking of the decision;
(b) declaring the rights of the parties in relation to the taking of the decision;
(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
(d) as to costs and other monetary compensation.