Taming the Tyranny of the Barons: Administrative Law and the Regulation of Power

Prof. Migai Akech

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An Inaugural Lecture

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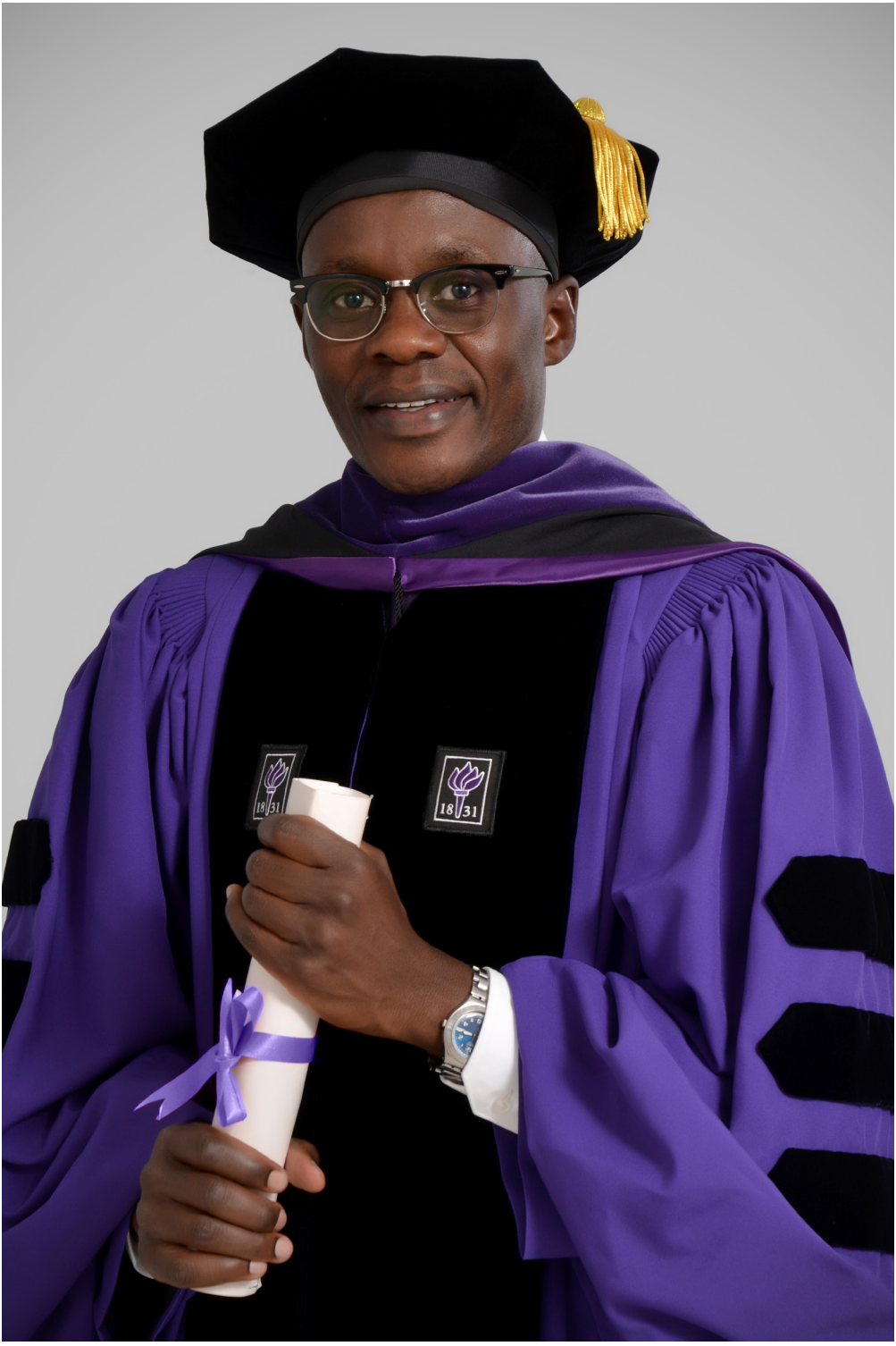

Biography

Migai Akech was born in January 1972. He attended various schools in Nyeri, Kanjira, Muhoroni, and Homa Bay for his primary education. He then proceeded to Starehe Boy's Center and School for his secondary education, before joining the University of Nairobi for his undergraduate studies in law. He graduated from the University of Nairobi in 1995 with a First Class Honors Degree in Law, then proceeded to the Cambridge University in the United Kingdom from which he graduated with a Master's Degree in Commercial Law in 1997. He then attended the New York University School of Law, where he was a Hauser Global Scholar, and from which he graduated with a Master's Degree in Trade Regulation in 1999 and a Doctor of Juridical Science in 2004. Migai returned to the University of Nairobi in 2004 and dedicated himself to teaching and research.

The International Forum for Democratic Studies of the National Endowment for Democracy (NED) in the United States offered Migai the prestigious Reagan-Fascell Democracy Fellowship, which he took up in October 2009 – February 2010. At the NED, Migai's research focused on the use of Administrative Law to constrain government power in Africa, and culminated in the

publication of perhaps the article that Migai considers to be his best work, namely “Constraining Government Power in Africa”, which was published in the prestigious Journal of Democracy in January 2011.

Migai resumed teaching and research at the University of Nairobi thereafter, before proceeding to work for the African Union’s African Peer Review Mechanism (APRM) as a Governance Expert from 2018 to 2020. While at the APRM, Migai monitored and evaluated governance in participating African states, and led the development of the Africa Governance Reports (AGR) of 2019 and 2021. The AGR is the African Union’s flagship biennial report on the state of governance in Africa.

Migai has consulted – as an expert on international trade law, policy development, policy analysis, rule of law, governance, devolution, anti-corruption, accountability, police reforms, justice sector reforms, prosecutorial reforms, legislative reforms, transitional justice, environmental crime, reform of criminal law and procedures, sentencing policy development, land policy development, curriculum development, monitoring human rights compliance, and mineral policies and regulatory frameworks – for national and international organizations, including the African Union (African Peer Review Mechanism), the International Development Law Organization (IDLO), the United Nations Economic Commission for Africa (UNECA),

the United Nations Office on Drugs and Crime (UNODC), the Open Society, German Technical Cooperation, the East African Business Council, and the World Bank. He has worked for these organizations in Kenya, Ethiopia, Lesotho, Sierra Leone, Somaliland, South Africa, Sudan, Uganda, and Tanzania.

Migai joined the University of Nairobi as an Assistant Lecturer in 1999, was promoted to the position of Lecturer in 2003, Senior Lecturer in 2006, Associate Professor in 2011, and Professor in 2023.

Migai plays football and has chaired the Kenyan Premier League's Independent Disciplinary and Complaints Committee.

Abstract

The one thing that has animated me the most even as a child is how our daily lives, in both private and public spaces, are characterized by routine and aggravating displays and abuses of power. In these spaces, we typically experience tyranny which finds expression in arbitrariness, condescension, corruption, disrespect, hostility, unfairness, gaslighting, prejudice, discrimination, threats, all kinds of bias, and even violence. If I ever was irreverent or defiant in my encounters with bureaucracies, blame it on my detestation of these displays and abuses of power. We experience these displays and abuses of power at home, in our places of work, in social clubs, in our encounters with the public and private police, and whenever we deal with public officers in national and international institutions. The irony is that we form these associations and institutions, in many cases out of our own volition, to safeguard our liberties and livelihoods. How, then, can we retain our inalienable right to self-rule, so that we are not oppressed even if we have agreed to, or are deemed to, relinquish some of our power or autonomy so that we live in well-ordered societies?

This is the question that I have spent my life as an academic trying to figure out. I have tried to answer this question by studying, researching and writing about power, democracy, and law. In particular, I have sought to understand how we can use democracy and Administrative Law to prevent the abuse of power, so that we can forestall or contain tyranny, and thereby preserve our liberties and livelihoods. My hypothesis has been a simple one: whenever a person wields a power over you that can affect, or affects, your liberties and livelihoods, that person has an obligation to exercise that power in a manner that is democratic, by which I mean that you should participate (or have a say) in how the power is exercised, and the power holder should be accountable to you while or after exercising the power.

We tend to think of tyranny as predominantly being a problem of governance in the state, which is the main form of large-scale governance at the national level (in comparison to the international level), without scrutinizing why this is the case, or problematizing how this happens. My contribution to scholarship is to say that while international geopolitical and neocolonial factors (such as development assistance and lopsided trade regimes) may certainly account for the tyranny that we experience in the state, bad governance in the smaller units that make up the state significantly contributes to this tyranny. In turn, tyranny in these smaller units is enabled by legal grants and sociologies or cultures of power. To liberate

ourselves from this tyranny, we should therefore worry about and democratize these smaller units of governance that are controlled by bureaucrats, whom I like to call the barons.

I have tested this hypothesis in various contexts and sought to understand whether and the extent to which the exercise of power (or governance) is participatory and/or accountable in these smaller units of governance. I have found that the exercise of power is in many cases neither participatory nor accountable and tried to explain why this is the case. I have found that governance is often undemocratic, and also difficult to democratize, for various reasons. I have then demonstrated how we can use Administrative Law to democratize the exercise of power, while appreciating that the utilization of Administrative Law is shaped by prevailing cultures of power.

In this lecture, I want to share the research on these phenomena that I have done across a period of twenty-five years. I have structured the lecture as follows. In Part II, I analyze the concepts of power, democracy, and governance, and explain why the idea of the rule of law is instrumental in human endeavors to regulate the exercise of power. In Part III, I explain why Administrative Law provides tools that can be effective in endeavors to circumscribe or constrain the exercise of power on a day-to-day basis, and why a credible regime of administrative law is a prerequisite for democratic polities, societies, and institutions. In Part IV, I explain how public and

private bureaucracies (the barons) threaten our liberties and livelihoods through their autocratic cultures and processes of rule-making, rule application, and adjudication that are autocratic in their orientation. I provide illustrations of their subterranean power and explain how Administrative Law has sought to constrain this power in various contexts of public and private administration. In the concluding Part V, I sketch out a future research agenda and examine the challenges that the automation of governance, or algorithmic decision-making, present for Administrative Law.

[I] Introduction

The one thing that has animated me the most even as a child is how our daily lives, in both private and public spaces, are characterized by routine and aggravating displays and abuses of power. In these spaces, we typically experience tyranny which finds expression in arbitrariness, condescension, corruption, disrespect, exploitation, hostility, unfairness, gaslighting, prejudice, discrimination, threats, all kinds of bias, and even violence. If I ever was irreverent or defiant in my encounters with bureaucracies, blame it on my detestation of these displays and abuses of power. We experience these displays and abuses of power at home, in our places of work, in social clubs, in our encounters with the public and private police, and whenever we deal with public officers in national and international institutions. The irony is that we form these associations and institutions, in many cases out of our own volition, to safeguard our liberties and livelihoods. How, then, can we retain our inalienable right to self-rule, so that we are not oppressed even if we have agreed to, or are deemed to, relinquish some of our power or autonomy so that we live in well-ordered societies?

This is the question that I have spent my life as an academic trying to figure out. I have tried to answer this question by studying, researching and writing about power, democracy, and law. In particular, I have sought to understand how we can use democracy and Administrative Law to prevent the abuse of power, so that we can forestall or contain tyranny, and thereby preserve our liberties and livelihoods. My hypothesis has been a simple one: whenever a person wields a power over you that can affect, or affects, your liberties and livelihoods, that person has an obligation to exercise that power in a manner that is democratic, by which I mean that you should participate (or have a say) in how the power is exercised, and the power holder should be accountable to you while or after exercising the power, including giving explanations for decisions or actions.

We tend to think of tyranny as predominantly being a problem of governance in the state, which is the main unit of large-scale governance at the national level (in comparison to the international level), without scrutinizing why this is the case, or problematizing how this happens. My contribution to scholarship is to say that while international geopolitical and neocolonial factors (such as development assistance and lopsided international trade regimes) may certainly account for the tyranny that we experience in the state, bad governance in the smaller units that make up the state significantly contributes to this tyranny. In turn, tyranny in these smaller units is enabled by legal grants and sociologies or cultures of power. To liberate

ourselves from this tyranny, we should therefore worry about and democratize these smaller units of governance that are controlled by bureaucrats, whom I like to call the barons.

I have tested this hypothesis in various contexts and sought to understand whether and the extent to which the exercise of power (or governance) is participatory and/or accountable in these smaller units of governance. I have found that the exercise of power is in many cases neither participatory nor accountable and tried to explain why this is the case. I have found that governance is often undemocratic, and also difficult to democratize, for various reasons. I have then demonstrated how we can use Administrative Law to democratize the exercise of power, while appreciating that the utilization of Administrative Law is shaped by prevailing cultures of power.

In this lecture, I want to share the research on these phenomena that I have done across a period of twenty-five years. I have structured the lecture as follows. In Part II, I analyze the concepts of power, democracy, and governance, and explain why the idea of the rule of law is instrumental in human endeavors to regulate the exercise of power. In Part III, I explain why Administrative Law provides tools that can be effective in endeavors to circumscribe or constrain the exercise of power on a day-to-day basis, and why a credible regime of Administrative Law is a prerequisite for democratic polities, societies, and institutions. In Part IV, I explain how public and

private bureaucracies (the barons) threaten our liberties and livelihoods through laws, cultures and processes of rule-making, rule application, and adjudication that are autocratic in their orientation. I provide illustrations of their subterranean power and explain how Administrative Law has sought to constrain this power in various contexts of national and international public and private administration. In the concluding Part V, I sketch out a future research agenda and examine the challenges that the automation of governance, or algorithmic decision-making, present for Administrative Law.

[II] Power, Democracy, and Limited Governance

a) The Different Dimensions of Power

As a starting point, we can think of power in terms of our autonomy, that is our inherent right and capacity to govern ourselves as human beings and shape our environment, including influencing other human beings to act or not to act in certain ways. In turn, our power to govern ourselves and shape our environment tends to vary, depending on various factors such as our resource endowments, personalities (and so, for example, charismatic individuals are said to have more power than the uncharismatic), socialization, literacy, acculturation, and capacity for group action. From this perspective, power is "the ability to make somebody do something that otherwise he or she would not do".[1]

Thinking of power in this sense is useful for understanding how human beings compete for nature's scarce resource, how collective decisions are made, why some overpower and dominate others, why others are dominated, and what the

1 Robert A. Dahl, "The Concept of Power", 2(3) *Behavioral Science* 201 at 202-203 (1957).

dominated need to do regain and exercise their power. We, therefore, need to see power as a social relationship that works to enable the dominance of certain individuals or groups while suppressing the ability of the dominated to raise their issues in the making of collective decisions.

In the best-case scenario – what political scientists call the "one-dimensional approach to power" – we can envisage a situation of equal power, in which every person, or representative of a group, participates effectively in the making of collective decisions. In this scenario, everyone is treated equally, has the same level of understanding of the issues, and, if representing a group, the representative is chosen freely. This scenario assumes three things. First, it assumes that all grievances (or interests) are readily recognized and that there is a willingness among those participating in the decision-making arena to act upon the grievances.[2] Second, it assumes that there is real participation in the decision-making arena, and the arena is open and accessible to everyone.[3] Third, it assumes that the representative truly represents the interests of the group.[4]

This best-case scenario is utopic. In real life, grievances are not usually readily recognized, those privileged enough to be included in the decision-making arena are not always willing to

2 John Gaventa, Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley 5 (Clarendon Press, 1980).
3 Gaventa at 5-6.
4 Gaventa at 6.

act upon the grievances of the excluded, and representatives do not always represent the grievances of the groups they claim to represent. Given these realities, political scientists have pointed out the need for us to recognize that power has covert dimensions, and that paying attention only to the overt exercise of power in the decision-making arena is insufficient if we are to understand how power is deployed in collective decision-making processes.

One covert dimension of power – what political scientists have termed "the two-dimensional approach" – looks at the exercise of power through the exclusion of participants and issues. As John Gaventa has observed "if issues are prevented from arising, so too may actors be prevented from acting."[5] Mechanisms for preventing issues from arising include threats of sanctions, intimidation, cooptation, and manipulation of the powerless and/or their representatives.[6] The person that controls the agenda shapes the decisions that get to be made in the decision-making arena. Further, where it is clear to individuals or groups that they are excluded from or have no influence over the agenda, they may be inclined to altogether avoid participating in the decision-making arena. Hence, the study of power needs to focus "both on who gets what, when and how and who gets left out and how – and how the two are interrelated".[7]

5 Gaventa at 9.
6 Gaventa at 14.
7 Gaventa at 9.

A second covert way in which power is exercised – what political scientists have termed "the three-dimensional approach" – entails the powerful controlling how the powerless think, so that the latter never even imagine taking their wants to the decision-making arena. By controlling how the powerless think, the powerful prevent the demands of the powerless "from becoming political issues or even from being made".[8] Mechanisms for controlling how the powerless think include the control of information, the mass media, and the processes of education and socialization.[9]

This, then, is the governance predicament. On one hand, we claim an "inherent" right to self-rule that should give us some autonomy or power over our destiny. On the other hand, however, we live in societies in which, for a variety of reasons, some individuals and groups have more power than others, and in which power will sometimes be exercised in overt and covert ways that exclude us and/or our interests. Hence, if individuals and groups are to realize their right to self-rule, a need arises for mechanisms that will enable them to control the exercise of power in the making of collective decisions.

8 Gaventa at 12.
9 Gaventa at 15.

b) Democracy, the Rule of Law, and the Regulation of Power

Historically, the ideals of democracy and the rule of law have constituted two such mechanisms.

In common parlance, we use the term "democracy" to refer to a system of government in which a group of people who belong to a political organization such as a nation-state govern themselves. It is a system of rule by the many, as "distinguished from monarchy (the rule of one person), aristocracy (the rule of the best), and oligarchy (the rule of the few)."[10] Democracy has its origins in Ancient Greece, where it was perceived as "a political system in which the members regard one another as political equals, are collectively sovereign, and possess all the capacities, resources and institutions they need in order to govern themselves".[11]

But seeing democracy as rule by the many is unhelpful if we are to regulate power, since majorities can, and often, oppress minorities. In addition, in the homogenous Greek setting of small city-states, it was relatively easy for the members of

10 Marc Plattner, "Liberalism and Democracy: Can't Have One Without the Other" 77(2) *Foreign Affairs* 171 at 172 (1998).

11 Robert A. Dahl, *Democracy and its Critics* 1 (Yale University Press, 1989).

the political system to regard themselves as political equals and participate directly in governance. But once the idea of democracy was transferred from the city state to the much larger scale of the nation-state, these prerequisites no longer obtained. For example, citizens could no longer participate directly in governance.[12] Further, Greek democracy excluded slaves and women from participating in governance.[13]

Part of the answer to the problem of ensuring the participation of citizens in the governance of the nation-state was found in the idea of representative government.[14] Unfortunately, the adoption of representative government created its own problems. For one, the institutions of representative democracy removed government from the direct reach of the people, which then lost touch with the people.[15] And once government became out of reach and out of touch, it could no longer act in the interests of the people since it could not easily discern those interests. The larger size of the nation-state made it impracticable for the people to assemble, and so the people no longer participated directly in their governance.[16]

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12 Dahl, *Democracy and its Critics* 27.

13 *See, for example,* Ryan K. Balot and Larissa M. Atkison, "Women and Slaves in Greek Democracy" in *A Companion to Greek Democracy and the Roman Republic* 389 – 404 (Dean Hammer, ed, Wiley Blackwell, 2015).

14 Dahl, *Democracy and its Critics* 28.

15 Dahl, *Democracy and its Critics* 30.

16 Plattner, "Liberalism and Democracy" 174.

It was also doubtful whether the representatives actually represented the views, and acted in the interests of, the people in the heterogenous nation-state. In this scenario, the Greek "belief that citizens could and should pursue the public good rather than their private ends became more and more difficult to sustain, and even impossible, as "the public good" fragmented into individual and groups interests."[17] This explains, perhaps, why Jean-Jacques Rousseau asserted that "the moment that a people gives itself representatives, it is no longer free."[18]

Democracy must, ergo, mean more than a system of government. It is in this respect that I find Robert Dahl's conceptualization of democracy to be particularly helpful. Dahl sees democracy as process of making collective decisions that has four unique characteristics.[19] First, the democratic process mandates effective participation, meaning that throughout the decision-making process individuals should be given an adequate opportunity to express their preferences as to the final outcome. Second, it mandates "voting equality at the decisive stage", meaning that each individual or group should have "an equal opportunity to express a choice that will be counted as equal in weight to the choice expressed by any other [individual or group]". Third, it requires "enlightened understanding", which means that the individuals or groups must be knowledgeable

17 Dahl, *Democracy and its Critics* 30.
18 Quoted in Plattner, "Liberalism and Democracy" 174.
19 Dahl, *Democracy and its Critics* 5, 109-113.

enough to know what they want, or what is best for them. The final attribute is that the individuals or groups must control the agenda. That is, they must be sovereign, in the sense of having the power "to decide how matters are to be placed on the agenda of matters that are to be decided". From Dahl's perspective, therefore, a process of making collective decisions, including those that claim to be representative, can only be deemed to be democratic if it fulfills these four conditions.

Shorn of these conditions, majority rule could only mean the domination and/or oppression by the more populous, or the more organized, or the more corrupt, or the more powerful groups, over lesser groups. This is why it historically became necessary to combine popular sovereignty with the protection of every individual from the abuse of power by government. The political philosophy of liberalism made this leap possible by recommending three significant mechanisms for limiting the power of government, namely the rule of law, a fundamental law or constitution, and the rights of the individual (also known as "natural" or "inalienable" or "human rights").[20] We owe to liberalism the expression[21] of the idea that people everywhere

20 Marc Plattner, *Democracy Without Borders? Global Challenges to Liberal Democracy* 69 (Rowman & Littlefield Publishers, 2008).

21 *See, for example,* Mhamood Mamdani, "The Social Basis of Constitutionalism in Africa" 28 (3) *Journal of Modern African Studies* 359 – 374 (1990) (Arguing that no continent has had a monopoly over the notion of rights in history).

are created free and equal and have the right to self-rule, that is, the right to choose their governors and hold them accountable.

The crux of the rule of law ideal is that government must be limited by law, meaning that it must abide by the law. Its actions must, therefore, adhere to the constitution and other laws. This explains why the rule of law is said to be the essence of constitutionalism. Living under the rule of law means not being "subject to the vagaries of other individuals – whether monarchs, judges, government officials, or fellow citizens".[22] The rule of law shields us from "the familiar weaknesses of bias, passion, prejudice, error, ignorance, cupidity, or whim".[23] Further, the rule of law guarantees our personal liberty by restricting government from infringing on our human rights.[24] Yet another important element of the rule of law ideal is that it mandates universalism (as opposed to particularism), meaning that institutions of governance should treat every person equally when they apply the law.[25]

Once democracy embraced liberalism, it became easy to see why the participation of the ruled and the accountability of rulers were essential to collective decision-making processes and the exercise of power. In a process of collective decision-

22 Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* 122 (Cambridge University Press, 2004).
23 Tamanaha, *On the Rule of Law* 122.
24 Tamanaha, *On the Rule of Law* 35.
25 Tamanaha, *On the Rule of Law* 119.

making, the interests (grievances) of every person who is subject to the decision ought to be considered.[26] This can only occur if we recognize and respect the intrinsic equality of every person who is subject to the decision. Second, the accountability of the rulers to the ruled for their decisions and the exercise of power signified the primacy of the ruled. It meant that the rulers were wielders of power that had been delegated to them by the ruled, who could take it back should the rulers fail to pursue "the public good of the society", which was understood to mean the preservation of the liberties and livelihoods of the ruled.[27]

Today, we claim to espouse liberal democracy in our governance arrangements, both at the national and international levels. However, the gap between theory and practice tends to be considerably wide in both cases. The result is that the exercise of power is often undemocratic.

c) National and International Democracy Deficits

At the national level, we have adopted the liberal desiderata of the rule of law and human rights in our constitutions and profess a love for constitutionalism (or limited government). Many modern African constitutions, including Kenya's Constitution of 2010 are excellent formal embodiments of these values. Unfortunately, however, the declarations of these liberal values

26 Dahl, *Democracy and its Critics* 84, 86.
27 Plattner, *Democracy Without Borders* 39.

in African Constitutions have not ensured limited government. This explains why many analysts of African politics contend that governance in Africa is informal, undemocratic, and above all neopatrimonial. They claim that in African governance, informal patron-client relationships both underlie and overshadow legal-rational norms, formal institutional rules are largely irrelevant, and the political struggle in Africa consequently remains "very much a conflict between the rule of law and the rule of the person".[28]

As I see it, Africa's democracy deficit results not so much from the absence of law as from the all-too-common presence of laws that grant government officials overly broad and poorly circumscribed discretionary powers[29], and a sociology or culture of how these powers should be exercised that was inherited from the era of colonialism.[30] This culture is exceedingly despotic.[31] In Kenya's case, for example, although

28 *See, for example,* Daniel N. Posner and Daniel J. Young, "The Institutionalization of Political Power in Africa" 18 *Journal of Democracy* 126 (2007); Goran Hyden, *African Politics in Comparative Perspective* 111 (Cambridge University Press, 2006); Richard Joseph, "Challenges to a Frontier Region", 19(2*) Journal of Democracy* 95 (2008); Larry Diamond "The Rule of Law versus the Big Man", 19(2*) Journal of Democracy* 138 at 145 (2008).

29 Migai Akech, "Constraining Government Power in Africa", 22(1) *Journal of Democracy* 96 (2011).

30 H.W.O. Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox", in *Constitutionalism and Democracy: Transitions in the Contemporary World* 67-82 (Douglas Greenberg, Stanley N. Katz, Steven C. Wheatley, and Melanie Beth Oliviero, eds, Oxford University Press, 1993).

31 *See* Mahmood Mamdani, *Citizen and Subject: Contemporray Africa*

Britain imposed a formal system of governance derived from norms and practices then prevailing in England, it governed using a system in which informal norms dominated the formal ones.[32] This system, which came to be known as the Provincial Administration, comprised the Commissioner/Governor of the colony, an executive council, a team of district commissioners assisted by coopted native chiefs, a cohort of white settlers, and English multinational firms.

The formal legal system featured broad grants of poorly circumscribed discretionary powers, which the colonial administrators deployed without any pretense of accountability. Law unpretentiously constituted an instrument of power and coercion. Further, the functionaries of the colonial system straddled the divide between informalism (patrimonialism) and formalism (the realm of legal-rational norms), and based their actions on formal rules, informal considerations, or some combination of the two, as expediency dictated. This coercive system of governance was retained at independence, and gave rise to the imperial presidency.[33]

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and the Legacy of Late Colonialism (Princeton, 2018).

32 *See* Migai Akech, "Judicial Review in Kenya: The Ambivalent Legacy of English Law" in *Judicial Review of Administrative Action across the Common Law World: Origins and Adaptation* 191 – 214 (Swati Jhaveri and Michael Ramsden, eds, Cambridge University Press, 2019).

33 *See* H. Kwasi Prempeh, "Presidents Untamed" 19 *Journal of Democracy* 109 at 110 (2008). The term "imperial presidency" denotes presidential supremacy, which is created through the appropriation by the president of the powers reserved by the constitution to other branches of government.

Further, this undemocratic system has proved to be intractable because the rules of governance continue to be insufficiently institutionalized – meaning that they are all too often open-ended and neither participatory nor accountable. These rules are a godsend for authoritarian or quasi-authoritarian regimes, who ably use them in overt and covert ways to subvert the progress of democracy and the rule of law.

Ergo, we have a democracy deficit at the national level because our democratization endeavors have concentrated on the holding of regular elections, on the rationale that this is sufficient to tame the imperial presidency. But the periodic election, however frequent, does not offer the electorate control over government. To address this gap, Africa needs to invest more in circumscribing the powers of the coercive legal order and ensuring the day-to-day participation of citizens in governance, and the accountability of government officials (or bureaucrats).

In any case, we need to appreciate that much of the work of government is delegated to these bureaucrats. It is these bureaucrats, whom I like to call barons, who exercise much of the power of government and are the enablers of the imperial presidency. When we encounter government, it is these bureaucrats that we interact with. And our interactions with them are often fraught with tyranny that takes forms such as

delays, broken promises, and extortion.[34] Unfortunately, these bureaucrats are often invisible, given that the mechanisms designed to protect the confidentiality of governmental affairs – such as state secrecy laws and privacy laws – often ensure they are safely shielded from public scrutiny. These bureaucrats must be tamed if we are to bridge the democracy deficit.

There are also democracy deficits in the private domain. Globalization and privatization processes fueled by neoliberalism have resulted in the transfer of immense power to private entities, which now considerably affect the liberties and livelihoods of individuals.[35] For example, these processes have resulted in the delegation of various "public functions" to private entities. And in other cases, private entities, although operating purely in the private domain, nevertheless wield and exercise immense power that equally affects the liberties and livelihoods of individuals. In either case, there is a democracy deficit since the ruled do not get to participate in the making of decisions that affect their interests and the rulers are not accountable for their exercise of power.

34 *See, for example,* H. Kwasi Prempeh, "Marbury in Africa: Judicial review and the Challenges of Constitutionalism in Contemporary Africa", 80 *Tulane Law Review* 64 (2006).

35 *See* Migai Akech, "Globalization, the Rule of (Administrative) Law, and the Realization of Democratic Governance in Africa: Realities, Challenges, and Prospects", 20 *Indiana Journal of Global Legal Studies* 339 – 375 (2013).

These private powers equally threaten our liberties and livelihoods and their exercise should, therefore, be subjected to democracy. But while it is now appreciated that private bodies exercising public functions must exercise their powers democratically, the need to democratize the exercise of power in the private domain remains a work in progress.

Finally, the proliferation of international regulatory mechanisms over the last two or so decades has also created a democracy deficit in the international arena. Our interactions across borders – in domains such as the utilization of environmental resources, sports, the movement of goods and services such as labor, the movement of money and the accompanying risks of degradation, crime, and the development of some parts of the world at the expense of others – have led to a realization that our interests/grievances cannot be addressed by separate national governance systems. As a result, the making of these governance decisions has shifted to global institutions, often without our participation or accountability to us. This shift has created a democracy deficit because these international institutions "are not directly subject to control by national governments or domestic legal systems".[36] Yet these institutions exercise immense powers and regulate vast sectors of our social and economic lives. Their decisions directly affect us, in many cases without any intervening role for national government

36 Benedict Kingsbury, Nico Krisch and Richard Stewart, "The Emergence of Global Administrative Law" 68 *Law & Contemporary Problems* 1 at 5 (2005).

action. Here as well, a need arises to democratize the exercise of power.

In a nutshell, by the term “barons” I mean individuals who possess power in public and private national and international institutions. The barons are present everywhere. You will find them in government ministries, the public service and its agencies such as public service commissions, the legislature and its bureaucracy, the judiciary and its bureaucracy, institutions of horizontal accountability, election management bodies, political parties and the bodies established to regulate them, tribunals and other alternative forums for dispute resolution, tax administrators, immigration officers, pensions officers, national health insurance officers, public and private institutions of learning such as primary schools, secondary schools and universities, private societies and clubs, local and international sports bodies, international development assistance administrators, and many other spaces where associational life occurs. The exercise of power by these barons invariably entails some form of rule-making, rule application and adjudication. Increasingly, the barons are also resorting to technologies such as artificial intelligence to make their decisions, or delegating some or all of their decision-making to these technologies, in ways that are not always democratic. Their powers are capable of being abused and, therefore, need to be subjected to the discipline of Administrative Law.

[III] The Promise of Administrative Law

As its name suggests, Administrative Law regulates administration, which may be defined as "the execution of public affairs as distinguished from policymaking".[37] The practice of representative democracy requires citizens to delegate their sovereignty to popularly elected representatives, who make broad policies and laws that establish a framework for how any polity should be governed. However, broad policies and laws are not self-executing and need to be administered, that is, translated into actions. For this to happen, a bureaucracy, which is a system of administration, needs to be established and given room to take actions that it considers to be appropriate.

This room that is given to the barons to take appropriate actions is what Administrative Law calls discretion. It is the power to "choose between more than one possible course of action",[38] and is inevitable in any scheme of administration, for various reasons. First, liberal democracies are not aristocracies, and legislators (the people's representatives) often lack the know-how required to enact precise legislation, particularly

37 Merriam-Webster Dictionary.

38 Secretary of State for Education and Science v Tameside Metropolitan Borough Council, [1977] A.C. 1014 at 1064 (per Lord Diplock).

when dealing with complex human problems (such as climate change, to give an example). Second, the complexity of modern government usually means that legislators are required to attend to numerous matters and do not have sufficient time to devote to their policy and law-making work. Third, ideological contests and conflicting political party interests often make it difficult for legislators to agree on policies and laws. Above all, there is a need to avoid rule-rigidity and it is, thus, desirable to give bureaucrats (or administrators) a measure of flexibility so that they can deal with novel situations without needing to go back to the legislature at every turn.

Our system of government also assumes that instances of maladministration will eventually come to the attention of the legislature, which should hold the barons accountable on behalf of the citizenry.[39] However, in view of the complexity of modern government, many significant instances of maladministration will escape the attention of the legislature. Unless the legislature has effective mechanisms and resources for conducting investigations into the affairs of government, and does so routinely, it is unlikely to hold the barons accountable for their exercise of their delegated powers.

For these reasons, policies and laws are often open-ended and give the barons broad discretionary powers, which they often

39 *See* Migai Akech, "Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability", 18 (1) *Indiana Journal of Global Legal Studies* 341 – 394 (2011).

exercise without proper oversight. In executing their mandates, the barons typically have the power to make rules, apply rules, and adjudicate disputes arising from their application of rules.

Rule-making entails developing generalized administrative standards (which usually take the form of regulations, policies, guidelines, or manuals). Rule application entails applying these administrative standards to particular cases (for example, determining whether an individual fulfils the established criteria for appointment to a position). Adjudication entails resolving disputes arising from the application of generalized administrative standards. These are immense powers that can be abused. The task of Administrative Law is to circumscribe the exercise of these powers so that they are not abused, and sanction bureaucrats whenever they abuse these powers.

Hence, Administrative Law appreciates that discretion is inevitable in the exercise of power and accordingly empowers administrators to implement policies and laws. At the same time, Administrative Law seeks to regulate the exercise of power by requiring that the actions and decisions of administrators meet certain requirements of legality, reasonableness, and fairness. It performs the latter function by setting out general principles and procedures that all administrators must follow, and providing remedies for individuals or groups affected by administrative actions and decisions.

Key principles of Administrative Law include the following: every administrative act must be justified by a specific law; decisions of administrators must be reasonable or rational; prior to making decisions, administrators must consult and consider the views of those likely to be affected by them; decision-making processes must be free of bias; administrators must be independent; administrators must explain their decisions, in writing; administrators must not act arbitrarily or outside their powers; administrators must act in good faith; administrators must keep their promises; and there must be a right to judicial review of administrators' decisions.

Crucial procedures of Administrative Law include requirements that administrators must give adequate notice of proposed action to those likely to be affected by their decisions, and give them reasonable opportunities to participate in the making of those decisions. These procedures can take the form of public inquiries, or notice-and-comment procedures in which the affected people are given an opportunity to make comments prior to the taking of a decision. Typically, such procedures are tailored to suit the circumstances of the particular case. Through these procedures, Administrative Law fosters participation by interested parties in the making of collective decisions.

Accordingly, Administrative Law's promise is that it can facilitate the realization of day-to-day democracy. First, the method of Administrative Law is to give those likely to be affected by an

administrative decision an opportunity to participate in its making, or to contest it once it is made. Second, the principles of Administrative Law facilitate accountability in the making of collective decisions. By enhancing the participation of the affected public in the making of collective decisions and imposing an enforceable duty on administrators to account for their actions and decisions, Administrative Law promises to legitimize governance and stem the abuses of power that are all-too-common in national and international institutions, whether public or private.

However, the extent to which individuals and groups will be able to participate in the making of administrative decisions and hold decision-makers to account will be dictated by politics. From this perspective, we can expect that the barons will treat universalistic and particularistic interests differently. On the one hand, universalistic interests refer to "those that are shared by a broad constituency… that are spread across national political geography".[40] By contrast, particularistic interests "are those narrow substantive constituencies [such as interest groups, industry associations and regulated firms] that are very likely to be concentrated in a discrete area of political geography".[41]

40 Anthony Michael Bertelli and Fiona Cece, "Comparative Administrative Law and Public Administration" in *The Oxford Handbook of Comparative Administrative Law* 175 at 177 (Oxford University Press 2021).

41 Bertelli and Cece at 177.

The danger is that because they are more organized, particularistic interests will get more favorable administrative decisions than universalistic interests. To guard against this probability of "agency capture",[42] Administrative Law endeavors to "constrain [the] particularistic behavior of administrative officials as they interact with organized constituencies".[43] It does so by promoting "values such as participation, openness, or contestation of decision-making".[44] That is, through procedures such as notice-and-comment, and judicial review, Administrative Law creates a surrogate political process that enables universalistic interests to participate in the making of administrative decisions and contest such decisions, with a view to ensuring that administrators do not favor particularistic interests.[45] Administrative Law, therefore, gives universalistic (or unorganized) interests a voice in the administrative decision-making process, thereby mitigating agency bias towards particularistic interests.[46] In doing so, Administrative Law facilitates the attainment of the rule of law and accountability in day-to-day governance.

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42 *See* Migai Akech, "Public Law and the Neoliberal Experiment in Kenya: What Should the Public Interest Become?" JSD Dissertation, NYU School of Law 226 – 234 (2004).

43 Bertelli and Cece at 175.

44 Bertelli and Cece at 178.

45 See Richard Stewart, "The Reformation of American Administrative Law", 88 *Harvard Law Review* 1670 (1975).

46 Bertelli and Cece at 186.

Accordingly, realizing the promise of Administrative Law depends on extant power relations and politics. We should, therefore, expect that in practice the use of Administrative Law will be shaped by cultures of power and the willingness and ability of weak individuals and groups to confront these cultures.

[IV] Administrative Law in Practice

Administrative Law can only constrain the exercise of power if there is a recognition of the inherent worth and autonomy of every person, and if powerless individuals and groups are persuaded that they will be treated fairly whenever they seek to secure their interests and will obtain remedies against adverse administrative actions and decisions, which further presupposes that forums for the resolution of administrative injustices will be free from the strictures of the powerful. Unfortunately, these preconditions for the effective deployment of Administrative Law do not usually obtain in practice, for various reasons.

a) The Culture of Power and Executive Control of Collective Decision-Making

In Kenya's case, the use of Administrative Law has been shaped by a culture of power whose genesis can be traced to Britain's despotic mode of colonial governance, in which government officials know what is best for the "natives", who are not deemed to be worthy and autonomous individuals, and who, therefore, should not question the actions of these officials. In this culture of power, the barons are beyond reproach, even when they oppress individuals and groups, and even when formal laws such

as the constitution proclaim constitutionalism and require the exercise of power to be democratic. Individuals and groups that challenge the barons are profiled as disrespectful or difficult by the powerful, who also deploy overt and covert mechanisms to prevent challenges against their exercise of power from being aired or challenged in dispute resolution forums.

How did this culture of power come about?[47] Britain's colonialism project was about subjugation and domination of the African population. Africans were subjects, not citizens; the paternalistic and despotic colonial government decided what was best for the Africans, without consulting them. Although the inhabitants of the entity that came to be known as Kenya were not British subjects, Britain unilaterally assumed power over them using a law enacted without their participation.[48] It then proceeded to govern them in a very undemocratic manner, using a team of administrators who were given very broad and unregulated powers.[49] These administrators "often did not know what the law allowed or forbade them to do, or if they did, sometimes considered that it was unrealistic and ignore it".[50]

47 *See* Akech, "Judicial Review in Kenya".

48 Y. P. Ghai and J. P. W. B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to Present* 15 (Oxford University Press, 1970).

49 The Kenya Protectorate was headed by a Commissioner (later Governor when Kenya became a colony in 1920) as the chief executive officer, and he was assisted by an executive council and local administrators.

50 Ghai and McAuslan at 24.

Indeed, formal rules "setting out rational decision-making procedures and explicitly setting forth guides to discretion" were considered irrelevant.[51] So that while in Britain the bureaucracy satisfied the requirements of formal rational-legality, this was deemed unnecessary in the Kenya colony. These requirements were: the subordination of the bureaucracy to Parliament (as the representative of the people), the narrow definition of administrative powers to preclude capriciousness in decision-making, the duty of administrators to consult affected groups before making decisions, and accountability institutions (namely, bureaucratic controls, parliamentary control, and judicial review) that sanctioned these norms.[52]

In the Kenya colony, the administration was not answerable to the governed, and administrative roles were defined broadly, as the system trusted the judgment of the "man on the spot". Further, these men were beyond the reach of the courts; thus, Lord Denning asserted in *Nyali Ltd v. Attorney General* that "Once jurisdiction is exercised by the Crown the courts will not permit it to be challenged".[53] Thus, far from being constrained by any notions of constitutionalism, the colonial state was highly authoritarian and was defined by control and

51 Robert B. Seidman, "Administrative Law and Legitimacy in Anglophonic Africa: A Problem in the Reception of Foreign Law" 5 *Law & Society Review* 161 at 196 (1970).

52 Seidman, "Administrative Law and Legitimacy in Anglophonic Africa" at 164.

53 *Nyali Ltd v. Attorney-General* [1956] K. B. 1 at 15.

coercion. In turn, statutory laws characterized by high degrees of discretion that courts either did not want to or were unable to constrain enabled such control and coercion. Consequently, Britain bequeathed to Kenya a culture of authoritarianism, not democracy. As Robert Seidman has noted, Britain bequeathed to Africa "a tradition that good government was made by good men, and a set of authoritarian institutions which were designed to give the widest possible scope to individual discretion".[54]

Following independence, Kenya's political elites retained the autocratic structures of the colonial system of government. Independence for the most part, therefore, meant continuity, as the independence government sought to maintain the colonial edifice. Hence, independence merely Africanized the oppressor. Amidst the masses' euphoria of gaining independence from Britain, the new "African" government quickly rendered useless the promising Independence Constitution of 1963, which Whitehall technicians had designed to establish democratic methods of governance. This was achieved by enacting a series of amendments that consolidated power in the president.[55] At the same time, the oppressive Provincial Administration was allowed to continue operating outside the law. Thus, while the Provincial Administration remained the primary instrument for exercising

54 Seidman, "Administrative Law and Legitimacy in Anglophonic Africa" at 199.

55 *See* H.W.O. Okoth-Ogendo, "The Politics of Constitutional Change in Kenya Since Independence, 1963-69" 71 *African Affairs* 9 (1972).

executive authority, it had no status under the Constitution.[56] The culture of authoritarianism, now taking the form of the imperial presidency, therefore persisted. Furthermore, instead of restructuring the Provincial Administration as the Constitution of 2010 mandated, the state simply reconfigured it into what it calls the "National Administration". Indeed, in spite of this progressive constitution, the idea that political elites know better than the people remains central to our governance.[57] This works very well these political elites who prefer to give power to the bureaucrats over elected leaders (administrators over governors or other elected leaders) since it enables them to control the people without the demands and pressures of accountability. The failure to operationalize the County Policing Authority is a good illustration of this phenomenon.

This is the culture that permeates Kenya's system of governance and continues to shape the making of collective decisions and the interactions of individuals and groups with power, in both the public and private domains. Indeed, many private clubs and associations are of colonial origin, and have fully embraced the ethos of their colonial founders. This culture is evident in public participation processes for the making of collective decisions, and in the workings of accountability institutions and processes. To reiterate, it is a culture of power that dictates that government (the President and his minions) is the law and its

56 Constitution of Kenya Review Commission, Report of the Constitution of Kenya Review Commission 34 (2005).

57 I am grateful to Dr. Mutuma Ruteere for this point.

decisions must be obeyed and not questioned, irrespective of what the Constitution says.

And the police force is socialized to enforce this culture, using vague criminal laws that give them immense discretionary powers.[58] Thus, although Article 49 of the Constitution clearly provides that an arrested person must be brought before a court within twenty-four hours after being arrested, police officers routinely violate this requirement. But this is just the beginning of the impunity of police officers, who, routinely abduct individuals without giving them reasons for their abduction, then produce them in court long after the expiry of twenty fours in locations that are far away from the sites of their alleged offences, where they charge such individuals with spurious offences, and strenuously insist that the courts should deny the accused persons bail, even when they pose no flight risks. Indeed, there is no consistency in how courts administer bail. The courts continue to impose exorbitant, unjustifiable, and often unaffordable bail terms and conditions, thereby undermining the right of accused persons to liberty and to be presumed innocent. In short, bail is a tool of oppression in our criminal justice system.

58 *See* Migai Akech, "Public Law Values and the Politics of Criminal (In) justice in Kenya: Creating a Democratic Framework for Policing" 5 *Oxford University Commonwealth Law Journal* 225 (2005).

As the followings examples demonstrate, although Kenyans have made great strides in using Administrative Law to constrain the exercise of power, the application of Administrative Law has been, and continues to be, limited by broad grants of statutory powers and the machinations of the barons who remain adept at deploying the inherited culture of power to resist participatory governance and control horizontal accountability institutions.[59] Thus, although these accountability institutions are aware that they should make decisions that adhere to the principles and procedures of Administrative Law, and in accordance with the Constitution, the barons often prevail upon them to make decisions that violate these principles and procedures, leading to the oppression of the powerless, even if courts sometimes subsequently correct the errors of the administrators.

In our system of governance, tyranny is the norm. However, the tyranny is often lawful given that it is enabled by open-ended statutory grants of power. This makes it difficult to subject this tyranny to the discipline of Administrative Law. As a result, the barons often do what they want when they want, and often get away with it (due to agenda and thought control), leading to bureaucratic impunity and corruption. Increasingly though, the Constitution has made it difficult for the barons to get away with their tyranny. The Commission on the Administration of Justice, which is a creation of this Constitution, has for example enabled citizens to successfully challenge this tyranny in various cases.

59 *See* Migai Akech, *Administrative Law* (Strathmore University Press, 2016); Migai Akech, "Judicial Review in Kenya".

Nevertheless, the open-ended grants of power still enable the barons to cleverly get away with their maladministration.

For example, a common practice among the barons is to invent and deploy subjective non-prescribed or irrelevant factors in their decision making. In the case of the public universities, for example, the law stipulates that promotions to academic positions should be made on the basis of objective criteria such as attaining the requisite publication points, obtaining research funding, and supervising a stipulated number of students. Yet, the barons have introduced additional and irrelevant factors, such as the candidate's views on a university's mental health policy. A determination is then made whether the candidate has "interviewed well", which is an inherently subjective criterion.[60] The barons also hold promotion interviews at their discretion, resulting in numerous delayed promotions, or expedited promotions, as they deem fit. Further, appointments to administrative offices are not made democratically and are primarily based on considerations of political patronage. In this environment, it is easy for the barons to control the thinking of those subject to their power, as the clear message is that they need to toe their line if they want the barons to treat them favorably.

60 *See, for example,* University of Nairobi, College of Humanities & Social Sciences, Minutes of the Shortlisting Committee Meeting for the Post of Professor in the School of Law Held on Friday, September 28, 2018; University of Nairobi, Minutes of an Appointment Committee Meeting for the Post of Professor, School of Law Held on Thursday, 7th March, 2019.

In this style of administration, whistleblowers and critics are not appreciated and their lives can be made very difficult, through the threat or imposition of sanctions. For example, the Employment Act provides that it is gross misconduct for an employee to "behave in a manner that is insulting" to his employer or a person placed authority over him by his employer. [61] Hence, those who are critical of the barons can be branded as disrespectful and even accused of insubordination, that is behaving in a manner that is insulting to his/her employer or a person placed in authority over him or her.[62] Spurious disciplinary processes will then be quickly instituted against such individuals and their salaries stopped or reduced, pending the determination of these processes.

This culture of power also produced the Government Financial Regulations that required public officers to comply with the instructions of ministers, even if the former considered such instructions to be illegal or improper.[63] Under these Regulations, the public officers were required to implement the instructions of the ministers before registering any objections. Further, these regulations obliged the public officers to implement the verbal instructions of ministers, although they could then ask for written confirmations of these instructions.

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61 Employment Act, section 44 (4) (d).

62 *See, for example,* Edward Otsieka Opiayo v. Insurance Regulatory Authority [2020] eKLR

63 Ministry of Finance, Government Financial Regulations and Procedures (1989).

Ironically, some statutory laws buttress this tyrannical culture of power. Thus, individuals who expose the misdeeds or corruption of the barons can be punished under the Official Secrets Act – yet another statute that gives the barons overly vague and broad discretionary powers – for leaking government documents. Further, the barons can use the Public Officer and Ethics Act to intimidate their subordinates into silence. This statute makes it an offence for a public officer to divulge information "without lawful excuse" and has been used to threaten public officers.[64] The result is that there is little or no protection for whistleblowers and efforts to pass a law in this respect have all floundered. This encourages impunity and tyranny, as many violations of the rule of law, corruption and abuses of power go unnoticed and unaddressed.

Above all, this culture of power means that Administrative Law actions are bound to be episodic given the systemic barriers that complainants have to overcome to bring such actions. In the following paragraphs, I discuss how these dynamics play out in various contexts of public administration. These are the administration of elections, the implementation of public participation in governance, the administration of the prosecutorial power, the administration of taxes, and the operations of institutions of horizontal accountability. These examples are illustrative. As I have indicated, the barons are ubiquitous, and the tyrannies illustrated here are replicated in very many other spaces of associational life.

64 *See* Akech, "Abuse of Power and Corruption in Kenya" at 354-365.

i) Elections

Administrative Law can play two essential roles in electoral processes. First, it can be a mechanism for regulating the exercise of political parties in nominating individuals to vie for seats in the legislature and other bodies. Secondly, it can be a mechanism for regulating the exercise of power by election management bodies, including the powers of delimiting boundaries and managing elections.

Political parties play a significant role in the governance of a country. Their nomination (or pre-selection) decisions shape the electoral process, and can either bolster or undermine the confidence of the electorate in electoral process and the quality of governance. It is, therefore, in the public interest to regulate the affairs of political parties and ensure that their decision-making processes are democratic. From the perspective of Administrative Law, this entails subjecting the decisions of political parties and the governmental agencies established to regulate them to the requirements of lawfulness, reasonableness, and procedural fairness. And where the decisions of political parties or their regulators do not adhere to these requirements, they should be subjected to judicial review.

Election management bodies also exercise far-reaching powers. Among other things, they create and maintain voter registers, establish voter and candidate eligibility, manage the electoral process (including procuring the necessary goods and services),

oversee the voting process, tabulate and tally votes, announce election results, and resolve certain election-related disputes such as whether the process of voting at a given precinct (or polling station) should be halted because there is evidence of an on-going irregularity, or whether the results announced at a precinct should be cancelled because the total number of votes exceeds the number of registered voters. Again, these powers have a significant impact on the governance of a country and should therefore be exercised in a manner that increases public confidence in the integrity of the electoral system.

Prior to 2010, Administrative Law did not play a notable role in Kenya's electoral process. However, the Constitution of 2010 changed this state of affairs, and individuals and groups now routinely file constitutional petitions or judicial review applications that seek to challenge the exercise of power by political parties, the Registrar of Political Parties, and the Independent Electoral and Boundaries Commission (IEBC), which is the body that manages elections in Kenya.

Kenya's system for the adjudication of electoral disputes eschews interfering with on-going electoral processes.[65] Thus, it does

65 *Republic v Independent Electoral Boundaries Commission Ex-Parte Gladwell Otieno & another* [2017] eKLR typifies this approach. Here, the applicant sought an order of prohibition to prohibit the IEBC from deploying a voter register for use in the 2017 general elections on the grounds that the register had not been subjected to a public inspection as required by the law. The court declined to issue the order on the rationale that to prohibit the IEBC from deploying the register to the polling stations would "amount to restraining it from

not have mechanisms for the contemporaneous resolution of violations of the law by the IEBC such as unlawfully determining that some ballots were cast fraudulently, or counting ballots that were cast fraudulently or erroneously, or poorly designing ballots with the effect that voters cannot reasonably make a choice among candidates, or opening polling stations so late that many voters cannot reasonably cast their votes. Instead, the system favors post-election dispute resolution on the rationale that voters, not courts, should decide elections. Hence the need for the electoral process to play out, even if it is evidently flawed, before courts can intervene to resolve any arising issues.

But this approach, while valid in some respects, favors incumbency and abuse of power. As Kenya's 2013 presidential election demonstrated, once the electoral management body has, rightly or wrongly, publicly declared that an individual has been elected president and the state machinery has begun treating that individual as president, the pomp and public display of presidential power immediately colors, and, arguably, even pre-determines, the nature of any judicial adjudication of a dispute arising from such an election. Indeed, such an individual is then likely to prevail upon his opponents not to contest the outcome, in exchange for positions in government or other rewards; or intimidate them into submission. In addition, the Constitution establishes stringent timelines for

carrying out its statutory duties" and interfere with preparations for the elections (paras. 156, 159, and 160).

the determination of presidential election petitions, which do not usually facilitate the sufficient ventilation of issues and incline the Supreme Court to adopting a technical approach to handling these petitions.[66]

This approach has also meant that powerful state actors get to control the administration of elections and determine their outcomes. In this process, the Provincial/National Administration and the security infrastructure have been invaluable instruments in two respects. First, these organizations are instrumental in securing favorable electoral outcomes for the regime, or whoever gets to control them. This is achieved by intimidating, bribing or otherwise influencing often-fearful masses into voting for preferred candidates.[67] Where this does not work, they simply manipulate the electoral process by, for example, deploying security officers to disrupt polling and where possible ensure that their preferred candidates prevail. Another strategy is to make it difficult for the opposition to access some polling stations, by for example, failing to provide security. Electoral processes can then can be manipulated to ensure outcomes.

66 Article 140(2) of the Constitution of Kenya 2010 gives the Supreme Court only fourteen days to hear and determine presidential election petitions.

67 *See, for example,* Kenya National Human Rights Commission, Mirage at Dusk: A Human Rights Account of the 2017 General Election (2018) (Giving examples of instances in which the Provincial Administration bribed voters to vote for the government).

Second, these organizations are instrumental in managing protests against unfair electoral processes and outcomes, which they invariably attain through the use of excessive force.[68] The result is that Kenya's elections are always defined by gross human rights violations, much of it involving the police brutalizing citizens in opposition strongholds protesting against what they perceive as unfair outcomes.[69] The National Intelligence Service is also said to infiltrate the electoral process, with the support of senior public servants.[70]

Another strategy is to weaken opponents by coopting their partners, as President Mwai Kibaki did following the 2007 elections. And on the very rare occasion that a court nullifies a presidential election and orders a fresh one, as the Supreme Court did in 2017, the situation still favors the incumbent as there is never enough time for the electoral management body to address its mistakes so that it can hold a valid poll.

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68 *See, for example,* Human Rights Watch, "Kill Those Criminals: Security Forces Violations in Kenya's August 2017 Elections, 12 August 2017, available at <https://www.hrw.org/report/2017/10/15/kill-those-criminals/security-forces-viol ations-kenyas-august-2017-elections>.

69 *See, for example*, Kenya National Commission on Human Rights, "Mirage at Dusk: A Human Rights Account of the 2017 General Elections" (2017).

70 "Updated: Kimemia, Gichangi and Karangi Complicit in General Election Manipulation", cordkenya. blogspot.com/2013/02/kimemia-gichangi-and-karangi-complicit.html; 'CORD alleges plot to rig polls', Daily Nation, elections.nation.co.ke/news/Raila-alleges-OP-plot-to-aid-Uhuru-pollbid/-/1631868/1696332/-/format/xhtml/-/7jisjcz/-/index.html.

Yet another strategy is for the state to influence the electoral environment through administrative decisions in the registration of voters.[71] The state puts more resources in registration of persons and issuance of national identity cards and voter registration in the strongholds of the preferred presidential candidate. In the strongholds of the non-preferred candidate, the state puts in the bare minimum leading to a pre-election advantage to one candidate. This is all done within rules, which makes it difficult to challenge.

For these reasons, a system of pre-election dispute resolution that embraces the tools of Administrative Law could be helpful. Such a system could enable complainants to seek the intervention of the courts before the electoral management body issues the result of an election. In this way, errors such as miscounting of votes or tallying mistakes could be corrected in a timely manner. But because the system continues to only permit post-election dispute resolution, the courts (particularly the Supreme Court given its monopoly in adjudicating presidential election disputes) become an institution that the powerful must control. There is also an incentive for the powerful to control the legislature and determine its agenda. This then makes it difficult for proposals to introduce pre-election dispute resolution mechanisms to be placed on the agenda of the legislature or succeed.

71 I am grateful to Dr. Mutuma Ruteere for this point.

The executive also retains control of the appointment of members of the Independent Electoral and Boundaries Commission (IEBC) and always ensures complaisant individuals are appointed to office. And although the IEBC is always disbanded because of poor performance, its members are rarely held to account, even where they have committed egregious violations of the law. On the contrary, they are invariably rewarded with hefty severance packages at the expense of the taxpayer. Conversely, officers of the IEBC who do not toe the line face all kinds of persecution, including death as happened in the run-up to the 2017 election when the IEBC's officer responsible for its electronic voting system was severely tortured and killed. It has, therefore, been exceedingly difficult for citizens to hold the IEBC to account.

ii) Public Participation in Governance

As we have seen, although the idea of representative government is the proffered solution to the problem of ensuring the participation of citizens in the governance of the nation-state, it is problematic because representatives may not act in the interests of those they claim to represent. Democratization initiatives have sought to deal with this problem by mandating the direct participation of citizens in the making of collective decisions, such as policies and laws. The argument is that because the periodic election does not offer the electorate an adequate degree of control over government, there is a need for auxiliary political and legal mechanisms that can facilitate

the day-to-day participation of citizens in governance and the political accountability of the agents and instruments of governance. The direct participation of citizens in governance is also said to enhance the quality of collective decisions and the prospects of their successful implementation.[72]

Perhaps the most transformative feature of the Constitution of 2010 is that it embraces the principle of (direct) public participation of citizens in governance. The Constitution establishes public participation as a national value and principle of governance that binds all "State organs, State officers, public officers, and all persons" whenever they enact, apply, or interpret any law, or make or implement public policy decisions.[73] Further, the Constitution imposes a duty of Parliament to facilitate public participation and involvement in its business, including that of its committees.[74] And it requires county governments to be based on, among other things, "democratic principles".[75]

The principle of public participation has completely transformed governance in Kenya. Quite literally, no collective decision can be made without some level of public participation. At the same time, the government has greatly resisted the implementation of this principle and sought to continue making decisions

72 Denis James Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* 128 (Clarendon Press, 1996),
73 Constitution of Kenya 2010, article 10.
74 Constitution of Kenya 2010, article 118 (1) (b).
75 Constitution of Kenya 2010, article 175 (a).

without involving the people.[76] This explains why the principle of public participation is perhaps the most litigated provision of the Constitution of 2010, and why many individuals and groups have used it to restrain actions and decisions of the government and bureaucrats that are perceived to be undemocratic or against the public interest. For example, the principle of public participation has been used to derail unpopular initiatives of the executive to amend the constitution and impose a housing levy on employed individuals and their employers.[77] This has frustrated the executive immensely and has seen the President in the housing levy case issuing veiled threats against the individual who initiated the court case.[78]

But while the principle of public participation can enhance the inclusiveness and quality of collective decision-making initiatives, there is yet no clarity on what constitutes adequate participation. The result is that government tends to pay lip

76 *See, for example,* Intergovernmental Relations Technical Committee (IGRTC), "The Status of Public Participation in National and County Governments" at 9 (2019) (observing that "The national government is operating largely the way it operated before the constitutional requirements for public participation were adopted, thus ensuring that public participation remains peripheral and perfunctory").

77 *See David Ndii & others v Attorney General & others* [2021] eKLR; *Okiya Omtatah Okoiti & others v Cabinet Secretary for the National Treasury and Planning & others*, Nairobi High Court Constitutional No. E181 of 2023.

78 *See* Nyaboga Kiage, "Senator Okiya Omtatah Says His Life is in Danger", *Nation*, 19 December 2023, available at <https://nation.africa/kenya/news/senator-okiya-omtatah-says-his-life-is-in-danger-4469054>.

service to public participation. The making of tax laws and regulations is instructive.[79] Once the government decides to impose a tax, it rarely entertains public debate on it, irrespective of its impracticability or likely impact on taxpayers.[80]

Although the Supreme Court has established a test[81] for the adequacy of public participation, this test is unclear and subjective, and could be used to either frustrate collective decision-making processes that are participatory or approve those that are not sufficiently participatory, depending on the inclination of the judges evaluating them. In either case, the test, therefore, enables the courts to inappropriately approve or decline specific collective decision-making initiatives.[82] For instance, in the case of the Building Bridges Initiative Bill that sought to amend the Constitution, fifteen judges of the Court of Appeal and the Supreme Court could not agree on whether there had been public participation, whether it had been sufficient, what it entailed, or when courts should interfere with collective decision making processes that are said to lack public

79 Migai Akech, *Administrative Law* 210 – 216.

80 *See, for example, Mark Obuya, Tom Gitogo, Thomas Maara Gichuhi acting for or on Behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes* [2014] eKLR.

81 *See British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others* [2019] eKLR.

82 Migai Akech, "The Basic Structure Doctrine and the Politics of Constitutional Change in Kenya: A Case of Judicial Adventurism?", in *Stellenbosch Handbook in African Constitutional Law* Chapter 9 (forthcoming, 2024).

participation.[83] An executive faced with court actions that seek to derail its programs, therefore, has an incentive to influence judges to issue decisions that declare that its efforts to ensure public participation in such programs pass constitutional muster, however tokenistic they may be.

iii) The Prosecutorial Power

In our criminal justice system, the prosecutor has the power to decide whom to prosecute and for what offence, when to prosecute them, where to prosecute them, how vigorously to prosecute them, and when to terminate a prosecution. These powers are now reposed in the Director of Public Prosecutions (DPP), as the administrator who decides when and how to enforce the criminal law. In exercising these powers, the DPP is assisted by the police, who arrest individuals suspected of committing criminal offences and conduct investigations with a view to obtaining the evidence required to sustain prosecutions in courts of law.

These powers can be abused. In Kenya's case, for example, the prosecutorial power has been used in many cases to achieve political expediency and persecute citizens.[84] As a result, government opponents and the poor are often on the receiving end of politically motivated or draconian prosecutorial decisions.

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83 Akech, "The Basic Structure Doctrine and the Politics of Constitutional Change in Kenya".

84 *See* Migai Akech, *Administrative Law* at 294 - 311.

Thus, cases abound where individuals are threatened with prosecution, only for the charges to be dropped along the way. Conversely, powerful actors are often not prosecuted or have their cases compromised or withdrawn despite committing serious crimes such as corruption.[85]

To prevent such abuses of the prosecutorial power, Administrative Law's approach is to establish pretrial procedural safeguards (including mechanisms that determine whether a charge is rational or reasonable, or whether there is probable cause that an individual committed an offence) and subject the exercise of this power to judicial review (on the basis, for example, that a prosecutorial action or decision was arrived at in bad faith or without considering the testimony of critical witnesses).

Although Kenyan courts now readily review the exercise of the prosecutorial power, it remains the case that there are few pre-trial procedural safeguards against the abuse of this power. The existing remedies are largely trial-centered and are typically only available once the trial process has commenced. A person who has been arrested or charged erroneously or falsely or baselessly must therefore wait for the prosecution to present

85 *See, for example,* Susan Muhindi, "Ex-Treasury CS Henry Rotich Acquitted in Sh63bn Dams Case", *Star*, 14 December 2023 (quoting a judicial officer as saying that "All the accused persons in this case are hereby acquitted… due to lack of evidence as a result of the reckless dereliction of duty by the prosecution"), available at < https://www.the-star.co.ke/news/2023-12-14-ex-treasury-cs-henry-rotich-acquitted-in-sh63bn-dams-case/>.

its evidence before seeking the intervention of the court. For instance, the courts rarely intervene to stop investigations, even where they are unreasonable, on the reasoning that the task of determining the sufficiency of evidence belongs to the trial court.[86] As a result, the criminal justice system remains an instrument that the barons use to oppress the poor and powerless.

iv) Taxation

The primary objective of taxation, which is a system of compulsory contributions that government levies on citizens and resident aliens, is to raise the revenue that government needs to provide public goods and services. But the taxing power can also be abused, thereby threatening or violating the liberties and livelihoods of individuals and groups. Hence the need for the exercise of the taxing power to be subjected to principles such as equity (the idea that all taxpayers with a greater ability to do so should pay a greater amount of tax, while similarly situated taxpayers should be treated similarly), fair treatment of taxpayers, and accountability of the tax system to taxpayers (for example, the idea that changes in tax policy should be publicized and open to public debate). Adhering to these principles also enhances the efficiency of the tax system given that procedural fairness encourages voluntary self-reporting. That is, taxpayers are more likely to comply with

86 *See, for example, Stephen Kiplangat v Chief Magistrate's Court & 2 others* [2012] eKLR.

the law (by, for example, filing tax returns) if they believe the system will treat them fairly.

Unfortunately, and as numerous judicial review decisions of the courts demonstrate, the administration of Kenya's tax system remains arbitrary in various respects.[87] It, thus, provides an instrument that the executive can use to oppress the weak, silence dissenting voices and preserve autocratic governance.[88] The courts have faulted the Kenya Revenue Authority for failing to adhere to established tax assessment procedures such as issuing taxpayers with proper tax assessment notices, issuing provisional tax assessments without a legal basis to forestall taxpayers' claims for tax refunds, failing to give taxpayers notice of issuance of agency notices[89], issuing agency notices despite tax claimed being disputed or before raising tax assessments or without conducting tax audits, issuing agency notices on the basis of decisions of the Tax Appeals Tribunal before the period for taxpayers to appeal these decisions has expired, failing to give taxpayers a hearing to respond to agency notices,

87 *See* Migai Akech, Administrative Law 229 – 238 for a discussion of some of these cases.

88 *See, for example,* Meshack Kukubo Masibo, "Brewing Trouble? The Case of Keroche Breweries and Kenya's Tax Dispute Resolution Framework", 27 July 2021, available at <https://www.linkedin.com/pulse/brewing-trouble-case-keroche-breweries-andkenyas-tax-dispute-masibo>.

89 An agency notice is an instruction to an institution holding a taxpayer's money, such as a bank or a debtor, to transmit the money directly to the Kenya Revenue Authority in settlement of a tax debt.

enforcing agency notices within shorter periods than the law permits, failing to specify the legal basis of penalties imposed on taxpayers, making unreasonable decisions, taking inordinately long to respond to taxpayer objections, failing to process tax refund claims in a timely manner, and refusing to consider tax refund claims because taxpayers owe taxes. Further, these violations are more prevalent in the case of small taxpayers, as compared to large taxpayers who are more organized and have the resources and courage to contest the decisions of the Kenya Revenue Authority.

These violations occur because in practice revenue officers have considerable discretionary powers which are prone to abuse because they are not circumscribed. For example, revenue officers can issue agency notices without raising assessments, which puts the affected taxpayers in a bind since they cannot formally object to such action or file appeals against them in the absence of the assessments. Further, revenue officers have the power to lift agency notices where the taxpayer agrees to pay the claimed amount or part thereof. And although the law requires a taxpayer to object to a tax assessment within thirty days, it does not establish a time limit within which the Kenya Revenue Authority should respond to the taxpayer. It is, thus, not uncommon to find the Kenya Revenue Authority confirming assessments even two years after a taxpayer has filed an objection.

Agency notices are extremely punitive. Once a taxpayer's bank receives this notice, the taxpayer cannot operate the account, and its business is essentially paralyzed as it cannot move money in or out of the account. It has, therefore, been recommended that the Kenya Revenue Authority should refrain from issuing these notices where the tax payable is disputed, and only issue them where it is evident that a tax is outstanding and the taxpayer has taken unreasonably long to settle it (for example, the Kenya Revenue Authority has sent demand letters which the taxpayer has ignored).

Judicial review has, therefore, been a useful instrument in holding the Kenya Revenue accountable for the exercise of its powers. However, the intervention of the courts through judicial review often comes late, by which time the taxpayer's business has been diminished or completely paralyzed.

v) Horizontal Accountability Institutions

From these examples, it should be evident that while discretion is necessary if the bureaucracy is to manage democratic processes (such as elections and the participation of the public in governance) and perform its functions (such as administering taxes and prosecuting individuals that violate the law), the grant of overly broad discretionary powers to the bureaucracy can be counterproductive. First, such grants of overweening power make it difficult to hold the bureaucracy accountable for

its actions and decisions. Second, unaccountable bureaucracies can then be captured by barons and used to preserve extant power relations in a polity.

A need, therefore, arises to ensure the accountability of the bureaucracy so that its powers are only used to pursue the public good.[90] Accordingly, many democracies have deemed it necessary to establish auxiliary institutions – the so-called institutions of "horizontal accountability"[91] – which seek to enhance the day-to-day accountability of the executive. Among other things, these institutions regulate the interactions of politicians (the legislature) and barons in the exercise of power. These institutions are typically created by the constitution and characterized by Administrative Law safeguards that seek to regulate how they perform their functions and exercise their powers. Prominent examples of the auxiliary institutions are the Controller of Budget, the Auditor General, the Ethics and Anti-Corruption Commission, human rights institutions (such as the Kenya National Commission on Human Rights), the Independent Policing Oversight Authority, and the judiciary.

The Constitution of Kenya establishes an elaborate horizontal accountability framework. However, the barons have quickly captured this framework and rendered it moribund. This has been achieved by manipulating appointment processes to

90 *See* Migai Akech, "Abuse of Power and Corruption in Kenya".

91 *See, for example*, Guillermo O'Donnell, "Horizontal Accountability in New Democracies", 9 (3) *Journal of Democracy* 112 – 126 (1998).

ensure that appointees are complaisant individuals.[92] In the rare case that a horizontal accountability mechanism threatens the interests of the barons, it is quickly neutered through resource deprivation, cooptation, coercion, manipulation, discreditation, control of member appointment and dismissal processes, infiltration and other unscrupulous means.[93]

Take the case of the offices of Auditor General and Controller of the Budget. Kenya has suffered inefficient, unaccountable and unfair public finance management that has often led to the embezzlement of public funds and inequitable national resource distribution. The Constitution of 2010 sought to address this problem by making public finance management more efficient, effective, participatory and accountable. It establishes two critical offices.[94] One is the Controller of the Budget whose function is to oversee the implementation of the budgets of the national and country governments by authorizing withdrawals from public funds. It is the duty of this office to ensure that all withdrawals of public money are authorized by law. The other is the office of the Auditor General, whose function is to audit and report on the accounts of all entities funded from public funds six months after the end of each financial year and report to Parliament or the relevant County Assembly.

92 Migai Akech, "Democracy Capture in Kenya", in *Democracy Capture in Africa* 80 – 104 (Ghana Centre for Democratic Development, 2021)
93 Akech, "Democracy Capture in Kenya".
94 Constitution of Kenya 2010, articles 228 and 229.

But the Auditor General is captured in various ways. First, the Auditor General is not given the resources it needs to do its work properly. This occurs because the National Treasury, which ironically is one of the entities subject to audit, determines the Auditor General's budget, leading to unwarranted pressure on the Auditor Generals and resulting in the withholding of necessary funds thus compromising its independence.[95] This is why it has been suggested that the Auditor General should submit its annual budget estimates directly to the legislature.[96]

Second, the executive usually manipulates the process of appointing the holders of the two officers. The process leading up to the appointment of the second holder of the office of Auditor General is instructive. A selection panel was established in September 2019 and subsequently forwarded the names of three candidates for the President to nominate one of them and forward it to the legislature for its approval. Contrary to the Public Audit Act, however, the panel did not submit a report of the interview proceedings to the legislature. At any rate the President rejected the list, citing "discomfort" with the individuals, forcing the panel to re-advertise the position.[97]

95 ICPAK, "Position Paper on Independence of the Auditor General's Office Kenya" (2015) at 1, available at < https://www.icpak.com/resource/position-paper-on-independence-of-the-office-of-the-auditor-general-in-kenya/>.

96 ICPAK at 2.

97 Noni Ireri, "Explained: Why Kenya Lacks Auditor General 6 Months On", 24 February 2020, available at < https://www.kenyans.co.ke/news/50068-why-kenya-doesnt-have-auditor-general-6-months>.

However, a citizen obtained court orders stopping the re-advertisement on the grounds that the selection panel lacked legal competence and validity to consider any applications as its term had expired and it had failed to submit to the legislature a report of the interview proceedings.[98] Ironically, the President then nominated one of the candidates he had earlier expressed discomfort with to be the next holder of the office.[99] However, the shortlisted candidates, including the President's nominee, lacked the requisite competency for the position. Second, the selection panel considered the candidates despite the above court order declaring it lacked the legal competence and validity to consider applications for the re-advertised vacancy for the position.

Third, the executive intimidates the holders of the office whenever they expose corruption or do not do its bidding. Thus, following his questioning of how the government had received and spent some 215 billion shillings that it had borrowed by way of a Eurobond, the first holder of the office of Auditor General was hauled to court by the Ethics and Anti-Corruption Commission (EACC) to face charges relating to an

98 Okiya Omtatah Okoiti v National Executive of the Republic of Kenya & 2 others; Katiba Institute (Interested Party) [2020] eKLR, para. 136.

99 *See, for example*, "Uhuru Nominates Nancy Gathungu for Auditor General Job", *Star*, 19 June 2020, available at < https://www.the-star.co.ke/news/2020-06-19-uhuru-nominates-nancy-gathungu-for-auditor-general-job/>.

alleged illegal procurement deal by his office.[100] Similarly, after the current holder of the office of Controller of Budget revealed to the public that the National Treasury had over-budgeted her salary and that of other state officers by three times, the Director of Public Prosecutions wasted no time in arraigning her before court to face various charges, including conspiracy to defraud.[101] The charges related to a case filed against her and her co-accused several years before her appointment to the office of Controller General, begging the question why she was appointed in the first place.

The barons have made similar efforts to capture the judiciary by influencing the processes of appointing and removing judges and denying it resources.[102] A key strategy here is to derail the administration of justice by getting the JSC to entertain frivolous complaints against judicial officers. This is possible because there are no procedural safeguards to ensure fairness in the preliminary stage of the removal process, as the frivolous attempts to remove a former Supreme Court judge from office

100 *See, for example,* Jacque Maribe, "Auditor General Edward Ouko to be 'Charged' with Irregular Procurement", *Citizen Digital*, 22 October 2016, available at <https://www.citizen.digital/news/auditor-general-edward-ouko-to-be-charged-with-irregular-procurement-146239>.

101 *See, for example,* Anthony Kitimo, "Controller of Budget Margaret Nyakang'o Faces Fraud Charges", Nation, 5 December 2023, available at < https://nation.africa/kenya/news/controller-of-budget-margaret-nyakang-o-faces-fraud-charges-4454278>.

102 *See* Migai Akech, *Administrative Law* 439 – 461.

demonstrated.[103] In that instance, the JSC did not conduct any preliminary inquiry to establish the credibility of the petition against the judge yet proceeded to request the President to establish a tribunal to investigate the suitability of the judge to remain in office. The President obliged, but the tribunal found that the allegations against the judge were frivolous.

Thus, in the absence of fair procedures for the consideration of complaints against judges, the JSC can be deployed to undermine or control the judiciary.[104]

The JSC has sought to seal this loophole by promulgating regulations to govern the processing of petitions and complaints against judges. However, while these regulations require the JSC to conduct a preliminary evaluation of petitions to determine whether they disclose grounds for the removal of a judicial officer from office, they do not provide for procedural fairness at this initial stage.[105] Fairness demands that even at this stage, the affected judicial officer should be informed of the case against him and given a chance to comment on it. And the JSC should only proceed if it is satisfied that a petition has prima facie sufficient basis in fact and, therefore, warrants representation to the President.

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103 Republic of Kenya, Tribunal of Investigation into the Conduct of Hon. Mr. Justice (Prof.) Jackton B. Ojwang 2019.

104 *See* Akech, *Administrative Law* at 443, 447-452.

105 Judicial Service (Processing of Petitions and Complaints Procedures) Regulations 2023, regulation 7.

Concerning the public financing of the judiciary, the Constitution of 2010 establishes a Judiciary Fund.[106] The idea is that the judiciary should be allocated adequate money for its operations and the money should be paid directly into this fund once Parliament (the National Assembly) approves the judiciary's budget. Initially, the executive respected this provision of the Constitution, even if it ensured that the judiciary received only a small proportion of the national budget which also declined over the years (typically less than one percent).[107] Subsequently, the executive simply ignored the Constitution and ordered the judiciary to take its budget estimates to the Ministry of Finance (Treasury) instead of taking them directly to the National Assembly.[108] Essentially, this made the judiciary's budget an item in the budget of the Governance, Justice, Law and Order Sector institutions (such as the Ministry of Internal Security, the Police, the Attorney General and the IEBC).[109] And although the current government has now operationalized the Judiciary Fund, the judiciary has not been allocated a sufficient portion of the national budget. Thus, the funding of the judiciary remains subject to political fluctuations.

106 Constitution of Kenya 2010, article 173.
107 David Maraga, "Statement by Chief Justice David Maraga on the Judiciary Budget Cuts", 4 November 2019.
108 Maraga, Chief Justice Maraga's Statement.
109 Maraga, Chief Justice Maraga's Statement.

b) Administrative Law in the Private Domain

In the private domain, we grapple with two kinds of collective powers in our day-to-day lives. These are the powers of the contracting state and the associations and clubs we belong to. The former arises because the government has outsourced, and continues to outsource, many of its traditional functions to private entities – including the delivery of services such as water, roads, education, health care, and policing. These processes of privatization create private power, and the private providers of public goods and services then get to determine the liberties and livelihoods of citizens.[110] The latter arises because private entities have responded to the failure of governments to regulate many areas of international interaction such as sports, and our desires to form private clubs and associations at the national level.

In common law jurisdictions such as ours, the law's relationship with power has largely been governed by the ideology of liberalism, which establishes a dichotomy between the public sphere and the private sphere. On the one hand, liberalism explicitly recognizes the imbalances in power between public bodies and private individuals, which is then seen to justify the imposition of "higher order duties" of fair and considerate decision making on public bodies. Conversely, liberalism does

110 *See* Migai Akech, *Privatization and Democracy in East Africa: The Promise of Administrative Law* (East African Educational Publishers, 2009).

not sufficiently recognize power imbalances in the private domain and largely assumes that individuals are equal and are capable of resolving any instances of abuses of private power among themselves, without the need for governmental intervention. While liberalism has evolved over the years, culminating in the establishment of the regulatory state, fidelity to the public/private dichotomy continues to be a hinderance to the imposition of the higher order duties on private bodies.

Nevertheless, Administrative Law has endeavored to regulate the immense power that private entities performing public functions (such as the provision of water and sanitation) have acquired by virtue of privatization processes.[111] In Kenya's case, judicial review can be a dependable mechanism for regulating this kind of private power, and its usefulness has been enhanced by the Constitution's recognition that the Bill of Rights also binds private entities.[112] Embracing this horizontal approach to constitutional rights, Kenyan courts have, therefore, granted judicial review remedies in various cases involving the abuse of power by private entities exercising public functions. Nevertheless, our courts are yet to fully appreciate the danger that this kind of private power poses to our liberties and livelihoods, and have in various decisions taken the approach

111 *See* Migai Akech, *Privatization and Democracy in East Africa: The Promise of Administrative Law* (East African Educational Publishers, 2009). Public functions are the duties that the state owes its citizens as a result of the social contract.

112 Constitution of Kenya 2010, articles 2 (1) and 20 (1).

that judicial review remedies are not available against such private bodies and that those aggrieved by their actions and decisions should seek private law remedies.[113]

The Kenya Association of Music Producers (KAMP) is one such private body. It is licensed by the Kenya Copyright Board, a public body established by the Copyright Act, to carry out a regulatory activity, namely formulating, imposing, and collecting royalties on behalf of the producers of sound recordings. Thus, it collects royalties from entities such as bars, restaurants and hotels that broadcast sound recordings. For all intents and purposes, therefore, KAMP is a private body performing a public function. The businesses from whom it collects the royalties have an interest in this regulatory activity since it affects their profitability. From this perspective, they ought to participate in the making of the rules governing the formulation and administration of the royalties. Further, KAMP wields significant power over these businesses, and this power should therefore be exercised in a manner that adheres to the principles and procedures of Administrative Law.

Indeed, these businesses have on two occasions filed cases against KAMP, alleging that it had imposed the royalties arbitrarily and without their participation, and sought to collect them without due process.[114] Unfortunately in both cases, the courts

113 Migai Akech, *Administrative Law* 365 – 371.
114 *See* Migai Akech, *Administrative Law* 368 – 369.

have declined to prohibit KAMP from collecting the royalties, on the reasoning that KAMP is a private body that is not amenable to judicial review. However, this is clearly a situation in which the government would have collected the royalties had it not established KAMP to do so on its behalf. In addition, KAMP is backed by governmental power. Accordingly, private entities that perform public functions, such as KAMP, should adhere to the principles and procedures of Administrative Law.

Conversely, the challenge of regulating de facto private power – that is, power that does not entail the exercise of public functions – has arisen in the context of sport and social clubs. In the sporting context, much of this power is wielded by autonomous international sports organizations, although it is often exercised through their national affiliates. Examples are the International Association of Federation Football (FIFA) and the International Cricket Council (ICC). These organizations can impose heavy sanctions on errant athletes, hence the need to ensure that they do so in a manner that is fair. However, the challenge of subjecting these entities to the discipline of Administrative Law is daunting because it not easy to get them to submit to the jurisdiction of national courts. For clubs, the question is usually whether courts can intervene in their rule making, rule application, and adjudication processes to protect the interests of their aggrieved members.

International sports organizations such as the ICC wield immense powers and ought to be subject to Administrative Law.[115] These organizations largely operate outside the purview of national and international law, and are governed by their constitutions and rule books as autonomous private entities. While membership in these organizations is voluntary, they invariably monopolize their sports because athletes are compelled to become members if they want to participate. These organizations are, therefore, extremely powerful and their decisions can have profound effects on the liberties and livelihoods of athletes. For instance, they can suspend or ban players from the sport, thereby depriving them of a livelihood. While such power may be necessary to ensure that the spirit of fair play prevails in sports, it is capable of being abused. Unfortunately, where such power is abused, the affected athletes are often at a dead-end since national courts in many jurisdictions remain reluctant to intervene, deeming their relationship a private affair governed by contract and outside the purview of public law.

This is the fate that befell Maurice Odumbe, a star cricketer and then captain of Kenya's national cricket team.[116] The Kenya Cricket Association (acting for and on behalf of the ICC) imposed an arguably excessive five-year ban on Odumbe for allegedly

115 *See* Migai Akech, "The Maurice Odumbe Investigation and Judicial Review of the Power of International Sports Organizations", Entertainment and Sports Law Journal, ISSN 1748-944X, January 2008, <http://go.warwick.ac.uk/eslj/issues/volume6/number2/akech/> .

116 *Republic v Kenya Cricket Association and 2 others* [2006] eKLR.

having inappropriate conduct with a bookmaker. In an attempt to overturn this ban that clearly threatened (and subsequently ended) his career, Odumbe applied to the High Court for judicial review orders. However, the High Court declined to issue judicial review orders against the KCA and ICC on the reasoning that they were not public bodies or persons performing public functions and that his remedies lay in private law as this was a contractual dispute.

Then there is the case of the International Federation of Association Football (FIFA), which has been overly meddlesome in the governance of football in Kenya, as its decision to replace the erstwhile Kenya Football Federation (KFF) with Football Kenya Limited (FKL) illustrates. In 2008, a faction of KFF led by Mohammed Hatimy registered a company by the name FKL, in the midst of court disputes by warring factions of the KFF on, among other things, who were the lawful officials of KFF. The Hatimy faction then held a general meeting of KFF which approved the dissolution of KFF and the formation of FKL. Representatives of the Confederation of African Football (CAF) and FIFA attended this meeting. Not long after this meeting, FIFA wrote to Hatimy in his capacity as the president of FKL, informing him that KFF was no longer registered by FIFA and CAF, and asking him to transmit this information to the Kenya Registrar of Societies. Subsequently, the Prime Minister of

Kenya wrote to the FIFA president and confirmed that the Government of Kenya now recognized FKL as the only body managing football in the country. Around the same time, the Sam Nyamweya faction of KFF held a special general meeting of KFF, which elected new office bearers, who were confirmed by the Registrar of Societies, as required by the Societies Act.

In recognizing FKL, FIFA violated its statutes. These statutes provide that membership is only permitted if an association has been a provisional member of FIFA for at least two years.[117] Having only been formed in June 2008, FKF did not, therefore, qualify to be a member of FIFA. Further, FIFA did not follow its procedures for expelling members in the case of KFF, on the reasoning that there was no need to follow these procedures since KFF was merely "transformed to FKL". This reasoning was faulty given that there are no mechanisms under Kenyan law for transforming a society such as KFF into a private limited liability company such as FKL. Under Kenyan law, a society can only be dissolved if a general meeting of the society resolves, by a vote of two-thirds of the majority of its members who are present and voting, that it should be dissolved. No such meeting took place in the case of KFF. Further, such a resolution must be filed with, and approved by, the Registrar of Societies. Again, this did not happen.

117 FIFA Statutes, article 10, para. 2.

The Court of Arbitration for Sport (CAS)[118] then ratified this illegality claiming that the highest representatives of the Kenyan government (namely the Prime Minister) had taken a decision to replace the body governing football in Kenya, that is, transform KFF into FKL.[119] However, the relevant Kenyan authority was the Registrar of Societies, who did approve any resolution to dissolve KFF and transform it into FKL. Further, the purported transformation of KFF into FKL was not facilitated or authorized by any law. Thus, there was no lawful "change of the legal vehicle" of the national football organization, as the CAS claimed. On these wrong premises, CAS reasoned that FIFA's rules for the expulsion of a member and the admission of a new member did not apply to this case. Indeed, questions concerning matters such as the legal status of the bodies managing football in the national context can only be resolved by the applicable law, which is the law of the place in which such bodies are established, which in this case was the law of Kenya. Unfortunately, the decisions of CAS are, for all intents and purposes, final. One can only appeal a decision of CAS to the Swiss Federal Tribunal (SFT) on procedural grounds. Hence, the factual findings of CAS cannot be challenged, even if they are incorrect, unreasonable, or arbitrary.

118 The Court of Arbitration for Sport is a body established by the International Olympic Committee to settle sport-related disputes, and is located in Lausanne, Switzerland.

119 Kenya Football Federation (KFF) v Federation Internationale de Football Association (FIFA), CAS 208/o/1808.

Although they are private bodies, international sports organizations should, therefore, be subject to the discipline of Administrative Law given that they have immense powers that they sometimes exercise in ways that undermine the liberties and livelihoods of athletes. In any case, there are no national or international legislative frameworks for the regulation of their power. While a number of these organizations have, through self-regulation, incorporated the principles and procedures of Administrative Law in the constitutions and rules, there remains a need for judicial review of the implementation of such principles and procedures to ensure that they are applied fairly.

As Lord Denning stated in the famous case of *Lee v Showmen's Guild of Great Britain*[120], these organizations "wield powers as great, if not greater, than any exercised by the courts of law", which can deprive a person of his or her livelihood. Further, while the relationship between these organizations and their members are in theory based on contract, these contracts are arguably never fair given that the members invariably do not have a choice in the matter. If the members want to engage in the trade regulated by the organizations, the members must submit to the organizations' unilateral rules. To prevent the abuse of this immense power, courts should intervene and ensure that these organizations apply their rule books in ways that adhere to the principles and procedures of Administrative Law.

120 Lee v Showmen's Guild of Great Britain (1952) 1 All E.R. 1175.

Then there are the social clubs. Kenyan courts now recognize that such private bodies wield significant power that can be abused. In any case, the Constitution of 2010 applies horizontally, in the sense that "Its Bill of Rights applies to all law and binds all state organs and all persons".[121] Hence, the courts now regulate the exercise of private power in deserving cases.[122] And in determining whether a case is deserving, the courts consider factors such as the adequacy or feasibility of internal remedies, and whether the club has followed the Constitution and its own rules in making the decisions or taking actions in respect of which its members seek judicial intervention. It follows that a club cannot discriminate against its members or violate its own constitution or rules.

From this discussion, we should appreciate that private power can be no less harmful than public power. Hence, a court confronted with a complaint against the exercise of private power should intervene where the private body in question acted contrary to the Constitution or other applicable law, or acted in bad faith, or violated its own rules or regulations, or acted unreasonably. In particular, courts should intervene if in such circumstances the alternative remedies available to the affected individuals are either inadequate or impracticable.

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121 Constitution of Kenya 2010, article 20 (1).

122 *See, for example, Rose Wangui Mambo and 2 others v Limuru Country Club and 17 others* [2014] eKLR.

c) Has Administrative Law Realized its Promise?

From the foregoing discussion, it should be evident that real democracy remains a mirage in Kenya. With each successive election, the performance of the IEBC continues to deteriorate and the little legitimacy that government enjoys is eroded further. The government thus feels compelled to rule by fiat as far as possible, in the process ignoring, undermining, compromising, discrediting or controlling institutions of accountability. The result is a vicious cycle of bad governance and corruption. And the courts remain inexplicably reluctant to subject private bodies such as KEMP exercising public functions to the strictures of Administrative Law.

Nevertheless, Administrative Law can be an effective instrument for realizing democratic governance in the public and private spheres, and we have made significant strides towards this end. Thanks to the constitutionalization of judicial review, Kenya has seen an exponential growth in judicial review since 2010. For example, judicial review has considerably constrained the exercise of power in various contexts of public and private administration. Unfortunately, and as we have seen, Kenya's inherited culture of power and its preference for autocratic governance means that efforts to use Administrative Law to ensure democratic governance will always face strong resistance from the powerful. Hence, the executive remains unconstrained in significant respects, even if it continues to be

needled by public interested litigation that is often based on Administrative Law.[123] Accordingly, if we are to make better use of Administrative Law, we need to enhance the supply of good administration and the demand for democratic governance.

Good administration would mean that bureaucrats/ administrators do the right thing in making decisions and taking actions, without being prompted and without being policed. It would entail bureaucrats, out of their own volition, making decisions and taking actions that adhere to the principles and procedures of Administrative Law. Thus, they would act autonomously but in accordance with the law, respect the rights of those concerned, take reasonable decisions, give reasons for their decisions, act fairly and proportionately and without unlawful discrimination, and ensure no conflicts of interest.[124] We need administrators who will safeguard the public interest, and who will not use their positions of trust to pursue regime maintenance or other partisan ends. In short, to attain good administration we need good administrators.

However, ensuring the supply of good administrators in a society such as ours in which corruption is pervasive is bound

123 *See, for example,* Mercy Koskei, "President Ruto: No Courts of Law Will Stand in My Way", *Nation*, 3 January 2024, available at <https://nation.africa/kenya/news/politics/president-ruto-no-courts-of-law-will-stand-in-my-way--4480668>.

124 *See, for example,* African Charter on Values and Principles of Public Service and Administration 2001.

to be a daunting task.[125] And so, it remains the case that we predominantly appoint administrators on the basis of political correctness and pliability, as opposed to their competence and integrity. Coupled with the fact that we continue to grant wide statutory powers to bureaucrats, the outcome is a bureaucracy that is "highly discretionary and patrimonial"[126] as it is mandated to distribute public resources as dictated by the President, who largely remains the grand patron, and his lackeys. This is a bureaucracy in which clientelism and political interference in the work of the bureaucracy are rife. In this context, the performance of the administrators mirrors the distribution of power in the society, and administrative decisions and actions largely effect or reflect the wishes of those that wield power at any given time. Thus, whenever citizens encounter government their treatment depends on their status or positions in society, including their ethnicity.

This state of affairs can only change if bureaucrats are selected on the basis of merit.[127] We, therefore, need to rethink the method we adopted in the Constitution for selecting the

125 *See, for example,* Migai Akech, "Abuse of Power and Corruption in Kenya; Migai Akech, "Evaluating the Impact of Corruption (Perception) Indicators on Governance Discourses in Kenya", in The Quiet Power of Indicators: Measuring Development, Corruption, and the Rule of Law 248 – 283 (Sally Engle Merry, Kevin Davis, and Benedict Kingsbury, eds, Cambridge University Press, 2015).

126 Francis Fukuyama, "What is Governance?" 26 (3) *Governance: An International Journal of Policy, Administration, and Institutions* 347 at 353 (2103).

127 *See, for example,* Fukuyama, "What is Governance?"

members of key public offices such as the institutions of horizontal accountability. These officers are appointees of the President, who controls the appointment process, including selecting the panels that consider applications to fill vacancies, through formal and informal means. The legislature essentially plays a nominal role in this process, which consists of approving the names of successful applicants that the President forwards to it. This is particularly the case where, as has tended to be the norm, the ruling party is also the majority party in the legislature, or controls it. Thus, the legislature typically rubberstamps the choices of the President. The result is that these officers are more accountable to the executive than to the public. On occasion they do bark, but just never too loudly. And when they bark, they are quickly brought under control or neutered.

Judicial review has the potential to enhance the quality of Kenya's governance by ensuring that the processes of appointing the members of the horizontal institutions of accountability are both transparent and accountable. In this respect, the High Court's decision in *Okoiti v National Executive*[128] is encouraging. Here, the court decided that the selection panel had a duty to disclose its interview proceedings on the reasoning that "[t]here would be no public confidence in the Auditor General if the Selection Panel was not transparent and accountable" in

128 Okiya Omtatah Okoiti v National Executive of the Republic of Kenya & 2 others; Katiba Institute (Interested Party) [2020] eKLR.

its appointment decision-making.[129] According to this court, the people of Kenya would only have been assured that extraneous considerations had not influenced the recruitment process had the Selection Panel released the interview proceedings.[130]

However, glaring inconsistencies in the requirements of the various statutes governing the processes of appointing the members of the institutions of accountability, and which ironically all claim to be implementing the Constitution's exacting standards of leadership and integrity, undermine this potential of judicial review. For example, while the Public Audit Act[131] requires a selection panel established to consider applications for the position of Auditor General to submit to the legislature a report of its interview proceedings, no similar obligation is imposed on the Judicial Service Commission (JSC) in respect of the appointment of judges. Further, the JSC has resisted calls for it to be transparent in hiring judicial officers.[132] Typically, the JSC makes a public announcement whenever it recommends individuals for appointment as judges. And in doing so, it usually declares how it acted in an open and transparent manner, and how the process was competitive. However, it never shares the rationale of its recommendations with the public nor how it arrived at them, thereby only giving the public a veneer of transparency.

129 Okoiti v National Executive at para. 94.
130 Okoiti v National Executive at para. 95.
131 Public Audit Act, section 11(5).
132 *See, for example,* Migai Akech, *Administrative Law* 446 – 447.

In the case of the JSC, a court has even preposterously claimed that there is no need to scrutinize its appointment decision-making on the grounds that the public can trust its discretion since its broad-based membership makes it credible.[133] Further, instead of championing transparency in the process of appointing judges, this court considered it was more important to protect the rights of applicants since publicizing the JSC's interview proceedings could violate their rights to privacy and prejudice their career advancement.[134]

On the demand side, citizens need to be civically empowered to make better use of Administrative Law, including educating them to challenge power, and training them to be legally literate and to find and use legal assistance. In other words, while our regime of Administrative Law now establishes mechanisms that the powerless can use to hold the powerful to account, there is a need to strengthen the capacities and resources (including access to information) of the powerless so that they can participate more effectively in public decision-making processes, and hold administrators to account. Hopefully, however, devolution and other mechanisms for the distribution of economic and political power that the Constitution establishes will, in the fullness of time, dismantle existing power relations, and create room for more inclusive, transparent and accountable governance.

133 Andrew Omtatah Okoiti v Attorney General & 2 others [2011] eKLR.
134 Andrew Omtatah Okoiti v Attorney General & 2 others [2011] eKLR.

We will also need to pay greater attention to reforming our statutory law regime, so that it can confer less discretionary powers to administrators. As we have seen, it is this regime that gives the legal order its imperial or authoritarian character. So far, our approach has been to leave the statutes that make up this regime to the vagaries of constitutional litigation and judicial review, in which we have asked the courts to strike them down. Sometimes the courts have obliged. The result is that the vast majority of these statutes remain intact, and are readily used to oppress citizens. And to make matters worse, we continue to use the same colonial approach to law-making, which entails giving the barons wide discretionary powers.

d) The Tyranny of Development Assistance and Lopsided International Trade Regimes

Our efforts to tame the tyranny of the barons should also extend to international geopolitical and neocolonial factors, such as development assistance and lopsided international trade regimes, which contribute to the tyranny that we experience in national governance.

In the case of development assistance, the Western countries that give us aid do so using institutional mechanisms that bypass national public accounting and procurement systems.[135]

135 Migai Akech, "Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid" 37 *NYU Journal of International Law and Politics* 829 (2005).

Indeed, Kenya's Public Procurement and Assets Disposal Act legalizes this tyranny by exempting "procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency".[136] The net effect is that development assistance then facilitates the use of public procurement as a resource for political patronage and for the unjust enrichment of corrupt barons and the aid givers.[137]

Alternatively, the aid givers, or development partners as they like to call themselves, mandate the recipient governments to establish parallel accounting and procurement regimes for their aid, and which they control.[138] Typically, these regimes consist of fairly informal and locally-unaccountable networks of the aid givers and powerful local barons, and their governance structures do not effectively incorporate representatives of local constituencies. This is counterproductive. The maintenance of parallel accounting and procurement systems is not only inefficient, but also provides avenues for corruption since the lines of accountability are attenuated and ignore local constituencies.

136 Public Procurement and Assets Disposal Acct 2015, section 4 (2) (f).

137 Akech, "Development Partners and Governance of Public Procurement in Kenya" at 830-831.

138 *See, for example,* Akech, "Development Partners and Governance of Public Procurement in Kenya" (discussing the governance of Sector Wide Approaches to development assistance).

In response to concerns that these parallel regimes are bypassing national frameworks for accountability, the aid givers often argue that they are primarily accountable to their taxpayers and that it is up to the recipient governments such as Kenya to worry about being accountable to the local electorate. Indeed, development assistance is not altruistic. It is invariably driven by the geopolitical interests of the donor countries, who set the agenda and conditions of cooperation. This explains the policy of tying aid, and ensuring that the firms incorporated in the donor countries get the critical tenders that administer their aid. Further, because meaningful local participation may lead to the citizens of the recipient countries expressing preferences that conflict with the priorities of the donors, participation in these regimes remains little more than a buzzword.

But this argument is not entirely persuasive since this accountability relationship implicates the effectiveness of aid. Because there are no frameworks through which the local electorate can hold the recipient government to account, aid funds have in many cases not been used for their intended purposes. Accordingly, there is a strong case for reformed national frameworks to ensure the accountability of development assistance regimes to the citizens of the recipient countries, since the local electorate cannot demand accountability directly from the aid givers. In other words, the development assistance regimes constitute a form of transnational regulation that should be subject to national Administrative Law oversight.

These development assistance regimes implicate the governance of public procurement in developing countries such as Kenya, given that many public contracts are financed by these regimes, as part of either bilateral or multilateral agreements. The barons who preside over these regimes control huge sums of money and effectively determine the fortunes of many domestic firms, given that their funds constitute a core part of the development expenditures of the recipient countries.

To ensure the accountability of these regimes, we need a national law on aid administration, establishing clear institutional and accountability frameworks, and also structuring the participation of local stakeholders.[139] The objective of such a law would be to ensure that the formulation and administration of aid is efficient, participatory, and accountable. Such a law should also require the government to keep an inventory of all development assistance agreements and facilitate public access thereto. While it can be expected that governments keen to maintain aid as a patronage resource will resist attempts to make aid administration transparent, such a law would offer an effective means through which the citizens of the recipient country can debate and counter the narrow interests of donors and local barons.

139 Akech, "Development Partners and Governance of Public Procurement in Kenya" at 865.

Developing countries also experience the foregoing pressures of development assistance in the international trade arena.[140] Here, bilateral political and economic pressures have eroded the policy autonomy of these countries to regulate international trade in the interests of their citizens. In particular, these bilateral pressures take advantage of regulatory uncertainty at the international level to facilitate the exploitation of developing countries, typically with the connivance of local barons.

The prevailing regulatory uncertainty over the regulation of trade in genetically modified (GM) food products provides an excellent illustration of this phenomenon. The United States and the Member States of the European Union (EU) have taken almost diametric approaches to the regulation of these products. While the United States has taken the approach that GM food products are substantially equivalent to their organic counterparts and should therefore be traded freely, the EU has adopted a precautionary approach to trade in these products on the rationale that they may have adverse impacts on human health and the environment.

Because the international regulatory framework does not effectively govern trade in GM foods, the United States and the EU have utilized bilateral political and economic pressures to prevail on the governments of developing countries to adopt

140 Migai Akech," Developing Countries at Crossroads: Aid, Public Participation, and the regulation of Trade in Genetically Modified Foods" 29 *Fordham International Law Journal* 265 (2006).

favorable regulatory approaches. In particular, these pressures are applied through the instruments of technical assistance – often in the context of the World Trade Organization's special and differential treatment (SDT) regime – and food aid. On the one hand, the technical assistance is provided on the condition that the recipients adopt regulatory policies that are favorable to the benefactors. On the other hand, food aid serves as an instrument to capture new markets for GM food products. Thus, United States legislation on food aid programs gives priority to export of agricultural commodities to developing countries that have "demonstrated the potential to become commercial markets".[141]

These bilateral pressures therefore serve to undermine the policy autonomy of developing countries to regulate trade in GM food products in the interests of their citizens. Further, they serve to narrow regulatory conversations by advocating for an approach to trade and aid that largely excludes the citizens of developing countries from participating in the administrative frameworks for regulation. Greater efforts are therefore required to ensure the democratization of these regulatory regimes that are dominated by powerful states such as the United States and the local barons who enable them.

141 Oxfam, "Food Aid or Hidden Dumping? Separating Wheat from Chaff", Oxfam Briefing Paper No. 71 of 2005.

[V] A Future Research Agenda

Given human foibles such as bias, prejudice, and caprice, it would seem that attaining the rule of law is virtually impossible. Thus, achieving universalism is always going to be a pipe dream as long as human agency controls or is involved in administrative decision making. In addition, challenging unfair administrative action is often an arduous task. Constraints dictated by extant cultures of powers and relations also mean that we won't always succeed in our endeavors to question unfair administrative action. So, why don't we use machines to make administrative decisions? Perhaps using machines to make or assist us to make administrative decisions will save us from human tyranny and help us to attain the universalism that now eludes us?

Take the case of the long-running saga of my promotion to the position of Professor of Law at the University of Nairobi, for example. The applicable regulations of the university state that an applicant for this position should fulfill the following criteria: (1) have a minimum of ten years teaching experience, three of which must be at an Associate Professor Level; (2) have supervised to completion a minimum of three PhD and five masters students or a minimum of two PhD and nine masters students; (3) a minimum of thirty nine publication points from

peer reviewed journals; (4) attracted research or development funds or educational resources as an Associate Professors; and (5) show evidence of community service and have registered with a relevant professional body. I met, and surpassed, these criteria in 2018. However, the University of Nairobi simply refused to promote me, and did not give me any, or intelligible, reasons for its cold and sterile inaction. Yet, it was very easy for the University to establish whether or not I had met the criteria. However, it took the University of Nairobi five long years to make this very simple decision. In the process, the University denied me income, seniority, and the prestige that goes with the title of Professor of Law.

In these circumstances, perhaps it would have been better had the promotion decision been left to a machine. Undoubtedly, a machine would have quickly determined whether or not I had met the promotion criteria. As I look to the future of Administrative Law scholarship, it, therefore, seems to me that we need to grapple with what the technologies that enable the digital automation of governance portend for democracy, the rule of law, and the exercise of power by the barons in the various contexts of public and private administration. This automation is powered by machine learning algorithms, which constitute a facet of artificial intelligence, and have created what is now termed algorithmic decision-making or automated decision-making.

Algorithmic decision-making raises a number of questions from the perspective of Administrative Law that should now concern scholars. The primary question is: will these technologies help us tame the tyranny of the barons, or make matters worse? Will the use of these technologies be beneficial (in the sense of promoting fairness and universalism in decision-making), or will they exhibit the same human biases in decision-making that undermine our liberties and livelihoods?[142] Their proponents aver that these technologies can help us to improve governance and deliver public goods and service.[143] They even assert that automating administration can enhance objectivity in decision-making and provide fewer opportunities for "the kinds of problems, such as capture and corruption, that administrative law has long sought to prevent".[144] But what if these technologies exhibit the same human biases, will Administrative Law as we know it be able to deal with them, or will it need new tools? In other words, should "algorithmic accountability regimes sit on the same foundation as due process artifacts of the industrial age"?[145]

142 Woodrow Barfield and Jessica Barfield, "An Introduction to Law and Algorithms", in *The Cambridge Handbook of the Law of Algorithms* 3 (Cambridge University Press, 2021).

143 *See, for example,* Cary Coglianese and David Lehr, "Regulating by Robot: Administrative Decision Making in the Machine-Learning Era" 105 *Georgetown Law Journal* 1147 (2017).

144 Coglianese at 111.

145 Ari Ezra Waldman *The Cambridge Handbook of the Law of Algorithms* 107 at 112.

Algorithms may be defined as a set of problem-solving mathematical procedures for controlling human-made systems such as autonomous cars or solving problems, including administrative problems. In their most common form, algorithms are mathematical "instructions embodied within computer programs, such as those which make artificial intelligence (AI) possible".[146] Algorithms "automate decision making processes by providing computer systems with instructions to analyze inputted data".[147] They mechanize decision-making by identifying and learning from meaningful relationships and probable patterns in large datasets.[148] Essentially, the algorithms are intelligent: they make their own decisions regarding the operations to be performed and even improve with experience.[149] Humans can then use the data analyzed by algorithms to make quick decisions, and do things they would otherwise not be able to do. Algorithms enable us to not only process complex data and make quick decisions but also allow us to outsource decision-making from humans to machines.[150]

146 Barfield and Barfield at 4.

147 Waldman at 108. *See also* Joshua A. Kroll, "Accountable Algorithms" 165 *University of Pennsylvania Law Review* 633 (2017).

148 Waldman at 108.

149 Michele Finck, "Automated Decision-Making and Administrative Law" in *The Oxford Handbook of Comparative Administrative Law* 657 at 659 (Peter Cane et al, eds, 2021).

150 Barfield and Barfield at 3.

Today, AI is used world over to make all kinds of decisions in the public and private domains.[151] In the private domain, for example, banks use AI to approve or reject loan applications. In this context, the value of algorithms is that they estimate the probability that an individual will or will not repay a loan or do so on time. Thus, rather than make a financial risk decision on the basis of her informal impression after interviewing an applicant, a loan officer can use AI-generated historical loan repayment data to make an intelligent, informed decision.[152]

And in the public domain, AI is used to evaluate teachers, allocate policing resources, distribute government benefits, inspect regulated entities, and adjudicate disputes. In Kenya, for example, we have made encouraging use of automation in the delivery of public services in ways that greatly enhance efficiency and reduce bureaucratic corruption. Indeed, in Kenya's case the prevalence of corruption can be attributed to the fact that systems of public administration are still predominantly manual. But because public officers use the inefficiencies of these systems to extort bribes from hapless citizens, the officers often resist automation initiatives that seek to speed up their administrative processes and minimize room for discretionary judgment.[153]

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151 *See, for example,* Cary Coglianese, "Administrative Law in the Automated State" 150 (3) *Daedalus* 104 (2021).

152 Waldman at 110-111.

153 *See, for example,* Akech, "Evaluating the Impact of Corruption (Perception) Indicators on Governance Discourses in Kenya" at 257 – 258.

Algorithms, therefore, offer tremendous benefits, and their use will continue to grow as the world moves into the Fourth Industrial Revolution (or 4IR), whose early stages we are now witnessing. Because they "simply compute the numbers and numbers are dispassionate", it is also arguable that algorithms are "neutral pieces of technology" and "promise a future without bias".[154] But are they ever free of bias or mistakes? It is humans who code algorithms and will, "consciously or not… seed [algorithms] with their own flawed perspectives" that are also shaped by extant power relations in society.[155] Further, numbers are not value-free and we attach to them meanings that vary with "human interpretation, understanding, and deployment".[156] Hence, we cannot take politics out of algorithms, which consequently "have the potential to exacerbate or replicate human bias".[157] Further, algorithms "will necessarily make mistakes" since they rely on probabilities, rather than certainties. Thus, in the loan approvals example above, "Some individuals who get tagged as bad credit risks are more than capable of repaying their loans, and those applicants who were approved for loans will default".[158] In algorithmic parlance, it is inevitable that they will be false negatives, and there will be false positives.

A need, therefore, arises for "algorithmic fairness" so that algorithms and the technologies that use AI are not only made

154 Waldman at 114.
155 Barfield and Barfield at 3.
156 Waldman at 114.
157 Barfield and Barfield at 3.
158 Waldman at 111.

but also used in ways that are democratic (that is, participatory and accountable) and legitimate.[159] The Administrative Law principles of transparency and fair procedure therefore become important in interrogating algorithmic decision-making. As in other contexts, therefore, fair procedures are likely to lead to the use of better data in the making of algorithms (through, for example, the diversification of data inputs) and the creation of better algorithm-based administrative systems in which people are treated with kindness and respect.[160] As Ari Ezra Waldman has noted, "Algorithmic systems designed with diverse voices are fairer systems, much like representative political bodies are fairer than unrepresentative ones".[161]

Algorithms can be used in decision-making in two ways. First, they can be used as aids to human decision-making. Second, they can be used to make decisions, which entails eliminating human discretion altogether. In either case, their uses may cause harms that implicate Administrative Law and require the establishment of enabling legislative frameworks, if their use is to fulfil Administrative Law's legality principle. That is, there must be laws that define the parameters within which algorithms can be used in decision-making, particularly in the public domain.

159 Waldman at 107.
160 Waldman at 107.
161 Waldman at 116.

To ameliorate the harms that will certainly occur when algorithms make mistakes, scholars of Administrative Law have therefore recommended the establishment of safeguards that "keep humans in the loop" where algorithms are used as decision-making aids – including *ex ante* and *ex post* evaluation of the design of algorithms and the data used to train algorithms.[162] In these ways, statistical errors in algorithms and their unintended effects can be resolved. In any case, it cannot be assumed that humans will use the algorithms in good faith, hence the need to interrogate algorithm-based human decision-making using Administrative Law principles such as reasonableness.

It is also in the nature of algorithms that they can be opaque. Automated systems use many data inputs and are bound to "become more complex and more opaque and resistant to interrogation" as the number of inputs increases.[163] Thus, their outputs are not always predictable given that "even the engineers who create them may not be able to fully explain how inputs become outputs".[164] Algorithms "detect patterns and generate predictions in complex, non-intuitive ways that

162 *See* Meg Leta Jones, "Right to a Human in the Loop: Political Constructions of Computer Automation & Personhood from Data Banks to Algorithms 47 *Social Studies of Science* 216 (2017); Sonia K. Katyal, "Private Accountability in the Age of Artificial Intelligence" 66 *UCLA Law Review* 54 (2019).

163 Waldman at 111.

164 Waldman at 112.

are not always easily explainable".[165] They can teach themselves (or learn on their own) and essentially assume a life of their own, so that what they do becomes unexplainable.[166] This explains why automated decision-making systems are said to be "black boxes": it is difficult to explain how they generate their outputs.[167] Accordingly, it is often the case that "one cannot ascribe a causal relationship between the algorithm's input data and output prediction".[168] Law then exacerbates or "metastasizes algorithmic opacity" by granting intellectual property rights (such as proprietary trade secrets) to the creators of automated decision-making systems.

The result is that it is often difficult to understand or challenge automated decision-making, particularly where human discretion has been eliminated altogether. For this to happen, algorithmic systems need to be made transparent, which can be achieved by, for example, not recognizing the intellectual property rights claims of their creators when this is in the public interest.[169] Alternatively, administrators could contractually require the owners of the algorithms to waive their intellectual

165 Steven M. Appel and Cary Coglianese, "Algorithmic Governance and Administrative Law" in *The Cambridge Handbook of the Law of Algorithms* 162 at 163.

166 Appel and Coglianese at 166.

167 Frank Pasquale, *Black Box Society: The Secret Algorithms that Control Money and Information* (Harvard University Press, 2015).

168 Appel and Coglianese at 167.

169 *See, for example,* Rebecca Wexler, "Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System" 70 *Stanford Law Review* 1343 (2018).

property protections.[170] Black box algorithmic systems could also be mitigated by giving individuals "a right to explanation of automated decisions" that would entitle them to informed about the process behind the development of an algorithmic model.[171] Thus, Europe's General Data Protection Regulation (GDPR) entitles data subjects to explanations about the logic behind algorithmic systems.[172] Yet another possible remedial measure is to require data protection impact assessments of algorithmic systems that seek to assess the fairness of algorithmic systems.[173] Among other things, these assessments require the creator of an algorithmic system to assess its potentially harmful impacts before implementation and create documentation that can be used later for accountability.[174]

Administrative Law safeguards are also required to discipline the use of algorithms in decision making processes. Among other things, individuals affected, or likely to be affected by the resulting decisions would have the right to be informed that algorithms would be used to assist in the making of, or would

170 Finck at 667.

171 *See, for example,* Andrew D. Selbst and Solon Barocas, "The Intuitive Appeal of Explainable Machines" 87 *Fordham Law Review* 1085 (2018).

172 *See* Margot Kaminski, "The Right to Explanation, Explained" 34 *Berkeley Technology Law Journal* 189 at 199 (2019).

173 *See* Lilian Edwards and Michael Veale, "Slave to the Algorithm? Why a "Right to an Explanation" is Probably Not the remedy You are Looking for" 16 *Duke Law Technology Review* 18 (2017).

174 *See, for example,* Andrew D. Selbst, "An Institutional View of Algorithmic Impact Assessments", 35 *Harvard Journal of Law & Technology* 117 (2021).

make, the decisions. Further, they would have the right to an explanation of why and how the algorithmic systems would be used in decision-making processes, and the right to appeal or challenge adverse decisions that are the outcomes of these processes.

Where automated machine-learning algorithms are used to make decisions instead of human hearing officers, what becomes of the procedural fairness rights of affected persons, such as the right to be heard? What, for example, would the right to a hearing entail in such a situation? Should this right be given in its classical or industrial age sense? Or should the right be modified to accommodate algorithmic decision-making? For example, would a faceless paperwork review process satisfy the hearing requirement in such a context? And if that were the case, would granting the affected persons a right to appeal the decision of an algorithm to a human adjudicator enhance the quality of the procedural fairness of algorithmic decision-making?[175]

The very technical nature of algorithms and the opacity associated with them also contributes to undermining efforts to hold their decision-making accountable. In industrial age settings, giving affected parties the right to cross-examine a decision-maker is often an effective accountability mechanism.

175 *See* Appel and Coglianese at 170.

This approach is unlikely to work with algorithms as most persons affected by their decisions are not likely to understand how they work. However, this challenge could be mitigated by establishing independent bodies of machine-learning experts "to provide on-going oversight and review" of algorithmic decision-making.[176] The use of such independent experts would also make it easy for courts to review algorithmic decision-making using principles of Administrative Law such as reasonableness.

Administrators could also be required to disclose details about how the algorithms they intend to use to make decisions are designed and operate.[177] The problem, however, is that administrators typically rely on private contractors to develop for them algorithmic decision-making tools; these private contractors invariably insist on treating their algorithms as proprietary information, thereby erecting a barrier to algorithm accountability.[178] A middle ground is to require the owners of the algorithmic decision-making tools to disclose such information as would enable affected persons to understand the basic mechanics and processes by which the algorithms reach their decisions.[179]

176 Appel and Coglianese at 170.
177 Appel and Coglianese at 176.
178 *See, for example,* Wisconsin v Loomis, 881 NW .2d 749 (Wis. 2016) (United States) (where the Wisconsin Supreme Court rejected the defendant's arguments by affirming that the company that had developed the algorithm that had been used to determine his sentence had a right to protect its proprietary information).
179 Appel and Coglienese at 177 (explaining that such information would

Yet another plausible challenge concerning automated decision-making, particularly where human discretion has been eliminated altogether and algorithms substitute human judgment, is that it could implicate Administrative Law's non-delegation doctrine.[180] This doctrine states that administrative power is to be exercised by the repository of the power, who cannot therefore delegate its exercise to another person unless the law expressly says so. Thus, where the law gives an administrator discretion, it expects that the administrator will apply his or her mind in making a decision and not simply follow a policy, or, for that matter, what an algorithm says. A related concern is that by adopting and using algorithms to make decisions, administrators can fetter their discretion, with the result that they will approach all cases the same way.[181] In such a case, it would be said that the administrators have delegated their discretion to the algorithm and can consequently make "no genuine or conscious choice".[182] This, it is argued, is undesirable

include the owners of the algorithms "showing the objectives an algorithm has been designed to serve, what kind of machine-learning algorithm it is, and how the algorithm generally processes data… and the data set used to train the algorithm.")

180 *See, for example,* Johan Wolswinkel, "Comparative Study on Administrative Law and the Use of Artificial Intelligence and other Algorithmic Systems in Administrative Decision-Making in the Member States of the Council of Europe" 10, European Committee on Legal Co-operation, Report CDCJ (2022)31 (Council of Europe, 2022).

181 Wolswinkel at 10.

182 Marion Oswald, "Algorithm-Assisted Decision-Making in the Public Sector: Framing the Issues Using Administrative Law Rules Governing Discretionary Power" *Philosophical Transactions of the Royal Society A* 376:20170359. Available at <https://royalsocietypublishing.org/doi/full/10.1098/rsta.2017.0359>

where their need to exercise their discretionary powers to make decisions on a case-by-case basis.

From the foregoing exegesis, it seems to me that Administrative Law will cope just fine with algorithmic decision-making, even if its principles and procedures will require some adaptation or contextualization. The safeguards of Administrative can no doubt help us to manage algorithmic decision-making, although much will depend on how we implement them on the ground and the politics of the ground. In the coming years, I therefore plan to study and contribute to policy discourses on the application of Administrative Law to algorithmic decision-making processes and the automation of governance.

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