

The Future of Administrative Law in Kenya

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Abstract: Administrative actions by government, in pre and post colonial Kenya, have consistently fallen short of serving public interest. This has been so despite the existence of administrative law. The purpose of this study was to establish the developments in administrative law vis-à-vis the attitude of the government towards public service. The researcher randomly identified some key historical events and noted how they have influenced public policy, executive actions, judicial decisions, and legislation. The study found that a flawed philosophy of governance undermined the ability of institutions of governance to serve public interest pre independence to the year 2010. However since administrative law was constitutionalized in 2010, administrative actions are being influenced by judicial decisions, legislation, and public policy of the government. Thus, the study concluded that the future of administrative law will depend on the quality of judicial decisions, legislation, and public policy of the government. The study recommended that public participation in the legislative, judicial, and public policy formulation processes should be encouraged by all.

Key Words: Administrative Actions, Public Interest, Administrative Law, Judicial Decisions, Legislation, Public Policy.

Introduction

Administrative law is part of public law. It regulates public bodies and officials to serve public interest. It is part of English law received into Kenya. The English law is received under the Kenyan Judicature Act. The initial reception clause is S.3 of *the Judicature Act 1967* (now cap 8, laws of Kenya), which specifies the sources of Kenyan law. Thus, the basis of administrative law is the Constitution, Acts (Statutes), and other written laws. It also derives legitimacy from substances of common law and doctrines of equity.

Prior and subsequent to Kenya's independence from Britain in 1963 and becoming a republic in 1964, certain administrative actions undermined public interest. Kenya now defines administrative actions as "any action relating to matters of administration including a decision made or an act carried out in the public service; a failure to act in discharge of a public duty required of an officer in public service; the making of a recommendation to a Cabinet Secretary; or an action taken pursuant to a recommendation made to a Cabinet Secretary" (The Commission of Administrative Justice Act, 2011, S.2). Like unfair administrative actions, violation of individual rights has also been a consequence of bad governance. The colonizers of Kenya fashioned public bodies into personal instruments. Public bodies mainly served their interests and those of their local collaborators.

Prime lands were seized without compensation. Grabbing of public, communal, and private land remains a thorny issue threatening public peace and security. To redress this, the *Constitution of*

Kenya 2010 has recognized and preserved rights/interests in public land (article 62); community land (article 63); and private land (article 64). The constitution has also established the *National Land Commission* and recognized it as constitutional commission to manage land (Article 67 & Article 248(2).b).

Plum public service jobs were also given to the politically correct. So were public tenders, contracts, and access to government opportunities and services. These corruption and ineptitude extending to date is blamed for the country's state of the economy. Examples of Mega scandals involving multi-billion dollars include the *Goldenberg scandal* in the 1990s and the *Anglo-leasing* in the 1990s-2000s.

Elections for political offices were mainly a sham, a continuing challenge to present-day elections. The elections were managed by the Provincial administration system, partisan presidential appointees. For instance the District Commissioners were the returning officers for all constituencies in all elections including the most chaotic 'queue voting system' of 1988. The first multiparty elections of 1992 were managed by an electoral commission but one appointed by the President. Kenya had become a de jure-single party state in 1982 through constitutional amendments. In the 1997 elections minimal electoral reforms were effected under the *Intra-Parties Parliamentary Group (IPPG, 1997)*, with opposition parties nominating a few commissioners to the electoral commission. The 2002 elections results were generally accepted because NARC, a coalition of opposition parties, defeated KANU (in power uninterrupted since independence). The 2007 elections results were violently disputed leading to unprecedented post-elections violence, a matter subsequently prosecuted by the International Criminal Court (ICC). The Independent Elections and Boundaries Commission (IEBC) under the new Constitution 2010 conducted the 2013 elections- the presidential results were disputed but upheld by the Supreme Court. In colonial times, political power was concentrated in the hands of the Governor acting for the Queen of England. This power became for the presidency after Kenya's independence. Critics say the country has had 'rulers' not 'public servants.'

Public bodies seldom served public interest. Political opponents were detained, maliciously charged and jailed, or tortured. The earliest political detention was in colonial times, 1952. It involved nationalists Jomo Kenyatta, Bildad Kaggia, Kung'u Karumba, Fred Kubai, Paul Ngei, and Achieng' Oneko, famous as 'the Kapenguria six.' Those detained after independence include Anyona, Koigi, Odinga, Rubia, Matiba, and Shikuku, among many others. Others were politically assassinated. Those allegedly assassinated include Dedan Kimanthi (1957), Gama Pinto (1965), Tom Mboya (1969), J.M. Kariuki (1975) and Robert Ouko (1990), among other many mysterious deaths claimed to be occurring to this day. Oppressive laws such as *The Chief's Act 1963 (Public Order Act, cap 56)* aided these acts. So did the provincial administration system of government. The system had authority cascading from Governor's office (later President) down to Provincial Commissioners, District Commissioners, District Officers, chiefs, assistant chiefs, to village elders in that order.

The provincial administration system helped the government to 'gather intelligence' countrywide. Critics claim it was a 'spying' system designed to unfairly crackdown on 'pro change activists.' Proponents argue it was a matter of 'national security and preservation of law and order.' Subsequent constitutional amendments in independent Kenya consolidated

unfettered powers to the presidency. In 1982, there was a failed coup attempt against President Moi's regime, seen as a protest to the 'imperial presidency'.

Parliamentary sovereignty suffered with the abolition of the senate in 1966, the turning of Kenya into a de jure single-party State in 1982, the manipulation of the electoral results, the incorporation of upto two-thirds of the members of parliament into the executive through presidential appointments as ministers and assistant ministers. It became increasingly easier for parliament to pass the laws desired by the executive. Some of these laws including those regulating public bodies and public service did not necessarily serve the public good.

As a result, loyalists were appointed by the president, directly and indirectly, to head public bodies and public service. There was neither competitive recruitment nor vetting processes for public servants. Neither were the appointees accountable to the public. Most turned public bodies and public service into powerful tools of flexing political muscles and plundering public resources. The conversion of the *Kenyatta International Conference Centre (KICC)*, a landmark multi-million public funded building in Nairobi, into a property for KANU political party stands out as classic administrative action against public interest. Collapse of parastatals and other public agencies, and biases in accessing government services and opportunities, became common. By late 1990s, the quality of government services had declined to an all time low.

But it was difficult to challenge bad administrative actions through petition to the executive, parliament, or judiciary. Parliament had been turned into a 'rubber stamp' for the overbearing executive. Judges too were appointees of the president, and the executive controlled the budget of the judiciary. Having no powers to legislate, the judges had to apply the law as made by parliament. Most cases meriting substantive review by the judiciary were 'locked out' on procedural technicalities. Since 2010 judges can now 'develop (make) laws.' The constitution empowers the court to (a) "develop the law to the extent that it does not give effect to a right or fundamental freedom;" and (b) "adopt the interpretation that most favours the enforcement of a right of fundamental freedom" (The Constitution of Kenya, 2010, article 20 (3). This power was unavailable to the court under the Constitution of Kenya 1963(repealed in 2010). Now "justice shall be administered without undue regard to procedural technicalities" (The Constitution of Kenya, 2010, 159(2) d). This clause was inserted to correct previous situations where cases were thrown out on technicalities without regard to their merit leading to undesirable judicial outcomes.

Perhaps as part of 'reward' for their loyalty and political capital (needed to retain political power), the state could not prosecute some public officials for criminal acts. Efforts at private prosecutions were frustrated by the Attorney-General entering 'nolle prosequi.' Prior to 2010, the powers for public prosecutions lay with the Attorney-General who could enter nolle prosequi at pleasure. Now the nolle prosequi powers are with the Director of Public Prosecutions (DPP), an independent constitutional office. The DPP's power to discontinue any case (by entering nolle prosequi) is exercised subject to the court's permission (The Constitution of Kenya, 2010, article 157(6) & 157(8). The DPP's independence in prosecuting cases and the court's control over the exercise of the nolle prosequi powers is intended to protect public interest, individual rights, and fundamental freedoms. In sum, some judicial outcomes in the former constitutional dispensation left intact administrative actions in conflict with public interest, individual rights, and

fundamental freedoms. Finally, dissatisfied Kenyans voted KANU out of power in the 2002 general elections.

In 2003, there was an attempt to reform the judiciary through ‘the radical surgery of the judiciary.’ The *2003 Ringera Judiciary Report*, a report by the Integrity and Anti-Corruption Committee of the Kenyan Judiciary implicated as corrupt 5 of 9 Court of Appeal Judges, 18 of 36 High Court Judges, and 82 out of 254 Magistrates. The affected judges were forced to resign or retire within two weeks. Some challenged the decision in a tribunal. Justice Waki was acquitted in 2004 and later investigated Kenya’s post-election violence and sealed names of ‘key suspects’ in an envelope to the ICC. The ICC used it to indict some Kenyans for crimes against humanity charges. The removal of some judges seemed to have renewed some public confidence in the judiciary. Many petitions for judicial review to correct administrative actions were made to the courts. The new government also tried to correct some administrative actions by executive orders (for example, by an executive order in 2013, Mr. Raphael Tuju, Tourism minister, returned ownership of KICC building back to the public from KANU which had possessed it illegally), and through institutional and legal reforms. However, the process of reform would take many political twists and turns (some violent) over the next decade.

Ultimately a new, progressive, and transformative Constitution of Kenya was enacted on August 27, 2010. The constitution included provisions on administrative law. For instance “every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair” (The Constitution of Kenya, 2010, article 47). It may be said that administration law was ‘constitutionalized.’ Indeed the constitution fundamentally restructured the governance structure of Kenya and prescribed higher values for public service.

The guiding principle for all government actions (cutting through the executive, legislature, and judiciary) is the promotion of public interest and protection of the fundamental rights of the individual and of groups identifiable by gender, community, age, or unique needs. Identifiable groups under the *Constitution of Kenya 2010* include children (article 53); youth (article 55); minorities and marginalized groups (article 56); the elderly persons (article 57); communities identified by ethnicity, culture or similar interests (article 63); gender (male, female); and family (article 45), among others. This is the new and elevated focus of administrative law going forward into the future under the new constitutional dispensation.

Judicial Review of Administrative Actions

In ‘The Law of the Constitution’ 1885 Professor Dicey argued that the Norman Conquest had produced two supreme principles in the English political institutions: supremacy of parliament and rule of law. To him, rule of law meant judicial supremacy in reviewing administrative actions by the executive and legislative actions by parliament. Prof. Harry Jones argues that rule of law also includes the right to fair hearing/due process of law. To Griswold, quality of legislation is another important part of the rule of law. To Harvey rule of law is the sum of what Dicey, Jones and Griswold recommended-none of the principle is correct independent of the other. Professor Dicey justified judicial review on the basis that “the principles of English constitutional law, particularly rights of individuals, were derived from judicial decisions as opposed to written constitutions.” To Dicey, judicial review serves to protect public interest and

individual rights from “threats of political actions should the accepted bounds for official action be exceeded” (Harvey, 2004, pp.214).

The principle of judicial review of administrative action was ‘imported’ into Kenya when English law was received (The Judicature Act, S.3). Judicial review is the procedure used by the courts to supervise the exercise of public power. It is a means by which improper exercise of such power can be remedied and, it is therefore an important component of good public administration (Sueur & Sunkin, 1997, pp. 466). According to Visram, judicial review seeks to ensure that public bodies act within their jurisdiction and without hurting public good or individual rights and fundamental freedoms (Visram, 2010, pp 2).

For a matter to qualify for judicial review, the court must ensure that the party to be challenged is a public body, and the dispute involves a right claimable under public law. Not private rights. The Kenyan courts have long held the view that judicial review is ‘*sui generis*’ (neither a civil nor criminal matter). Prior to August 27, 2010, judicial review was a special statutory power enabling the High court to grant orders of mandamus (to do or refrain from doing specific actions); prohibition (stop an act); and certiorari (call up records of a body or subordinate court for review (Law Reform Act S.8 &9).

In the *Judicial commission of inquiry into the Goldenberg affair case, Miscellaneous Civil Application 102 of 2006*, Professor Saitoti’s rights for orders of certiorari and prohibition were upheld because his legitimate expectation that the commission would conduct itself in a judicial manner had been violated. Despite lacking jurisdiction to charge or try suspects, the commission had imputed, suggested or implied that he had committed a criminal offence before any charges were preferred, thus denying him the right to equality. This disadvantaged him in any future trial. By the certiorari order, the offending clauses concerning Saitoti were deleted from the Goldenberg affairs report. By the prohibition order, the Attorney-General (then with public prosecutorial powers now with the DPP) was stopped permanently from prosecuting Prof. Saitoti over the Goldenberg affair in future. This decision protected Saitoti’s individual right to fair trial. On August 27, 2010, the basis for seeking judicial review of administrative action, the forum to do so, and the procedure to follow, became guaranteed as part of the Bills of Right under the Constitution. Every person has a right to an expeditious, efficient, lawful, reasonable, and procedurally fair administrative action; right to receive written reasons for any administrative actions likely to be adverse to him or her; and right to access an efficient court or impartial tribunal established by parliament through legislation (The Constitution of Kenya, 2010, article 47).

The constitution gives a right to every person to access from the state or any other person holding any information needed to exercise or protect any right or fundamental freedoms (The Constitution of Kenya 2010, article 35). A person can use such information to pursue fair administrative action in a judicial or quasi-judicial body. However, it is article 20 that will most likely have a more direct bearing on the future of administrative law. It empowers the court to *develop (make)* the law to the extent that it does not give effect to a right or fundamental freedom; and adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

The transformative nature of article 20 has already reflected in judicial decisions with far reaching effects on administrative law. In February 2013, the court upheld the Electoral Commission's (IEBC's) decision to clear Uhuru Kenyatta (now President) and William Ruto (now Deputy President) to contest the March 2013 presidential elections despite facing charges for crimes against humanity at the International Criminal Court (ICC). Kenya had ratified the *Rome Statute* creating the ICC and domesticated it by the *International Crimes Act 2008*, thus forming part of the laws of Kenya under article 2(6) of the *Constitution of Kenya 2010*. The court reasoned that Uhuru's and Ruto's right of presumption of innocence until proved otherwise in court overrides integrity questions around their character. Further, the two, their political party, and supporters, had a legitimate expectation to participate in the presidential contest.

In *Diana Kethi Kilonzo & Wiper Democratic Movement Party Vs IEBC & Others*, petition no. 359 of 2013, Kethi had been nominated by Wiper as its candidate for the Makueni senatorial by-elections. After the IEBC had cleared her to contest and closed the nomination for candidates, her eligibility to contest was successfully challenged at the IEBC dispute resolution tribunal on the grounds that she was not a registered voter in Makueni, a mandatory requirement for candidates and voters to participate in such elections, and had used a forged registration slip to be cleared by IEBC.

Under the (repealed) constitution of Kenya 1963, Wiper would not have had a candidate for the seat, the deadline for fielding an alternative candidate having lapsed. However applying the new constitution, the High court held that Wiper could nominate another candidate, because the party had not been proved to be party to the forgery. Secondly, the party and its supporters had legitimate expectation to contest the seat.

The above cases demonstrate that judicial decisions will have a transformative effect to administrative law going into the future.

Parliamentary Oversight over Administrative Actions

Griswold argued that the quality of legislation by parliament directly affects judicial outcomes. In his view "no matter how fair and competent a court may be, if the underlying legal situation is deeply unsound, the court may, simply because it must act according to the law, be compelled to unjust results"(Harvey, 2004, pp.217). This is how important the quality of legislation is. Furthermore, parliament can be said to act on behalf of the people who elected them (as opposed to judges who are not elected). Lord Acton famously stated that 'power tends to corrupt and absolute power to corrupt absolutely.' Though elected, the executive wields immense powers and controls colossal resources, therefore must be checked by an independent body. This approach favours the principle of parliamentary sovereignty and justifies parliamentary oversight over the other arms of government. Harvey states that the supremacy of parliament is "the initial characteristic of English constitutional law" (Harvey, 2004, pp.215).

In Kenya, parliamentary oversight is through specialized committees created by the standing orders both at the senate, national assembly, and county assemblies, as well as resolutions passed after debates involving the whole house. For example, there is a parliamentary committee on legal affairs, education, agriculture, health and so on covering all aspects of governance.

Parliament checks administrative actions by vetting public appointments, investigating complaints against public officials, impeaching errant officials, approving budgets and monitoring their use. Further, parliament legislates to deal with emerging threats to minimize abuse of discretion by public officials.

The Constitution of Kenya 2010 restored parliament sovereignty by freeing it from the executive in terms of budgetary allocations and control of events calendar. Cabinet Secretaries (formerly ministers) are no longer members of parliament and vice versa. Therefore, parliament is better placed to oversight the executive, and to make better laws. An important point to note is that sufficient public participation is a prerequisite to the enactment of laws under the constitution (The Constitution of Kenya, 2010, article 118). Thus, it is possible that future administrative law in Kenya will be more reflective of the public interests through public participation in the legislative process.

Executive's Responsibility over Administrative Actions

One of Harvey's criticisms of Dicey's concept of the rule of law is that Dicey "rejected the idea of a separate body of administrative law applied by special tribunals to the conduct of officials." (Harvey, 2004, pp.214). Dicey and Hayek considered law and administration as being distinct of each other. To them, law was the "the body of rather specific rules applied by ordinary courts" and administration "meant discretion and official arbitrariness."

Yet by the late 19th century the English Crown (the executive) had intervened many times in various ways; giving privileges, powers, and immunities, administratively to promote public interest and protect individual rights and fundamental freedoms. By then, France and much of the continent had administrative agencies "developing meaningful review of administrative actions" and "curbing abuses" by public officials. In other words, evidence that the executive could participate in checking its own excesses by establishing administrative bodies and tribunals dates back to the late 19th century. Therefore, the executive must have appropriate mechanisms to check 'excesses of its officials.'

It is indeed a good political strategy for the executive to ensure that its administrative actions are well measured. This is because the public is inclined to vote to power, or retain in power, a government that respects public interest and individual rights. Therefore, the executive should pursue good administrative actions as its policy, instead of relying on parliamentary oversight or judicial review. The executive can do this by establishing watchdog bodies and specialized bodies to ensure moderation of administrative actions by public bodies.

In Kenya, as a minimum, article 248 (2) of the constitution of Kenya 2010 has established constitutional commissions and independent offices. These are the Kenya National Human Rights and Equality Commission, National Land Commission, Independent Electoral and Boundaries Commission, Parliamentary Service Commission, Judicial Service Commission, Commission on Revenue Allocation, Public Service Commission, Salaries and Remuneration Commission, Teachers Service Commission, National Police Service Commission, Auditor General and Controller of Budget.

Other bodies created by statutes are the Commission and Administrative Justice, Gender and Equality Commission, Ethics and Anti-corruption Commission, and the National Cohesion and Integration Commission, among others. These commissions work fairly independent of executive interference thus check administrative actions of the executive and public bodies. These bodies are fairly young; having been created after the constitution was enacted in 2010. As they grow, they will contribute specialized principles for enactment into administrative law thus enriching it. Thus future administrative law in Kenya is likely to be highly specialized, therefore better for public good. The specialty could be in terms of satisfying the unique needs of the identifiable groups in Kenya, individual rights, and fundamental freedoms.

Conclusion

This study has shown that administrative law is now a constitutional principle in Kenya. Its future in Kenya will be shaped by the quality of judicial decisions made, the quality of legislation enacted by parliament, and the public policy of the executive arm of government. It has also been shown that the future administrative law will be reflective of the compromises of the diverse interests of the identifiable groups that make Kenya. It will also reflect international best practices because experts are influencing public policy through participation in constitutional commissions and independent offices, and the general principles of international law now form part of the law of Kenya, automatically or by ratification of treaties or conventions (The Constitution of Kenya, 2010, article 2(6)). It will be increasingly difficult to distinguish administrative law from constitutional law in the future.

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