

Casting fresh light on an age-old discipline: Migai Akech's creative study of administrative law

*Jackton B Ojwang**

1. Introduction

Being concerned with '[t]he law relating to the organization, powers and duties of administrative authorities,'¹ and as it is conventionally perceived as '[t]he subordinate branch of constitutional law consisting of the body of rules which govern the detailed exercise of executive functions by officers or public authorities to whom they are entrusted by the constitution,'² administrative law, as treated by scholars and jurists generally, has tended to be both narrowly-defined, and restrictive in its jurisdictional span. Thus, most works of administrative law have a primary focus on particular national experience, even where they make comparisons with foreign practice based on a historical sharing.

Standing in distinct contrast is the remarkable, much broader orientation of Migai Akech's new study.³ His approach opens out from the very definition of the subject:

As I see it, administrative law comprises a set of principles and procedures for regulating (and, even better, circumscribing) the exercise of public and private power. Its rationale is that the exercise of power can threaten or adversely affect the vital interests of individuals or groups thereof, such as their liberties, and livelihoods. Accordingly, it aims to give such indi-

¹ Burke J, *Osborn's concise law dictionary*, 6 ed, Sweet and Maxwell, London, 1976, 15.

² Burke J, *Osborn's concise law dictionary*, 15.

³ Akech M, *Administrative law*, Strathmore University Press, 2016, Nairobi, xxxi and 513.

* PhD (Cantab), LLD (Nairobi), FKNAS, CBS, Justice of the Supreme Court of Kenya.

viduals and groups an opportunity to participate in the making of administrative decisions, and to hold to account those who exercise power.... [Administrative law] seeks to regulate the exercise of power by requiring that all administrative actions meet certain requirements of legality, reasonableness, and procedural fairness.⁴

From such a depiction, it becomes evident that, far from being preoccupied with matters of procedure and technicality, the subject significantly overlaps with priority themes of the constitution. Thus, administrative law, to a significant extent, runs within the orbit of constitutional law. Insofar as administrative law seeks to safeguard essential private rights and liberties, and to circumscribe the actions of the main agencies of state power and all kindred power, it becomes a well – integrated partner of the express mechanisms of the Constitution. Administrative law – on that account, and depending on whether the constitution is a ‘conventional’ one (as that of the United Kingdom), a synoptic one (as that of the United States of America), or a fully codified one (as that of Kenya) – significantly runs in integral partnership with the main body of constitutional law.

Such a reality introduces yet another broadening element in Akech’s work. It has had to contemplate differing types of constitution, and to advert to the interpretive judicial function thereunder. This is a meritorious aspect in itself, insofar as it affirms the recognised value of comparative legal inquiry, namely, in the words of Charles Hamson:

to bring into an approximately sensible juxtaposition at least two systems of law as systems, as entiretys, and, within the measure of the possible and of that of [the comparatist’s] own capacity, to see in each something of its own native quality; without seeking to attribute praise or blame....⁵

This rich and detailed study, thus, enhances the stock and effect of learning material for those who must reflect upon the law, apply it, impart it or bear its impact.

2. The work: Essence

This work of distinct pedagogic conception is set in a logical triple structure, devoted to the theoretical context; operational dimensions of administrative justice; and lastly, policy issues bearing upon good administration, and the balances to be kept between governance and personal liberties.

⁴ Akech, *Administrative law*, xxix.

⁵ Hamson CJ, *The law: Its study and comparison*, Cambridge University Press, Cambridge, 1955, 28-29.

2.1 *Administrative law: Theoretical premises*

In view of the traditional preoccupation of administrative law scholars with the workaday motions of governmental machinery, it is a refreshing path Akech has taken, devoting a third of his study to the cognitive dimension, by undertaking theoretical inquiry. In this treatment, the author draws distinct linkages between the operational schemes of administration, and the larger societal questions of political ideals, democracy, and the rule of law. He observes that:

administrative law can play a significant role in regulating governmental power thereby facilitating the realization of democracy and the rule of law, if its principles and procedures are adopted and enforced consistently.⁶

The author considers the inherent discord between the popular-participation concept imported by the idea of democracy, and the governance reality, which calls for a large management apparatus, which thereafter evolves its own dynamics of alienated motion – and which invites the ‘remote’ dynamics of administrative law.⁷

The inherent disharmony, as Akech considers, is mitigated by the liberal culture, which comes to mark the regime of law itself, especially in its limitation upon power;⁸ in its safeguard of individual liberty; and in its protection of personal rights.⁹ Within that culture falls the tradition of constitutionalism and the rule of law, which ‘either prohibit the government from interfering with protected rights, or require it to “satisfy a high burden,” such as demonstrating compelling necessity, before interfering with them.’¹⁰

The author suggests that such principles of governance are not everywhere a guaranteed success. For the scene in Africa, as an example, presents major challenges; and this has led numbers of scholars ‘to contend that African politics can largely be explained by reference not to formal but to informal institutions, and above all neopatrimonialism’.¹¹ Akech’s recipe is that:

friends of democracy in Africa should worry about how the operation of formal law can be made more participatory, transparent and accountable – in short, more power-constraining than power-enabling.¹²

⁶ Akech, *Administrative law*, 3.

⁷ Akech, *Administrative law*, 4-6.

⁸ Akech, *Administrative law*, 6-7.

⁹ Akech, *Administrative law*, 6-8.

¹⁰ Akech, *Administrative law*, 10.

¹¹ Akech, *Administrative law*, 13.

¹² Akech, *Administrative law*, 18.

He urges that such a strategy should extend from the more direct law bearing upon political power – constitutional law – to the law bearing upon the machinery of administration – administrative law.¹³ The author highlights the role of administrative law in this regard, on account of its expansive coverage of the regulation of conditions that constantly bear impacts on ordinary life – including the actions of private actors who handle social goods such as water, security and the like. He observes the integrality that has in contemporary times been forged in a number of African countries by way of bill of rights provisions in their constitutions safeguarding the ‘right to fair administrative action.’¹⁴

The author has highlighted the disciplinary chain that connects the conventional administrative law to the regular constitutional law and to the political order:

Administrative law is therefore instrumental to the realisation of day-to-day democracy, since it requires that decisions of government must not only be subjected to checks and balances, but must also be explained or justified to the people that they affect. In this way, administrative law ensures that public officials do not abuse their powers, thereby undermining the liberties and livelihoods of citizens. Administrative law, in short, is a critical tool for the creation of a limited government that does not rule arbitrarily, but instead respects the rule of law.¹⁵

After situating administrative law in its proper context in the political order, and then defining its place in the constitutional context, Akech takes on the subject in its ordinary coverage, which rests on the basis that ‘a good administrative decision is one that is lawful, reasonable, proportional, respects the principle of legitimate expectations, justified, and procedurally fair.’¹⁶ He discusses (Chapter 2) the main principles of administrative law, these being: legality;¹⁷ reasonableness;¹⁸ proportionality;¹⁹ right of participation/duty of consultation;²⁰ justification;²¹ legitimate expectations;²² independent decision-making;²³ and accountability.²⁴

¹³ Akech, *Administrative law*, 18.

¹⁴ Akech, *Administrative law*, 19.

¹⁵ Akech, *Administrative law*, 20.

¹⁶ Akech, *Administrative law*, 27.

¹⁷ Akech, *Administrative law*, 29-33.

¹⁸ Akech, *Administrative law*, 33-35.

¹⁹ Akech, *Administrative law*, 35-37.

²⁰ Akech, *Administrative law*, 38-40.

²¹ Akech, *Administrative law*, 40-42.

²² Akech, *Administrative law*, 42-48.

²³ Akech, *Administrative law*, 48-49.

²⁴ Akech, *Administrative law*, 49-51.

'Legality' requires compliance with the applicable law, whenever the government acts administratively.²⁵ 'Reasonableness' dictates that 'decision-makers should only make decisions that are reasonable or rational, particularly where they are exercising discretionary powers.'²⁶ 'Proportionality' requires that 'the means used by administrators must be appropriate to achieve the objectives sought, and must not go beyond what is necessary to attain those objectives.'²⁷ 'Participation' seeks to democratise regular administration of public affairs: it means the 'effective participation of those likely to be affected by the decision in question.'²⁸ 'Justification' is 'the giving of satisfactory reasons for decisions.'²⁹ 'Legitimate expectations' come about when the government or its administrative agencies 'issue policies, procedures, guidelines, public statements and promises that indicate to the public how they intend to go about exercising their discretionary powers.'³⁰ Such government agencies, in the discharge of their public tasks, are required to be guided by independent initiative and decision-making – that is, 'complete autonomy and insusceptibility to external guidance, influence or control.'³¹ Such agencies, in the course of administrative action, must be accountable, and will bear 'the obligation to explain and justify [their] conduct.'³²

For the realisation of the foregoing attributes of 'a good administrative decision,'³³ a procedural code – be it statutory, or regulatory – may be adopted, embodying the operative guidelines. In the alternative (or in addition), a special organ to ensure accountability in the conduct of administration may be established; the typical agency in this regard is the *Ombudsman*, defined as '[a]n official appointed to receive, investigate, and report on private citizens' complaints about the government.'³⁴ The object of such institutional arrangements is 'to ensure that administrators "get it right" the first time by making decisions that adhere to the principles of administrative law.'³⁵ Secondly, such arrangements 'seek to correct the errors of administrators when they make decisions that violate [the relevant] principles....'³⁶

²⁵ Akech, *Administrative law*, 29.

²⁶ Akech, *Administrative law*, 33.

²⁷ Akech, *Administrative law*, 35.

²⁸ Akech, *Administrative law*, 38.

²⁹ Akech, *Administrative law*, 40.

³⁰ Akech, *Administrative law*, 42.

³¹ Akech, *Administrative law*, 8.

³² Akech, *Administrative law*, 49.

³³ Akech, *Administrative law*, 27.

³⁴ Garner B, *Black's law dictionary*, 8 ed, West Group, Minnesota, 1999, 1121.

³⁵ Akech, *Administrative law*, 55.

³⁶ Akech, *Administrative law*, 55.

For the attractions of the vital linkages between the administrative mechanism, on the one hand, and the constitutional norm and the political order on the other hand, there is a possibility of glossing over the detailed procedural aspect of administrative law. Akech responds to this temptation by considering in detail the significance of *procedures* in this sphere of law.³⁷

By extempore pronouncements, ‘procedure’ is ever assigned the secondary role, far below the rank of ‘substantive entitlement.’ Yet, as the author observes, such a distinction is often deceptive, especially as regards entitlements issuing forth from law, legality and even-handedness. In his words: ‘We need mechanisms to help us determine what is justly due to one human being in relation to another human being, relative to any given resource.’³⁸ Now the same law that dispenses justice and equity, as a basis for attaining that object, requires *procedures*. The author underlines this integrality of cause and procedure: ‘Law promises justice by establishing the procedure that will ensure that our claims are treated in the same manner as others who have similar claims.’³⁹

He observes that ‘[p]rocedures are...instruments of justice since they facilitate the treatment of individuals “in accordance with the standards which govern the life of the society”.’⁴⁰ And he notes that: ‘procedures aim to produce accurate outcomes, or the correct application of the law to the facts of the particular case.’⁴¹

The author discusses the large-scale apparatus, which is the bureaucracy, as the instrument of discharge of the numerous tasks entrusted to the executive branch, under the constitution. This set-up is aptly depicted:

While administrations will come and go depending on the length of the electoral cycles, the bureaucracy is a permanent institution that every in-coming administration will rely on to fulfil its promises to the electorate.⁴²

Akech considers the complications arising from this innermost bearing of bureaucracy in the scheme of governance: (i) how is it to be kept in tune with the electorate’s standpoints? (ii) will it run riot, right out of the elected government’s control? (iii) does bureaucracy consider itself accountable to the electorate? The author finds a recipe in

³⁷ Akech, *Administrative law*, 55.

³⁸ Akech, *Administrative law*, 57.

³⁹ Akech, *Administrative law*, 57.

⁴⁰ Akech, *Administrative law*, 58.

⁴¹ Akech, *Administrative law*, 61.

⁴² Akech, *Administrative law*, 83.

insulating bureaucracy from political interference while subjecting it to democratic control by implementing the principle of civil service neutrality and establishing auxiliary institutions of accountability.⁴³

So crucial as it is to the modalities of public governance, the functioning of bureaucracy has to be appreciated as a basis for a clear view of the domain of administrative law, which turns on the regulation of the exercise of governance powers.

As the author notes, administrative agencies serve the primary purpose of providing goods and services to citizens – an object that profoundly touches on ‘the enjoyment of citizens’ liberties and livelihoods.’⁴⁴ Towards that end, ‘[a]dministrative agencies... need to make rules, apply rules and, quite often, adjudicate disputes or complaints if they are to discharge their mandates fairly, accountably and efficiently.’⁴⁵ This task is complex, as it often entails ‘combining legislative, executive and judicial powers in single institutions in a way that does not bode well for civil liberties.’⁴⁶ Therein lies the conventional task of the discipline of administrative law – which ‘is particularly concerned with the control of public power by judicial review and by non-judicial mechanisms....’⁴⁷

The regime of administrative law is fraught with challenges that flow in particular from the fact that a key feature of public administration is the coalescence of legislative, executive and judicial powers in single institutions.⁴⁸

2.2 Tasks of administrative law

Akech has identified the main spheres of regulation and dispensation of services, with impacts on the citizen's rights and expectations, as follows: local governance;⁴⁹ tax administration;⁵⁰ the environment;⁵¹ conduct of criminal prosecutions;⁵² the electoral process;⁵³ and the sphere of coalescence in the public and the private initiative.⁵⁴

⁴³ Akech, *Administrative law*, 115.

⁴⁴ Akech, *Administrative law*, 117.

⁴⁵ Akech, *Administrative law*, 117-118.

⁴⁶ Akech, *Administrative law*, 150-151.

⁴⁷ Law J and Martin E, *Oxford dictionary of law*, 7 ed, Oxford University Press, Oxford, 2009, 16.

⁴⁸ Akech, *Administrative law*, 151.

⁴⁹ Akech, *Administrative law*, Chapter 6.

⁵⁰ Akech, *Administrative law*, Chapter 7.

⁵¹ Akech, *Administrative law*, Chapter 8.

⁵² Akech, *Administrative law*, Chapter 9.

⁵³ Akech, *Administrative law*, Chapter 10.

⁵⁴ Akech, *Administrative law*, Chapter 11.

The author proceeds on the basis that:

compared to central governments, local governments tend to be more responsive to local needs and aspirations, and consequently [are] more likely to ‘produce systems of governance that are effective and accountable’....⁵⁵

And on that basis, he focuses attention on the prevailing situation, dedicating his inquiry to the local entities under the Constitution of Kenya (2010 Constitution).

The author proceeds on the premise that the taxing power is vital, as the supply-base for essential services to the citizen. Yet the taxing power is liable to abuse; and thus it is the case in many countries that it is subjected to certain principles: ‘These principles include equity..., fair treatment of taxpayers, and accountability of the tax system to taxpayers....’⁵⁶

Considering the tax-administration experience in Kenya, the author identifies failures in the proper exercise of the taxing powers. He attributes these to ‘the considerable discretionary but uncircumscribed powers of revenue officers, and internal pressures to collect taxes.’⁵⁷

As regards the environment, Akech proceeds on the basis that this is a common heritage of all humankind, which has also been the subject of general norms of international law: and its common principles necessarily devolve to national implementation – by the hands of administrators operating under the watch of the national executive agency.

From a study of the Kenyan experience on environmental governance, the author finds shortfalls in the exercise of the bureaucratic mandate, such as detracts from the vital principle of the environment as a common heritage of all citizens. One of his conclusions, in that regard, is as follows:

[W]e have established that [the National Environmental Management Authority – NEMA] does not always adhere to the principles of administrative law, such as legality and reasonableness, as numerous decisions of the [National Environment Tribunal – NET] and the courts attest. For example, NEMA has failed to hold public meetings, issued [Environmental Impact Assessment – EIA] licences after the commencement of projects, issued letters of approval pending the issuance of EIA licences, issued letters of approval and EIA licences contemporaneously, issued EIA licences on the basis of project reports that were faulty or did not contain sufficient information on likely environmental impacts, and disregarded the advice of lead agencies.⁵⁸

⁵⁵ Akech, *Administrative law*, 155.

⁵⁶ Akech, *Administrative law*, 205.

⁵⁷ Akech, *Administrative law*, 238.

⁵⁸ Akech, *Administrative law*, 276.

The domain of criminal law, and the conduct of prosecutions, is certainly – and in nearly all countries – an active one in the exercise of administrative powers: for it has a bearing on the setting of the scheme of law and order, and of civilised public governance. So, naturally, it has a prominent place in Akech's study, and he thus sets out its essence:

The prosecutor is an extremely powerful figure in the criminal justice systems of many common law jurisdictions. Although the criminal codes of these jurisdictions require the prosecutor to enforce all violations of criminal law, the practice is that the prosecutor has a considerable, if not unlimited, discretion to decide which cases to prosecute, when to prosecute them, and where to prosecute them. The prosecutor is therefore an administrator who decides when and how to enforce the criminal code.⁵⁹

The author proceeds on the basis that the expansive prosecutorial powers fall squarely within the objects of administrative law. Such powers, it is urged, are quasi-judicial in nature: 'the decision to prosecute or not prosecute, when to prosecute, where to prosecute, what charges to file, to terminate prosecutions, and to accept plea bargains.'⁶⁰ He considers a wide range of Kenyan case law, and recommends that 'the courts should adopt a robust approach to regulating the exercise of the prosecutorial power.'⁶¹

The experience of democratic governance, be it in the older or the more recent states, ordains election as the device of ascendancy to the seat of government. Elections, with their detailed stages of preparation – and the sense of judgment entailed –, necessarily involve public administrative agencies: and the tasks of these agencies call for regulation, within the scheme of administrative law. As Akech observes:

The electoral process entails the making of various administrative decisions, including delimiting electoral boundaries, producing and maintaining voter registers, establishing voter eligibility, managing electoral processes including procuring goods and services, tabulating and tallying votes, announcing the results of elections, and resolving electoral disputes. Further, many such decisions have to be made accurately and efficiently, in order to forestall power vacuums and ensure that the electorate has confidence in electoral outcomes.⁶²

The author aptly notes the interplay, as regards political parties in elections, between the common cause for the public, and the claims of the 'private' sector (in the shape of such parties):

⁵⁹ Akech, *Administrative law*, 279.

⁶⁰ Akech, *Administrative law*, 310.

⁶¹ Akech, *Administrative law*, 311.

⁶² Akech, *Administrative law*, 316.

Although political parties can be said to be private bodies, the concern of administrative law is that they wield power that can have a negative impact on the liberties and livelihoods of citizens, including aspirants for electoral position and the electorate.⁶³

In the last chapter of Part II of the book, Akech considers the place of contracted-out public resources and services, within the scheme of administrative law. As government constricts its service-delivery-front by contracting its tasks to private entities, a new challenge in the scheme of power-control emerges: what is the standing of administrative law *vis-à-vis* such ‘outsider’ entities?

The author apprehends that the resulting new sphere of the public interest may not readily lend itself to the known mechanisms of administrative law: ‘there is a danger that privatization may lead to the creation of [an] unregulated and therefore unaccountable, private sector.’⁶⁴

Akech has considered parallel situations in other countries, and, from comparative case law, he expresses the hope that adaptable regulatory approaches may be adopted in Kenya; he remarks:

[C]ourts all over the common law world appear to be coming to grips with this challenge, and are increasingly regulating such power in deserving cases. In doing so, they have adopted the view that any power, whether public or private, that is capable of adversely affecting the rights and interests of individuals, should be subjected to the controls of administrative law, including the democratic requirement of considerate decision-making.⁶⁵

2.3 *Maladministration: Remedial techniques*

In the final part of the work, Akech considers the general question of good administration, beginning with the Ombudsman in this regard.⁶⁶ The author considers that ‘good administration’ extends beyond legalistic probity, and incorporates ‘non-legal values, such as efficiency.’⁶⁷ He portrays Kenya’s Ombudsman (the Commission on Administration of Justice) as a useful mechanism for ensuring good administration, such as would respond to the prescription of Article 47(1) of the 2010 Constitution, which thus declares: ‘Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.’

⁶³ Akech, *Administrative law*, 316.

⁶⁴ Akech, *Administrative law*, 350.

⁶⁵ Akech, *Administrative law*, 388.

⁶⁶ Akech, *Administrative law*, Chapter 12.

⁶⁷ Akech, *Administrative law*, 391.

The author considers the broadly conceived mandate of the Ombudsman to be consistent with the values-oriented call for 'good administration':

[T]he [Ombudsman] has given citizens a much-needed tool for enhancing the rule of law in their daily interactions with public officers, and for participating in the governance of public institutions.⁶⁸

In the same category of control mechanisms – though being more strategy-based – is judicial review,

the power of the court, in appropriate proceedings before it, to declare a governmental measure either contrary to, or in accordance with, the constitution or other governing law, with the effect of rendering the measure invalid and void or vindicating its validity.⁶⁹

The author adverts to the contemporary issue that has engaged public law scholars: the non-majoritarian basis of the judicial establishment, and its claim to the power of judicial review. He proposes that: 'Courts must therefore walk a fine line, given that their judicial review decisions may offend electoral majorities, and the other branches of government may choose to ignore such decisions.'⁷⁰

The author concludes with a consideration of the scope of redress for instances of maladministration. The framework of redress, in the course of judicial review, gives no assured answers – in view of the inscrutable course taken by the courts in certain cases.⁷¹ Such review, moreover, may merely require a repeat of the impugned administrative process; but 'there is no guarantee that the decision-maker will come to a different conclusion when it reconsiders its initial decision.'⁷² The author takes the position, in view of the uncertainty as regards remedies for maladministration, that – 'Kenyan courts should consider awarding compensation in judicial review proceedings where maladministration has caused the applicant serious and irreparable harm.'⁷³

3. Conclusion

Patient and meticulous scholarly research is the mark of every aspect of Akech's treatise. The reader is distinctly enriched by certain attributes of the

⁶⁸ Akech, *Administrative law*, 408.

⁶⁹ Nwabueze BO, cited in Akech, *Administrative law*, 411.

⁷⁰ Akech, *Administrative law*, 412.

⁷¹ Akech, *Administrative law*, 498-506.

⁷² Akech, *Administrative law*, 482.

⁷³ Akech, *Administrative law*, 483.

work, in particular: the imaginative conceptual pillars upon which it is erected; the detailed scrutiny effected under those pillars; the fresh outlook on the contours of administrative law; the incorporation of new, problematic dimensions of the subject-area – exemplified by the issue of control over the conduct of such public functions as have been contracted out to private agencies; the application of administrative law mechanisms in the complex sphere of environmental management; and the focused location of administrative law motions within the wider span of constitutional norms.

Not only does the work represent a distinct and progressive orientation in scholarship; but, by its imaginative cast, and its intensive detail and example, this work's merit stands both at the level of pedagogy, and that of practical dispute resolution within the judicial process.