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CONSTRAINING GOVERNMENT POWER IN AFRICA

Migai Akech

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Most analysts have long contended that African politics can largely be explained by reference not to formal but to informal institutions, and above all to neopatrimonialism. This term, coined in the early 1970s to identify a seeming variation on Max Weber's notion of patrimonialism, is meant to identify a hybrid political regime in which informal patron-client relationships both underlie and overshadow legal-rational norms.¹ This literature privileges the patrimonial; legal-rational norms hardly matter. According to this binary view in which the formal can be neatly separated from the informal, Africa is "a place where formal institutional rules are *largely* irrelevant."²

Recent revisions of this dominant thesis acknowledge that formal institutions, or legal-rational norms, are beginning to matter. For example, Daniel Posner and Daniel Young see the Nigerian Senate's 2007 rejection of a proposed constitutional change that would have permitted President Olusegun Obasanjo a third term in office as a sign of formal rules' growing importance.³ In their view, it matters that leaders who want to get around constitutional restrictions such as term limits feel the need to use formal institutional channels rather than extraconstitutional ones.

But even as it acknowledges the growing importance of formal institutions, such revisionism asserts that progress remains marginal. Thus Goran Hyden observes that political leaders are not yet bound by constitutional norms.⁴ Further, Richard Joseph sees systems of personal rule as continuing "to *clash*" with formal institutions.⁵ And Larry Diamond

contends that “the political struggle in Africa remains very much a *conflict* between the rule of law and the rule of the person.”⁶

The flaw in such accounts is their failure to grasp the role that law and its guardian, the judiciary, now play and *have always played* in African politics. Precisely because Africa’s formal legal systems tend to feature broad grants of poorly circumscribed discretionary powers, law and legal processes often become important tools in political contests. Indeed, the sheer breadth of formal power is what facilitates informal and unaccountable uses of it. Hence it is time that students of African politics began paying closer attention to the nature and uses of formal laws and legal processes. Empirical studies of how formal and informal institutions interact are particularly needed, in part to help us understand what sorts of reforms will help citizens to take part in politically salient legal processes and hold them to account.

Neopatrimonialism has become a synonym for informalism and personal rule, or the antithesis of the rule of law. Thus Larry Diamond observes that in African politics, “the informal *always* trumps the formal.”⁷ Extreme, if not cynical, versions of this perspective even suggest that formal rules are “essentially epiphenomenal and unable to alter the underlying structural dynamics of African politics.”⁸

Neopatrimonialism is also synonymous with presidentialism. This is the dominant form of government in Africa, where it is characterized by the extreme concentration of power in the president, often known as the “Big Man.” The Big Man often stays in power until the end of his life, distributes public-sector jobs and resources to his followers, and makes little distinction between public and private funds.⁹ His lieutenants act as patrons to lower-level power brokers. Politics becomes a matter of clientelism, patronage, and “corrupt, *lawless*, personal rule.”¹⁰

While it cannot be denied that neopatrimonialism and extremely powerful presidencies are prevalent in Africa, the existing literature largely fails to account for the role that formal law has played in the emergence and persistence of these phenomena. Neopatrimonialism in Africa is not merely evidence of the absence or failure of law; it is enabled or facilitated by formal law. Likewise, the African imperial presidency is not epiphenomenal; it is a creature of formal law.

Formal laws facilitate neopatrimonialism for the simple reason that discretion is inevitable in any grant of power, whether formal or informal. Indeed, the inevitability of discretion in any governance arrangement means that neopatrimonialism will be a characteristic of all political systems—if only to the extent that everywhere political power is exercised via both formal institutions and informal (or personal) relations. It can therefore be expected that some level of informalism will be prevalent, if not desirable, in any political system. After all, politics is about negotiation. Ideally, however, such informalism and the negotiations that go with it are kept transparent and open to public scrutiny.

In established democracies, where this ideal is relatively well approximated, norms of transparency and accountability remain strong enough to stop patrimonial institutions from dominating legal-rational ones, and citizens enjoy fairly ample opportunity to question how political power is being used. In African countries, by contrast, the legal-rational domain is not sufficiently transparent or accountable. This results in legal-rational systems—with their already-broad grants of power—that are subject to penetration by patrimonial forces bent on self-serving rather than public-regarding outcomes.

Examples abound of how African legal systems grant wide discretionary powers. For example, statutory laws and regulations typically grant officials broad powers without establishing effective procedural mechanisms or limiting principles to circumscribe their exercise. In the absence of effective regulation, the formal law therefore often aids the practice and maintenance of neopatrimonialism.

Africa's imperial presidencies are creatures of formal law. Soon after independence, postcolonial elites set about carefully building up these offices and their powers. Between 1960 and 1962 alone, thirteen newly sovereign African states, beginning with Kwame Nkrumah's Ghana, amended or replaced their independence constitutions in favor of new "rules of the game" that centralized public power in a one-person presidency.¹¹ Such reconstitutions of the state were informed by an instrumental view of law that saw the primary purpose of the constitution as facilitating state power, not controlling it. To the extent that the imperial presidency is a creature of formal law, it should not be perceived as an informal institution, which is how the conventional literature on neopatrimonialism often sees it.

Examining the ways in which law is used as an instrument in elections, state-security matters, media regulation, and control of the public service will show that formal rules have *always* mattered in African politics. Typically, those who wield political power straddle the divide between patrimonialism and the realm of legal-rational norms, and will base their actions on formal rules, informal considerations, or some combination of the two, as expediency dictates.

For a long time, African political elites won or kept power through extraconstitutional means, including violence and coups d'état. Increasingly, however, they are capturing or retaining power through formal institutional channels such as elections. What explains this turn to formal institutions? First, the democratization drives of the past two decades have made citizens more politically potent and aware, leaving incumbents with fewer options. No longer able simply to ignore formal law, incumbents must seek to manipulate it instead. Their turn to law is the stuff of calculation, not conversion. Law has become the next political frontier. Second, formal law may lend political decisions an air of legitimate authority. If "the law" proclaims that a president has been validly

elected or can serve a third term or can unilaterally name the members of an electoral-oversight agency, then perhaps citizens will swallow the pill thus handed to them.

Such calculations have probably figured in the decisions of presidents who have sought third terms by means of constitutional amendments. Some, such as Yoweri Museveni of Uganda, have succeeded. Others, such as Nigeria's Obasanjo and Zambia's Frederick Chiluba, have failed. But even they have gone on to manipulate formal rules in order to bar rivals or impose handpicked successors. In this way, Obasanjo stopped his rival, Vice-President Abubakar Atiku, from gaining the ruling party's 2007 presidential nomination. In this endeavor, Obasanjo received the aid of the Independent National Electoral Commission—a body whose members the president appoints by law—which issued politically motivated corruption indictments aimed at disqualifying Atiku and other targeted candidates.¹²

In Zambia, President Chiluba disqualified his predecessor, Kenneth Kaunda, from contesting the presidency in 1996 by amending the constitution to require Zambian ancestry of all presidential candidates. Subsequently in 2001, when Chiluba's efforts to amend the constitution to allow a third term were thwarted, he nevertheless manipulated the formal rules to guarantee victory for his handpicked successor, Levy Mwanawasa. Thus voter registration, a process overseen by political appointees loyal to Chiluba, began suspiciously late in opposition strongholds. In Zambia, as in Nigeria a few years later, a sitting president's manipulation of formal rules had enabled him to shape the presidential succession.

Kenya's bungled 2007 presidential elections can also be attributed to presidential manipulation of the rules governing the electoral process. Here, although an informal 1997 agreement of the so-called Inter-Parties Parliamentary Group (IPPG) had stipulated that all major political parties would thenceforth be represented on the Electoral Commission, subsequent governments ignored the accord, arguing that it was not legally binding. Thus President Mwai Kibaki opted to unilaterally appoint members of the Electoral Commission in the months preceding the 2007 elections. As authority for this, he could cite the constitution, brushing aside the IPPG agreement that he thought less likely to aid his quest for a second term.

The instrumental use of the formal law is also prevalent in the state-

security domain. In many African countries, regime maintenance dominates the realm of public-security enforcement. This means using a strict law-and-order approach and repressive statutes to hold on to power in the face of competition from groups and factions that reject the regime's claims to legitimacy. Invariably, postauthoritarian governments in Africa have retained and zealously enforced many existing repressive laws. When Museveni took power in Uganda in 1986, for example, he refused to repeal any of the repressive laws then in place, and indeed reinforced them.¹³ It is arguable that the neoliberal privatization reforms that came along with the democratization initiatives of the early 1990s have also made regime maintenance easier. Thus in contemporary Africa, many nominally "private" purveyors of physical-security services are joined in complex networks—involving formal and informal arrangements alike—with the public authorities. In these circumstances, distinguishing public from private security actors can be difficult.

In order to escape scrutiny, many African governments employ private security operatives. Indeed, examples of joint ventures between political actors (including government ministers) and private security or military companies abound.¹⁴ Thus in Angola, a major private security company counts prominent public officials among its shareholders. In Uganda, a politically influential army officer also owned a security firm that was often seen as an extension of the army. In Nigeria, public security forces, including the military, have been integrated into the security arrangements of the oil industry to an extent that makes it difficult to determine where public policing ends and private security provision begins. Such hybrid arrangements are found in Sierra Leone as well.

Typically, the laws of these countries do not forbid such straddling of the formal-versus-informal divide. In practice, the tactic has proven a useful tool for regime maintenance. Many of these countries have set up (admittedly imperfect) systems of accountability in order to help regulate the relationship between the uniformed military and civilian public-security agencies, but have no such accountability frameworks to govern how their militaries relate to private security providers. As "private" entities, such providers can and often do seek to shield themselves from scrutiny by resorting to claims of privacy and confidentiality. The danger that regimes and their state-security agencies can use such private actors to evade legal obligations and do dirty work is obvious.

Exploiting Legal Gaps

Among the regimes which have thus exploited gaps in the law is that of Museveni's National Resistance Movement (NRM) in Uganda. There the method is to use private security agencies as operational arms and task forces of formal security structures, with officials prepared to disown their private partners should public disapproval be roused. Simi-

lar trends can also be observed in neighboring Kenya, where vigilante groups have been touted as carrying out a form of community policing. They often consult with actual police officers, and there is a perception that the government condones vigilantism whenever it is politically expedient—not least because members of certain vigilante groups may carry illegal firearms without fear of arrest. In both countries, it is evident that such groups succeed only thanks to the support that the formal security apparatus gives them.

Media activities too have become targets of legal manipulation. Elites naturally fear having their illicit activities exposed by a vigorous media, and eagerly seek ways to curb it. One useful tool is the body of criminal libel statutes left over from the colonial era. In Ghana and Kenya, journalists have found themselves prosecuted under such laws on charges of defaming the government and influential public figures. Constitutional guarantees of press freedom notwithstanding, the courts in Ghana have upheld such laws as necessary to protect the dignity of public office.¹⁵

Finally, there is the legal manipulation of the public service. In many African countries, independence constitutions that mandated a non-political public service were changed in short order to give presidents vast powers over state agencies. These, accordingly, have often become entangled in corrupt dealings and schemes for keeping incumbents in power. Presidential authority typically includes the right to constitute and abolish offices, and to name or dismiss their holders at will.

Anticorruption campaigns stand little chance in the face of laws that bind civil servants to obey all orders from above (even if merely verbal and patently illegal). As a result, even well-meaning public employees can find themselves forced to act as accomplices in grand corruption schemes meant to finance regime-maintenance projects. In Kenya, for example, public servants who refuse to go along are transferred to irrelevant departments or fired, often without due process. Thus the head of the Central Bank of Kenya's tender committee was "promoted" to the newly created Ministry of Development of Northern Kenya after objecting to a new currency issue on the grounds that it violated the public-procurement law. When public complaints arose, the attorney-general quickly issued a legal opinion pointing out that, under the constitution, the tender-committee chair served purely at the president's pleasure. Likewise in Nigeria, the head of the Economic and Financial Crimes Commission, who by all accounts was doing a fine job of tackling corruption and had brought to justice many "untouchable" figures, was sent on "study leave" by the president when political winds shifted.

Longstanding official-secrets acts and more recent ethics laws augment presidential control over the civil service in many an African country. Thus Kenya's Public Officer Ethics Act is proving a double-edged sword. Its declared purpose is to improve ethics standards, but it contains provisions—including stiff fines or even a jail term for

“divulg[ing] information”—that allow the president or his minions to intimidate subordinates into silence. At the Kenyan central bank, for instance, the tender-committee controversy was followed by the bank governor’s decision to have the police launch a leak investigation under the Ethics Act. A plausible interpretation is that lower-level officials were being signaled to keep their mouths shut, or else.

As African regimes have watched their informal or extralegal options growing narrower under pressure from more vigilant citizens and donors, incumbents have found ways to work through formal institutions, including courts. Kenya again provides a case in point. Not long after his December 2002 election, President Mwai Kibaki began reshaping the judiciary, citing corruption as a reason to sack numerous judges and replace them with his own candidates. Because the Kenyan justice system was poorly institutionalized until the promulgation of a new constitution in August 2010—there were no accountability or due-process mechanisms for appointing or disciplining judges, for instance—the courts were fairly easy to turn into instruments whose rulings advanced regime objectives. These included Kibaki’s plans to stymie and then reconfigure a constitutional-revision process, inherited from the last days of his predecessor Daniel arap Moi’s administration, that Kibaki feared would dilute his power as president.

The Case for Administrative-Law Reform

It should by now be evident that the failure of democratization initiatives to tame African presidents is not merely a matter of rampant informalism, but in fact has much to do with statutory laws that give these chief executives and their subordinates vast discretionary powers. As we have seen, these powers are instrumental to the regime-maintenance endeavors of these presidents, who are adept at manipulating law. The fundamental problem with African politics, therefore, is not that formal rules are inconsequential or neglected. On the contrary, they are insufficiently institutionalized—at least in the sense that they are all too often open-ended and neither transparent nor accountable. They therefore avail authoritarian or quasi-authoritarian regimes as tools with which to subvert the progress of democracy and constitutionalism. The deliberate laxity of the formal rules explains why leaders such as President Abdoulaye Wade of Senegal, who spent many years in opposition sharply criticizing incumbents as undemocratic, begin to behave autocratically once they gain power.¹⁶

This suggests 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. A key challenge is to transform the statutes that give the legal order its imperial or authoritarian character so that this

order conforms to the demands of constitutionalism. H. Kwasi Prempeh takes the view that simply leaving these laws to the vagaries of constitutional litigation and judicial review—hoping that courts will strike them down, in other words—may not be enough, especially given that judicial review is a reactive institution.¹⁷ According to him, a more effective approach would be to repeal by express provision in the text (of the new constitution) all the repressive statutory laws upon which authoritarian regimes rely. Although the adoption of such an approach could help to tame the imperial presidency, I believe that the reform of administrative law—a field often overlooked amid the dominant concern with constitutional law—also offers a useful avenue for democratizing the exercise of power.

Administrative law, as its name suggests, regulates public administration. On the one hand, this type of law reflects an appreciation of the inevitability of discretion in the exercise of power, and empowers public officials (or administrators) to implement government policies and programs. On the other hand, it seeks to regulate the exercise of power by requiring that all administrative actions meet certain requirements of legality, reasonableness, and fairness. It performs this latter function by setting out general principles and procedures that all administrators must follow, and by providing remedies for people affected by administrative decisions. In common-law jurisdictions, the courts have developed these principles and procedures.

Nevertheless, countries such as the United States and South Africa have codified them in statutes such as the federal Administrative Procedure Act and the Promotion of Administrative Justice Act, respectively. In South Africa's case, the statute provides a mechanism for the realization of a constitutional provision that confers on every person the right to administrative action which is lawful, reasonable, and fair. Kenya has followed South Africa's lead, and its new constitution gives every person a right to fair administrative action. The inclusion of a similar provision in Zimbabwe's draft constitution of 2007 suggests that the idea of fair administrative action is also gaining acceptance in other African countries.

Key principles of administrative law include the following requirements: decisions of administrators must be reasonable or justifiable; prior to making major decisions, administrators must consult those likely to be affected by them; decision-making processes must be free of real or apparent bias; administrators must explain their decisions in writing; administrators must not act arbitrarily or outside their powers; administrators must act in good faith; and there must be a right to judicial review of administrators' decisions. Another critical principle of administrative law is to require checks and balances in decision making. For example, in the context of criminal-law enforcement, administrative-law principles would decree a separation of functions between those officials who

are responsible for conducting investigations, and those who are responsible for prosecuting any offenses thereby uncovered.

Crucial procedures also 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 make representations. These procedures can take the form of public inquiries or notice-and-comment procedures in which the affected people are given, say, thirty days 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 decision-making processes of government.

Administrative law is therefore instrumental to the realization 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.

The method of administrative law is to give those likely to be affected by a governmental decision an opportunity to participate in its making, or to contest it once it is made. For this to work in practice, members of the public should be ready, willing, and able to utilize these opportunities. In that regard, it is encouraging to witness African civil societies' increasing vibrancy and readiness to call public officials to account. Further, recent democratization initiatives—especially in the context of constitutional reforms and such technological changes as the proliferation of mobile phones—have made citizens more aware of civic matters. In significant ways, then, civil society actors and members of the public are now better able than ever to make good use of the opportunities that the establishment of administrative-law regimes would create. The public's capacity to engage officials, moreover, could benefit from legal-empowerment initiatives, including training in legal literacy and methods of finding and using legal assistance. Finally, disadvantaged or marginalized groups would need to have their capacities enhanced in order to be able to take advantage of the greater amounts of democratic "space" that an administrative-law regime would create.

In particular, administrative-law reforms can stem the instrumental use of law for political purposes. For example, an administrative-law re-

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give adequate notice of proposed action to those likely to be affected by their decisions, and give them reasonable opportunities to make representations. These procedures can take the form of public inquiries or notice-and-comment procedures in which the affected people are given, say, thirty days to make comments prior to the taking of a decision. Typically, such procedures are tailored to

gime would enhance the reasonableness and fairness of the decisions of electoral bodies, ensuring that they are not used as instruments of regime maintenance. In the security domain, administrative-law reforms would enable citizens to hold accountable private security providers who are integrated into public security networks. Private providers, the reasoning would go, are performing an essentially public function in this case (that is, suppressing crime) and must therefore be held to normal public-law obligations such as respecting the civil liberties of citizens. By separating the function of bringing charges from that of following through on prosecutions, administrative law would also ensure reasonableness and fairness in the exercise of the prosecutorial power. This would, for instance, prevent governing elites from abusing criminal statutes for the purpose of silencing critical journalists such as those exposing corruption in government. And by requiring that administrators consult members of the public before making decisions—including regulations—that are likely to affect the public, administrative law would enhance the prospect that the exercise of power will display a higher regard for public interests and concerns.

In these ways, administrative law would draw limits around the exercise of the broad swaths of power found in the statutory order. If the framers of the U.S. Constitution deserve the thanks of posterity for having adopted such a visionary basic law for their country, the later and less famous figures who wrote the federal and state Administrative Procedure Acts deserve thanks of their own for giving U.S. citizens the tools with which to scrutinize and hold the powers of government to account on a day-to-day basis. The enactment of similar statutes in African countries, and the legal empowerment of citizens to take advantage of them, would contribute immensely toward taming the imperial presidency. Administrative-law reform is thus critical to enhancing citizens' abilities and opportunities to challenge what remain all-too-common abuses of power in African countries.

NOTES

1. The first use of the term occurs in Shmuel N. Eisenstadt, *Traditional Patrimonialism and Modern Neopatrimonialism* (Beverly Hills, Calif.: Sage, 1973).

2. Daniel N. Posner and Daniel J. Young, "The Institutionalization of Political Power in Africa," *Journal of Democracy* 18 (July 2007): 126 (emphasis added).

3. Posner and Young, "Institutionalization of Political Power in Africa," 126.

4. Goran Hyden, *African Politics in Comparative Perspective* (New York: Cambridge University Press, 2006), 111.

5. Richard Joseph, "Progress and Retreat in Africa: Challenges of a 'Frontier' Region," *Journal of Democracy* 19 (April 2008): 95 (emphasis added).

6. Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies Throughout the World* (New York: Holt, 2008), 260–61 (emphasis added).
7. Larry Diamond, “Progress and Retreat in Africa: The Rule of Law versus the Big Man,” *Journal of Democracy* 19 (April 2008): 145 (emphasis added).
8. Nicolas van de Walle, “The Democratization of Political Clientelism in Sub-Saharan Africa,” paper prepared for delivery at the Third European Conference on African Studies, Leipzig, Germany, 4–7 June 2009, 2.
9. Michael Bratton and Nicolas van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective* (Cambridge: Cambridge University Press, 1997), 63, 66.
10. Diamond, *Spirit of Democracy*, 247 (emphasis added).
11. H. Kwasi Prempeh, “Africa’s ‘Constitutionalism Revival’: False Start or New Dawn?” *International Journal of Constitutional Law* 5 (July 2007): 474.
12. Rotimi T. Suberu, “Nigeria’s Muddled Elections,” in Larry Diamond and Marc F. Plattner, eds., *Democratization in Africa: Progress and Retreat*, 2nd ed. (Baltimore: Johns Hopkins University Press, 2010), 124.
13. Andrew M. Mwenda, “Personalizing Power in Uganda,” in Diamond and Plattner, *Democratization in Africa*, 238.
14. Migai Akech, *Privatization and Democracy in East Africa: The Promise of Administrative Law* (Nairobi: East African Educational Publishers, 2009), 97–103.
15. H. Kwasi Prempeh, “A New Jurisprudence for Africa,” *Journal of Democracy* 10 (July 1999): 138.
16. Joseph, “Challenges of a ‘Frontier’ Region,” 100.
17. Prempeh, “Africa’s ‘Constitutionalism Revival,’” 469.