Introduction – Privatization and Democracy in East Africa

Migai Akech (migai.akech@gmail.com)

This book explores the role of democracy and Public Law in privatization processes in the three East African countries of Kenya, Uganda and Tanzania. In particular, the book recommends the creation of strongly institutionalized Administrative Law frameworks to facilitate meaningful democratization of privatization processes in these countries. The book anticipates that such reforms would enhance the day-to-day accountability of, and public participation in, privatization processes in the three countries. The book seeks to contribute to the study of the relationship between Public Law, markets and democracy in African countries. Its particular contribution is the argument that privatization processes can only be efficient, fair and legitimate if they are democratic, that is, participatory and accountable.

The processes of privatization typically involve the exercise of immense power, which can be unaccountable and can impact adversely on the liberties and livelihoods of citizens. For example, privatization processes entail a power to decide which private entity will be favoured with the privilege of performing functions that were previously the domain of public agencies. It also confers upon such private entities power to decide which citizens will benefit from their services and the conditions under which such services will be offered. It should also be noted that the three countries have either established or are establishing agencies to regulate the manner in which these private entities are now offering their services to the public. These regulatory agencies also exercise immense powers and therefore influence the liberties and livelihoods of citizens. There is thus a need to interrogate how they are governed.

The book therefore problematizes two related aspects of privatization processes in East Africa. First, the book is concerned with the inadequate democratization and regulation of privatization transactions. Second, the book is concerned with governance of the private power that these privatization transactions create. The book asks whether the power to privatize, and the power that private entities acquire from privatization processes, have been, or are being, exercised in a democratic manner. Further, it asks whether the power of the regulatory agencies

being established to regulate privatized industries is being exercised in a democratic manner. The premise for this inquiry is that both kinds of power can affect the liberties and livelihoods of citizens, and therefore ought to be exercised in an accountable and participatory manner in democratic societies. Indeed, privatization processes are augmenting the power of bureaucrats, who ordinarily possess wide discretionary powers but are largely unaccountable for their exercise due to deficient accountability frameworks.

In a nutshell, the book is about the governance of privatization in the three East African countries. Governance has been defined as the manner in which power is exercised in the management of a country's resources.[1] A broader conceptualization sees it as the manner in which people are ruled and the affairs of a state administered and regulated.[2] Privatization processes have everything to do with governance, since they are really about the administration and regulation of the affairs of the state, such as the provision of services, for example, water and sanitation, and security. For there to be good governance of privatization processes in East Africa, a way must be found for the citizenry to participate meaningfully in the formulation and implementation of policies.

Like other African countries, the three East African countries have been implementing structural adjustment programs (SAPs) under the direction and oversight of the World Bank and the International Monetary Fund (IMF) since the early 1980s. In efforts to address the abysmal performance of their economies in the wake of the oil crises of the 1970s and an international economic environment unfavourable to their primary product exports, many African countries turned to the World Bank and IMF for financial assistance.[3] While SAPs have evolved since their inception, they have consisted of two broad components. In the first component have been short-to-medium-term macro-economic stabilization measures which fall within the jurisdiction of the IMF and are designed to deal with budgetary and balance of payments problems.[4] Stabilization policies aim at returning the economy to an equilibrium path that was followed prior to a shock.[5] The second component has consisted of the so-called "SAPs proper," which fall within the jurisdiction of the World Bank and are designed to "unleash markets so that

[1] *See* World Bank (1992).
[2] *See* Nanda (2006: 269).
[3] *See* World Bank (1989); Walker (1998).
[4] Ibid.
[5] Kayira and Hope (1997: 60).

competition can help improve the allocation of resources."[6] These "SAPs proper" require market liberalization, introduction of competition, privatization and a significant reduction in the role of the state in economic affairs.[7]

It should be noted that SAPs emerged out of a diagnosis by international development policy institutions that the policies that African states had been pursuing were responsible for their poor economic performance. Thus the World Bank observed that "the main factors behind the stagnation and decline were poor [macroeconomic and sectoral policies] emanating from a development paradigm that gave the State a prominent role in production and in regulating economic activity."[8] It is noteworthy that the World Bank had earlier promoted[9] this development paradigm, at a time when Keynesian economics was vogue and the state was perceived as being instrumental in correcting market failures. The dominant view in development economics in the 1950s and 1960s was that active state intervention and participation was necessary since market failure was a frequent phenomenon especially in developing countries.[10] This explains the large public sector and the adoption of economic planning in Africa.[11] The results were disappointing, however, and largely explain the shift in development policy. For example, the import substituting industrialization strategy, which was an integral part of the interventionist approach to development, largely failed. And public enterprises, the principal means through which African States participated in development, were performing rather poorly. What is not crystal clear is whether these failures are to be attributed to the policies themselves or to the manner in which they were implemented.[12]

During this period, there was also an attack on big government in the industrialized countries of the West, which led to the ascendance of the ideology of neoliberalism.[13] Neoliberalism refers to "a broad structure of political beliefs founded on [New Right] ideas about political democracy,

---

[6] Mkandawire and Soludo (1999: 42).
[7] *See* World Bank (1997).
[8] World Bank (1994: 20).
[9] *See* Cook and Kirkpatrick (1988: 3, 8, and 30) (Noting that the World Bank and other international aid agencies provided technical assistance to strengthen planning capabilities and allocated investment funds to public sector projects and that "the irony of the international agencies advocating the dismantling of the publicly-owned institutions that they themselves created in the 1960s, has not gone unnoticed.")
[10] Ibid.
[11] Ibid.
[12] Some African economists have, for instance, asserted that "the import substitution industrialization strategy as implemented in much of Africa lacked any strategy to move progressively to a greater emphasis on exports or to gain access to technology. This lack of strategy for export competitiveness, rather than import substitution per se, was the central problem of African industrialization." *See* Mkandawire and Soludo, note 6.
[13] Cook and Kirkpatrick, note 9.

individual freedom and the creative potential of unfettered entrepreneurship."[14] New Right thinking derives its inspiration from free market economic theory and public choice theory.[15] Free market economic theory represents "market processes as optimally efficient means of allocating resources to the most productive uses."[16] According to neoliberals, such as Friedrich von Hayek and Milton Friedman, "The main restriction on the tendency for free capitalist economies to grow is … market failure resulting from perverse governmental intervention."[17] In their estimation, "most governments in welfare state societies and developing countries alike … have gone too far in interfering with the free play of markets."[18] Indeed, Hayek opposed economic planning and argued strongly against redistributive legislation.[19]

For their part, public choice theorists argue that governmental officials, like all other private individuals, pursue their own interest.[20] For instance, politicians seek to maximize their chances of being re-elected, while bureaucrats seek to enhance their status and salary. And because politicians and bureaucrats therefore have no incentive to promote efficiency, the public sector becomes wasteful. Further, because state intervention is "intrinsically inefficient," market failure does not constitute a sufficient ground for government intervention."[21]

SAPs were therefore inspired by the perceived failures of the state-led development paradigm and neoliberalism. To enhance their development, therefore, African countries were now being asked to increase the role of the market, a process that in particular mandated reducing the size of the public sector including the privatization of public enterprises, and removing government regulations and controls.[22]

---

[14] Peet (2001:329); See *also* MacEwan (1999). It should be noted that it is difficult to delineate the boundaries of the term "New Right" because "the meanings of traditional political terms like 'left' and 'right' and 'Conservative' and 'Liberal' have changed over time and become highly ambiguous." *See* Oliver and Drewry (1996:20).
[15] Oliver and Drewry, note 14 at 21.
[16] Ibid.
[17] Peet note 14 at 329.
[18] Ibid.
[19] *See* Hayek (1944:59) (Observing that "formal equality before the law is in conflict, and in fact incompatible with any activity of the government deliberately aiming at material or substantive equality of different people, and … any policy aimed at a substantive ideal of redistributive justice must lead to the destruction of the Rule of Law.")
[20] For a review of public choice theory, *see, e.g.,* Walsh (1995).
[21] Oliver and Drewry note 14 at 22.
[22] Brett (1988: 49).

It should be noted that the IMF and the World Bank work together to ensure that SAPs are implemented.[23] Before entering into a structural adjustment program with the World Bank, a country must reach an agreement on stabilization measures with the IMF.[24]

In the process of implementing SAPs, African countries have devalued their currencies, reduced tariffs, removed subsidies, decontrolled prices, deregulated commercial activity, carried out banking reform and public sector retrenchment, drastically reduced their social expenditures, privatized many public enterprises, opened up their economies to foreign competition and initiated policies aimed at encouraging foreign investment.[25]

This book is, in the first place, concerned with how the three East African countries have privatized in this international development policy context. Secondly, the book is concerned with privatization processes arising out of the inability or failure of the state to provide services such as security. Such shortcomings of the state have, for example, motivated the citizenry to find their "private solutions to public problems"[26] in the areas of security, education, health and electricity supply, for example. Accordingly, privatization often entails two kinds of processes. First, there are state-led processes that entail state actors engaging private actors. These may be termed as "privatizations from above." Secondly, there are citizen-led processes, which are characterized by the citizenry responding to state failure or inability to provide essential services. These may be termed as "privatizations from below." From a Public Law perspective, however, both kinds of privatization raise an important question of how the power of service providers will be regulated, especially where this power is exercised in a way that impacts adversely on the liberties or livelihoods of citizens. In my view, therefore, the need for democratic governance arises in both contexts.

Recognizing that privatization processes in Africa have evolved since their inception, the book therefore defines privatization broadly as the transfer of ownership or control of public assets and/or functions from public to private entities. Such transfers may be driven by the state or citizens. Further, privatization typically embraces measures such as divestiture,

---

[23] Stiglitz (2002: 13-14) (Noting that the activities of the IMF and the World Bank became increasingly intertwined in the early 1980s, with the ascendancy of neoliberalism in the United Kingdom and the United States. In his words, "In the 1980s the Bank went beyond just lending for projects (like roads and dams) to providing broad-based support, in the form of *structural adjustment loans*; but it did this only when the IMF gave its approval – and with that approval came IMF-imposed conditions on the country.")

[24] Kayira and Hope note 5 at 60.

[25] Walker note 3 at 1-2, 175-176; *See also* Stewart, *et al* (1992: 6).

[26] I am grateful to H. Kwasi Prempeh for suggesting this formulation.

commercialization or corporatization, commodification, contracting-out and public-private partnerships, terms which we shall comprehensively explore in the study. In a nutshell, divestiture refers to the ultimate shift in ownership and control of public assets from the public to private companies. In some cases, the transfer of public assets is partial, with the sale being implemented through methods such as leasing arrangements, employee buy-outs and share issues. The terms commercialization and corporatization are invariably used interchangeably, and denote the restructuring of public management institutions along commercial lines, with or without private sector involvement, by introducing commercial principles and practices such as efficiency, cost-benefit analysis and profit maximization. For its part, commodification refers to the conversion of a public good into a private (or economic) good through the application of mechanisms that facilitate the appropriation of such goods so that they can be sold at prices determined through market exchanges. Contracting out refers to the transfer of the performance of public functions such as health care delivery from public to private entities through contractual arrangements under which the private entities are paid a fee for their services. Increasingly, there are also public private partnerships which constitute institutionalized forms of cooperation between public and private entities. Public private partnerships are seen as a way of involving the private sector in government projects while avoiding the problems associated with the more extensive methods of privatization.[27] For the purposes of our inquiry, it is important to define privatization broadly since, and as we shall see, all these methods raise issues of public participation and accountability in their formulation and implementation.

Why, then, a book on privatization and democracy? What is wrong with privatization in East Africa? Let me say at the outset that I believe privatization is generally a good idea if it is done well. In the case of state-led privatization, for example, governments in these countries can overcome their resource constraints by partnering with private actors through privatization arrangements. This perhaps explains why the World Bank and the IMF continue to be enthusiastic about the benefits of privatization.

But while privatization is generally a good thing, many critics of government-led privatization are concerned that it has been, and continues to be, applied without proper regard to the prevailing political, social and economic conditions in the recipient countries.[28] Critics raise

[27] Jamali (2004: 416-417) (Describing PPPs as a derivative of the privatization movement).
[28] Kikeri and Nellis (2004: 88-89).

various objections. First, they contend that privatization leads to layoffs and worsening labour conditions. Further, they argue that even where privatization enhances enterprise efficiency, the bulk of its benefits accrue to a privileged few, such as the owners of capital and the political elite, while its costs are borne by the majority such as consumers and workers, whose welfare thereby worsens. These criticisms have led to a widespread acknowledgement that privatization may have been oversold, especially in countries with weak institutional capacity.[29] In the case of SSA, critics point out that privatization policies have neither sufficiently accounted for nor appreciated the limitations of the market and the need for economic regulation. Francis Fukuyama thus observes that "while privatization involves a reduction in the scope of state functions, it requires functioning markets and a high degree of state capacity to implement."[30]

Again, privatizations from below are good for democracy, since they entail citizens taking control for the provision of essential services such as water and sanitation, and security, which they require if they are to safeguard their liberties and livelihoods. In an era in which scholars and practitioners of democracy are looking for ways and means of enhancing the practice of democracy, such privatizations are therefore welcome. As we have noted, however, privatizations from below can also be undemocratic. Often, women and other marginalized groups are excluded from participation in decision making in such contexts. In addition, the private actors entrusted with providing services in such contexts may also abuse their powers, thereby threatening the livelihoods and liberties of fellow citizens.

As I see it, the problem with privatization in East Africa, and which forms the motivation for this book, is that it is not sufficiently democratic. First, the processes of privatization have not been sufficiently participatory or accountable. Second, these privatization processes are leading to the creation of largely unregulated, and therefore unaccountable, private power. In either case, it is the citizens who are on the receiving end, since privatization processes often impact adversely on their liberties and livelihoods, yet they often have no voice in policy formulation and implementation. This problem also arises in the context of bottom-up privatization initiatives, which, for instance, only offer services to those who pay. Thus while it is fair to say that resource constraints and state failures have made privatization inevitable in the three countries, privatization processes have been formulated and implemented in ways that have not

[29] Ibid at 105.
[30] Fukuyama (2004: 24-25).

allowed sufficient critical reflection on what kinds of institutional mechanisms are required to make them democratic.

This raises the question of how the citizenry can be empowered so that they can participate in discourses on privatization and hold government, and powerful private actors, accountable for the formulation and implementation of privatization processes.

Getting citizens to participate in, and hold government accountable for, privatization initiatives entails democratic regulation of the power of government. Further, once government privatizes a service, say the provision of water, it simultaneously transfers some of its power to private entities, which are thereby enabled to determine the liberties and livelihoods of citizens. But even where a privatization is the result of a bottom-up initiative that does not involve government, the power that it creates ought to be exercised in a democratic manner, especially since this power can also threaten the liberties and livelihoods of powerless citizens. In democratic societies, how should the power of government to privatize, and the power that private entities acquire by virtue of privatization processes be regulated? The task of regulating these powers falls to the discipline of law. Law performs this critical function by making sure that the exercise of power is democratic. Accordingly, if, as the book argues, privatization processes have not been democratic, it must therefore mean that the laws of the three countries are deficient in some significant way. That is, it must then be the case that the three countries have not meaningfully or adequately regulated power, be it public or private.

But this raises another difficult question. If law is critical to the democratic regulation of privatization processes in East Africa and elsewhere, why has law or legal reform not been given sufficient attention by policy makers? In my view, one plausible answer to this question is to be found in two political economy practices, which have dictated the formulation and implementation of neoliberal policies. These practices are neopatrimonialism and development assistance. Both tend to eschew law and work to ensure that privatization continues to take place in a context characterized by weak state institutions, including law. In addition, both practices work to ensure that the state does not regulate privatization processes in a democratic manner. Neopatrimonialism entails the usurpation of public resources by political elites which they then use to dispense political patronage for purposes of keeping political power. Neopatrimonial considerations have considerably influenced privatization processes in African countries. Again,

international financial institutions (IFIs) have typically insisted on the implementation of neoliberal reforms as a precondition for the receipt of development assistance.

These practices facilitate a culture of secrecy in the formulation and implementation of privatization processes that are also characterized by straddling – by internal and external actors – between the public and private realms. In the area of security, for example, clandestine power networks of African elites and private security/military companies linked to multinational corporations have conspired to exploit the continent's natural resources and the commercial opportunities offered by the privatization of security. And even where they have cut down on military strengths in keeping with the neoliberal agenda, African political elites have in some cases established private security groups to protect their regimes. These privatizations often take place outside the law, and are prevalent in countries such as Angola, Sierra Leone, Uganda and Kenya. These secretive privatizations are bad for democracy since they pursue objectives that are inimical to the public interest. They therefore need to be dismantled. But they can only be dismantled by embracing "Public Law values" – such as participation, accountability and fairness – as part of a process of deeply entrenching mechanisms for the practice of day-to-day democracy in African countries.

Another plausible explanation for the neglect of legal reform issues has to do with the failure to acknowledge the legal ramifications of the acquisition of significant power by private bodies as a result of privatization processes. In turn this failure can be attributed to a liberal mindset, which only seeks to regulate public power and largely considers private power to be benign.

Accordingly, the book decries the neglect of law and closely examines the links between law, democracy and privatization in East Africa. It comes at a time when there has been a renewed preoccupation with democracy in international law and development circles, as a result of which there have been concerted efforts to make democracy a norm of international law.[31] The idea has been to incorporate it into international law as a human right, which has been expressed variously as "the right to democracy" or "the democratic entitlement" or "the right to democratic governance."[32] Thomas Franck has been a leading advocate for this right and has argued that there is an emerging international obligation on states to govern themselves democratically.[33] It should also be noted that a number of international legal instruments already recognize this right

[31] *See, e.g.*, Rich (2001: 20).
[32] Ibid at 21.
[33] Franck (1994: 7).

to democracy or democratic governance, albeit tangentially. For example, the Universal Declaration of Human Rights provides that all persons have a right to take part in government and to participate in the conduct of public affairs.[34] Closer home, the African Charter on Democracy, Elections and Governance calls upon signatory states to ensure the "effective participation of citizens in democratic and development processes and in governance of public affairs."[35] Further, one of the objectives of the Constitutive Act of the African Union is to "promote democratic principles and institutions, popular participation and good governance."[36]

But the democracy espoused in these circles is by and large a narrow or thin one, given its attachment mainly to the ballot box.[37] The current international practice is to assess the existence of democracy by reference to the ballot box, that is, whether or not, and the frequency with which, developing countries allow their citizens to choose who will govern them.[38] And to determine whether or not such countries are democratic, the practice is to send international observers to monitor whether electoral processes are "free and fair." It is almost assumed that once elections are held, developing countries will attain democratic governance. This is a gigantic leap of faith in many cases. Indeed, as Christopher L. Eisgruber has observed, "An election produces only a flattened, incomplete representation of a people."[39]

This book questions this democratization orthodoxy. It starts off from the premise that democracy must be a day-to-day practice, and not a periodic event for international display. Since democracy is about the right to be consulted when political decisions or choices are being made, democratization initiatives would be hollow if they are not accompanied by mechanisms to enable citizens to participate meaningfully in the processes of governance.[40] In particular, since the periodic election does not offer the electorate an adequate degree of control over government, as would be required by a robust practice of democratic governance, there is a need for auxiliary political and legal mechanisms to ensure not only day-to-day participation by the citizenry in governance but also the political accountability of the agents and instruments of government. Such a deepening of democracy is especially necessary in light of the aforesaid cartels of power built around privatization processes. Only such deep democracy will enable the

---

[34] Universal Declaration of Human Rights, Articles 21 and 25.
[35] African Charter on Democracy, Elections and Governance, Article 3(7).
[36] Constitutive Act of the African Union, Article 3(g).
[37] *See, e.g.*,Gaventa (2006: 11).
[38] Ibid.
[39] Eisgruber (2007: 4); *See also* Armony and Schamis (2005: 113).
[40] Franck note 33 at 7.

citizens of East African and other developing countries to gain control of privatization and other public processes that may affect their liberties and livelihoods.

In this regard, the book should be seen in the context of recent scholarship on "deepening democracy", whose main objective is to develop and sustain more substantive and empowered citizen participation in the democratic process. That is, the idea is to deepen the ways in which ordinary citizens can effectively participate in and influence policies which directly affect their lives.[41] Key scholars in the deepening democracy movement, if it could be called a movement, include Archon Fung and Erik Olin Wright, who argue that "the institutional forms of liberal democracy developed in the nineteenth century – representative democracy plus techno-bureaucratic administration – seem increasingly ill-suited to the novel problems we face in the twenty-first century."[42] Another notable scholar here is John Gaventa, who argues that "democracy-building is an ongoing process of struggle and contestation rather than the adoption of a standard recipe of institutional designs."[43] A particular concern of these scholars is the lack of meaningful democracy in economic policy issues, such as fiscal policy, monetary policy, and privatization, since these issues are "often off the agenda of public debate."[44] In these contexts, they observe that there are concerted efforts to reduce the role of politics in policy discourse.[45]

The book takes the view that Public Law – namely, Constitutional and Administrative Law – can be a critical instrument for the day-to-day realization of democracy. In particular, the book envisages that Administrative Law will establish strong institutional frameworks necessary for day-to-day regulation of power, thereby enabling the citizens of the three countries to acquire some measure of control over their liberties and livelihoods in the context of the privatization of arguably governmental functions such as the provision of water and sanitation, and security. The book thus advances the argument that in order to promote public-regarding and equitable outcomes, privatization processes must be accompanied by strongly institutionalized accountability and participation mechanisms targeted at the exercise of power – whether public or private – that affects the liberties and livelihoods of the citizenry.

---

[41] Fung and Wright (2003: 5).
[42] Ibid at 3.
[43] Gaventa note 37 at 8.
[44] Ibid at 26.
[45] Fung and Wright note 41 at 4.

There is yet another aspect of privatization that presents a further challenge to Public Law. This is the transfer of what may be termed "public functions"[46] such as the provision of water and sanitation, security and healthcare to private entities. As we are aware, Public Law in countries whose legal regimes are based on the English legal system is only designed to regulate the exercise of "public power" – that is the power of government – as opposed to "private power." In these Common Law jurisdictions, the law's relationship with power has largely been governed by the ideology of liberal theory, which establishes a dichotomy between the public sphere and the private sphere. On the one hand, liberal theory 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, liberal theory does 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 liberal theory has evolved over the years, culminating in the establishment of the regulatory state in many developed countries,[47] fidelity to the public/private dichotomy continues to be a hindrance to the imposition of certain higher order duties on private bodies.

For example, the orthodox view is that constitutional rights impose constitutional duties only on government and not on private actors.[48] According to liberal theory, it is desirable to maintain "a public-private division in the scope of constitutional rights, leaving the private sphere free from constitutional regulation."[49] It is asserted that this limitation of "the scope of constitutional rights to the public sphere enhances the autonomy of citizens, preserving a heterogeneous private sphere free from the uniform and compulsory regime constructed by constitutional norms."[50]

How, then, should constitutional law respond to the emergence of private power that is fuelled by the processes of globalization and privatization? The orthodox view is arguably inadequate in today's world given that much power is now wielded by private as opposed to public bodies. Fortunately, a horizontal approach to constitutional rights is emerging, according to which "constitutional rights and values may be threatened by extremely powerful private

---

[46] Public functions may be defined as the duties that the state owes its citizens as a result of the social contract. The fulfillment of such duties requires the grant of certain powers to the state. *See, e.g.*, Gilmour and Jensen (1998).
[47] *See, e.g.*, Sunstein (1990).
[48] Gardbaum (2003: 394).
[49] Ibid.
[50] Ibid at 394-395.

actors and institutions as well as governmental ones."[51] The horizontal approach criticizes the vertical approach for "automatically [privileging] the autonomy and privacy of such citizen-threateners over that of their victims."[52]

What then happens where, as is increasingly common today, government transfers its functions (and the accompanying power) to private entities through privatization? Should we continue to assume that the power that is then wielded by private entities is benign? The danger with making such an assumption is that where, for example, the government chooses to deliver a given public service by way of contractual arrangements with private entities, performance will be deemed to be a private matter between the contracting parties with the result that there will be no framework for public scrutiny or accountability. What is therefore required is a review of the premises of Public Law so that it can extend its regulatory mechanisms to the exercise of private power, which in many cases poses a threat to individual liberties and livelihoods as a result of privatization initiatives.

The fact that the state has chosen to privatize the provision of a service does not relieve it of its obligations to its citizens. In this regard, it is useful to examine privatization from the viewpoint of the human rights obligations of the state. In particular, the development of a notion of "positive obligations" in human rights discourse, which requires the state to "respect, protect and fulfil" human rights, is particularly encouraging.[53] This notion expresses the idea that the state has a duty to take some positive action in order to ensure the effective enjoyment of human rights.[54] As we will see in Chapter 1, the obligations imposed on the state by international human rights instruments include a duty to ensure effective public participation in decision-making and access to information. Accordingly, the state is required to ensure democratic governance if it is to meet its human rights obligations. This question of governance arises in the context of regulatory agencies that need to be established to facilitate the democratic governance of privatization processes. Among other things, the state will meet its human rights obligations by establishing mechanisms that facilitate effective public participation in regulatory decision-making. Further, the state will meet its human rights obligations by regulating the power of private actors to ensure that they do not violate the human rights of citizens.

---

[51] Ibid at 395.
[52] Ibid.
[53] *See, e.g.,* Borelli (2006: 101); Fredman (2006: 498).
[54] Borelli note 53 at 101.

The book therefore constitutes a critique of the suitability of existing public law frameworks in the three East African countries to ensure the democratic governance of privatization processes. It sees Public Law as providing a framework for the practice of democracy and controlling the exercise of public and private power, and calls upon these countries to re-conceptualize their Public Law frameworks – especially their Administrative Law – in order to safeguard the liberties and livelihoods of their citizens in the face of the exercise of immense power enabled by privatization processes. In particular, the book contends that there is a need to constitutionalize a right to "administrative justice" or "fair administration," which would facilitate constitutional oversight of the exercise of power, whether public or private. Further, it emphasizes the need for these countries to embrace public law values as mechanisms for the regulation of power.

The book's motivation is that while much has been written by economists and political scientists on the subject of privatization in African countries, lawyers have not said much about its ramifications for democracy and constitutionalism. The explanation for this dearth of legal analysis of the phenomenon of privatization lies in the fact that the discourse on privatization has been and continues to be dominated by economists, whose concerns primarily revolve around questions of economic efficiency. By and large, privatization has been perceived as an exclusive preserve of economic technocrats that does not require public debate. Thus legislatures in the three East African countries and elsewhere have for a long time been bystanders in privatization policy processes.

Even though Uganda and Tanzania enacted laws to guide the privatization of public enterprises fairly early on in the process, both created implementation agencies that were mere handmaidens of the executive. In addition, these laws provided little, if any, room for public accountability, whether directly or through parliament. Thus Tanzania's Presidential Parastatal Sector Reform Commission, which is the lead privatization agency, is primarily answerable to the President, who retains ultimate authority over all privatization decisions.[55] It is required to obtain the approval of the Government before entering into any agreement where the privatization in question involves a change in the concerned public corporation's ownership structure.[56] Further, the Commission is prohibited from entering into any privatization

[55] Public Corporations (Amendment) Act of 1999, section 22(2) (a) and 22(3) (c) (Tanzania).
[56] Ibid, section 40(1).

agreement without "consultations in writing with the Treasury, the responsible Minister and the Attorney General."[57] A similar scenario prevails in Uganda. Here, the main agency is the Divestiture and Reform Implementation Committee,[58] whose membership is also dominated by executive actors.[59] The enabling legislation makes no provision for public participation or accountability mechanisms. Kenya also established a Privatization Commission recently.[60] The membership of the Commission is also dominated by executive actors, and much of its work is controlled by, or done through, the relevant Minister. Further, the enabling legislation does not give the Commission control over all privatizations, since its jurisdiction is limited to privatizations included in the privatization program.[61] Indeed, the Act's accountability framework only governs privatizations included in this program. The effect is that significant privatizations may escape regulation. A major weakness of the institutional frameworks of the three countries has therefore been the lack of effective regulatory frameworks, as a result of which privatization processes have been "bedevilled by lack of transparency and accountability."[62] The legislative frameworks of the three countries also continue to be preoccupied by privatizations from above, and have paid little, if any, attention to privatizations from below.

Due to these deficiencies, sufficient attention has not been paid to privatization's implications for democracy and constitutionalism in these countries. Yet privatization processes continue to distribute societal resources and regulate the lives of citizens. It therefore becomes important to ensure that the political processes, such as those involving privatization, are democratic. This book should consequently be seen as a step – albeit a small one – towards filling this gap in Public Law scholarship.

In terms of methodology, the book is based on an analysis of the existing literature on privatization in the three countries. While the book draws on privatization experiences throughout Africa, its legal analysis is confined to the experience of the three East African countries. The book adopts this approach since these countries have a common approach to Administrative Law and the exercise of power, due to the Westminster origins of their legal

[57] Ibid, section 22(3).
[58] Public Enterprises Reform and Divestiture Statute of 1993 (Uganda).
[59] Ibid, section 5.
[60] Privatization Act of 2005 (Kenya).
[61] Ibid, sections 4, 17 and 22.
[62] Ranja (2004: 14).

systems and continued adherence to the Common Law tradition. In these countries, public administration is characterized by wide discretionary powers, while the maintenance of an almost strict public and private divide has meant that private power is largely beyond the reach of regulation by public law. In addition, in order to make its arguments, the book uses the privatization of water and sanitation, and security in the three countries as case studies. In particular, the case studies seek to establish whether and the extent to which there has been public participation in privatization processes. A related concern is with the public accountability of these processes. The choice of water and sanitation and security as case studies is motivated by a number of factors. First, both services are public goods that arguably should be provided by the state. Second, both are so essential that citizens will endeavour to acquire them irrespective of the failures of the state. Their absence therefore implicates the legitimacy, and may indeed undermine the very existence, of the state. Third, these services are critical for the livelihoods and liberties of citizens and constitute a strong illustration of the need for privatization processes to be guided by public law values. Finally, while the water and sanitation case studies illustrate the pitfalls of privatization from above, the security case studies illustrate the challenges of privatization from below.

The book is organized as follows. Chapter 1 provides the book's conceptual framework and explores the role that Public Law should play in privatization processes in a context in which state action is often determined by the practices of neopatrimonialism and development assistance. It advances the argument that in order to promote public-regarding outcomes, privatization processes need to be accompanied by strongly institutionalized mechanisms for democratic governance. By enabling citizens to participate in privatization processes and hold them to account, the Chapter contends that such mechanisms would facilitate effective regulation of the exercise of the power that typically accompanies privatization. The Chapter also examines the need to regulate this power in the context of the human rights obligations of states and non-state actors. The Chapter envisages that Public Law will provide the avenues for the institutionalization of public participation and accountability mechanisms. By doing so, the Chapter argues that public law would promote the consolidation of meaningful democracy and the protection of human rights in the three countries by giving citizens meaningful opportunities to participate in governance. Chapter 1 further contends that it is only by undertaking these reforms that these countries will be able to arrest the undue influence of the key factors that are

responsible for exacerbating the weakness of the state, especially neopatrimonialism and development assistance.

Chapters 2 and 3 make up the book's case studies. On the one hand, Chapter 2 examines the privatization of water and sanitation in the three countries. It reviews Tanzania's failed attempt to privatize water and sanitation services in the city of Dar es Salaam through a lease contract. It then reviews Kenya's attempts to liberalize water and sanitation markets, and Uganda's efforts to ensure the provision of water and sanitation to the poor through local government arrangements. Chapter 2 contends that while private sector participation has the potential to remedy at least some of the deficiencies of public water and sanitation systems in the three countries, this potential cannot be realized in the absence of democratic market design, implementation and regulatory frameworks. If the market is to constitute a viable instrument for delivering water and sanitation services, there is a need for the creation of institutional mechanisms that will enable the public to participate meaningfully in, and hold to account, privatization processes. On the other hand, Chapter 3 reviews Africa's experience with security privatization in general and examines the governance challenges that different private forms of security provision present for the three East African countries in particular. It contends that these countries need to adopt an integrated approach to security governance if they are to effectively manage the deployment of the various forms of private security and their interaction with public security actors.

Chapter 4 then grapples with how administrative law reform can help the three countries to respond effectively to the governance challenges presented by privatization processes. While acknowledging that democratic governance of privatization processes requires the establishment of regulatory or oversight agencies, this Chapter warns that such agencies may not serve the public interest unless suitable governance mechanisms are established to compel them to do so. The Chapter evaluates the institutional mechanisms established by the three countries to facilitate the effectiveness and public accountability of regulatory agencies in the areas of water and sanitation, and security. In particular, the Chapter contends that the essential promise of administrative law is that it can politicize and democratize the decision-making processes of such agencies in such a manner that most, if not all, citizens can participate in governance. Important attributes of administrative law in this context include its ability to provide avenues for citizens to influence the decisions of public agencies and require them to provide fair as opposed to autocratic administration.

Chapter 5 highlights the arguments advanced by the book, and observes that while the three countries still have a long way to go if the practice of democracy is to be deepened, the emergence of participatory governance institutions is encouraging; the potential of such institutions can be harnessed through the constitutionalization of a right to administrative justice, the establishment of suitable statutory frameworks for the realization of such a right, and the implementation of legal empowerment initiatives.