

DEMOCRACY CAPTURE IN AFRICA

Benin

Ghana

Kenya

Mozambique

Nigeria



Ghana Center for Democratic Development

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INTRODUCTION

DEMOCRACY CAPTURE IN COMPARATIVE PERSPECTIVE



1. Introduction: Democracy and Why it Matters

One of the reasons that democracy is valued is that, by empowering all citizens to have a say in the running of the country, it is expected to ensure that economic and political opportunities are more broadly shared. For Alexis de Tocqueville, one of the most influential students of what during his time was a relatively young political phenomena, the multiple problems of democracy were justified on the basis that it would improve the condition of the worst off.¹ Yet in reality democratic political systems have not always delivered on this central promise. In some established democracies with developed economies, such as the United Kingdom and the United States, “one-person-one-vote” has gone hand in hand with rising economic inequality.² One of the important consequences of this trend is that the ideal of political equality has effectively been compromised, as poorer citizens struggle to secure the resources needed to compete for political office.

In the younger democratic systems of sub-Saharan Africa, democracy has been shown to generate developmental gains as compared to authoritarianism,³ but these have tended to be far less impressive than many hoped when the vast majority of the continent’s one-party states and military regimes were replaced with multiparty politics in the 1990s. In the decade following 1989, almost every country on the continent with the notable exceptions of Eritrea and Swaziland, moved to hold elections of some kind to select the government.⁴ Yet although poverty has fallen in a number of states, this has been a slow process and for the most part has gone hand-in-hand with the expansion of a super elite that has gotten richer at a far quicker rate than the worst off have become less poor. Partly as a result, countries such as Benin, Chad, and Malawi are still located in the “low human development” category of the United Nations Human Development Index, almost thirty years after multiparty elections were reintroduced.⁵

A number of reasons have been put forward for this disappointing performance. First, many countries have yet to overcome problematic colonial inheritances, which bequeathed economies and infrastructures set up to expropriate natural resources rather than to do the kind of manufacturing work that adds value and hence creates more highly skilled and better paid jobs.⁶ Second, for a long time the International Monetary Fund and the World Bank promoted economic adjustment policies that sought to make African economies more sustainable by cutting government spending, which had a negative impact on government investment on the healthcare and education systems that the poor rely upon.⁷ Relatedly, the economic models adopted by many governments approximate, whether intentionally or otherwise, the kind of neo-liberal policies that are typically justified on the basis that wealth “trickles” down to the worst off, when in reality this typically fails to happen.⁸ Finally, the international economic system continues to be governed in ways that advantage already wealthy and industrialised countries, compounding the other challenges faced by African countries.

Yet while there is some truth to all four of these explanations, it is also important to recognize that one of the key problems is that in many countries what has been delivered is not democracy but a

¹ Alexis de Tocqueville. *Democracy in America*. Chicago: University of Chicago Press, 1838.

² Jacobs, Lawrence R., and Theda Skocpol, eds. *Inequality and American democracy: What we know and what we need to learn*. Russell Sage Foundation, 2005.

³ Giovanni Marco Carbone, Vincenzo Memoli, and Lia Quartapelle. "Are lions democrats? The impact of democratization on economic growth in Africa, 1980–2010." *Democratization* 23, no. 1 (2016): 27-48, 27.

⁴ Nic Cheeseman, *Democracy in Africa: Successes, failures, and the struggle for political reform*. Cambridge: Cambridge University Press, 2015.

⁵ For the Human Development Index, see: <http://hdr.undp.org/en/content/human-development-index-hdi>.

⁶ Nicolas Van de Walle. "The institutional origins of inequality in Sub-Saharan Africa." *Annual Review of Political Science* 12 (2009): 307-327.

⁷ Asad Ismi. *Impoverishing a continent: The World Bank and the IMF in Africa*. Ottawa: Canadian Centre for Policy Alternatives, 2004.

⁸ Craig Stirling, "Fifty Years of Tax Cuts for the Rich Didn't Trickle Down, Says Study", *Bloomberg*, 15 December 2020, <https://www.bloomberg.com/news/articles/2020-12-16/fifty-years-of-tax-cuts-for-rich-didn-t-trickle-down-study-says>.

political system that looks democratic from the outside but operates on the basis of a very different logic.⁹ In other words, the political systems introduced in the early 1990s have not been run according to democratic principles – for example, they often lack fully independent judiciaries and electoral commissions, and feature a civil service that is run on the basis of clientelism and favouritism rather than meritocracy. This has often been described in terms of the problem that corruption poses to effective government,¹⁰ and it is clear that grand corruption and graft takes vital resources away from the state while undermining the provision of essential public services. In reality, however, corruption is a symptom, rather than the cause, of the problems facing many African democracies today.

The authors represented in this report argue that the real challenge is both broader and more worrying than corruption – as damaging as it is – namely the capture of democracy itself by a small number of political actors who use their influence over key democratic institutions to further their own interests at the expense of those of the public. As Professor E. Gyimah-Boadi puts it in his theoretical overview (Chapter 2 of this volume), **“Democracy Capture occurs when a few individuals or section of a supposedly democratic polity are able to systematically appropriate to themselves the institutions and processes as well as dividends of democratic governance”**.

This report is comprised of a conceptual framing of the nature and importance of “Democracy Capture” and a series of case studies that investigate the extent and impact of Democracy Capture in five very different states: Benin, Ghana, Kenya, Mozambique and Nigeria. Each chapter was written by a country expert on the basis of cross-referencing available documentation including media reports, grey literature, academic analysis and their own past studies on related topics. In some cases, authors supplemented this with selected interviews in order to ensure that findings were robust. One important theme that comes out from many of the chapters is that Democracy Capture is particularly difficult to study, both because its activities often take place in the shadows and are hidden from public view, and also because the key players – the “captors”, we might say – are often able to censor the media and so it can be difficult to prove accusations of corruption, criminality and clientelism.

Despite these challenges, all five reports also identify disturbing and anti-democratic practices that risk hollowing out democracy so that it serves as a political mirage that legitimises the monopolization of economic opportunities by a small elite (defined in greater detail below) at the expense of the public. Although the extent and nature of Democracy Capture varies from case to case, in none of the five cases does the author conclude that it is not a significant concern. The reports therefore call for far greater attention to the challenge of Democracy Capture, including a greater investment of resources into mapping and researching how it occurs, and propose a range of political and legal steps that can be implemented in order to resist it.

The common theme running through all of the analysis contained in these pages is that every month that goes by without concrete and concerted resistance facilitates greater Democracy Capture, which in turn makes it even more difficult to ensure that the political system, broadly understood, works in the interests of all citizens.

In order to put the chapters that follow into context, and to draw out some comparative lessons, this introduction briefly sets out how the authors understand and conceptualise Democracy Capture, what the five cases have in common and how they differ, and concludes by highlighting some of the key findings and recommendations.

⁹ Nic Cheeseman and Brian Klaas. *How to rig an election*. New Haven: Yale University Press, 2019.

¹⁰ Dominic Burbidge. *The shadow of Kenyan democracy: Widespread expectations of widespread corruption*. Routledge, 2016.

1. Why “Democracy Capture”

A number of different terms have been used to characterise the struggles that African countries have had in establishing effective democracies that work for ordinary citizens. Academics have long written about the challenge of neo-patrimonialism, which is often argued to have been the dominant form of politics on the continent since independence. In most formulations, ‘the term “neopatrimonialism” is intended to signify that, following the imposition of the colonial state, African political systems can no longer be treated as purely traditional. The reason for this is that patrimonial modes of conducting politics were grafted on to the trappings of the modern state, including political parties, legislatures, and judiciaries. In the process, both patrimonial and formal institutional structures were transformed.’¹¹ The consequences of this are said to be profound: “On the one hand, institutions such as legislatures did not perform as expected because they conformed to a patrimonial, rather than a rational-legal, logic. On the other hand, the fusion of traditional forms of authority with the centralised political structures of colonial rule often served to empower the position of traditional leaders, or chiefs, over their communities.’¹² Variations on this theme include Richard Joseph’s discussion of ‘prebendalism’ in Nigeria,¹³ Jean-François Bayart’s analysis of the ‘politics of the belly’,¹⁴ and analysis of the ‘it’s our turn to eat’ phenomena in Kenya.¹⁵

Other approaches to the poor performance of political institutions in Africa have focussed more on the takeover and subversion of political systems. In the late 1990s, there was a spate of interest in the ‘criminalization’ of the state,¹⁶ and the way in which political elites can manipulate disorder as a political instrument to entrench their authority.¹⁷ More recently, a number of studies of the way in which the South African government was subverted to private interests under the presidency of Jacob Zuma have described a process that has become popularly known as “State Capture”. In particular, this body of research has focussed on how a ‘power elite’ – a ‘well-structured network of people located in government, state institutions, state-owned enterprises (SOEs), private businesses, security agencies, traditional leaders, family networks and the governing party’ – has gained control of the formal apparatus of the state and used it for its own ends. According to Ivor Chipkin and Mark Swilling, these actors are distinguished by their privileged ‘access (either consistently or intermittently) to the inner sanctum of power in order to make decisions’.¹⁸ The members of such networks are able to subvert the state for their own ends because they enjoy ‘high-level protection’, including ‘from law enforcement agencies; intense loyalty to one another; a climate of fear; and the elimination of competitors’.¹⁹

The use of the term Democracy Capture is not intended to suggest that these existing approaches are necessarily incorrect or unhelpful, but rather to draw them together under a common framework through which to understand their impact on democracy in particular. In other words, Democracy Capture refers to the way in which interconnected processes of clientelism, neo-patrimonialism, the personalization of politics and state capture impact on the democratic process – and highlights how the image of democracy is used to legitimate this process. On this understanding, a country can be said to have experienced Democracy Capture when: **The political context may be formally democratic, but public policies are still largely developed to favour elite interests – by manipulating democratic institutions and processes, and through practices such as payment of illicit contributions**

¹¹ Nic Cheeseman, and Eloïse Bertrand. *A Dictionary of African Politics*. Oxford University Press, 2019, <https://www.oxfordreference.com/view/10.1093/acref/9780191828836.001.0001/acref-9780191828836>.

¹² *Ibid.*

¹³ Richard A Joseph. *Democracy and prebendal politics in Nigeria*. Cambridge University Press, 2014.

¹⁴ Jean-François Bayart. *The State in Africa: the politics of the belly*. Polity, 2009.

¹⁵ Daniel Branch, Nic Cheeseman, and Leigh Gardner. *Our turn to eat: politics in Kenya since 1950*. Lit Verlag, 2010.

¹⁶ Jean-François Bayart, Stephen Ellis, and Béatrice Hibou. ‘The criminalization of the state in Africa’. Oxford: James Currey, 1999.

¹⁷ Patrick Chabal and Jean-Pascal Daloz, *Africa works: Disorder as political instrument*, Oxford: James Currey, 1999.

¹⁸ Ivor Chipkin and Mark Swilling (eds). *Shadow state: The politics of state capture*. NYU Press, 2018.

¹⁹ *Ibid.*

by private interests to political parties and for election campaigns, parliamentary vote-buying, buying of presidential decrees or court decisions, as well as through illegitimate lobbying and revolving-door public appointments (Gyimah-Boadi, Chapter 2 of this volume). In line with this understanding, it is important to note that the scope of this capture can be very broad and may encompass:

- The Executive including the Cabinet
- Elections and the Electoral Commission
- Political Parties including the Ruling Party
- The Judiciary including the Supreme/Constitutional Court
- The Media
- The Central Bank and Ministry of Finance
- The Security Sector, including the Police, Army, and informal militias
- State-Owned-Enterprises, Parastatals, Quangos and Regulatory Bodies
- The Civil Service including Permanent Secretaries and their equivalent
- Civil Society including some supposedly pro-democracy and Human Rights organizations

One implication of the breadth of Democracy Capture covered in this report is that it has implications for almost all aspects of democratic practice and political and economic decision making. Thus, according to Professor E. Gyimah-Boadi (chapter 2) some of the most problematic effects of Democracy Capture include:

- Distorting democratic politics in such a way that it systematically favours an elite and grants them privileges over a majority of the population – even where there is a façade of popular support and legitimacy.
- Corroding the principles and institutions of democracy – both in its minimalist definitions (which emphasize the conduct of free and fair elections and other formal democratic procedures) and substantive definitions (which emphasize effective checks and balances, including on the executive’s discretionary power, and policy outcomes such as law and order, corruption control, and the reduction of social and economic inequities).
- Enabling the elite to maintain a stranglehold over state institutions and resources and dominate society from that position. It therefore engenders a vicious cycle of ever-weakening democratic institutions, poor quality governance, and social and economic backwardness.
- Preventing the creation of a political culture that sustains democratic principles, institutions, and processes, thereby accelerating the decline of democratic institutions and furthering the capture of democracy.

In this sense, one of the most distinctive and problematic features of Democracy Capture is that it can create a vicious cycle, in which the deliberate actions and practices of those in control of the state undermines the prospects for democratic renewal and so reinforces the hollowing out of key democratic institutions. However, it is important to keep in mind that as with state capture and neo-patrimonialism, the extent and impact of Democracy Capture is far from even across the continent.²⁰ Instead, the dynamics and impacts of Democracy Capture vary significantly in relation to the strength and independence of key institutions, the extent to which patrimonial practices were constrained under previous governments, and the structure of the economy. The next section therefore introduces the five countries covered in this report, reviews their similarities and differences, and considers how this impacts the way in which Democracy Capture plays out.

²⁰ Nic Cheeseman, “Introduction”, in Nic Cheeseman. *Institutions and democracy in Africa*. Cambridge University Press, 2018.

2. The Cases

Democracy Capture is not an “African” phenomena. Indeed, examples of Democracy Capture, and attempted Democracy Capture, can be identified in Brazil, India, and the United States.²¹ The focus of this report on African cases should therefore not be interpreted as an indication that there is anything unique or distinctive about African politics. Instead, this report looks at five countries on the continent – Benin, Ghana, Kenya, Mozambique and Nigeria – in order to highlight particular variations and strains of what is best thought of as a global threat to democracy and the public interest. While these cases are not fully representative of Africa’s multiple regions and rich diversity, they include coverage of West, East and East/Southern (in the case of Mozambique) Africa, and of Anglophone (Ghana, Kenya, Nigeria), Lusophone (Mozambique) and Francophone (Benin) countries.

This case selection also ensures variation on a number of factors that might be expected to shape how Democracy Capture plays out, as demonstrated by Table 1.1.

Table 1.1. Variation Between Cases on Wealth, Democracy and Conflict (2020)

	GDP per capita*	Serious conflict?	Freedom House Rating	Freedom House Score**
Benin	\$1,291	Coups following independence, but no civil conflict	Partly Free	65
Ghana	\$2,329	Coups following independence, but no civil conflict	Free	82
Kenya	\$1,838	No civil war but serious electoral violence	Partly Free	48
Mozambique	\$449	Yes, past civil war and current insurgency	Partly Free	43
Nigeria	\$2,097	Yes, past civil war and current insurgency	Partly Free	45

* SOURCE: World Bank, Data at: <https://data.worldbank.org/>.

**Higher scores = More free, Freedom House scores: <https://freedomhouse.org/countries/freedom-world/scores>.

The quality of democracy

The first factor that might be expected to impact Democracy Capture is the quality of democracy. Other things being equal, we would expect both the degree and negative impact of Democracy Capture to be lowest in countries in which democracy is strongest. This ranges from Ghana, widely viewed to be a consolidating democracy and “free”, to Mozambique and Nigeria, which are often described as being “hybrid regimes” (Economist Democracy Index) that combine aspects of democracy and authoritarianism and so are only “partly free”.²²

Ghana is widely seen to be one of the most democratic countries on the continent, having experienced three peaceful transfers of power via the ballot box and featuring high levels of respect for both political rights and civil liberties.²³ Benin was previously ranked alongside Ghana, but has subsequently

²¹ Brian Klaas. *The Despot's Apprentice: Donald Trump's Attack on Democracy*. Oxford University Press, 2017; Wendy Hunter and Timothy J. Power. "Bolsonaro and Brazil's illiberal backlash." *Journal of Democracy* 30, no. 1 (2019): 68-82.

²² See the Economist Democracy Index 2020: <https://www.eiu.com/n/campaigns/democracy-index-2020/>.

²³ Emmanuel Gyimah-Boadi. "Another step forward for Ghana." *Journal of democracy* 20, no. 2 (2009): 138-152.

fallen from grace under President Patrice Talon as democratic space has been closed off,²⁴ with opposition leaders effectively prevented from contesting elections as the country moves from being one of the most open and competitive political systems in Africa to a near one-party state.

The next country after Benin (If we follow the Freedom House rankings in Table 1.1) is Kenya, which experienced a democratic transfer of power in 2002, and introduced a progressive constitution in 2010 that sought to place greater constraints on the executive and decentralized to 47 new counties, but has also suffered a series of electoral controversies that have undermined political stability.²⁵ Closely behind Kenya is Nigeria, a state that has also experienced one peaceful democratic transition – in 2015 – but, like Kenya, has also suffered a series of electoral controversies²⁶ and suffers from compromised democratic institutions that are not fully independent from executive manipulation.

At the bottom of the democracy rankings sits Mozambique, although its score is close to that of Kenya and Nigeria. This signals that although Mozambique has never had a transfer of power and the political system is heavily weighted against the opposition,²⁷ citizens enjoy some civil liberties – although there is considerable media censorship, and there is no possibility of using these freedoms to bring about political change.

Histories of conflict

Another important variation is experience of civil conflict and political violence. One of the greatest barriers to the institutionalization of democratic norms and values is the militarization of politics,²⁸ which can undermine the influence of civilian politicians and generates even greater barriers to reform. Again, there is considerable variation among our cases.

Benin and Ghana both suffered a number of coups in the wake of independence, but both ultimately experienced a prolonged period of relatively stable rule under a former military leader who set up a political system that was closer in some ways a one-party state: Mathieu Kérékou in Benin and J.J. Rawlings in Ghana. Neither country has experienced civil war or prolonged conflict.

The experience of Mozambique and Nigeria has been radically different. Both countries suffered prolonged and harrowing civil wars that continue to shape politics today. In the Nigerian case, the civil war, or the Biafran war as it is also known, lasted from 1967 to 1970, and was followed by a lengthy period of military rule prior to a transition to multiparty politics in 1999.²⁹ The conflict in Mozambique lasted much longer, from 1976 until a peace agreement 1992,³⁰ by which time the country had already introduced a new constitution in 1990 paving the way for the return of multiparty elections in 1994.

Although both countries have managed to avoid a return to full-scale conflict, violent political insurgencies have remained a significant problem. In Nigeria, the combination of a long-running insurgency in the oil-rich Niger Delta region, the more recent rise of the Boko Haram radical Islamic

²⁴ Ife Paul Atihou. "Declining democratic processes in Benin Republic: implication for African security." *African Renaissance* 15, no. 3 (2018): 29-47.

²⁵ Karuti Kanyinga and James D. Long. "The political economy of reforms in Kenya: the post-2007 election violence and a new constitution." *African Studies Review* 55, no. 1 (2012): 31-51.

²⁶ Samuel Oyewole and J. Shola Omotola. "Violence in Nigeria's 2019 general elections: trend and geospatial dimensions." *GeoJournal* (2021): 1-11.

²⁷ M. Anne Pitcher. "Mozambique elections 2019: Pernicious polarization, democratic decline, and rising authoritarianism." *African Affairs* 119, no. 476 (2020): 468-486.

²⁸ Nicole Beardsworth, Nic Cheeseman, and Simukai Tihhu. "Zimbabwe: The coup that never was, and the election that could have been." *African Affairs* 118, no. 472 (2019): 580-596.

²⁹ Tom Lodge. "Conflict resolution in Nigeria after the 1967–1970 Civil War." *African studies* 77, no. 1 (2018): 1-22.

³⁰ Michel Cahen, Eric Morier-Genoud, and Domingos Do Rosário. *The War Within. New Perspectives on the Civil War in Mozambique, 1976-1992*. James Currey/Boydell and Brewer, 2018.

terrorist group and its various splinter groups in the northeast of the country, and the spread of banditry and criminality in many areas, has led to growing fears that the country is, or will soon become, a failed state.³¹ The security situation in Mozambique today is less extensive, but is nonetheless deeply problematic. In 2013, twenty years after the end of the civil war, the opposition party RENAMO (the Mozambican National Resistance) returned to arms in central Mozambique, playing on popular grievances against the state to rally support.³² More recently, armed militants – sometimes operating under the flag of the Islamic State – launched an insurgency in Capo Delgado in 2017 that has been fuelled by the failure to deal with long-term political tensions and economic inequality. In turn, this has led to a crisis that has so far cost over 3,000 lives and had significant implications for the country's ability to benefit from the large gas reserves present in the region.³³

Kenya is a different story again, having experienced no civil wars but rather repeated bouts of serious political violence around contested elections. The most significant violence occurred following disputed general elections in 2007/2008, when over 1,000 people died and 600,000 were displaced in clashes between communities,³⁴ and as a result of the clashes between protestors and the security forces. Significant numbers of deaths and displacement preceded elections in 1992 and 1997, and followed them in 2017.

Wealth and the economy

The five cases also vary significantly when it comes to national wealth and the structure of the economy. This is significant because certain kinds of economic activities, such as oil expropriation, have frequently linked to forms of grand corruption in which resources are misappropriated and in many cases removed from the country via transnational networks.³⁵ High valuable natural resources have also been argued to increase the risk of both grand corruption and political conflict.³⁶

The three countries with the highest GDP per capita – Kenya, Nigeria and Ghana in ascending order – all have the potential to be “oil economies” in the sense that they boast commercially viable quantities of oil, but the significance of “black gold” to their finances is radically different. Oil rents represent just 0.022% in Kenya in 2019,³⁷ and even this represents a recent high as the large discovery in Turkana has yet to come fully online. At present, agriculture, tourism and telecommunications are far more important areas of economic activity. Although Ghana has been exporting oil for longer, first pumping in 2010 following the discovery of the Jubilee Field in 2007, quantities have been relatively modest and the country's economy has historically relied on other sources of income, such as cocoa, gold, agriculture, and the service sector. As a result, oil rents only represented 5% of GDP in 2019 – and have never exceeded 6%.³⁸

The situation is very different in Nigeria, where oil has dominated the post-colonial economy, reaching a high of 39% in 1979, and has continued to be a major source of government revenue – bringing in some \$34 billion in 2019 – although the falling price has resulted in a decline in oil rents as a proportion

³¹ Edidiong Oko, Henry Ufomba, and Washington Benjamin. "Is Nigeria a Failed State? A Commentary on the Boko Haram Insurgency." *Global Journal of Human Social Science* 18 (5) (2018): 35.

³² Justin Pearce. "History, legitimacy, and Renamo's return to arms in central Mozambique." *Africa* 90, no. 4 (2020): 774-795.

³³ Felix Makonye. "The Cabo Delgado Insurgency in Mozambique: Origin, Ideology, Recruitment Strategies and, Social, Political and Economic Implications for Natural Gas and Oil Exploration." *African Journal of Terrorism and Insurgency Research* 1, no. 3 (2020): 59-72.

³⁴ Susanne D Mueller. "The political economy of Kenya's crisis." *Journal of Eastern African Studies* 2, no. 2 (2008): 185-210.

³⁵ Ricardo Soares de Oliveira. "Oil and Politics in the Gulf of Guinea." *London: Hurst and Company* (2007).

³⁶ Cyril Obi. "Oil as the 'curse' of conflict in Africa: peering through the smoke and mirrors." *Review of African political economy* 37, no. 126 (2010): 483-495.

³⁷ For oil rents as a percentage of GDP, see World Bank, 2021, <https://data.worldbank.org/>.

³⁸ *Ibid.*

of GDP to 7.4% that year.³⁹ Other key areas of economic activity include construction, the service sector, and agriculture, although production has not kept up with demand and the country now has to import some food products.

Mozambique is also rich in natural resources due to the vast gas reserves, having found 100 trillion tonnes of natural gas in the Rovuma Basin Area, around 40km off the coast of Capo Delgado but, like Kenya, has yet to significantly benefit from this discovery. In the Mozambican case, this is partly due to the Capo Delgado insurgency, which has disrupted plans to build the complex infrastructure necessary to take the gas to market.⁴⁰ As a result, the economy continues to predominantly revolve around agriculture, the service sector, and the export of aluminium and coal, while around two-thirds of the country's population continue to live and work in rural areas.

3. The Dynamics and Impact of Democracy Capture

The five case studies that follow demonstrate that the kinds of variations described in the previous section shape how Democracy Capture plays out, but also serve as an important reminder not to assume that Democracy Capture is simply the product of prior levels of authoritarian rule, conflict and corruption.

This is clear from the first two empirical chapters. Although Benin has long been thought of as one of the least autocratic states on the continent, Expédit B. Ologou (Chapter 2) identifies a number of aspects of Democracy Capture that have combined to generate what “can be characterized without any exaggeration as an era of political tightening, an era of “de-democratization”. In particular, Ologou argues that the “weakness of democratic culture and the cupidity of sociopolitical elites”, along with fragile democratic institutions, has enabled the emergence of a self-serving “economico-political oligarchy”.

More specifically, Ologou tracks the emergence of two trends that he argues have played a critical role in driving democracy capture: the growing influence of businessmen within the political landscape, and the progressive weakening of institutions. Where the former is concerned, he tracks the growing dominance of powerful business figures, who have gone from backing allied political candidates to standing themselves. This trend reached its apogee when Patrice Talon, one of the country's richest businessmen, won the presidency in 2016. Where the latter is concerned, Ologou suggests that democracy has started to be taken for granted, and that the failure of pro-democracy actors to resist the “instrumentalization” of institutions – through the promotion of unqualified allies of the executive – has enabled supposed check and balances to be fatally undermined.

As a result of the combination of these two trends, politics in Benin has become both more corrupt and less democratic. In turn, this process has revealed the limitations of the country's civil society, which proved to be insufficiently broad and deep-rooted to resist the attack on democracy. The impact of growing of Democracy Capture are best illustrated by the way in which the two ruling parties – Union Progressiste and Bloc Républicain – not only manipulated the communal elections of 2020 so that they won 71 out of 77 communes, but also curtailed freedom of expression and the scope for political protests, effectively insulating the power-grab from popular disapproval.

Ologou's analysis is an important reminder that although reasonable levels of political rights and civil liberties have persisted in countries such as Malawi, Namibia, and Senegal over the past three decades, this does not mean that democracy has become consolidated. Instead, the

³⁹ *Ibid.*

⁴⁰ *Total Energies*. “Total declares Force Majeure on Mozambique LNG project”. 26 April 2021, <https://totalenergies.com/media/news/press-releases/total-declares-force-majeure-mozambique-lng-project>.

institutionalization of democracy can only be confirmed when democracy is challenged and key elites and institutions – and the people themselves, supported by civil society – rise up to meet the challenge, preserving the democratic system and strengthening it in the process.

A similar theme emerges from E. Gyimah-Boadi's analysis of Ghana (Chapter 3) – a country often seen to be a democratic success story, but one that his analysis suggests is not completely immune from a trajectory such as that seen in Benin. This is because beneath the image of a thriving democracy, 'lies a reality of toxicity, dysfunction, corruption and a zero-sum/winner-takes-all politics that enables a narrow group of (mainly party elites and close allies in the domestic private sector) to co-opt, corrupt or pervert the nature of democratic institutions'. The process described by Gyimah-Boadi's has strong echoes to that described by Ologou. In particular, Ghana's democracy is argued to rest on weak institutional foundations that have enabled a narrow political elite to capture 'a number of primary democratic governance and state institutions and processes, particularly, elections, together with the election management body, the Electoral Commission, the legislature, political parties, and the executive branch/ presidency as well as secondary ones such as civil society and the media.' In turn, this is said to have facilitated the spread of a highly monetized form of politics characterised by 'moral decadence' and a 'culture of unethical materialism'.

The strength of Ghana's two main political parties has meant that this process has not led to the closure of democratic space seen in Benin, because elections remain competitive and no one side appears able to exert prolonged dominance over the other.⁴¹ Nonetheless, Gyimah-Boadi warns that similar consequences are possible if these trends are left unchecked. The collusion of political leaders from across the political divide has led to a situation in which Ghana has experienced 'non-inclusive' growth, increasing the gap between the 'haves' and the 'have nots'. Thus, 'While Ghana's poverty rate has declined from over 50 percent in the early 1990s to under 16 percent in 2013/14', this 'still leaves over 6 million Ghanaians unable to afford three Cedis and 60 pesewas to spend on food per day; and the high Gini coefficient of around 42, places Ghana in the top 30 percent of unequal countries'. Significantly, persistent inequality is not just an economic issue – if combined with a prolonged economic downturn, the lack of basic fairness could compromise public confidence in democracy itself.

This concern is echoed by Migai Akech (chapter four), who also describes a process in which a self-serving political elite has failed to ensure that the benefits of economic growth have been broadly shared, this time in Kenya. According to Akech, 'democracy capture in Kenya has predominantly taken the form of the manipulation of the electoral process and the institutions of public or horizontal accountability'. As a result, elections have not served to generate effective political accountability. One consequence of this is that, despite the introduction of a progressive constitution in 2010, the 'democracy capturers' who 'straddle the public-private divide' rarely face an insurmountable institutional barrier to the abuse of office. Instead, 'In the rare case that a horizontal accountability mechanism threatens the interests of the state, it is quickly neutered through resource deprivation, co-optation, manipulation, infiltration, discreditation, control of member appointment and dismissal processes ...'.

Akech argues that this is not a new process. Instead, it can be traced back to colonial rule because, right from the start 'The Kenyan state was not designed to be democratic'. Although the state has been frequently tinkered with, some of its most fundamental elements, such as the limited ability of citizens to select those in power, the strength of the civil service and the bureaucracy – which has served as both administrator and policeman – and the unaccountable nature of the security forces, have remained largely unchanged. In other words, the differences between the governments that have ruled Kenya since independence in terms of their ethnic make-up and the political institutions

⁴¹ Nic Cheeseman, Gabrielle Lynch, and Justin Willis. "The moral economy of elections in Africa: democracy, voting and virtue." Cambridge: Cambridge University Press, 2020.

they occupied have served to mask the fact that successive regimes have deployed the same 'infrastructure to contain the citizenry's clamour for a more participatory and accountable governance system.'

As in Benin and Ghana, Democracy Capture in Kenya has sustained a deeply unequal society, in which 'Less than 0.1% of the population (8,300 people) own more wealth than the bottom 99.9% (more than 44 million people)'.⁴² Although poverty fell from 46.8% to 36.1% between 2005 and 2015, many segments of society have not benefitted from consistent economic growth, and 'If Kenya continues on its current growth path, poverty will remain above 20% by 2030'.⁴³ Again, the significance of this goes well beyond economic issues, because as Akech argues 'It is also plausible that the citizenry will sooner rather than later tire of the democracy capturers' effective divide and rule tactics, which in any case only impoverish them.'

In a sense, the Kenya case study represents a bridge between the Benin and Ghana chapters, which describe civilian political systems in which the security forces have played a limited role for the last thirty years, and the chapters on Nigeria and Mozambique, where civil conflict and insurgencies have ensured that the security forces have played a central role in efforts to preserve political power. In Kenya, the army has historically played a less prominent role – although this has begun to change in the last decade with the prominent role of the army in anti-terror operations and the invasion of Somalia⁴⁴ – but the police and in particular the paramilitary General Service Unit have played a critical role in repressing political unrest.⁴⁵

Indeed, political violence is a theme that runs through both the Mozambican and Nigerian cases. Where Mozambique is concerned (chapter five), Adriano Nuvunga suggests that the interests of prominent military actors were baked into the contemporary political settlement from the very start. More specifically, he explains that 'by the time that the post-Peace Agreement demobilization started, the implicit interests of the key military actors – the freedom fighters – had been economically accommodated'. This has not served to generate political stability, however, for two reasons. First, it established a system of government based in 'pure corruption', and second, the enrichment that took place under the ruling party, FRELIMO (the Liberation Front of Mozambique) was not inclusive. Along with frequent electoral controversies, this has contributed to 'political-military' conflicts such as the decision of REMANO militants to return to violence in 2013.

Against this background it is perhaps unsurprising, though no less tragic, that Democracy Capture has been pursued through violent repression. As Nuvunga notes, the censorship of critical voices and the media has been achieved by demonstrating the high price that individuals may pay for opposing the regime. Most notably, independent journalist Carlos Cardoso was murdered in 2020 while 'investigating cases of corruption involving the FRELIMO elite'. This is part of a much strategy in which FRELIMO deploys various forms of violence in order to maintain a near monopoly over political power. When it comes to controlling electoral processes, for example, Nuvunga explains that 'FRELIMO does this in connivance with the police, on the one hand, against opposition leaders and candidates and, on the other hand, against election observers and journalists who want to contribute to electoral transparency'. Partly as a result, voter turnout has declined significantly since 1994.

⁴² *Oxfam International*, "Kenya: Extreme Inequality in Numbers", n.d., <https://www.oxfam.org/en/kenya-extreme-inequality-numbers>.

⁴³ Utz Pape and Carolina Meija-Mantilla, "More than just growth: Accelerating poverty reduction in Kenya", *World Bank Blogs*, 12 February 2019, <https://blogs.worldbank.org/african/more-than-just-growth-accelerating-poverty-reduction-in-kenya>.

⁴⁴ Jonathan Fisher and David M. Anderson. "Authoritarianism and the securitization of development in Africa." *International Affairs* 91, no. 1 (2015): 131-151.

⁴⁵ Daniel Branch, and Nic Cheeseman. "Democratization, sequencing, and state failure in Africa: Lessons from Kenya." *African Affairs* 108, no. 430 (2009): 1-26.

The combined impact of these processes is familiar, though perhaps even more problematic and dangerous than in the case of Benin, Ghana, and Kenya. The combination of economic ‘liberalization for self-enrichment’ and ‘growing autocratization’, Nuvunga argues, is a transition that has not improved ‘the people’s standards of living’ and so ‘poverty and social instability could undermine the democratization process’. As the government looks to foreign assistance to contain the crisis in Capo Delgado, it appears that Nuvunga’s worst fears are already being realised.⁴⁶

A similar sense of urgency characterises Idayat Hassan’s analysis of Democracy Capture in Nigeria (chapter six). Although the country celebrated its first peaceful transfer of power via the ballot box in 2015, Hassan warns that the democratic system remains weak and vulnerable to manipulation. In particular, ‘Nigeria’s elections, its census, the three arms of government, its political party system and the press all show high degrees of being captive’. Worse still, ‘anti-democratic forces have penetrated each arm of government – the judiciary, legislature and executive’.

In explaining the extent of the challenge, Hassan draws on a number of the factors set out above. First, the availability of oil rents has fuelled corruption and the emergence of a political system based on prebendalism. Second, the strength of communal identities such as religion and ethnicity has made it harder to build an effective and cohesive national identity, so that ‘Even after decades of military rule and the return to democracy since 1999 ... ethnic voting persists.’ Third, a combination of the co-optation emergent militias and vigilante groups while selectively deploying violence against political rivals has stymied the emergence of fundamental challenges to the status quo. Taken together, these interrelated processes mean that by ‘creating in-group and out-group narratives and sponsoring violence against outgroup actors’, politicians can ‘score cheap wins at the expense of real development’.

Hassan explains that as a result, the “Cabal” of figures around the president – the ‘unelected informal advisors and stakeholders who pull strings within a ruling government’ – and a tier of powerful political “godfathers” that operate at multiple levels have been able to monopolise the benefits of access to the state. In turn, this has facilitated a deeply problematic cocktail of rising organized crime, on the one hand, and unaccountable security forces that act with impunity, on the other. The combined effect of these developments has led to a major security crisis in which Nigerian citizens require the military and police to protect them from insurgencies, banditry and regular crime, but do not trust the country’s law enforcement agencies. This was powerfully demonstrated by the #EndSARS protests that began in 2017 but erupted in October 2020 as thousands of Nigerians campaigned against police brutality, demanding that the notorious Special Anti-Robbery Squad be disbanded.⁴⁷

As Hassan points out, poverty and inequality are not simply an outcome of this process of Democracy Capture, but also a driver. Pronounced hardship and vast discrepancies between the rich and the poor both drive crime and insurgencies, and are themselves intensified by the consequences of theft, extortion, kidnapping for ransom, and the economic losses generated by intense insecurity. This particular vicious cycle is most pernicious for those who are already poor, and so cannot afford private security and – when public services break down – private healthcare and education. Thus, despite the country’s vast oil wealth, ‘Only 19% of Nigerians can access safe drinking water, and in rural areas, only 54% have ready access to any clean water at all. In fact, 90% of homes in Nigeria drink water that has been contaminated by faeces, E coli, or other pathogens.’

Once again, the damage done by Democracy Capture is not just to individuals or the economy, but to the integrity and legitimacy of the political system – and the democratic project – itself. In Hassan’s

⁴⁶ Charles Mangwiro, “Mozambique Says Influx of African Troops Will Target Cabo Delgado Insurgents”, VOA, 31 July 2021, <https://www.voanews.com/africa/mozambique-says-influx-african-troops-will-target-cabo-delgado-insurgents>

⁴⁷ Amnesty International, ‘#ENDSARS movement from Twitter to Nigerian streets’, n.d., <https://www.amnesty.org/en/latest/campaigns/2021/02/nigeria-end-impunity-for-police-violence-by-sars-endsars/>.

words, 'As the crisis of democracy deepens, the legitimacy of the state weakens. This results in the further exclusion of the majority, the exact opposite of what a democratic system strives to achieve.'

Taken together, the five case studies demonstrate the presence of aspects of Democracy Capture in a wide variety of contexts, and make a strong case for this phenomenon being the most serious challenge facing Africa's multiparty political systems today. Although the extent of Democracy Capture – and the intensity of its pernicious impact – appear to be higher in countries with more pronounced histories of conflict, greater natural resources and less history of functioning civilian institutions, it is also generating real challenges in countries where the conditions for democratic consolidation appear to be more favourable. In turn, the ubiquity of Democracy Capture in Benin, Ghana, Kenya, Mozambique and Nigeria raises a critical question: what is to be done?

4. How to resist democracy capture

One reason why Democracy Capture has become such a significant challenge in sub-Saharan Africa is that it contains the seeds of its own reproduction. Especially where the process is more pronounced, the ability of those in power to neuter the media, direct the security forces, and economically marginalise their rivals, makes it particularly difficult to mount effective resistance.

In other words, while the case studies that follow identify a number of steps that would, if taken, reverse the process of Democracy Capture, the real question is how to bring them about.

There is common agreement across the five papers, for example, that the rule of law needs to be strengthened, and that those who break it need to be prosecuted. Only by ending the culture of impunity can institutions be strengthened and the public protected from abuse of office. It is also clear that greater restrictions need to be placed on the executive, to both 'curb excessive presidential/executive branch office-holder power' (Gyimah-Boadi, chapter three this volume) and to limit the ability of the ruling party to appoint individuals throughout the economic and political system without scrutiny. An important corollary of this strategy will be to better insulate key economic institutions, such as Central Banks, parastatals, and State-owned-Enterprises, from being politically instrumentalised by the ruling party. These two measures will only work, of course, if they go hand-in-hand with a strengthening of the judiciary, both to enable it to rule against the interests of the government and to remove judges who have demonstrated themselves to be corrupt.

There is also a consensus across the five case studies that democratic processes need to be deepened, with greater public involvement and a revival of independent medias and civil societies that can inform, educate, and mobilize citizens in defense of their rights and liberties. And because popular mobilization is unlikely in the face of violent repression, it is essential that the security forces are professionalised and forced to obey the rule of law that they are entrusted with enforcing. This process will need to be predominantly domestic, because Democracy Capture is deep rooted and must be addressed on a case-by-case basis by those who understand its dynamics and are prepared to devote their lives to the fight, but will be significantly strengthened if foreign governments – including those within Africa – multinational companies, and international banks cease facilitating corruption and the abuse of office by aiding and abetting leaders to abuse their office.

These measures would make a significant impact on the growth of Democracy Capture, but the critical question is how they can be implemented. Political leaders that have already learned the value of subverting democratic institutions are unlikely to simply be persuaded into enacting reforms that will constrain their authority and make it more likely that they will lose power at a future election. We therefore need to pay greater attention to how civil society groups, opposition parties, concerned citizens, and independent media can work together to expose processes of Democracy Capture and so mobilize broader support for broader and more structured resistance. It is therefore critical that

domestic and international actors – governments, foundations, and citizens – take a greater interest in this process and how it can be countered.

If this can be done, there may be opportunities to push back against the hollowing out of democratic institutions in the coming years. The one aspect of Democracy Capture that has the potential to lead to its undoing is its inherently exclusionary nature. The more institutions that are captured, the narrower the network of those benefitting from access to state resources can become, especially when this takes place against the backdrop of steady population growth. As poverty and inequality go hand-in-hand with greater wealth and luxury enjoyed by those in control of the state, the pool of people with an interest in challenging the status quo will only grow. Neither this, nor the much vaunted expansion of the middle-class and the urban population, will automatically lead to effective popular resistance. But if it takes place alongside efforts to build new cross-cutting social movements, and to increase popular understanding of the way in which Democracy Capture directly harms individual's standards of living, more effective opposition may start to emerge.

This report is intended as a small but hopefully nonetheless valuable contribution to efforts to raise awareness of the dangers posed by Democracy Capture, and the importance of developing a better understanding of how it can be resisted.

CHAPTER 2

WHAT IS DEMOCRACY CAPTURE?

E. Gyimah-Boadi



1. Defining Democracy Capture

A democratic political order is expected to deliver dividends⁴⁸ for the entire society (rather than a few individuals, groups or elites). Indeed, inclusion is embedded in the notion of democracy – as in Abraham Lincoln’s seminal definition: “*government of the people, by the people and for the people.*” Democratic capture refers to situations where “elites co-opt, corrupt or pervert the nature of democratic institutions in order to impose policies that work towards maintaining the privileged status of the same elites.”⁴⁹ It also refers to situations in which a minority holds *de facto* political power, although in *de jure* and formal terms, power is equally distributed.⁵⁰ And we can speak of democracy capture in supposedly “democratic” countries in which a large majority of the people have electoral rights but not economic or cultural parity and coexist with groups that enjoy concentrated economic power.⁵¹ In short, **democracy capture occurs when a few individuals or section of a supposedly democratic polity are able to systematically appropriate to themselves the institutions and processes as well as dividends of democratic governance.**

Democracy Capture versus State Capture

State capture refers to “*a situation where powerful individuals, institutions, companies or groups within or outside a country use corruption to shape a nation’s policies, legal environment and economy to benefit their own private interests.*”⁵² Public institutions, at both the central and local levels of the state, such as the legislature, the executive, the judiciary and regulatory agencies, are subject to capture. As such, **state capture can broadly be understood as the disproportionate and unregulated influence of special interest groups over decision-making processes, with these interest groups bending state laws, policies, and regulations to their will. The phenomenon of “democracy capture” is therefore a subset of the broader phenomenon of state capture.** The same sort of institutions, actors and stakeholders are involved in both processes: the president and close family members; top leadership of the ruling party (in some countries, together with the opposition party or its leadership); leadership of military/state security and law enforcement agencies; judiciary; media, traditional rulers; religious leaders, and so on. **The political context may be formally democratic, but public policies are still largely developed to favour elite interests – by manipulating democratic institutions and processes, and through practices such as payment of illicit contributions by private interests to political parties and for election campaigns, parliamentary vote-buying, buying of presidential decrees or court decisions, as well as through illegitimate lobbying and revolving-door public appointments.**

The Scope of Democracy Capture

Cognizant of the possibility of losing elections, the beneficiaries of *de facto* power in a democratic system establish institutional trenches to resist democratic transformations that might negatively affect their privileges, even while also participating in the electoral process. They take hold of strategic institutions – election management bodies, political parties, elite media, judiciary, as well as sections of political and civil society, which enables them to manipulate public opinion in order to win political power and impose their perspectives and decisions.⁵³ And if and when they feel threatened by popular

¹ The dividends of democratic governance include political goods (such as civil liberties, freedoms, political rights, the rule of law, justice, effective public administration, accountable and responsive governance, etc.); economic goods (food, shelter and clothing, jobs, stable prices and income, decent infrastructure, etc); and social/cultural/symbolic goods (e.g., health, education, social security, individual human and group dignity, etc).

⁴⁹ Canete, 2015. Cañete, R. (2015). *Privileges that deny rights: Extreme.*

⁵⁰ James Robinson and Daren Acemoglu, 2008.

⁵¹ Roberto Sansón Mizrahi, date.

⁵² Transparency International Plain Language Guide, 2009.

⁵³ Meirotti & Masterson, 2006.

sentiment or protest, they mobilize their allies in the judiciary, media, civil society, and in some cases, paramilitary and state security agencies to block any unfavourable changes.⁵⁴

2. The effects of Democracy Capture

Democratic capture has a number of deeply problematic effects. The significant of these are:

- to distort democratic politics in such a way that it systematically favours an elite and grants them privileges over a majority of the population – even where there is a façade of popular support and legitimacy.
- Corrode the principles and institutions of democracy – both in its minimalist definitions (which emphasize the conduct of free and fair elections and other formal democratic procedures) and substantive definitions (which emphasize effective checks and balances, including on the executive’s discretionary power, and policy outcomes such as law and order, corruption control, and the reduction of social and economic inequities).⁵⁵
- Democracy capture enables the elite to maintain a stranglehold over state institutions and resources and dominate society from that vantage. It therefore engenders a vicious cycle of ever-weakening democratic institutions, poor quality governance, and social and economic backwardness.
- Furthermore, it prevents the creation of a political culture that sustains democratic principles, institutions, and processes, thereby accelerating the decline of democratic institutions and furthering the capture of democracy.

3. Democracy Capture in Africa

Of course, it is possible for any country’s democracy to be held captive, as demonstrated particularly in Donald Trump’s America. However, countries going through democratic transition and/or developing democracies may be more susceptible to the phenomenon.⁵⁶

As commonly recognized, the state remains the most important target of political competition in Africa. Securing control over the state opens up nearly unfettered access to the economic, social, and bureaucratic resources concentrated it controls. Democracy capture has become the new route to state capture in Africa -- in an era where citizens, the African Union, NEPAD/APRM, regional economic communities (notably ECOWAS), and multilateral and bilateral international development partners insist on some level of democratization of national politics, and have even threatened enforcement through military action or effected it in some instances.

Recent developments in South Africa regarding former President Jacob Zuma and his business and political relationship with the industrialist Gupta brothers have provided a vivid portrayal of what democracy capture looks like in both appearance and reality. Using his powers as President, Mr. Zuma allegedly appointed people to positions in key ministries, law enforcement agencies, and state-owned enterprises on the condition that they ignored the blatant misuse of government contracts by the Gupta brothers.⁵⁷ In turn, the Gupta Brothers hired family members of Mr. Zuma – including his son – to top positions within their company.⁵⁸ In the process, the interests of the state in the delivery of quality public services and goods as well as the principle of governmental accountability for taxpayer money was abandoned. The Presidency, the ruling African National Congress, the bureaucracy, and

⁵⁴ Acemoglu & Robinson, op cit.

⁵⁵ Taylor, B. (2013, March 26). Defining Democracy Through Thick and Thin. *Foundation for Economic Education*.

⁵⁶ Acemoglu & Robinson op cit.

⁵⁷ Arun, N. (2019, July 15). State Capture: Zuma, the Guptas, and the sale of South Africa. *BBC*.

⁵⁸ *ibid*.

the country's prosecutorial and regulatory agencies all became complicit in the Gupta brothers' takeover of the South African state's resources.

Change in the presidency and/or party through elections may not fundamentally alter the political dynamics of democracy capture, such as the composition of individuals and groups who hold sway over the democratic process and institutions as well as enjoy lopsided benefits from it. Through collusion and back-scratching among the political class (including ruling and opposition party leaderships), can ensure the basic arrangements which enable the political elite to annex the dividends of democratic governance and economic development for themselves remain unchanged with or without electoral turnover. Thus, elements of democratic capture may be present in countries with relatively advanced democracies such as Benin, Ghana, Senegal and South Africa (who boast of vibrant media and civil society, fairly independent judiciary as well as election management body, etc), as well as in nominally democratic countries that have yet to experience electoral turnover such as Tanzania and Zimbabwe.

It is not only the shape of political power that remains unchanged; in some cases, the same leaders and their aides and families persist for decades. Prominent examples include Sassou Nguesso in the Republic of Congo, Museveni, his family and cronies in Uganda; and Zimbabwe's ZANU-PF under Mnangagwa (after Mugabe's ouster). It is similarly no coincidence that Ivorian politics is still dominated by the same figures since the early 90s (Alassane Ouattara, Laurent Gbagbo, Konan Bédié); Nigeria by politicians from the APC and PDP; and Ghana by those from NPP and NDC.

We place the spotlight on some the key institutions and processes that are typically targeted for manipulation to achieve democracy capture:

Elections

Following the broad acceptance of the ballot box as the sole legitimate mechanism through which political power may be acquired in Africa, elections have become the principal focus of domestic political competition in Africa.⁵⁹ Polls have, indeed, come to represent the first line of battle in the proxy war for democracy and state capture. This begins with the co-optation of election management bodies and stacking them with partisan hacks (whose complicity and connivance is essential to the successful retention of political power). It may also involve gerrymandering (to ensure favourable parliamentary majority for the incumbent president's party and the legislature's rubber stamping of presidential decisions).

More commonly, it also involves voter suppression through restrictive voter registration laws, padding the voter roll with "ghost names", or voter intimidation under the threat of force as was witnessed most recently in the Zimbabwean Presidential Elections of 2018.⁶⁰ Ballot tampering and ballot stuffing are also possible, as was done in the Gabonese presidential elections of 2016 where impossibly high turnout rates of 99% were observed in some regions, with the incumbent President Ali Bongo Ondimba carrying these areas with sweeping margins in an otherwise closely contested election.⁶¹ Wilful wrong vote tallying or announcement of poll results in favour of a candidate other than the one who won the highest number of votes, and hacking into poll results transmission systems are some of

⁵⁹ See African Charter on Democracy, Elections and Governance, 30 January 2007; NEPAD, Declaration on Democracy, Political, Economic and Corporate Governance, 18 June 2002; and Economic Community of West African States Protocol on Democracy and Good Governance, A/SP1/12/01, Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, 1 January 2001.

¹³ A 2017 Afrobarometer survey gives insight into the nature of this violence: 79% of Opposition party supporters noted the government's poor performance in preventing political violence, while only 21% of the ruling party's supporters shared this sentiment (Ndoma & Kokera, 2017), a stark partisan divide that clearly indicates a unidirectional trend in the intimidation.

⁶¹ Penar, P. (2016). *Will of the people? Election results and public opinion in Gabon*. Afrobarometer.

the other forms of electoral fraud deployed in democracy capture schemes.⁶² Vote buying is another means through which electoral fraud is perpetrated – Afrobarometer surveys report that at least 16% of voters across African countries have been offered money or goods for their votes during the last election season.⁶³

Particular note should be taken of the increasing use of super expensive e-voting systems – ranging from biometric voter registration and verification to electronic voting as well as poll results transmission in African elections. National election management bodies and/or incumbent governments enter into procurement agreements with vendors (mainly Israeli and Indian) in an industry that is, so far, poorly regulated – making the technology highly favourable to incumbent presidential candidates and/or parties. The prospect of collusion between buyers and vendors is also high for a technology that is generally poorly understood by independent poll watchers and the public. In addition to being prone to hacking, rogue vendors can create backdoor channels to allow access to “unauthorized persons” that compromise the integrity of the electoral process

The growing presence of international media and PR consultants and firms is another new phenomenon in African politics in general and elections in particular. De facto power holders are increasingly resorting to the services of these high-priced firms to launder their image, and to conduct and disseminate the results of so-called “opposition research.” Recent examples this type of electoral malpractice in Africa includes the reported involvement of the British political consulting firm, Cambridge Analytica, in Nigeria’s 2015 elections. (A Nigerian billionaire supportive of the candidature of incumbent President Goodluck Jonathan is said to have paid an estimated £2m the firm to undertake activities aimed at undermining the campaign of opposition candidate Muhammadu Buhari. This included reported hacking the opposition leader’s emails to access his health records).⁶⁴ And in Kenya, the incumbent party is alleged to have paid \$6 million to Cambridge Analytica for its 2017 re-election campaign, an election which saw vicious online campaigns relying on fearmongering about terrorism and disease to discredit the opposition leader Raila Odinga.⁶⁵

The escalating cost and increasing monetization of politics in general and election campaigns in particular promotes the entrenchment of democracy capture in Africa. Desperate to achieve success at all costs, and taking advantage of weak to non-existent political financing regulations, unprincipled parties and candidates in African elections, especially incumbents, (even in relatively democratic Ghana), source funds from a variety of illicit sources: crooked local and external investors seeking sweetheart deals in the extractive commodities sectors of oil, gas, and other natural resources, drug lords, etc. In this environment of free-wheeling political financing arrangements, leaders of some of Africa’s kleptocratic regimes, notably, Equatorial Guinea’s president Teodoro Obiang Nguema Mbasogo and Congo Brazzaville’s president Denis Sassou Nguesso have reportedly played kingmakers roles in elections even in relatively democratic African countries.

Regardless of the method used, all electoral fraud ultimately benefits the elite: those who have the muscle power required to intimidate voters, the resources needed to buy votes, or the impunity needed to stuff ballot boxes. In turn, the poor, the minorities, and the marginalized suffer the most. Election rigging subverts the will of the people, and effectively nullifies the capacity of citizens to demand accountability and responsiveness from their elected and appointive leaders. It thus upends even the most minimalist notions of democracy.

Political Parties

⁶² Nic Cheeseman and Brian Klaas, *How To Rig An Election*, Yale University Press, 2018.

⁶³ Matenga, G. (2016, October 11). Cash for Votes: Political Legitimacy in Nigeria. *OpenDemocracy*.

¹⁷ Cadwalladr, C. (2018, March 21). Cambridge Analytica was offered politicians' hacked emails, say witnesses. *The Guardian*.

¹⁸ Solomon, S., & Griesbach, T. (2017, November 16). Did Data Mining Influence Kenya's Annulled Election? *VOA News*.

The resurgence of political parties and multi-party competition is one of the most noticeable developments on the African continent in the last 20 years. Parties are fiercely contesting for political power in regularly scheduled elections; and they spend the time in-between elections preparing, strategizing, and positioning themselves for advantage in the next polls. Many analysts take this as a measure of the political progress Africa has made in the last decade and a half: instead of plotting and staging military coups, African politicians and political elites are keeping themselves busy in intra-party and inter-party affairs, and particularly in making preparations towards the next elections.

However, political parties are also key actors in democracy capture schemes. They bear the main responsibility for the recruitment of members, which has sometimes degenerated into the recruitment of ethno-nationalist and other sectarian blocs of supporters. They are also responsible for the establishment and sustenance of clientelistic linkages to voters to facilitate vote-buying and get-out-to-vote mobilization programs on election-day and, if necessary, the mobilization and deployment of electoral violence and intimidation.

Political parties, particularly incumbent parties, manipulate political financing arrangements in a manner that undermines democratic structures and processes and enables the capture of key political figures. Taking advantage of weak and poorly enforced political financing regulations, parties engage in the mobilization of funds for party and candidate election campaigns, some of which are increasingly coming from highly questionable, and possibly, illicit sources. The fusion of government and ruling party is key component of democracy and state capture strategies. It involves appointment of ruling party figures to high-level positions in the state bureaucracy and regulatory and licensing agencies. This is most common among the agencies that oversee primary sector industries such as natural resources (minerals, oil and gas, timber, etc), commodities (cocoa, tea, coffee, etc) and marketing boards. From that vantage, the incumbent party diverts state funds and other resources into servicing its patronage networks, financing its presidential and parliamentary election campaigns, and buying off media, civil society, and election management and adjudication bodies.

State Security Sector

The capture of the state security and law enforcement agencies is typically a central element of a democracy capture strategy. It begins with packing the top echelons of these agencies and their governing councils/oversight bodies (for example Police Councils) with the president's supporters and ruling party figures. This in turn opens the way for the recruitment of the incumbent president and incumbent party's partisans into strategic positions within these institutions and ensures systematic partisan, pro-regime, and anti-opposition deployment of the coercive instruments of the state.

Equally strategically, state security agencies capture provides a perfect setting for the president, leading ruling party politicians, and private business interests to collude with senior military and security officials in questionable defense and security procurement deals. With salaries, equipment, and operational expenses largely exempted from external audit and legislative oversight (on account of the need for secrecy), and funds mainly disbursed in cash, security sector officials enjoy near total freedom to mispend security funds, channel them into political activities, or embezzle them.⁶⁶ A similar set up in Uganda enabled senior military officials and businessmen with close ties to the military and political hierarchy to profit from military procurement deals.⁶⁷ Some of the excess money has allegedly been used to fund political campaigns for the ruling party.⁶⁸ In Uganda, the cycle of

⁶⁶ Akinkuotu, E. (2018, September 6). *President, govts, spend over N241bn on security votes yearly –TI*. Retrieved from Punch: <https://punchng.com/president-govts-spend-over-n241bn-on-security-votes-yearly-ti/>.

⁶⁷ Abbas, T., Anderson, E., Dixon, K., Hurd, H., & Raymond, G. (2016). *Regional Results Africa: Government Defence Anti-Corruption Index*. Transparency International.

⁶⁸ *The Lure of Military Corruption: Shady Jets, Ghost Soldiers and Coups*. (2016, February 19). Retrieved from National Interest: <https://nationalinterest.org/blog/the-buzz/the-lure-military-corruption-useless-jets-ghost-soldiers-15259>.

democracy capture is nearly complete, with the military supporting President Museveni, and his son and heir apparent as the second in command of the nation's armed forces.⁶⁹

Legislature

The legislature is a key democratic institution whose primary responsibilities include overseeing and restraining the executive branch of the Government. Unfortunately, African legislatures are among the most pliable of the three main branches of government. The Parliament has a weak status in many African constitutions, and both the leadership (including the Speaker) and the members of both the majority and minority side of the Parliament are often open to co-optation by the Executive. Presidents therefore often have no difficulty in taking advantage of these factors and turning legislative bodies into rubber stamps for their decisions, draft legislations, approval of international loans and agreements as well as individuals the President nominates for appointment.

The use of national legislatures in democracy capture processes has been most dramatically played out in the many instances across Africa where incumbent presidents have sought to prolong incumbency by using the legislature to overturn constitutionally mandated term or age limits. In Uganda, a compromised legislature has indulged president Yoweri Museveni's proposal to overturn term and age limits for the presidency; President Nkurunziza of Burundi similarly used the national assembly to breach presidential term limits; and in Cameroon in 2008, President Paul Biya used his party's overwhelming majority in the Parliament to amend the Constitution's two-term limit to the Presidency.⁷⁰

The Judiciary

The judiciary is a crucial institution for safeguarding the rights of citizens and upholding the law. Elite capture of the judiciary occurs when judicial pronouncements are systematically biased in favour of the incumbent political authorities and ruling parties in a democratic political order. This typically begins with the packing of the courts with partisans, individuals of questionable integrity and competence, and other hacks by the president. It may be combined with the use of money, blackmail, and intimidation to bend members of the bench to the will of the president, ruling party, and their elite allies.

One of the manifestations of elite capture of the judiciary in Africa is the increasing instances where the incumbent President and party have manipulated the judiciary to secure favourable verdicts in the adjudication of election results disputes – although judges broke new ground by nullifying presidential victories in Kenya in 2017 (in the first election – President Kenyatta won the re-run) and Malawi in 2019. Another strategy used to capture the judiciary is the practice of judicial forum shopping by incumbent authorities, where cases of particular interest to them are allocated to selected judicial forums and judges deemed likely to turn in a favourable decision.

State Owned Enterprises (SoEs)

State owned enterprises (SoEs) are some of the most important – and lucrative - assets in the modern economy of African states. As such, they are prime targets for capture in Africa's democratic political settings. Presidents and incumbent parties are keen to convert SoEs into political assets for rewarding their loyalists, who are appointed to CEO and board director positions. A partisan SoE leadership, in turn, oversees the skewing of staff recruitment in favor of presidential and ruling party loyalists, and channelling of the corporation funds and other resources into party and presidential coffers for use in

²² Msemo, M. (2019, July 1). Consolidation of democracy in Africa's Great Lakes Region remains a vague hope. *Face2Face Africa*.

⁷⁰ Musa, T. (2008, April 15). Cameroon's Biya signs law allowing third term bid. *UK Reuters*.

election campaigns. That's the only way to understand why, for instance, in Ghana, all current SoE CEOs, board chairmen, and in some cases, their deputies are senior figures in the ruling New Patriotic Party, including its current national chairman and former campaign manager.⁷¹ Similar developments have been chronicled in the scandals involving South Africa's national electricity company, Eskom, the Gupta family, and President Zuma/ANC.⁷² State-owned firms and industries, ostensibly created to prevent the elite from dominating the economy, instead became the dominion of the political elite.

Media

Control over the media – via co-optation and/or repression - is a common means through which elites capture democracy in Africa. A common approach is for the government to run its own media as is the case with Tanzania's state-owned *Zanzibari Leo* in the Arabic-speaking Zanzibar region.⁷³ Others place government advertisement exclusively in government-owned or government-friendly media houses, thereby depriving the independent media of a crucial revenue source; and appoint key media personalities to membership of state boards and/or including them in government delegations to travel abroad.

Another approach is ownership of media houses and/or key journalists by politicians, parties and politically aligned private investors (like the Fox TV model in the US). This practice is rife in Tunisia where a six out of 10 TV stations are directly or indirectly linked to a political party or a politician – notwithstanding Tunisian media regulatory authority's rules prohibiting media owners from participating in politics.⁷⁴ In Tanzania, four conglomerates dominate the media market, and these conglomerates are in turn owned by the wealthy, politically connected elite of the country who are closely associated with the ruling party.⁷⁵

Incumbent governments are also increasingly deploying repression as a tool for media capture in Africa. Although legal restrictions on the media have been relaxed in many countries and the number of media outlets has increased, reporters still face serious risks. Journalists continue to suffer intimidation, harassment, violence, and even assassination. Media operators must tread cautiously even in African countries that normally win plaudits for allowing a free press. In Ghana, an investigative journalist involved in undercover operations that exposed match-fixing and other corrupt practices among Ghana Football Association officials and others was recently murdered a few months after a leading MP from the ruling party revealed his identity on national television. Another investigative journalist was forced to go into temporary exile following threats to his life after he broadcasted a documentary exposing a pro-ruling party vigilante group's misuse of a state-owned building for its operations.

⁷¹ Freddie Blay, National Chairman for the NPP, and Board Chairman of the Ghana National Petroleum Corporation (GNPC) has been accused officially by the GNPC CEO of directly interfering in the day to day operations of GNPC and of using his "position as chairman of the ruling party to force your way through on matters which must be handled professionally. *Freddie Blay and K.K. Sarpong Turn GNPC into a Boxing Ring*. (2019, February 18). Retrieved from <http://www.peacefonline.com/pages/local/news/201902/375702.php>.

²⁵In 2014 the governing Board of Eskom, South Africa's public electricity company, was reconstituted and Brian Molefe was appointed as the CEO. All the members of the newly constituted Eskom board had ties to Salim Essa, a businessman, and to the controversial Gupta family that is embroiled in South Africa's immense state capture scandal <https://cdn.24.co.za/files/Cms/General/d/4666/3f63a8b78d2b495d88f10ed060997f76.pdf>

²⁶ Cardenas, P. J., Declercq, A., Lai, M. S., & Rasquinet, N. (2017). *The Political Economy of Media Capture*. LSE Department of International Development.

²⁷ Nessma TV, Hannibal TV, Zitouna TV were all launched by men who have political ambitions, or have openly exhibited a party affiliation. While these owners are legally required to divest from these stations as political actors, rumours persist that they still hold influence over their stations operations. See Reporters Without Borders; Al-Khatt. (n.d.). *Political affiliations: A very politicised ownership of TV stations*. Retrieved from Media Ownership Monitor: <http://tunisia.mom-rsf.org/en/findings/affiliations/>.

²⁸ Atal, M. R. (2017). Competing forms of media capture in developing democracies. In *In the Service of Power: Media Capture and the Threat to Democracy* (pp. 19-33). National Endowment for Democracy.

In Tanzania, media capture is shaped by government regulations and intimidation. One such regulation is the 2015 Cybercrimes Act. The Cybercrimes Act gives the government the authority to arrest anyone publishing “information deemed false, deceptive, misleading, or inaccurate, and to levy heavy penalties against individuals involved in a host of criminalized cyber activities.” In practice the Cybercrimes Act has been used to punish government critics. Under the Act many have been jailed or fined, including a man who received a 3 year prison sentence and a \$3,190 fine after he was found guilty of insulting President John Magufuli on his Facebook page.⁷⁶ Further regulations implemented by the government have forced bloggers and content creators to pay an annual \$930 license fee, nearly equivalent to the per capita income of Tanzania in 2016.⁷⁷ Another regulatory channel for media capture was introduced with the 2016 Media Services Bill that established a government-controlled Journalist Accreditation Board, with the powers to “ban newspapers and prohibit non-accredited journalists from publishing” and the power to expel any journalist for professional misconduct.⁷⁸

African governments are also increasingly resorting to the imposition of blackouts on the internet and social media. This approach is hugely enabled by technology typically sourced from Israeli companies and the Chinese government.⁷⁹ More worryingly, the frequency of these internet blackouts is rising. In the DRC for instance internet was suspended for 20 days after the results were declared for a controversial election, whereas in Benin, internet was suspended on the day of the election itself.⁸⁰

Civil Society

Civil society plays important roles in holding government to account and putting restraints on state power.⁸¹ But civil society organizations are equally susceptible to elite capture. In the last few years, a number of countries, including Ethiopia, Sierra Leone, Sudan, Uganda, Zambia, and Zimbabwe, have considered or enacted legislation, adopted policies, or otherwise taken measures to limit the space for media and civil society. Recent efforts to constrain domestic civil society have included criminalizing unregistered associational activity (as in Uganda and Zambia), imposing burdensome registration requirements on civil society organizations (as in Sierra Leone and Mozambique), subjecting NGOs to political litmus tests (as in Nigeria), and severely restricting their access to foreign funding (as in Ethiopia).⁸² Other pernicious government regulations involve invasive government supervision and monitoring of civil society organizations’ activities, including the requirement to secure government authorization for operations and programs. Under Zambia’s Non-Governmental Organisations Act (2009), for instance, an operator of an unregistered NGO can be fined or imprisoned up to three years; and Zimbabwe’s Interception of Communications Act (2007) authorizes the issuance of a warrant to intercept mail, phone calls, and emails “to prevent a serious offence by an organized criminal group” or that concern a “potential threat to public safety or national security.” Some CSOs make themselves easy to co-opt into elite democracy capture games by being run undemocratically, concentrating decision-making power in the hands of a few individuals, having executive presidents for life, and accepting inducements from government.

⁷⁶ Ismail, B. (2016, June 9). *Man fined Tsh7m or three years in jail for insulting Magufuli on Facebook*. Retrieved from Daily Nation: <https://www.nation.co.ke/news/africa/-/1066/3241352/-/91de0r/-/index.html>.

⁷⁷ Reporters Without Borders; Media Council of Tanzania. (n.d.). *Regulatory Safeguards: Net Neutrality*. Retrieved from Media Ownership Monitor Tanzania: <http://tanzania.momrsf.org/en/findings/findings/#!d12236d08eaa0bf0b699693b862a0fc9>.

⁷⁸ International Press Institute. (2016, November 4). *New media bill threatens press freedom in Tanzania*. Retrieved from International Press Institute: <http://ipi.media/new-media-bill-threatens-press-freedom-in-tanzania/>.

⁷⁹ Dahir, A. L. (2018, November 1). *China is exporting its digital surveillance methods to African governments*. Retrieved from Quartz Africa: <https://qz.com/africa/1447015/china-is-helping-african-countries-control-the-internet/>.

³³ Wilson, Tom. "Mobile Gr Blocoups Comply with African Rulers' Orders Tok Internet." *Financial Times*, May 22, 2019. Accessed July 26, 2019. <https://www.ft.com/content/9695dbc8-70a6-11e9-bf5c-6eeb837566c5>.

⁸¹ Diamond, L. (1999). *Development Democracy: Towards Consolidation*. Baltimore: The John Hopkins University Press.

³⁵ Walker, J.-A. (1999). Civil Society, the Challenge to the Authoritarian State, and the Consolidation of Democracy in Nigeria. *A Journal of Opinion*, 54-68.

4. Enabling Factors/Conditions for Democracy Capture in Africa

There are many enabling factors for democracy capture in the African context, which can be broken down into legal/constitutional and political factors, domestic political economy factors, cultural enablers and international enablers.

❖ Domestic legal/constitutional and political factors:

- The over-concentration of political, bureaucratic, economic, and symbolic powers in the hands of the president, executive branch, and ruling party at the expense of the legislature and judiciary. This makes state capture the sole objective of political competition by rendering the work of the Opposition party insignificant.
- Weak institutional checks and balances/lack of inter-branch accountability in the government, reflected particularly in the government and the presidency's enjoyment -by constitutional design or default - of nearly unfettered and often poorly regulated discretionary powers over public service appointments, resource allocation, deployment of national security and intelligence resources, disposal of over state/public assets (mining rights, lands, airwaves, radio frequency etc).
- Low levels of transparency in government/public office-holder actions, inactions, and decisions.
- Weak party and election campaign finance regulation, or lack of credible enforcement of existing regulations.

❖ Domestic political economy factors:

- Africa's poor-quality economic growth leaves behind a large pool of unemployed and therefore economically disenfranchised citizens, particularly youth, who are susceptible to vote buying and other forms co-optation through political patronage.
- State dominance over the formal economy and the weakness and small size of domestic private sector leaves the state as the key source of formal sector employment, and chief dispenser of coveted mineral, forestry, land, and other state-controlled assets as well as source of lucrative construction and supply contracts. It provides considerable leverage to individuals and groups that manage to secure political control over the state.
- The dominance of export commodities, particularly oil, gas and other extractives, which is typically controlled by the central government, helps to reduce African government's reliance on tax revenue (particularly direct tax revenue) and other internally generated revenue. This in turn depresses bottom up/popular demand for accountable governance.
- With their national treasuries brimming with extractive resource revenue in recent years, governments, particularly those of extractive resource-rich nations' have ample resources for state and democracy capture manoeuvres. In addition, natural resource wealth significantly reduces reliance on international development assistance from the West and its accompanying political conditionalities.
- The extremely limited opportunities available for accumulation of personal wealth and influence outside of the state sector, in turn, makes the capture of the state and control of the economic, political, and social resources concentrated in that realm the main object of electoral competition. This reduces the private sector, civil society, and citizens to the "clients" of the government and ruling party/group. It also causes pervasive fear of official reprisals and consequently, self-censorship among African citizens.
- Extremely skewed income distribution and high levels of poverty, which guarantees a steady stream of clients for/recipients of patronage from whoever dispenses it.
- The extremely narrow tax base of most African states and their high reliance indirect tax revenue (e.g., custom duty, VAT) rather than direct tax (e.g. income tax and property rates) and external loans, grants, etc disincentivizes citizens to demand accountability. It obscures

the real source of national revenue and the real fiscal burdens citizens bear when their revenues are appropriated in democracy capture schemes.

❖ **Cultural enablers:**

- The residual authoritarian political culture rooted in the status quo ante of pre-colonial, colonial and post-colonial Africa means that the internalization of democratic values lags behind the introduction of the formal processes of democracy. Those who seek to subvert democratic institutions and practices are therefore able to appeal to some fictive notion of the African way of governing or practicing democracy.
- The weak development of democratic citizenship in Africa. This is reflected in the assertion of a significant section of Africans (about 1 in 7) that they find politics and government too complicated for them to comprehend. Those believing that voters are responsible for monitoring the performance of their elected president, parliamentarian, and local councillor are in fact in the minority (less than 1 in 4). When it comes to civic participation, passive forms dominate over active ones (only 55% report ever joining others to raise an issue in the past year), indicating weak civic efficacy. Of course, such mass attitudes breed tolerance of government under-performance and misconduct and undermine bottom up demand for democratic accountability.⁸³
- Over-emphasis on vigilance against real or imagined external and internal enemies as well as reverence for the heroes of the “liberation” and the independence movement at the expense of “critical citizenship”⁸⁴ in countries that have gained independence through liberation wars and armed struggle. This is especially relevant for countries where the “national liberation party” is still in power (such as Angola, South Africa and Mozambique) as well as others that have recently emerged from civil war (such as South Sudan) or genocide (such as Rwanda).

❖ **International enablers of democracy/state capture in Africa**

Today’s overall external environment for democracy building and consolidation in African nations is inauspicious - in marked contrast to the global and regional setting that prevailed during the first decade and a half of Africa’s democratic rebirth. The following factors make it relatively easy for incumbent presidents and parties to get away with democratic backsliding and perversion at the domestic level in the current continental and global environment:

- The absence in today’s Africa of incumbent presidents in the mould of John Kufuor, Thabo Mbeki, Abdoulaye Wade, Bouteflika who had robustly championed democratic governance, particularly through the New Partnership African Development’s Africa Peer Review Mechanism (APRM). In contrast, contemporary leaders have an ambiguous commitment to democracy.
- The West/G7 has retreated from its emphasis on democratic governance in its foreign policy and development partnership. It has been replaced with a largely transactional approach to African policy and relationships, especially with countries whose leaders offer attractive geo-strategic benefits such as military bases, counter-terrorism facilities, access to energy resources; etc. The number of defense and security arrangements that external powers (US/AFRICOM, Russia, China, etc) have entered into with African states is growing, even though it means incumbent governments in Africa are outsourcing their sovereignty to foreign powers at the expense of their own citizens.
- The West has become increasingly reluctant to press for democratic governance reforms in oil-rich and misgoverned states such as Angola, Chad, Equatorial Guinea, DRC, Sudan, South Sudan and Nigeria because of the importance of their resources to the Western economies.

³⁴ Mike Bratton and Carolyn Logan (2013), “Voters but not yet citizens” in Mike Bratton ed., *Voting and democratic citizenship in Africa* (Lynne Rienner Publishers), pp. 197-218

⁸⁴ See Pippa Norris (1999) in Pippa Norris ed., “Introduction: the growth of critical citizens,” *Critical citizens: global support for democratic governance* Oxford University Press

- The emergence of China and other so-called non-traditional partners, who have little or no interest in matters of democracy and accountable governance in their African client states. Their vigorous courtship is, in turn, providing African governments and leadership with alternative non-Western markets, trade partners and sources of military and development aid.
- The desire to counter the growing global and regional influence of China, India, Brazil, and other new major actors on the international scene has become a central goal of Western economic and political diplomacy and triggered neo-cold war impulses among the US and other western powers. They have recalibrated and tinkered with their established democratic governance benchmarks to maintain relevance in the new scramble for African energy, markets and other geo-strategic advantages. Worse still, Africa's external partners, especially former colonial powers, appear to place a premium on status quo regimes and leadership maintenance, being keen to cuddle and protect them so long as they pose no threat to the extant neo-colonial order. Thus, they can be counted upon to endorse even the most flawed elections and lend legitimacy to its outcomes.
- Kleptocratic African politicians and cronies keen to capture democracy do not lack offshore safe havens for laundering funds that they have looted from state coffers, to be partly recycled back into election campaigns and other domestic political processes. Nor do they lack kleptocratic leaders in their sub-region or the continent to provide resources for their democracy capture schemes.

5. What can be done?

The five empirical chapters that follow this theoretical chapter each identify ways in which Democracy Capture can be resisted. What each bring out, however, in some detail, is the extent of the challenge that we face in protecting democracy, and the broad range of strategies that will be required to prevent the further extension of democracy capture in the years to come.

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CHAPTER 3

DEMOCRACY CAPTURE IN BENIN

Expédit B. Ologou



1. Democracy Capture in Benin

The status of democracy in Benin is of vital importance. Few would disagree with this statement: over the last few years this leading African democratic state has witnessed the introduction of a polemic political charter and electoral reforms; a controversial constitutional reform;⁸⁵ the emergence of a monolithic parliament⁸⁶ following the legislative elections of April 2019;⁸⁷ communal elections in which the two ruling parties (Union Progressiste and Bloc Républicain) took the quasi totality of the communes (71 out of 77);⁸⁸ declining media freedom and civil liberties;⁸⁹ and, a restriction of the space available for civil and political mobilization.⁹⁰

There are numerous other examples that can be brought forth to testify to the fact that Benin has entered a peculiar era that can be characterized without any exaggeration as a period of political tightening – an era of “de-democratization”.⁹¹ In this regard, the 11 April 2021 Presidential Election was very important, the most critical since 1990. Ahead of this election, the revision of the Electoral Code⁹² – most notably article 132 – introduced an unprecedented eligibility condition for an individual to stand as a presidential election candidate, namely collecting the signature of at least 16 members of parliament and /or mayors to act as sponsors. After this change was introduced, the sitting president monopolized all 83 legislative seats and 71 out of the 77 mayors of the country, so that the opposition was unable to secure sufficient sponsors to have one of its candidates contest the presidential elections. As a result, the vote took place in a volatile and violent atmosphere: in some localities in the centre of the country (Savè, Bantè, and Tchaourou), where the army and the civil populations were engaged in fierce confrontations for days, it was not possible to vote.⁹³ Although the Constitutional Court stated that the voter participation rate had been 50.63%,⁹⁴ controversy continues to rage, not least because the civil society electoral platform affirmed that the rate was in fact 26.47%.⁹⁵

This kaleidoscopic overview can serve as the foundation for a series of interrogations to understand the root factors of the democratic backsliding occurring in Benin. Among the plausible causes of such a situation, there are a lot of entangled processes, techniques, instruments, facts, acts and artifacts, which can be summarized as *democracy capture*. There is the assumption of this provisional work.

⁸⁵ Loi n° 2019-40 du 07 novembre 2019 portant révision de la loi n° 90-32 du 11 décembre 1990 portant Constitution de la République du Bénin.

⁸⁶ All the opposition parties were excluded from participating in the electoral process, despite bilateral, regional and international mediations. Only the two parties – Union Progressiste (UP) and Bloc Républicain (BR) – created under the auspices of the President of the Republic took part in the elections and then took all the 83 seats in the Parliament.

⁸⁷ Thierry Sédjro Bidouzo, Emmanuel Odilon Koukoubou, Afouda Vincent Agué, *Le Parlement de rupture*, Cotonou, CiAAF, July 2019, 42 p. ; Expédit Ologou, « Le parlement du Bénin: une affaire à suivre », Position Paper, n°1, 04 juin 2019, URL : https://www.ciaaf.org/storage/2019/06/Le_parlement_beninois_Ciaaf_Expe%CC%81dit_Ologou.pdf, consulted on 05 October 2020 ; Expédit Ologou (ed.), *Législatives 2019 au Bénin : le piège fatal ?*, Cotonou, CiAAF, April 2019, 48 p.

⁸⁸ Force Cauris pour un Bénin Emergent (FCBE).

⁸⁹ See Reporters Sans Frontières' 2020 Ranking in which Benin has lost 17 places compared to the 2019 ranking, URL: <https://rsf.org/en/benin>, consulted on 04 October 2020.

⁹⁰ Cf. Freedom House, *Freedom in the World 2020*, URL: <https://freedomhouse.org/country/benin/freedom-world/2020>, consulted on 05 October 2020. In this report, Benin's status declined from Free to Partly Free.

⁹¹ Charles Tilly, *Democracy*, Cambridge University Press, New York, 2007, 234 p., in particular “Democratization and De-Democratization”, pp. 51-79.

⁹² Loi n° 2019-43 du 15 novembre 2019 portant Code électoral en République du Bénin.

⁹³ <https://information.tv5monde.com/video/presidentielle-au-benin-violences-preelectorales-meurtrieres-bante>

⁹⁴ <https://information.tv5monde.com/afrique/benin-la-cour-constitutionnelle-valide-la-reelection-de-patrice-talon-404970>, consulted on April 19, 2021.

⁹⁵ Déclaration préliminaire de la Plateforme électorale des Organisations de la Société civile du Bénin https://drive.google.com/file/d/1U-5Dj2IX_48YABPzLWbEYHsfp-fhy0SZ/view, consulted on April 18, 2021.

The concept of “*democracy capture*” has to do with the “systematic targeting, manipulation exploitation, and perversion of democracy – its *processes, institutions, and actors* (including *citizens*) – by and for the benefit of interests other than of the People whose interests and needs democracy is intended or supposed.”⁹⁶ Thus, “*Democracy capture*” is not limited to the democratic system but is extended to “those institutions, processes, and actors, whether state or non-state, that ordinarily define, constitute, and legitimize a political system as democratic.”⁹⁷

In this vein, *democracy capture* “is not [only] simply grand corruption”, but also “a situation in which control or power passes from officials to non-state corporate interests, or officials themselves (including elected politicians) become corporate, primarily individually entrepreneurially-oriented, actors”.⁹⁸ *Democracy capture* is a situation of subversion of any democratic institution, process, procedure, by any actor for its own interest.

To some extent, the concept of *democracy capture* is an adaptation of the *state capture* concept. The motive of either *state capture* or *democracy capture* is “to subvert public interest by distorting laws, policies, regulations and decrees to achieve undue advantage or private gain.”⁹⁹ In short, *democracy capture* is the “the government for few”¹⁰⁰ instead of being, in Abraham Lincoln’s words, “the government of the people by the people for the people”.

This study intends to understand how and why democratic institutions succeed or fail in serving the interests and needs of ordinary citizens. More precisely, it identifies who/what interests/actors are engaged in the capture of democracy; characterizes the mechanics of capture, that is, the occurrences and manifestations of democracy capture; isolates the institutions, processes, and actors most vulnerable to capture and in what ways; and, established what historical, structural other conditions or factors in relation to the transition to and implantation of democracy in contemporary Africa have enabled or facilitated democracy capture.

1. The Context

With a population around 12 million, Benin shares land borders with Togo to the West, Nigeria to the East, and Burkina Faso and Niger to the North; and in the South, is bordered by the Atlantic Ocean.¹⁰¹ Despite the great number of ethno-linguistic groups, the country has not been socially and politically divided by ethnic lines. Instead, the linguistic pluralism, as a vector of “shared identity”, has been a certain advantage for peace and social cohesion¹⁰² and political fluidity. This is not to suggest the total absence of ethno-regionalism in the Beninese socio-political history.¹⁰³ It is rather to underline that

⁹⁶ CDD-Ghana, *Concept Note. Democracy Capture*, 2020, p. 4.

⁹⁷ *Ibidem*.

⁹⁸ Tom Lodge, “State capture. Conceptual Considerations” in Melanie Meirotti and Grant Masterson (ed.), *State capture in Africa. Old Threats, New Packaging*, Johannesburg, EISA, 2018, p. 23.

⁹⁹ Maurice O. Dassah, “Theoretical analysis of state capture and its manifestation as a governance problem in South Africa”, *The Journal for Transdisciplinary Research in Southern Africa*, n°14, 2018, URL: <https://doi.org/10.4102/td.v14i1.473>, consulted on 12 September 2020, p. 5.

¹⁰⁰ Rosa Cañete Alonso.

¹⁰¹ Philippe Noudjènoumè (ed.), *Les frontières maritimes du Bénin*, Paris, L’Harmattan, 2004, p. 151.

¹⁰² Boèvi Denis Lawson, *Les identités partagées comme facteur de paix et de stabilité : le cas du Bénin*, Thèse pour l’obtention du grade de Docteur en Science politique de l’Université de Bordeaux VI, 2013, p. 621.

¹⁰³ Rogatien Tossou, *Multipartisme, ethnicité et pouvoir politique au Bénin. 1951-2006*, thèse d’histoire politique, Université d’Abomey-Calavi, Ecole Doctorale Pluridisciplinaire, FLASH, octobre 2010 ; Maurice Ahanhanzo-Glele, *Naissance d’un Etat noir. L’évolution politique et constitutionnelle du Dahomey, de la colonisation à nos jours*, Paris, LGDJ, coll. Bibliothèque Africaine et Malgache, 1969, p. 537.

till now, the ethno-regional cleavages have not been so profound that they could have provoked violent crises as it is the case in some west-African countries.¹⁰⁴

Benin is often considered as the “laboratory of democracy”, at least in Francophone West Africa. After a dictatorial Marxist-Leninist regime for 17 years (1972-1989) headed by Mathieu Kérékou,¹⁰⁵ a National Conference – unique in its design and conduct¹⁰⁶ – introduced the country to the world’s third wave of democratization¹⁰⁷. After overseeing a transition of power as the Prime Minister, Nicéphore Soglo won the first presidential elections. After five (5) years of retirement in silence, Mathieu Kérékou attained power,¹⁰⁸ and remained in power for two terms (1996-2001; 2001-2006).

Benin’s political history was marked by severe political instability and tripartite regional competition following independence in 1960, with a succession of military-supported regimes. In 1972, single party stability began when a military *coup d’état* installed Mathieu Kérékou, who formed the Marxist-Leninist Parti de la Révolution Populaire du Bénin (PRPB). From this period on, the goal of national integration has been more effectively realized, and while contemporary political party competition is based on regional fiefdoms of support, there is not a strong sense of regional divisions today. However, there are latent social fault lines that could be triggered with a severe representation crisis surrounding contested elections.

Benin’s transition to multiparty democracy came out of the economic collapse and state bankruptcy of the late 1980s, which mobilized political protests and culminated in the February 1990’s National Conference. The participants included representatives of all political tendencies, regions, associations, and sectors of the Beninese society. The Conference declared itself sovereign, implemented a new constitution and prepared institutions for multiparty elections. In 1991 Nicéphore Soglo, a former World Bank official, was elected president after being the First Minister of the one year-transitional government led by Mathieu Kérékou (1990-1991). Mathieu Kérékou was first elected president in 1996 and then re-elected in 2001. While tempted to delay elections and stay in office, President Kérékou was pressured by international and domestic actors to organize the 2006 presidential elections, where he was not eligible to run due to constitutional term limits and age restrictions. This election, with Thomas Boni Yayi’s victory, marked a major point of democratic alternation and resilience, as the population successfully safeguarded the constitutional imperatives of electoral accountability. Key actors included civil society organizations and opposition parties (funded largely by current President Patrice Talon) that organized against constitutional reforms and pressured for democratic elections as the mechanism for government accountability. Similarly, in the run up to the conclusion of President Boni Yayi’s second presidential term in 2016, another round of popular mobilization was necessary to maintain term limits and uphold the spirit of inclusive participation forged in the National Conference.

Following the double transition in political and economic liberalization of the 1990s, the political and economic elite in Benin are tightly interwoven. This entanglement gives the opportunity to Mr. Patrice

¹⁰⁴ Expédit Ologou, *Les violences électorales dans les nouveaux systèmes politiques africains : sociologie historique comparée des cas du Bénin et de la Côte d’Ivoire*, thèse de doctorat en Science politique, Université d’Abomey-Calavi, Bénin, mars 2019, 667 p.

¹⁰⁵ Felix Iroko, *Le Président Mathieu Kérékou. Un homme hors du commun*, Cotonou, Les Nouvelles Editions du Bénin, 2001, p. 314.

¹⁰⁶ Afize Adamon, *Le Renouveau démocratique au Bénin. La conférence nationale des forces vives et la période de transition*, Paris, L’Harmattan, 1995, p. 223; Richard Banegas, *La démocratie à pas de caméléon. Transition et imaginaires politiques au Bénin*, Paris, Karthala/CERI, 2003, p. 494.

¹⁰⁷ Samuel P. Huntington, *The Third Wave. Democratization in the Late Twentieth Century*, Norman, London, University of Oklahoma Press, 1991, xvii p., 366 p.; Samuel P. Huntington, *Democracy’s third way*, *Journal of Democracy*, vol. 2, n°2, 1991, pp. 12-34.

¹⁰⁸ Cédric Mayrargue, « Le caméléon est remonté en haut de l’arbre : le retour au pouvoir de M. Kérékou au Bénin », *Politique Africaine*, 1996, n° 62, pp. 124-131.

Talon, a multimillionaire cotton tycoon, to rule the country with de-democratizing methods and tools after having been elected 2016 in what is considered as one of the most fair, democratic and transparent presidential elections since 1990.

This report takes the form of a desk review that looks at key texts and reports, complemented by a few key informant interviews. The literature review includes published and grey literature, journalistic and NGO reports, and assessments generally related to democracy, governance and corruption, etc. The documents we mobilized are focused on the three decades of democratization in Benin. But we also engaged with some publications which proved relevant as they provided historical insights on developments prior to the 1990s. We also engaged interviews with a number of key informants¹⁰⁹ whose narratives provide a deeper understanding of the dynamics of the democracy capture phenomenon.

Therefore, the approach used in this study to comprehend the phenomenon of democracy capture through historical sociology.¹¹⁰ Using this approach will help to avoid focusing only on what is happening in the present, but at least be able to provide a mid-term perspective, i.e. from 1990 up to now. This approach would be useful for a diachronic “re-exam and reinvigoration” of “the design, workings, and practice of democracy” in Benin over the last three (3) decades.

2. The Factors Driving Democracy Capture in Benin

The capture of democracy in Benin has been possible in Benin *via* different factors including at least two: the progressive and decisive appearance of businessmen in the Beninese political landscape on one hand, and the progressive collapse of institutions on the other.

The progressive invasion of the political arena by economic actors

The demarcation between the economic and the political arena remains unclear in Benin. In the immediate aftermath of the National Conference, the political arena has been occupied by the intellectuals and the highest public servants of the country. As a result, the quasi totality of the first legislature (1991-1995) was composed of intellectuals and administrative elites. This earned it the reputation of “the chamber of intellectuals”.¹¹¹ Only 6 members of this parliament were *business men/women*.¹¹² From all since the founding elections in 1991, the first legislature is commonly considered as the best for, on one hand, the quality of debates held in the hemicycle and, on the other, the relative integrity and probity of its members. It is regularly told that during this first legislature, a Minister, like a student, had to work very hard on his *dossier* before going to defend it in front of the Parliament. Otherwise, he would be humiliated publicly by the Parliament with the risk of being fired by the Head of State. Therefore, there was very little chance for active or passive corruption to govern the politics at the time. The explanation of this state of things is also that the framing ideas settled in the National Conference were so fresh in the public opinions that nobody wanted to bear the responsibility to have failed in his part of the task of rebuilding the country and maintaining the hope and promise of efficient democracy for all.

¹⁰⁹ Most of them required confidentiality.

¹¹⁰ There is no need here engaging the debate about the relevance of historical sociology, or the preeminence of one discipline on the other. We here just use historical sociology as a combination of these two social sciences or two “historical sciences” (Jean-Claude Passeron, *Le raisonnement sociologique. Un espace non poppérien de l’argumentation*, Paris, Albin Michel, 2006, 670 p.) to apprehend more critically this phenomenon of state capture in a peculiar context: Benin, one of the first leading countries in “the third wave of democratization” in Africa.

¹¹¹ Afize D. Adamon, *Le Parlement béninois en mouvement (1990-2015)*, tome 2, *Vie et œuvre des six premières législatures*, Cotonou, Editions du Journal Officiel du Bénin, 2016, p. 35.

¹¹² Afize D. Adamon, *Le Parlement béninois en mouvement (1990-2015)*, tome 2, *op. cit.*, p. 47.

But, the more distant that first legislature period becomes, the more problematic is the quality of the parliament. One of the main reasons of such an evolution is the prominent and significant place that money has been gradually taking in Beninese politics.¹¹³ It has become a normal feature of Benin's politics that political actors, including the members of parliament, can be bought for a precise political objective.¹¹⁴ For instance, Mrs. Rosine Soglo, the former first lady (Nicephore Soglo, 1991-1996) and Deputy since 1995, affirmed publicly that the quasi totality of deputies have received millions of CFA in order to vote for the constitutional reform prepared by President Talon's Government. This political *mercato* is a struggle between the dominant political big man, the incumbent president, and the business-men who, even if they are not in office, have the sinews of the war.

Historically, two events can be the sources of this progressive reign of money in the political landscape. On the one hand, some observers pointed out the introduction of money in the second legislative elections (1995) by a certain political leader: Adrien Houngbédji. Important actors and observers do affirm more and more persistently Mr. Houngbédji with its Parti du Renouveau Démocratique (PRD) is the first political party that began distributing money during an electoral campaign in the post-1990 electoral democracy history of Benin.

On the other hand, one can notice the emergence or the invasion of the political arena by business men. First, an important and illiterate businessman Sefou Fagbohoun – very close friend of the then President of the Republic, Mathieu Kérékou – created a political party, MADEP,¹¹⁵ in November 1997. Sefou Fagbohoun was involved in the famous "Affaire Sonacop". At this time, the MADEP was considered as the most financially robust party. The proof is that, less than two years later, the party took part in the 1999 parliamentary elections and won six (6) seats. Furthermore, in the 2003 electoral competition, not only had it increased the number of its seats to nine (9) but it obtained the position of President of the Parliament¹¹⁶. At the same time, Mathieu Kerekou created the conditions for the emergence of a new category of political actors: young business men and/or entrepreneurs with a low level of instruction¹¹⁷. They entered the fourth (4th) legislature of the parliament, and their member Eustache Akpovi, took the position of 2nd Vice-President of the institution, Eustache Akpovi.

The year 2006 consecrated the very significant and decisive involvement of another businessman in Benin's politics: Patrice Talon. He, who timidly and secretly had been a sponsor of many political actors and parties, decided to throw his weight behind Boni Yayi, a newcomer and outsider coming from the leadership of BOAD (West African Bank for Development).

After the two terms of Boni Yayi's presidency (2006-2016), the circumstances lead the oligarchs, no longer as the discrete supporters and sponsors, to invest their fortune in the political arena as the front-runners and premier actors.¹¹⁸ Thus, the two richest businessmen of the country, Patrice Talon and Sebastien Adjavon, took part in the presidential elections and came respectively 2nd and 3rd of the first round, Lionel Zinsou, Boni Yayi's mentee being the first. In the second turn, Talon benefited obviously from the support of Talon to be elected as the President of Benin.

¹¹³ Leonard Wantchekon, "Clientelism and Voting Behavior. Evidence from a Field Experiment in Benin", *World Politics*, n° 55, April 2003, pp. 399–422; Richard Banegas, « "Bouffer l'argent". Politique du ventre, démocratie et clientélisme au Bénin », in Jean-Louis Briquet et al., *Le clientélisme politique dans les sociétés contemporaines*, Paris, PUF, 1998, pp. 75-109.

¹¹⁴ Francois Awoudo, *Le mal transhumant. Les infidélités politiques dans le Bénin démocratique*, Cotonou, Editions Tundé, 2004, precisely « Du démarchage des militants à la dérive mercantile dans l'arène politique béninoise », pp. 105-126.

¹¹⁵ Mouvement Africain pour le Développement et le Progrès.

¹¹⁶ The Secretary General of the Party, Mr Antoine Idji Kolawolé, a diplomat and former Minister of Foreign Affairs, became the Chairman of the 4th legislature (2003-2007).

¹¹⁷ The main figures of this apparition in the political arena of young businessmen are Issa Salifou (Saley), Rachidi Gbadamassi, Eustache Akpovi, Cyriaque Domingo.

¹¹⁸ Jean-Philippe Platteau, "An overview of institutional and other constraints: The spatial, historical and socio-political context, in François Bourguignon et al. (eds), *Benin Institutional Diagnostic*, chapter 1, 2019, p. 27.

The progressive collapse of institutions

An idea has been jeopardizing the reinforcement of Beninese democratic institutions: democracy is taken for granted because we fought to set up a strong law and institutional system after the February 1990's National Conference. This idea led to political actors' neglect and off-handedness, and the civil society lack of vigilance. All of this is compounded by the wider public's general ignorance on issues regarding the country's governance. It is important to notice that more than 80% of Benin's population is French illiterate, while all the entirety of Benin's legal framework is in French, without the possibility of translating them into local languages. As a result, the destiny of the country is abandoned in the hands of a very few – less than 20% of the population – who decide as they want, or as the struggle between them continues.

The situation got more complex when, on the occasion of the 1999's legislative elections, a cohort of semi-literate businessmen, promoted by the then incumbent President Mathieu Kerekou, entered in the political scene by becoming members of the parliament. These "*hommes d'affaires*", became rich by their businesses in the flourishing second-hand vehicles sector which has a very attractive market in Nigeria and in the hinterland (Niger, Burkina-Faso).

The collapse of the republican institutions in Benin also has to do with the conditions under which the choice of the members of these institutions is operated. Generally, the composition of the constitutional institutions is the prerogative of the president of the Republic and the parliament. Such is the case for the constitutional Court, the Supreme Court, the High Court of Justice, and the High Authority for Audiovisual and Communication, etc. The processes of establishing these fundamental institutions – the Parliament and the President of the Republic – have been jeopardized by the merchandising and the money corruption of the electoral game. As a result, election after election, it has become an obvious rule that the richer a candidate is, the more likely it is that that candidate will win the election. This rule – which is said to have been introduced into the Beninese political *habitus* by Adrien Houngbédji and his political party PRD during the 1995 legislative elections – imposes to the political actors the idea that the political and electoral battle is before and beyond all 'a battle of money'. When they succeed in their election, they believe that everything is possible for them. This includes the President of the Republic and those occupying parliamentary seats, to master and utilize to their guise all the political, institutional and administrative resources. This way of thinking and acting is current in Benin: one intends to be elected generally for the substantial purpose of reaching personal even private interests by instrumentalizing the institutions.

The issue is not the mode of designation of the members of these institutions. As it is commonly accepted, the nomination or the election of the members of an institution does not guarantee the independence and the impartiality of the latter. However, whatever the mode of designation adopted, the quality of the personalities chosen to be members of an institution determines the quality of its office. In fact, for a decade now, one can observe that the intrinsic quality of the members of key constitutional institutions has been deteriorating. Public opinion in Benin doubted the professional competencies and the moral probity of some personalities designated to be members of some institutions. In other cases, some members chosen have no problem with moral probity, but they have a critical lack of competences in the institution's domain. Therefore, the office is undermined and monopolized by a small number of members whose role is not to ensure that their institution fulfils its duly assigned responsibilities, but to conduct affairs based on the interests of an invisible actor. This is particularly the case with the current mandate of Benin's Constitutional Court (2018-2023). The parliamentary majority coinciding with the presidential majority,¹¹⁹ the seven (7) members of the Constitutional Court were designated by the regime, that is there was no member of the Court coming

¹¹⁹ This was not the first time this coincidence had occurred in the history of the country.

from the opposition or the civil society. Moreover, the president of the Court, Joseph Djogbénu – professor of private law and personal advocate of Mr. Talon¹²⁰ – was until then, the Ministry of Justice and spokesman of President Talon’s Government. There is no other well-known and competent constitutional expert or a reputable public law specialist. As a result, for many law and political analysts, Mr. Djogbénu is the *hegemon*, meaning the *omniscient and the omnipotent* in the Court, working for the *hegemon* of the country, the Head of the State and his businesses. This impression of the control of the Constitutional Court, and more widely of all the institutions, by the president of the Republic is not new. During Boni Yayi’s two terms(2006-2016), the institutions’ instrumentalization was perceptible and worrying. However, this practice seems to have culminated to an unprecedented degree since Patrice Talon took office.

This progressive instrumentalization has profoundly weakened the institutions, and made them vulnerable to any assault from the captors.

3. The “Democracy Captors” in Benin

The actors of the process of capturing democracy in Benin can be classified in three categories: the president of the Republic, the head of state’s entourage and the businessmen.

The president of the Republic

The Beninese Head of State, like his colleagues in West Africa, if not in the whole Africa, is the “big man”, the *omniscient, omnipresent and omnipotent* who governs and rules the country, as he pleases. The political, institutional and judicial arrangement gives all the means to the president of the Republic to control, manipulate all the other institutions as he wants. In fact, the head of State is a “republican monarch”, meaning despite the counter-power’s institutions, he is the heart of the political system, the main referee of the political, social and economic life of the State.¹²¹ Therefore, in Benin, democracy is what the Head of State makes of it, or decides it is. To say it frankly, the constitutional design of the presidential institution, the psychological and social predispositions about power, and the political history of the country have created the favourable conditions for the Beninese democracy to be captured. The president of the Republic has the public, civil, judicial and military administration at his disposal. He has the concurrent prerogatives, with the parliament, of designating the members of the other institutions (Constitutional Court, Supreme Court, High Authority of Audiovisual and Communication). He nominates the president of the latter institutions. He presides over the Council of the Judiciary whose members are dominated in number by the Executive’s representatives. When the parliament corresponds to the presidential majority, the head of State can designate all, or at least the quasi totality of the members of the institutions.

To take an example in the economic field, the businessmen are promoted or destroyed only by the will of the Head of State. This was seen with President Soglo when he promoted Patrice Talon as the principal operator for the cotton industry; with President Kerekou who encouraged the emergence of a new class of businessmen (Issa Salifou alias Saley, Eustache Akpovi, Domingo, etc.); with President Boni Yayi who promoted a large number of micro-business men and harassed some very important economic actors who seemed to politically rebel; with President Patrice Talon who has, if not destroyed, forced all the major businessmen to put the key under the door or to flee into exile, leaving the main economic sectors in his hands or in those of his close circle.

¹²⁰ Till Mr. Patrice Talon became President of Republic.

¹²¹ See for instance Frédéric Joël Aïvo, *Le président de la République en Afrique noire francophone. Genèse, mutations et avenir de la fonction*, Paris, L’Harmattan, 2006, p. 643.

The entourage of the head of state

The entourage of the head of the State should be taken into account here in its large sense. It includes the familial relatives, the very close political partners, the economic clique and the spiritual supporters of the ruling leader. This multilevel-actors group constitutes the first circle of power within the country.

Each part of this entourage has a certain power that it exercises in the name of the president of the Republic, and not necessarily for the interests of the latter and the country, but for its own interests. Very often some members of this entourage can succeed in obtaining a very important decision from an institution, a public department just by arguing the decision is asked by the executive leader or the decision will please the latter. Sometimes, the executive leader does not know that a strategic decision has been taken by the usage of his name. The targeted institution doesn't know the mission it is asked to accomplish is not known by the head of state. Under these circumstances, the president of the republic and the targeted institution are manipulated by the entourage.

The businessmen

Along with the entourage of the head of State, the businessmen are the true rulers of the country. Some of them are members of the executive leader. Some are far from the first circle of power. But wherever they are, they keep on influencing the political realm by their capacities of funding political and civil society actors and their activities. This sponsorship allows them to be near or behind strategic activities organized by political and civil actors. That is why when huge and sensitive activities such as demonstrations happen, the recurrent question asked in the Beninese public opinion are the following: who is behind that? That is, who is the sponsor of the activity? The most interesting is that the businessmen fund ruling parties, and if need be, the opposition actors as well, particularly during the electoral competition. This behaviour of funding all categories of actors is based on a philosophy: a businessman has no party, he can't be in opposition, so he must support every important candidate/party so that he can be on the right side when it comes to ruling the country. The proverbial formula is: a businessman never supports the opposition unless he is sure the opposition is becoming the incumbent.

This philosophy has a practical effect: in any case, Beninese businessmen do all their possible to have a presence and influence in all the strategic institutions, procedures and processes. For instance, when the judges, the members of governments, the members and heads of core institutions are appointed, everyone is preoccupied with knowing to which political/economic actor this or that appointed personality is near to.

Thus, generally behind the political and electoral competition there is at stake a hard competition between the most important businessmen for funding the winning candidate/party. Since 1990, in the absence of public funding of political parties, the businessmen have occupied the place normally devoted to the State for the regulation of financial mobilization by political parties. Under these circumstances, economic actors have transformed the political arena to a mere jungle, where only the more financially powerful can emerge and survive. The omnipotent actors in the country, the businessmen - not the political actors, become the ruling authorities. The latter become the agents of the former. When the businessmen realize that their political agents do not accomplish their will adequately, they decide to invest in the political arena with all their means. This is the commencement of the creation of political parties led by businessmen. President Patrice Talon, after Sefou Fagbohoun (MADEP's leader) and many others, is the illustration of this shift.

4. The manifestations of democracy capture in Benin

Since the February 1990's National Conference, Benin has been experimenting with a democratic regime. The principle of liberal democracy and Rule of law permits the involvement of all categories of citizens into the governance of the country. Contrary to the PRPB regime, the private sector actors, particularly the businessmen, can therefore take part in the democratic process. Very often, in the first two decades, they were at the back office or at the margins of the political game. This position gives them the discretion and efficiency for capturing what they target in diverse domains. However, since the famous attempt to poison President Boni Yayi affair¹²² by Patrice Talon in 2012, the emergence of the businessman as a public and core political actor becomes more visible in Benin. The figure *par excellence* of this bizarre emergence from the informal captor position to the official captor is Patrice Talon.

The ordinary habitus of democracy capture in Benin

Pierre Bourdieu defines the *habitus* as this set of habitual behaviours that have durably structured the ways of thinking and acting of a social group. In the aftermaths of the 1990 National Conference, the Beninese ambient political culture was structured by high intellectual debates, as the first post-national Conference political class level showed it. This political class was in a very wide extent preoccupied with in-depth political affairs, the settlement of the "new" Benin's institutional architecture. Therefore, it left economic, financial and material affairs in the hands of economic actors who in turn were very discrete and amenable to political leaders. The businessmen' prosperity was possible under the umbrella of the political actors. Progressively, the liberalization of the national economy and the invasion of the political debate by money, made the economic actors more and more influent in the quest, conquest and management of the political power. As some political leaders had money for funding their own campaign and in the absence a public funding of political parties, the challengers used to revert to occult funders, the businessmen.

The proximity of political and economic actors creates a conflict of interest when the former comes in office. The latter become the co-managers of the country. Some state departments are supposed to be the "chasse gardée" of a certain category of businessmen. The appointment of the ministers, directors general and other important civil servants and the procurements in those ministries are due to some economic actors.

Such was the case with some very important businessmen during Mathieu Kérékou's office (1996-2006). They were used to having a *quota* (a certain number of recruited) in the recruitment of some civil servants, particularly in the customs administrations and in the judiciary. Such was also the case during Boni Yayi's regime. A former Minister of Boni Yayi, under confidentiality, asserts that a recruitment process of court bailiffs has been postponed and he, the Minister of Justice, has been fired because he had refused the deadline's prorogation to the nephew of a very strategic businessman around President Boni Yayi. In fact, the candidates have already been in the rooms, waiting for the examinations' launching by the Minister of Justice when the latter received a call from the president of the Republic who ordered him to cancel the competition. A couple of weeks further, the Minister will be fired. This was the rigid demand of the economic oligarch around the head of the State. For the businessman, firing the Minister of Justice has become a matter of life or death since the Minister has been guilty of a crime of lese majesty.

¹²² For a complete understanding of this affair, see the book written by the judge in charge of the investigation: Angelo D. Houssou, *Je ne suis pas un héros. Affaires Talon*, Paris, AFRIDIC-CDA, 2016, 272 p.

Patrice Talon: a peculiar case of democracy capture

Patrice Talon is, by his only own, a peculiar case of democracy capture in Benin because he has been experimenting all of the strategic positions in the process of capturing: on one hand, he has been at the back office of the process as an influent businessman in the shadow and corridors of the political power and, on the other hand at the front office of the process, since his inauguration as the president of Republic in 2016.

Within the Beninese political landscape, Patrice Talon had been known as a very discrete and successful business man in the cotton sector. In fact, President Nicephore Soglo, upon the occasion of reforming the cotton sector within the framework of the Structural Adjustment Plan, allocated in 1992 the ginning branch to a young businessman of 32 years: Patrice Talon. He was introduced to President Soglo by Mr. Désiré Vieira, the then Minister of Defense and the President's brother-in-law¹²³. Then, Talon became a very strategic economic actor since the cotton sector and the Cotonou's port were considered as the national economy's lungs. In order to protect his interests, he was used to keeping as very close as possible, by all means, to any Minister of Agriculture of any government since 1992. As a result, Talon funded President Soglo's campaign for the 1996 presidential election which the latter lost. At the arrival of President Kérékou in office, his business went bad for a while. He was so enterprising in his informal stratagems to keep control on the cotton sector that some of his corruptive behaviours irritated President Mathieu Kérékou who decided to imprison him. But he fled the country to Dakar for a moment. Concomitantly, he became progressively the main funder of numerous political parties and actors except Mathieu Kérékou, held a quasi-monopolistic position in the cotton industry and then established a rhizomatic network within the public administration.

When President Kérékou retired from office in 2006 after his two constitutional terms, Mr. Talon was the prominent sponsor of the main candidates' campaigns to the 2006 presidential elections, particularly Mr. Boni Yayi's two campaigns (2006 and 2011)¹²⁴.

As a result, when the latter won the 2006 election and came to office, Mr. Talon was "the man of the situation". He directly formed President Boni Yayi's first government. In a television interview in August 2017, President Yayi himself stated he did not know, prior to their appointment, some members of the first government he was leading. For instance, the Minister of Agriculture of this first government, Mr. Gaston Dossouhoui, was designated by Mr. Talon. The proof is that Mr. Dossouhoui is the current Minister of Agriculture in President Talon's cabinet. Under President Yayi's regime, Talon has become the Ministers and Directors General maker. In fact, before becoming head of state in 2016, Talon had been a very influent actor in ruling the country. Some Boni Yayi's Ministers affirmed¹²⁵ they were fired because they haven't executed Talon's will on some important issues. For them, nothing in the governance of the country should not jeopardize Talon's interests. Any person who persists in taking a public action contrary to his interests would either be fired or face troubles. Such was the case with President Boni Yayi himself about the PVI (Importations Verification Program) agreement. This program dispossesses the customs Administration. When the latter engaged strikes to protest against this PVI program, the Parliament, under the secret and "generous" support of Mr Talon, took a new law which withdrew from the Customs Officers Trade Unions the right to strike¹²⁶. But, a couple of months later, in reason of the amount gained by Benin Control to the detriments of the public treasury, President Boni Yayi disengaged the Beninese government from the contract.

¹²³ Emmanuel V. Adjovi, *Une élection libre en Afrique. La présidentielle du Bénin, (1996)*, Paris, Karthala, 1998, p. 181.

¹²⁴ For a quasi-exhaustive factual report of the both campaigns of Boni Yayi and the role of Patrice Talon, cf. Tiburce T. Adagbè, *Mémoire du Chaudron. Conquérir le pouvoir d'Etat*, préface, Robert Dossou, Encrage édition, France, 2020, p. 620.

¹²⁵ Under confidentiality.

¹²⁶ See the Loi n° 2011-25 portant règles générales applicables aux personnels militaires, des forces de sécurité publique et assimilés en République du Bénin, votée par l'Assemblée Nationale le 26 septembre 2011, and the Constitutional Court decision Décision DCC 11-065 du 30 septembre 2011 confirming the constitutionality of this law.

Patrice Talon lost the PVI program. Mr. Talon undertook unsuccessfully some initiatives to destabilize Yayi's regime. He succeeded in fleeing the country to Paris. From there, he planned to poison President Boni Yayi. The operation did not work. The judiciary battle engaged between President Boni Yayi and him turned into his advantages. He came back in Benin and ran successfully for the 2016 presidential race.

The attempt of assassination of President Boni Yayi by Patrice Talon is a peculiar case of democracy capture: *democracy capture by violence, even by mortal violence*. But it should be understood, *to a significant extent, as an **economic instrument to ensure his business interests will not be hindered by competing political elites, and his economic monopoly over key sectors.***

Talon's capture strategy

Talon's capture strategy can be characterized by two modalities: on one hand the strategy of a discrete, powerful businessman and kingmaker and, on the other, the strategy of the big man in office. Patrice Talon, as informal/discrete captor, has exercised around 20 years of rhizomatic power upon an important part of the national economy and the public administration in Benin. He is presented as a colossal and predatory businessman. He used to offer diverse liberalities to civil servants in all the compartments of the public administration. Therefore, he can be aware immediately and permanently of any governmental decision concerning his scope of activities. The eloquent proof is that the two times Presidents Mathieu Kérékou and Boni Yayi decided to jail him, he succeeded in fleeing the country due to his informants' network in the presidential cabinet and moreover in the National Army leadership. He treats so well his informants that they become his accomplices and are conditioned to prefer serving him than the national interest. The fact is a bit amazing: between Patrice Talon and the President of the Republic, civil servants, regardless their level, do obey to the former, who had no official position in the country, more than to the latter. His mastering of things and people in the power circuits is impressive. The culmination is the facility he used to convince all President Boni Yayi's main and closest aides to poison him. Judge Angelo Houssou, the judge who decided an order of proceedings dismissal in the poisoning affair whose Patrice Talon was the main accused, related a striking story about that affair:¹²⁷

"Zoubérath Kora, the housekeeper and nephew of the President of the Republic [Boni Yayi], Ibrahim Mama Cissé, his physician, and Bachirou Adjani Sika, a member of his closed guard, all in an official delegation with the President in Brussels, said to have been received, Wednesday October 17, 2012, separately by Patrice Talon, in Chateau du Lac Hotel in Brussels. Zoubérath Kora declared that Patrice Talon entrusted her with the mission of administering to the Head of State some medicines in order, not to kill him, but to make him unfit to perform the functions of President of Republic. She said to have received there and then 5000 euros and a promise of a billion of FCFA. She would get the drugs by Dr Ibrahim Mama Cissé.

Ibrahim Mama Cissé said to have received by Patrice Talon in presence of Mrs Moudjaïdou Soumanou and Olivier Boco. He affirmed to have been promised the amount of one billion of FCFA. He declared it had been said that Soumanou would give him, on Friday 19 October 2012, some drugs he would hand over to Zoubérath Kora and which would be administered to the Head of State for killing him.

In preparation for this operation, Moudjaïdou Soumanou, Ibrahim Cissé and Olivier Boco would have met in New-York during September 2012 on the initiative of Patrice Talon who,

¹²⁷ Since Patrice Talon came in office, Judge Angelo Houssou is appointed in the Presidency of Republic.

unavailable, was represented by Olivier Boco. The meeting was about the medicines the Head of State was used to utilizing. [...]

Moudjaïdou Soumanou declares to have actually brought the drugs to Cotonou, on Friday 19 October 2012. It was a white and scotched package, and four boxes composed of injectable Spasfon, Lyricar 75 mg, Josir LP 0,4 mg, Spasfon-Lyoc, Dafalgan paracetamol 500 mg. He adds he gave them to Dr Ibrahim Mama Cissé, in his office around 9.00 p.m. just after getting of the plane. The day after, Zoubérath Kora came in Dr Ibrahima Mama Cissé's office for taking knowledge of the products. The Dr did not leave them to her. The crime was planned to be executed on Friday 19 October 2012's night. Patrice Talon should come back in Benin on the following Wednesday, after the Constitutional Court would have certified the power vacuum. But the operation did not work. Zoubérath Kora made her fiancé, Patrick Darwichian, aware of the facts. The latter in his turn, informed one of the Head of State's bodyguards, Florent Capo-Chichi, who kept the son of the Head of State, Nasser Yayi, informed of. The latter warned his father. Therefore, Dr Ibrahim Mama Cissé was arrested with the drugs in his possession. During the same day, Zoubérath Kora and Moudjaïdou were arrested as well.

Dr Ibrahim Mama Cissé acknowledges to have given the names of the medicines used by the Head of State to Patrice Talon and Olivier Boco. The so-called medicines are amid the seized products.

From Friday 19 to Saturday 20 October 2012, Patrice Talon, concerned with being ensured about the level of execution of drugs administering to the Head of State, sent seventeen SMS messages to Zoubérath Kora. The latter responded to him by ten messages.

The three accused all acknowledged the facts, but affirmed they did not want to conduct the operation to its end¹²⁸.

A bit later, another affair of *coup d'état* raised. Three personalities were involved in that affair: Pamphile Zomahoun, a senior officer of Gendarmerie working in the then Head of State (Boni Yayi) military cabinet; colonel Bako Megounnga, the Chief of the Land Staff of the Army, and Johannes Dagnon, a Certified Public Accountant in charge of Patrice Talon's businesses and his cousin as well. Judge Houssou, in charge also of investigating this affair, counts that:

"On 17 February 2013, Pamphile Zomahoun, a senior officer of Gendarmerie working in the then Head of State's military cabinet, visited colonel Bako Mégounnga, Chief of the Land Staff of the Army, at home. The discussion which was engaged about the economic and sociopolitical situation of the country ended up on the preparation of a coup d'état, which will consist in taking occasion of an abroad journey of the Head of State for investing the Office of Radio and Television of Benin and prevent the other medias from broadcasting [...]."

Three other meetings were held in Bako Megounnga's office, successively on Tuesday 19, Wednesday 20, and Thursday 21 February 2013. At the second meeting, Pamphile Zomahoun

As an institutional captor, Patrice Talon's strategy is an exclusive capture: an economic monopoly hidden by an apparent liberalism. As a matter of fact, the competition in the capturing landscape is not allowed. All the main economic, private, public and political actors potentially capable of any capturing action are neutralized – jailed or forced to exile –. For instance, the main economic actors known in the country lost part or all of their businesses and are constrained either, for some, to put

¹²⁸ Angelo D. Houssou, *Je ne suis pas un héros. Affaires Talon*, Paris, AFRIDIC-CDA, 2016, pp. 45-48. The translation is ours.

the key under the doormat, to refuge in silence and live in the country or, for some others, to live in exile if they want to publicly express their opinions. The well-known examples are Sebastien Ajavon, Martin Rodriguez. The first is his economic rival and political challenger: Ajavon has been considered as the richest man or *ex-aequo* with Mr Talon; he arrived 3rd (23%) in the 2016 presidential election just behind Patrice Talon (24%); the latter won the second turn of the election thanks to Ajavon support. The second, Martin Rodriguez, was the challenger of Talon in the cotton industry sector.

Moreover, in his style of public affairs' management, Talon creates two parallel states: an officious parallel state and an official parallel state.

The officious parallel is a technique practiced by all the heads of state in Africa and worldwide. There is an informal and obscure cabinet which is in charge of peculiar and sensitive affairs. The particularity in Talon's case is that this informal cabinet is said to be held by his *alter ego* in business and besides, Mr Olivier Boko, who is a fortunate businessman and has become the strongest ally and connivant of Talon, after a challenging collision on a procurement struggle. Mr Boko has replaced Talon, as CEO, in some of his companies' boards when the latter gets in power. Since then, Mr Boko represents officially Mr Talon's businesses' interests. But he also has all the liabilities to manage a very important part of the public affairs and thus without any official position. He is commonly called as the Vice-President of the country.

Overall, it is common lieu in Benin now that President Talon and his clique have a stranglehold on the key economic sectors and the public procurements. Consequently, any enterprise in the country is unable to gain any piece of procurement without being under the umbrella of the *omnipotent* of the day. This monopoly and the very quasi-monopoly of the politico-institutional landscape and the public administration tend to transform the country into "a company in the hands of Talon and his very close clique".¹²⁹

The official parallel state is structured by a set of new institutions and mechanisms established to execute concurrently the same mandates with the existing institutions and mechanisms. Precisely, President Talon created in all the most important domains a certain number of agencies, located at the Presidency, and whose prerogatives are the same, if not more, with those of traditional ministries¹³⁰. The agencies directly depend on the President of the Republic. Their personnel are generally better paid than the civil servants employed in the existing public administration and ministries. If the agencies' attributions are known their budgets in the contrary remain a mystery. Even the civil society organizations working in the field of governance affirm they don't have exacting information on the budgets, the procedures and the expenditures of these agencies. Concretely, this "agencification" of the public governance, although argued to aim at efficiency, dismantles the public administration, weakens its capacities and shrouds in mystery the traceability of the public expenditures. This situation raises a couple of questions. Why is it necessary to create a parallel state if the aim of the governance is really efficiency? Why doesn't the creator of the parallel state take his power to reform the existing public administration and ministries in order to make them rather performant? And why in a democracy the budgets and expenditures of new public agencies instituted for a supposed better democratic governance should be a secret? One of the plausible hypotheses is that there is an ensemble of interests at stake in the institution and functioning of these agencies,

¹²⁹ Francis Kpatindé, « Patrice Talon veut transformer le Bénin en une immense SARL dont il serait l'unique actionnaire », *Le Monde Afrique*, URL : https://www.lemonde.fr/afrique/article/2019/05/08/patrice-talon-veut-transformer-le-benin-en-une-immense-sarl-dont-il-serait-l-unique-actionnaire_5459603_3212.html , consulted on January 15, 2021.

¹³⁰ ABRP: Beninese Pharmaceutical Regulatory Agency; ACISE: Agency for the Construction of Infrastructures in the Education Sector; ACVDT: Agency of the Living Environment for the Development of the Territory; ANAEP-MR: National Agency for the Provision of Potable Water in Rural Areas; ADN: Agency for the Digital; ANPT: National Agency for the Promotion of Patrimony and Development of Tourism; ANSS: National Agency for Primary Health Care, etc.

especially the control of the procurements generated by the agencies' scope of activities, the amount of these procurements being about hundreds of millions of dollars.

Patrice Talon is a total case of democracy captor: **an informal individual captor (as a private firm captain) and an institutional, official captor as he is the president of the Republic since 2016**. His case alone is sufficient to understand how democracy capture occurs and operates in one of the first and more stable democracies in Africa. Patrice Talon has been an informal captor and since he has got in power, he has become an official captor.

Election funding

The electoral funding is the main *lieu* of democracy capturing attempts, particularly by businessmen. Because of the lack of public funding¹³¹, the political parties/actors in Benin are used to begging for money with economic actors. In fact, a political actor who wants to be elected as a Member of Parliament in Benin should spend at least the totality of the equivalent of his three years' salary while his office lasts only four years. Then the question, generally raised since a while now: why so many politicians are struggling to be elected if there is no benefit for them. The more relevant response found by the public opinion is that politicians instrumentalize their political positions to obtain undue advantages from the public Administration and all other possible circuits of traffics.

So, the economic decide to support the politicians/parties they want with the obligation for the latter to be grateful when they get in power. Generally:

“businessmen invested, on aggregate, a total of CFA franc 7,567,560,000 (\$13,080,443.46) in the recent electoral campaigns as financial support to politicians, according to the 189 who responded to this question. On average, the former invested, all elections combined, an amount of CFA franc 40,040,000 (\$69,252.750) in the campaigns of a candidate. Considering the type of elections and the location, the financial package is about CFA franc 10,900,000 (\$18,838.524) and CFA franc 47,600,000 (\$82,288.818) for municipal elections, respectively, in rural and urban areas. These figures are higher according to the importance of elections. For instance, CFA franc 37,300,000 (\$64,470.847) and CFA franc 67,600,000 (\$116,842.61) are invested in legislative campaigns of a candidate, respectively, in rural and urban locations”¹³².

This financial situation shows how imprisoned politicians are in the hands of economic actors. As a result, funding a political actor who is more or less sure to be elected has become a challenging work for the quasi-totality of the businessmen in Benin. The electoral landscape has been transformed in a market where the political parties/actors who have the chance to come in power are the object of a disputed “*mercato*”. This “*mercato*” is also held by the local and less important businessmen in order to control the local political field and the economic and financial benefits it generates. At the national or local level, the main objective is the “control of bureaucratic recruitment control, procurement, etc.”¹³³

¹³¹ The issue of public funding, which has been one of the main weaknesses of Beninese political system, has been resolved by the 2018 revised Charter of political parties. But the implementation of this law is only beneficial, for the time being, for the two ruling political parties (Union Progressiste and Bloc Républicain) and for one so called opposition party, Force Cauris pour un Bénin Emergent (FCBE).

¹³² Ch Rafael, Mathias Hounkpe, Leonard Wantchekon, “Campaign Finance and State Capture”, in François Bourguignon et al. (eds), *Benin Institutional Diagnostic*, chapter 4, 2019, p. 11.

¹³³ Rafael Ch, Mathias Hounkpe, Leonard Wantchekon, “Campaign Finance and State Capture”, in François Bourguignon et al. (eds), *Benin Institutional Diagnostic*, chapter 4, 2019, 37 p.

6. The targets of democracy capture

All the components of the society can be targets of democratic capture. Some of them are more significant including the public procurements, the constitutional institutions, the political parties, the diplomacy, the media, the intellectual class, and the religious authorities.

The public procurements

The public procurements are the usual and the more important target of the democracy capture. As they are the main circuit of financial expenditures by the State and the principal route for resources' mobilization by economic actors, the public procurements are the arena of all types of struggles among politicians, businessmen, high public servants and many other stakeholders. Controlling the public procurements means controlling the financial flux, the heart of the power, and the sinews of the political war. In the State which is not particularly different from a "neo-patrimonial", "kleptocratic" or "opaque" State, the public procurements are one of the blackest boxes in Benin's governance system since the first government post-1990. The scandals about the public procurements mark out all the post 1990 regimes in Benin¹³⁴. The common point with all these scandals is the collusion between the businessmen/companies and, the ruling elites (governmental authorities, members of parliaments, some members of the judiciary, some high public servants). The public procurements give these stakeholders the possibility to peculate in the satisfaction of personal needs and interests. The gentleman agreement known an informal law but more efficient than any official law is the law of the 10%. This is the percentage any company should concede to the politico-administrative chain that attributes a procurement. This 10% has to be distributed all along the hierarchy in order, for the company, to ensure that it won't face any major obstacle on the route for executing his procurement. It is commonly said that this percentage has increased towards 20% of the total amount of a procurement. One of the most spectacular affairs pertaining to this informal percentage is the construction of the parliament's new seat in the capital Porto-Novo. In reason of exaggerated bribes and other corruptive practices, the construction has never been finished despite many tens thousands of dollars invested. The rumour says that the decision has been taken that the unfinished building will be razed. The affair is under silence because it is commonly said that a great number of governmental and parliamentary authorities and their relatives, high civil servants, and businessmen were involved in the capture of the procurement for the construction of the parliament seat.

The constitutional institutions

The quasi-totality of the Beninese constitutional institutions is continuously subject to the democracy capture. Why? They are the heart of the democratic architecture of the country. As we saw it above, the President of the Republic is not only the central actor but also the main target of capture in Benin. The Beninese institutional arrangement installs the Head of the State as the Republican Monarch from whom everything comes and to whom everything goes. Therefore, the Head of State has the capacities to undermine all the other institutions and to make them do all he wants. During the first two decades after the National Conference, it was complex and complicated even impossible for the President of the Republic to control absolutely the other constitutional institutions. But since the second term of Boni Yayi's regime, the instrumentalization of the constitutional institutions has taken

¹³⁴ About Nicephore Soglo regime, see Emmanuel V. Adjovi, *Une élection libre en Afrique, op. cit.* ; Concerning Mathieu Kerekou regime, see Janvier Yahouedehou, *Crépuscules d'un dictateur*, Cotonou, Planète Communications, 2003, 239 p. ; Janvier Yahouedehou, *Les vraies couleurs du caméléon*, Cotonou, Planète Communications, 2002, 227 p. ; For a transversal from 1990 to 2006, read Wilfrid Hervé Adoun, François K. Awoudo, *Bénin. Une démocratie prisonnière de la corruption. Investigation sur des faits et scandales de 1990-2006*, Tome 1, Cotonou, Friedrich Ebert Stiftung, COPEF, 2007, 387 p. ; For Boni Yayi's office, cf. Wilfrid Hervé Adoun, François Koffi Awoudo, *Les dossiers de la République. Investigations sur des anomalies de gouvernance et pratiques corruptives au Bénin de 2006 à 2015*, Cotonou, sans éditeur, 2015, 427 p.

on a very significant scale. For instance, President Boni Yayi used to say that “when I say *piinn* the Parliament says *paann*” as the train cries. This to show the complicity between the executive and the legislative, and more precisely the influence of the executive leader on the parliament.

The culmination of this capture of all the constitutional institutions by the executive leader can be exemplified with President Talon’s regime (2016-2021). Benin’s parliament is constituted of 83 members all coming from two parties created and funded by the Head of State after an exclusive electoral process in April 2019. The Constitutional Court, – which is also the electoral judge for parliamentary and presidential elections – is composed, on one hand, of 4 members designated by the Parliament Board which is favourable to the ruling majority and, on the other hand, of 3 members designated by the incumbent President. The High Authority of Audiovisual and Communication contains 9 members. Only three (3) of them are elected by the media’s professionals. Three (3) are nominated by the Parliament and three (3) by the Head of State who designates the President of the institution. For the current mandate installed in 2019, the ruling majority controls 6 of the 9 members of the Authority. As a result, one can understand the decisions taken by this Authority, decisions considered as deconsolidating for the freedom of expression and media in Benin. The High Council of Judiciary is dominated, in number, by the representatives of the government. Consequently, the independence of the justice remains a huge issue if the executive is plethoric in an institution whose mission is to decide about the career of the judges. The Supreme Court appears to be less controlled than the other institutions, because in part, its president and some of its members have been designated by the former Head of State, Boni Yayi.

Consequently, the capture of the parliament, the Constitutional Court, the Authority of Audiovisual and Communication lead to the capture of all the main democratic procedures and processes in the country. The Constitution of 11 December 1990 has been reformed by the one-color parliament in November 2019, with the introduction of the controversial sponsorship (*parrainages*) system in the presidential elections and the prorogation of the incumbent president’s mandate from April to June 2021. As far as the electoral democracy is concerned, and as a consequence of this capture, since the arrival of Patrice Talon in office in 2016, the opposition hasn’t been allowed to take part in any election. The opposition was excluded from the legislative (2019), the communal (2020) and the presidential (2021) elections. The institutional capture leads to the capture of the legal capture which lead to the capture of the substantial processes such as elections and fundamental rights enjoyment. This systematic capture resulted in the edification of a personal, authoritarian power exercised by M. Talon. It is objectively impossible to say in Benin there is only an institution which is in the possibility of resisting to President Talon. It is impossible to see in the jurisprudence of the Constitutional Court in place since 2018 a single case on a fundamental issue unfavourable to the executive, and particularly to his leader.

The political parties

The political parties in Benin look like having the destiny of a mouse permanently under the holding jaw of the cat, the head of the State.

But under other circumstances, the political parties are a particular category of means used by the political leaders to bargain all kinds of advantages with the president of the Republic: material and financial advantages (the public procurements for example), important positions in the public Administration and in some strategic institutions. The political parties then do not function as an instrument for conquering and exercising the State’s power but as a tool for getting and sharing some parts of the collective good, that is the State. They appear in Benin as “electoral clubs”¹³⁵ without any

¹³⁵ This expression originates in the colonial period during the first elections (1946-1947) which authorizes the *indigenous* political leaders to be candidates for a seat in the French Parliament. At that time there was no political party. So, the then

distinctive ideology, established for the single purpose of elections and post-electoral negotiations. There were around 250 political parties till the political reforms in 2018.¹³⁶

In effect, the political parties are captured by political leaders to achieve their personal goals and interests. That is one of the reasons why since 1990 till 2021, all the Benin's presidents of the Republic have been elected without being a member of any political party. They are independent personalities who obtain the support of the political parties for winning the elections. And then, at their arrival in office, they make what they want of the political parties and their leaders. In return, especially when the political parties and their leaders are frustrated by the incumbency, they use their alliances in the Parliament to fragilize the executive leader and his government. The institutional clash happens when the supporting parties for the head of the State's election are dissatisfied, join with the opposition and become majority in the Parliament.

The party system's reform occurred in 2018, even if it has reduced significantly the number of the parties, has not resolved the issue of their capture. In contrary, a rigorous observation shows that the immediate and mid-term objective of this political reform is for the incumbent, Patrice Talon, to have a stranglehold on the political system, to set up an authoritarian and personal power. The proof is that, only the two parties founded under his auspices in the late 2018 were allowed to take part in the April 2019 legislative elections. They took all the 83 seats in the parliaments. Upon that, all the laws sent by the government to the parliament are systematically voted. Rapidly, in November 2019 the Constitution of December 11 1990 was revised in an emergency procedure.

In 2020, the two ruling parties took 71 mayors on the 77 communes of the country, the remaining 6 mayors belonging to the FCBE a so-called opposition party, which is in fact very close to the regime. And according to the revised electoral code voted by the one-color parliament in November 2019, any citizen must mobilize at least 16 sponsors from members of parliament and/or mayors in order to be candidate to a presidential election. As a result, no opposition party was in the possibility of having the necessary sponsors. Then, the ruling majority sponsors to two very little known candidates it chose for the April 2021 presidential election. Any significant opposition leader wasn't allowed to participate to the elections. Consequently, the election, won by President Talon, resulted in violence, riots, fights between the security and defense forces and the civil populations including the hunters in some localities (Savè, Tchaourou, and Bantè) where the vote did not operate, with a low rate of participation, and post-electoral arrests of opposition leaders¹³⁷. Most of them have fled into exile just after April 11 2021 to avoid being jailed. The post-electoral situation resembles particularly to a grand boulevard to an authoritarian regime¹³⁸. Finally, the political parties in a large extent are what the omnipotent head of state makes of them. The reform undertaken in 2018 confines them not in the position of the main actors of the political realm but as the instruments devoted to the big man of the country.

political leaders constitute the "electoral clubs", a kind of informal groups put in place in all the localities of the colony and whose purpose was the organization and the mobilization of the "popular masses" around the chosen candidates.

¹³⁶ The political parties Charter of September 2018, revised in November 2019 (Loi n° 2019-41 du 15 novembre 2019 modifiant et complétant la loi n°2018-23 du 17 septembre 2018 portant charte des partis politiques en République du Bénin), has hardened the conditions of creation political parties. For instance, the number of the founding members of a party has increased from 120 to 1155 with a very long list of exacting documents. Consequently, in compliance with this Charter, only fifteen (15) political parties are registered in the Ministry of Homeland and therefore exist in Benin till February 2021.

¹³⁷ Reckya Madougou, Alexandre Jean Hountondji, Joseph Tamégnon, Frédéric Joel Aïvo and their collaborators, and many other partisans of the opposition.

¹³⁸ Camille Malplat, Louise Dewast, "Benin's Talon Takes Tough Line After Re-election Win", URL: <https://www.barrons.com/news/benin-s-talon-takes-tough-line-after-re-election-win-01618417214>, consulted on April 19, 2021.

The diplomacy

The diplomacy remains “la chasse gardée” of the Head of the State, accordingly to the Constitution. But it has become obvious that political actors fight for diplomatic positions for their closes not only for the prestige of the function but also and particularly for the business opportunities it offers. In the last years, indiscretions in the political and diplomatic milieu point out that the fights are rude for the Ambassador’s position in the Gulf countries (Dubai, Koweit, Saoudite, etc.) for the business advantages such a position can expose to.

In fact, since Talon’s arrival in office, the main strategic diplomatic positions have been dedicated to the very president’s close relatives, more precisely to personalities coming from his familial circle. Many observers saw these appointments as a strategy for ensuring that the clique’s businesses will be efficiently and, most important of all, secretly dealt with by people of solid confidence. A couple of months ago, the Talon’s regime decided to re-design the “diplomatic cartography” of the state. It strictly then reduced the number of the embassies basing on the argument of financial and efficiency reasons. But when it comes to the heads of these diplomatic missions, the critique poses that likely 70% of the positions are still held by key familial relatives of the President of the Republic. The critique alleged that these appointments are the symptom of a “familial-business” foreign policy, a kind of private foreign policy. The critique is not irrelevant when considering Mr Talon is the richest Beninese businessman and his governance does not appear to make a clear and transparent distinction between the public affairs and his own private ones. Nonetheless, constitutionally, the Head of State is the unique leader of the foreign policy and diplomacy of the country. And there is absolutely no legal limit to the number or the quality of those who should be appointed for the foreign affairs. The diplomats are considered as professionals who have to give competent and technical support to the heads of the diplomatic missions who are not necessary diplomats.

The media

Media in Benin as likely the *vidomegons* of political and economic actors. The *vidomegon* is a young person placed in a family and who is employed for all types of hard and dehumanizing works. Generally, the *vidomegon* is synonymous of slave-child/young, without any will, any capacity of self-determination. Without any exaggeration, such is the case of Beninese medias. Medias, because of the absence a clear and viable economic model¹³⁹, struggle in transforming themselves into information clerks for political and economic actors. The medias’ bosses utilize the media as a tool of negotiating money with political and economic protagonists. Those business-medias exist only for money, and for the money sponsors. The more an actor funds media the more widely, and regularly his/her voice is published and broadcasted. In the struggle for media’ control by funding, the governmental authorities are the premier owner of the media. The different regimes since 1990, except Nicephore Soglo and Mathieu Kérékou’s regimes, are used to signing some contracts with the private media whose main function is to undermine the capacities of the latter to divulgate critical information against the former. The contracts of silence use to on one hand mute the medias on all the bad governance issues of the regime and moreover to produce fake news to disorient the public opinions on critical matters. On the other hand, the contracts of silence are signed to oblige media for activating propaganda about the regime’s positive actions. Those strategies of media manipulation culminate to of self-censure.

Concerning the public media, they used to be literally subject to the regime with some episodic reflexes of resistance. The appointment of their managers is also controlled by the government.

¹³⁹ Friedrich Ebert Stiftung, *Baromètre des Médias Africains. Bénin 2018*, Windhoek, 2019, pp. 21-32.

It is not exaggerated to affirm that the media are captured by the political actors. Particularly it is evident with the influence of the ruling parties and the governmental authorities. Generally, the Beninese media work in a precarious economic environment. The economic model of the media does not allow the latter to be economically autonomous and independent. Upon that, all the different governments are at their ease to manipulate the media as they want.

The intellectual class

The political functions of the intellectuals vary according to their choices but also to the appeals of politicians. Among these functions there are those of explaining, justifying, defending the governmental actions and speeches. These functions are different from the official positions of spokesperson held by either a member of the government or an intellectual employed as a civil servant, playing the role of “organic intellectual”. The political function of the intellectuals as the government’s defender is in general a position without any official etiquette. The absence of official etiquette is used as an apparent proof of neutrality and legitimacy. But in fact, these “free” intellectuals are secretly appointed by political and financial interests or exposed to informal pressures. Generally, these intellectuals are paid secretly by some economic actors close to the regime if it is not the regime itself which pays them directly by obscure procedures.

As a result, they are committed to justify the unjustifiable, to defend the indefensible to in a certain manner applaud publicly what they privately hate. They take possession of the public space and the medias, prevent contradictory opinions from emerging.

Progressively, independent intellectuals, capable of critiques become rare. The reality is that most of the intellectuals capable of public interventions are captured either by political and administrative appointments and privileges or by political, judicial threats, harassments and imprisonments. This leads the country in a stage of poverty of the public debate about the crucial issues.

Overall, in a context where the medias are captured yet, if the intellectuals are captured, it goes without saying the public sphere will in a large part be captured and regulated by the private *desiderata* of the captors. This situation of privatization of the public sphere is a peculiar point in the capturing strategy. Why? Because the problem is not the capture itself. The real stake is the publicity of the capture, the possibility for the public opinion to be informed about the affairs and procedures captured. If this possibility is confiscated, the captors can be at their ease. The scandals cannot be revealed. The governance seems to be efficient and irreproachable. If finally, the public sphere is captured – because medias and intellectual class are captured –, meaning the possibility of critique is captured, it becomes obvious that the democracy is captured.

The religious authorities

The religious authorities, for a period of time, have been considered in Benin as the last recourse when the whole society face unsolvable difficulties. Nobody knows neither the colour of God nor the money’s one. So, it has become an evidence without any complex that the moral and religious authorities, except the catholic Episcopal Conference, accept funding from the governmental authorities. And it is difficult to know clearly the amount and the procedures of the funding. So to say there has been an opaque system of funding the religious authorities in Benin.

To such an extent that there is sometimes a kind of hierarchical dependence between the two kinds of authorities. Particularly, since the aftermath of the National Conference, in reason of the famous and exceptional leadership of Archbishop Isidore de Souza at the presidency of the Conference, the religious authority has acquired an incontestable prestige within Beninese society. Thus, practically,

the moral authority of the catholic leaders has been for a long time the last resort which all the political actors used to revert to when it comes to resolve sociopolitical crises. But progressively, the emergence of the evangelic leaders and their decisive influence upon the executive power, particularly under President Kerekou's regime (1996-2006) and moreover during President Boni Yayi's office (2006-2016), instead of reinforcing their moral supremacy, have eroded their authority and legitimacy within the society. As a result, towards the end of Boni Yayi's regime, the religious authorities have lost their respect and prestige. This loss has been accentuated by Talon's regime.

7. The consequences of democracy capture in Benin

The consequences of democracy capture are numerous. Some are more radical than others on the well-being of democracy in Benin.

Democracy capture in Benin is conducting the country into a process of **de-democratization**.¹⁴⁰ That is, apparently the country can be seen as a functioning system following the democratic lines and principles, but in fact, it is deviating on another way, probably either a semi-authoritarian or a very dictatorial one. The institutions, procedures, processes and principles are jeopardized, diverted to an objective far from being democratic. This de-democratizing approach shapes all the compartments of the society, deconstructs and in some extent destroys the fragile pillars of the on-going democratic experience.

Citizens can therefore loose the faith not in democracy but in the ruling leadership. Confusedly, this lack of faith in the ruling leadership can produce a lack of faith and respect to the existing democratic institutions. As a result, this lack of faith in democratic institutions can generate a desperate faith in hostile ideas against indifferently the ruling authorities and the democratic regime. Contestations and protestations can raise. The de-legitimization of the capturing regime becomes plausible with damageable effects on the whole society. Such is, for instance, the case with the conflictual and violent Beninese 2019 legislative, 2020 communal and 2021 presidential elections.

Moreover, the monopoly of the country's major sectors in the hands of a politico-economic oligarchy can be a source of sociopolitical crises in the future. The critiques and claims of citizens persistently focused on the control of the fragile country's wealth in the pockets of a very few part of the population have become a banal thing in Benin. The citizens' perceptions of State and the public good become more and more negative, and generate frustrations amidst the society.

Finally, democracy capture produces a substantial effect: the transformation of citizens' rights into privileges. Democracy capture succeeds in maintaining citizens in commonly shared logic that the policies implemented are not their rights but privileges given to them by the almighty governmental authorities. Then, the public action could not consequently be evaluated on the basis of the responsiveness, and accountability principles but on mendicant and "Good Samaritan" logic. By doing so, democracy capture has the chance to succeed in weakening continuously citizens and more and more strengthening the captors. This strategy follows a logic: the more the citizens are vulnerable even indigent the more the captors have the chance to reinforce their power for a long period of time.

¹⁴⁰ Charles Tilly, *Democracy*, Cambridge University Press, 2007.

8. Recommendations

When moving to the end of this brief study – a much deeper one is necessary – it is important to re-examine the issue of businessmen and women political involvement in low-income countries like Benin. As a citizen, a businessman has the right to elect and to be elected. The issue is how the societies deal with the high probability of confounding public and private interests when they allow businessmen or private groups to confiscate *democratically* the political power in addition to the economic one which is already in their possession.

As we saw *supra* that the fundamental and main consequence of the capture of democracy in Benin is de-democratization, the global solution should be a new, organized and strategic process of *re-democratization* of the country.

Generally, when it comes to this issue, some observers wonder if it would not be better to experiment a new form of governance which mixes dictatorship and democracy. The lessons drawn from Benin's history show that the dictatorial parenthesis from 1972 to 1989 under the auspices of Mathieu Kerekou did not lead the country to development. Moreover, not only the revolutionary regime conducted the country to bankrupt but it also contributed in a large part to the degradation of human rights in the society.¹⁴¹

It is very important to re-strengthening the civil society in its large sense. The civil society organizations in Benin seem to have lost a big part of their capacities and thus their credibility. The focus should be put on the emerging civil society organizations, for some of the oldest are fed up or committed in some compromises with the incumbent regime which has substantially broken them down.

The training of young citizens interested in engaging in public action and politics. Sometimes, it is obvious that some young political actors are willing really to perform in politics. But their lack in many strategic and indispensable domains of knowledge, action and capacities underpins their engagement. The strengthening of the citizen control of public action in order to support the citizens' political maturity. This implies to go beyond traditional civil society organizations and to give individuals skills for, on one hand, being deeply aware of the main stakes of public policies and, on the other, taking action for a better monitoring of the country's governance.

A process of rebuilding the capacities of media is a fundamental issue. Some legislative reforms are necessary on one hand to extract the press infractions from the *Code du numérique*¹⁴² and on the other to set up a policy of public media funding in order to give them a minimum of autonomy and independence. This can help designing a consequent economic model of media development in Benin. Anyway, this re-democratization at stake has to be a re-democratization by food. A veritable re-democratization won't be possible if it is brought in play without taking seriously into account the question of populations' well-being, beginning by food security. A country, such as Benin, where civil and political rights seem to be guaranteed wouldn't be a sustainable democracy if the social and economic rights don't exist, or partially exist.

¹⁴¹ Philippe Noudjènoumè, *La démocratie au Bénin. Bilan et perspectives*, Paris, L'Harmattan, 1999, p. 395.

¹⁴² This *Code* criminalizes the fact for the journalists to publish on digital platforms information that can generate "moral harassment" to other. Upon such a provision, a journalist, Ignace Sossou, was sentenced to 12 months including 6 months of imprisonment.

9. Conclusion

“Time is on the side of democracy”¹⁴³. This assertion sentenced by Samuel Huntington in the early 1990s is not so evident nowadays, either all over the world or in Africa. After three decades of democratization, Benin, the “laboratory of democracy” in West Africa, is entering an era of de-democratization. This de-democratization has been operating in Benin by the capture of key institutions, procedures and processes susceptible to strengthen and consolidate the democracy. The capture takes formal and informal ways. The capture has been taking wider and wider scope, expanding to what can be called as radical capture. The radical or integral capture is the extreme form of capture that jeopardizes and prevents the targets from any capacity of autonomy and independence.

The quasi-totality of democracy’s indicators is in an uncomfortable situation in Benin. The weakness of democratic culture and the cupidity of the sociopolitical elites lead them falling totally in the hands of economic oligarchs who by all means capture for their own purposes the state and democracy. In other words, democracy in Benin seems to be reoriented from the government for all to “the government for few”. Few of Beninese draw the majority of the national wealth, procedures and processes for their own interests. Progressively, an economico-political oligarchy has been emerging in Benin. As a result, many domains of activity and powers are under its control for its interests. Without any exaggeration, one can say that Benin is following the way of radical or integral capture because of the concentration of all the – institutional, political, legal, economic – powers in the hands of a unique actor, the big man: the head of the State. The Benin’s presidential system has itself created the favourable conditions for that. But, the unlimited manipulation of it by the incumbent, on the name of economic development, shows the fragility and the reversibility of democracy, in Benin like in many other places in Africa and all over the world.

Such a situation is a potential source of the society’s radicalization because of the sociopolitical and economic exclusion of the majority of the citizens. Thus, a captured democracy has a chance to become if not an authoritarian regime but at least a *fake democracy*.

¹⁴³ Samuel P. Huntington, “Democracy’s third way”, *op. cit.*, p. 34.

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CHAPTER 4

DEMOCRACY CAPTURE IN

GHANA

E. Gyimah-Boadi



1. Introduction: Democracy Capture¹⁴⁴ in Ghana

Ghana's exceptional democratic progress is widely acknowledged. Since democratic rule was restored in 1993, the country has held seven free and fair elections and thrice transferred power peacefully from one party to the other (in 2001, 2009 and 2016). The country's two main political parties, the National Democratic Congress (NDC) and the New Patriotic Party (NPP) appear to command roughly equal electoral support nationally, ensuring the presence of a strong and credible opposition, complemented by a vibrant independent media and civil society.

However, beneath the surface of democratic governance in Ghana lies a reality of toxicity, dysfunction, corruption and a zero-sum/winner-takes-all politics that enables a narrow group of (mainly party elites and close allies in the domestic private sector) to co-opt, corrupt or pervert the nature of democratic institutions (and processes) to impose policies that work towards maintaining their privileged status. Consequently, Ghana's democracy, as described by Kofi Nsia-Pepra, is "flawed", with embedded corruption, deficient punishment; winner take all politics; monetized politics; dominant executive powers that create 'institutional capture'; moral decadence and a 'culture of unethical materialism'.¹⁴⁵

Notwithstanding the country's success as an electoral democracy, an elite of government leadership, political parties, senior state bureaucrats, media owners and personalities, and private sector operators have systematically appropriated the dividends of democratic governance. They have engineered this degree of appropriation by capturing a number of primary democratic governance and state institutions and processes, particularly, elections, together with the election management body, the Electoral Commission, the legislature, political parties, and the executive branch/ presidency as well as secondary ones such as civil society and the media.

1. Capture of the Electoral Commission and electoral processes

The Electoral Commission and the electoral processes have gained extraordinary prominence in political life in Ghana following the public's fulsome embrace of the ballot box as the sole legitimate mechanism for obtaining political power. They have come to represent the first line of battle in the

¹⁴⁴ Working definition of democracy capture: An ideal democratic political order is inclusive, and the dividends of democratic governance are delivered for the entire society and not a few individuals, groups or elites in that society. Democracy capture occurs when a few individuals or sections of a supposedly democratic polity are able to systematically appropriate to themselves the institutions and processes as well as dividends of democratic governance. It is a subset of the broader phenomenon of state capture. The same sort of actors and stakeholders are involved in both processes; and involves asymmetries of power, with public policies developed and resources distributed to favour elite interests. In a country that is democratic at least in formal legal institutional terms, and in the popular imagination, the capture and control of its democratic institutions and processes is an essential strategy towards the capture of the state and resources it controls. It involves the annexation of strategic institutions to resist democratic transformation that might affect their privileges at the same time as they play on the electorate. This includes co-opting or buying allies in the elite media and judiciary as well as sections of political and civil society. It is typically done through the manipulation of illicit political financing arrangements, that undermine democratic structures and promotes the capture of key political figures. The main effects of democracy capture include leaving a large majority of the people in a democratic country with electoral rights but not economic or cultural parity, who coexist with groups that enjoy concentrated/outsize economic and social power; and distorting democratic politics in such a way that it systematically favours the elites by granting them privileges over a majority of the population – in spite of the façade of popular power. See Rosa Canete et al, "Captured Democracy: Government for the Few (OXFAM, 2018); Transparency International Plain Language Guide, 2009; and Arun, N. (2019, July 15). State Capture: Zuma, the Guptas, and the sale of South Africa. *BBC*.

¹⁴⁵ See Kofi Nsia-Pepra "Flawed Democracy: the bane of Ghana's success in curbing corruption. *ASPJ Africa & Francophonie*, 2nd Quarter 2017, pp62-78; also E. Gyimah-Boadi and H. Kwasi Prempeh, "Oil, Politics and Ghana's Democracy", *Journal of Democracy*, Vol.23 No.3 July 2012, pp. 94-108.

proxy war for democracy and ultimately state capture in Ghana among key political and economic actors. With elections as the main gate through which political parties as well as presidential and parliamentary candidates must constitutionally pass in order to legitimately access political power and related benefits¹⁴⁶, the EC's leadership and actors external to the EC have strived sought to hold the institution and processes over which it superintends captive.

The capture of this primary democratic institution and related processes begins with the incumbent president and governing party packing the leadership of the EC with their own partisans, sympathizers and individuals deemed pliable. The elected Rawlings-NDC government initiated the trend at the founding of the Republic when it drafted into leadership positions at the new Commission individuals that had been handpicked by its quasi-military predecessor, the Rawlings-Provisional National Defence Council (PNDC) administration to lead Ghana's early nineties transition to democratic rule.¹⁴⁷ The Commission was also made to absorb part of the organizational rump and some of the personnel of the erstwhile National Commission for Democracy (NCD), a body that had performed largely anti-multiparty democracy and pro-authoritarian rule political propaganda functions for the Rawlings/PNDC's populist "revolution." Presidents and governing parties coming after Rawlings/NDC have been happy to continue with this practice; they have filled vacancies in the leadership and other strategic positions in the Commission with their own supporters and party sympathizers, typically with zero opposition party and other Ghanaian election and democracy stakeholder consultation.

The practice of packing EC leadership positions with partisans has become more brazen following the retirement of the long-serving chair of the Commission, Dr Afari Gyan. In 2015, John Mahama controversially appointed suspected NDC sympathizer Mrs Charlotte Osei as Chair of the EC – notwithstanding the fact that she was chair of another constitutionally-independent body – the National Commission for Civic Education (to which she had been appointed a few years earlier by the John Atta Mills-NDC ¹⁴⁸), had not distinguished herself in that position, and especially, lacked professional or even activist background and experience in election management in Ghana. And President Akufo-Addo lost no time at all in dismissing Mrs Osei (and her two deputies) from office, following her impeachment for corruption and abuse of office by the Supreme Court in 2018. He proceeded with the appointment of a replacement and two new deputy commissioners -- in a similarly non-consultative fashion - giving the opposition NDC reasonable grounds to be mistrustful of the new election management body and setting the stage for tension in the 2020 election cycle.¹⁴⁹

2. Manifestations of capture of EC and electoral processes

A major tell-tale sign of incumbent party and presidential capture of the EC has been the recurrent tendency for the Commission's election administration decisions and actions to align with the preferences and interests of the incumbent president and party as well as vigorously contest opposition party or non-governmental actor legal challenges mounted against those actions and inactions; and for the incumbent party to take sides with the Commission and also act as its mouthpiece in the frequent disputes and disagreements with the opposition parties. For instance, in

¹⁴⁶ See the Constitution of the Fourth Republic of Ghana, Article 45, 1992 Constitution; Act 451, and Electoral Commission Act, 1993).

¹⁴⁷ This included Dr Kwadwo Afari Gyan, who had been a member of the experts' committee that developed proposals for the draft constitution to be adopted by the Consultative Assembly, and Nana Oduro Numapau who joined Dr Afari Djan as commissioners of the Interim Electoral Commission for the transition elections. See Kwadwo Afari Gyan, *The Making of the Fourth Republican Constitution of Ghana* (Accra: Friedrich Ebert Foundation, 1995); "Ghana's Uncertain Political Opening," *Journal of Democracy*, Vol. 5, No. 2 (1994), pp. 75-86.

¹⁴⁸ Apparently, this was Lawyer Osei's first appointment to public office, and she lacked professional or prior experience in the field of civic and democracy education.

¹⁴⁹ CDD Democracy Watch.

the 2012 election cycle, the main opposition NPP vehemently advocated for the introduction of biometric voter registration and voting, against staunch opposition from the incumbent NDC. The EC reluctantly conceded the demand to undertake biometric voter registration, but only applied it in the ensuing polls. In the 2016 election cycle, the Commission, in alignment with the incumbent NDC, successfully resisted the opposition NPP's call for the compilation of an entirely new voters' register. Ahead of the 2020 polls, the EC has compiled a brand new voters register, which also happens to address a long standing demand of the incumbent president and party. It is instructive to note that the new voters' register was compiled despite vociferous opposition by the NDC and in the midst of the COVID-19 pandemic. Similarly, the EC's arbitrary decision to double the amount of money to be deposited with the Commission by presidential aspirants in the 2020 polls was stridently opposed by the NDC, other minority parties, and independents, but supported by the governing party.

Capture of Ghana's election management body and election processes has not been confined only to actors external to the institution (such as presidents, parties and election material vendors). The Commission's own leadership and other well-placed actors within the institution have staged their own capture of the electoral institution and related processes. The Commission and its leadership enjoy security of tenure¹⁵⁰: 70 years for the chair; 65 years for the two other executive members; all three commissioners together with their non-executive counterparts enjoy decent basic compensation packages, including duty cars, personal vehicles, official housing, etc. And yet, they seem to have converted their constitutional and legal independence as well as operational control over the Commission and electoral processes into opportunities for personal enrichment and aggrandizement. Election quality and integrity, national interest seem to take second place to the individual leader and corporate interests of the Commissioners. They particularly prioritize election administration related decisions and initiatives that entail high expenditure and procurement of equipment and supplies, such as repeated rounds of compilation of voters' register, issuance of voter cards, leadership and senior staff travel abroad, etc.

3. Effects of Electoral Commission and electoral process capture

Despite relatively peaceful and transparent elections, Ghana's elections and electoral processes continue to be dogged by deficits and challenges that imperil the country's democratic project and undermines its ability to yield dividends. Legitimate questions have persisted over the integrity of the voter register, even as each set of EC commissioners have undertaken fresh voter registration exercises and issued brand new voter ID cards, including one with unique biometric features since 2012 and an entirely new register in 2020.

Whether it is purely accidental or designed, the above-noted recurrent pattern of alignment of EC actions and inactions with the preferences of the president and governing party has been a key factor in the tendency for the main opposition party and its supporters to be deeply mistrustful of the Commission's leadership, and suspicious of its actions as well as omissions. It has been a leading cause of the intense tension and violent conflicts that have occurred in elections in the Fourth Republic. It partly explains the repeated episodes of localized partisan violence and intimidation in Ghanaian polls, especially in parliamentary re-runs and by-elections.¹⁵¹

¹⁵⁰ The Commission enjoys considerable constitutional, legal and operational independence (1992 Constitution, Art 46).

¹⁵¹ This includes the run up to the by-elections in Chereponi in 2009 during which an official of Ghana's intelligence service was caught on video firing indiscriminately into an opposition demonstration; and more recently in 2019 during the Ayawaso West Wougon constituency by-election (in which masked men identifying as officials of the National Security Council shot at and assaulted some supporters of the NDC including the NDC Member of Parliament for Ningo-Prampram, Sam George). See the Report of the Emile Short Commission, established by the president to inquire into the violence that occurred in the Ayawaso West Wuogon bye-elections on January 31, 2019.

The report of the Chief Justice’s panel that investigated allegations of corruption and breaches in public procurement laws against Charlotte Osei and her deputies leading to their impeachment and removal from office revealed colourful examples of the EC’s culture of corruption, low integrity and self-service.¹⁵² For example, a deputy Commissioner had been paid GH 5 million Cedis (about \$1M) by the governing party to conduct its internal primaries (an unreasonably high “service fee,” compared to about Six Hundred Thousand Ghana Cedis/\$120K paid by the opposition NPP for the same service); and the mode of payment for the service was cash (reportedly carried in black plastic bags). The same impeachment panel indicted the EC Chair, Mrs Osei for making multi-million-dollar procurement decisions unilaterally, and in some cases significantly increasing authorized procurement levels without official approval -- flagrant breach of applicable laws and procedures. In another instance of self-service, the EC leadership and senior staff made a case for funding to enable them to register Ghanaians serving in official positions outside the country in 2012. They travelled to different cities around the world, only to register 750 Ghanaians on duty tour or government scholarship (mainly embassy staff and students on scholarship).

The Commissioners appear to have mastered the art of staying in the good grace of the governing party and president in order to take full advantage of opportunities for graft and self-dealing from the procurement of multi-million-dollar election infrastructure and other supplies in each election cycle. This is a plausible cause of the unjustifiably high cost of Ghanaian elections. The cost per voter in Ghana’s 2016 polls was \$12.3, compared to an average global figure of \$5; Nigeria’s \$9.33 in 2015; Tanzania’s \$5.16 in 2015; and Uganda’s \$4 in 2016.

The culture of EC self-preservation and practice of mutual back-scratching between the EC and president/governing party has seen the EC condoning successive presidents and governing parties in gerrymandering of constituency demarcation. Rather than establish and apply transparent and verifiable criteria for the creation of new constituencies, the EC has tended to take the easy road of converting administrative districts (District/Municipal and Metropolitan Assemblies) created by the president into parliamentary constituencies. This has introduced an element of gerrymandering in the creation of new constituencies that typically favours the president’s party. The president creates new administrative districts in accordance with the constitution and law, typically in the election year; then the EC converts the new districts into constituencies – citing the statutory prohibition against having a district that straddles two constituencies. The opacity in constituency creation criteria has also caused costly rises in the number of MPs in the Ghanaian parliament from 200 in 1992 to 275 less than three decades into the 4th Republic, with its cost efficiency implications.

The absence of objective standards for constituency creation has left a persistent representation gap in the Ghanaian legislature and democracy – with the ratio of the size of the population represented by MPs highly uneven. Thus, with a voter population of 149220, the MP for the most populous constituency in Ghana, Ketu South, represents nearly 10 times more voters than those represented by the MP for Sekyere Afram, the least populous constituency.¹⁵³

The EC’s culture of self-preservation and taking the easy way out has also manifested in the repeated failure to impose punitive sanctions against breakers of election regulations (e.g., multiple registration, multiple voting, ballot box snatching, and intimidation and/or violent actions at polling stations). Worse still, the Commission’s fecklessness is partly responsible for the growing influence of

¹⁵² See Report of the CJ’s panel on the impeachment of the EC Chair and two deputies.

¹⁵³ The three largest constituencies in Ghana by voter population are Ketu South, 149,220; Dome Kwabenya, 144,624; and Ashaiman, 142,720. The three smallest are Sekyere Afram Plains, 15,111; Banda Kabrono, 17,279; and Salaga North, 17,487.

money in Ghanaian elections and overall monetization of the country's politics:¹⁵⁴ It has neglected to enforce the few party and election campaign finance rules on the books, and thereby allowed parties and candidates that buy votes with likely ill-gotten funds. The EC has also contributed to the lack of transparency and accountability in political party and candidate election campaign financing and vote-buying in Ghanaian elections by its laxity in the implementation of the requirements in the 1992 Constitution and the Political Parties Act that requires the parties to furnish the EC with audited accounts annually.

Some EC actions and inactions have resulted in the disenfranchisement of some Ghanaians. They include unnecessarily burdensome proof of eligibility to vote requirements¹⁵⁵ and time-consuming voter registration arrangements. For instance, the EC has typically ordered a fresh round of voter registration in every election year, with separate and randomly selected dates for registration and verification/authentication of registration. The tendency on the part of the EC to avoid displeasing the president and governing party explains its failure to implement a law dating from 2000s (Representation of the Peoples Amendment Act) mandating that arrangements are made to enable Ghanaians in the diaspora to vote in general elections.¹⁵⁶

In short, thanks to the capture of the EC and election processes by the political establishment and leadership of the institution, the quality of Ghanaian elections has hardly improved beyond the significant advances in election management in the mid-nineties,¹⁵⁷ and the overall contribution of successive elections to democracy quality is increasingly doubtful¹⁵⁸.

4. Political parties in democracy capture in Ghana

Ghana has evolved into a strong de-facto two party democracy in which the National Democratic Congress (NDC) and New Patriotic Party (NPP), who have taken turns in government and in opposition, are overwhelmingly dominant.¹⁵⁹ This has guaranteed highly competitive elections and fairly strong opposition to put the government on its toes. There is also a plethora of smaller parties together with independent candidates (mainly the Convention Peoples Party, National Convention Party and other so-called "Nkrumahist" parties), who hardly win more than 5% of total the presidential votes and parliamentary seats.

Indeed, to be a real player in Ghanaian democratic politics, you have to come through a political party and especially pick up a party executive position at the polling station, constituency regional, and national level. That position is then used to play kingmaker in party primaries and parliamentary and

¹⁵⁴ See Kwame Ninsin, Ninsin, Kwame A., 'Issues in Ghana's Electoral Politics', 2016, 1–217

<<https://doi.org/10.2307/j.ctvh8r21x>>; Money and Politics: 'The Challenge of Democracy in Ghana (Owusu 2009) Maxwell Owusu, Money and Politics: 'The Challenge of Democracy in Ghana (Owusu 2009), Cantonments, Accra: Institute For Democratic Governance.

¹⁵⁵ In the latest edition of voter registration exercise for the 2020 election conducted in the midst of the COVID-19 pandemic, registrants were required to produce a national ID card or valid passport as proof of citizenship (though most Ghanaians lack a passport and less than a third were covered by the ongoing national identification process) or two Ghanaians who are already registered to vote to vouch for them.

¹⁵⁶ In 2012, the Electoral Commission solicited funds and made a great to register serving officials outside the country. They this exercise and the need for it, only to register 750 service people (embassy staff, Ghanaian students abroad) worldwide.

¹⁵⁷ This included the introduction of transparent ballot boxes, allowing party agent and independent observer presence at polling stations, polling station vote counting, etc.

¹⁵⁸ Paul Nugent, Heinz Jockers and Dick Kohnert, "The Successful Ghana Election of 2008: a convenient myth?" *Journal of Modern African Studies* 48(1), 2010 95-116.

¹⁵⁹ See Whitfield, Lindsay. 2009. "*Change for a Better Ghana: Party Competition, Institutionalization and Alternation in Ghana's 2008 Elections.*" *African Affairs* 108 (433): 621–641.

presidential primaries. As constituency, regional and national party executives, they mobilize the resources necessary for sponsorship of delegates in the respective primaries and congresses of their parties as well as the election of the party's presidential and parliamentary aspirants. This includes financing the party's presidential and parliamentary election campaigns, and co-opting election management and state justice administration officials as well as media and relevant civil society.

Indeed, most individuals take membership or affiliate with a political party so they can enjoy the spoils of political office that comes with it – especially with victory in internal elections or general elections. The extent to which party politics is a major avenue to wealth and influence in Ghana today is reflected in sudden wealth that individuals associated with the NDC and NPP as leaders or senior activists at all levels have come to display, regardless of pre-political career in business or profession.

Some Ghanaians appear to acquire top party executive positions or manipulate their way to parliamentary or presidential candidacy within a political party in order to insure themselves, politically against criminal prosecution. It has become commonplace, since the first electoral turnover of 2001 for party leadership and activists to mount vociferous defence, including the deployment of party-affiliated propagandists and media as well as lawyers, for senior members and financiers of the party caught in the criminal justice system, irrespective of the alleged offense.¹⁶⁰ At least one indicted politician contesting for a parliamentary seat in 2016 explicitly canvassed for votes on the grounds that she was likely to be prosecuted and jailed if she were not an MP and her party was not in power.¹⁶¹ Politicising the prosecution and defence of politically-exposed criminals has compromised the country's quest for probity and accountability of its leaders.

Political parties and especially their executives and supporters, however, have also been key players in the perversion of Ghanaian democracy. Winning elections, especially the presidential contest, and capturing the state for partisan and group benefits is their principal focus. And to achieve this, the NDC and NPP single-mindedly devote themselves to the establishment and sustenance of clientelistic linkages between their respective parties and voters in intra and inter-party electoral contests. The two main parties are the principal mobilizers of ethno-regional and other sectarian voting blocs for their respective parties and presidential candidates – with the NPP typically mobilizing the votes of Twi-speaking (Asante, Akyem, Kwahu and Akuapem sub-groups within the pan-Akan group) Ghanaians; while the NDC mobilizes Volta region, Ewe and Ga-Adangbe-speaking voters.

The leadership of the two parties are responsible for the usually successful get-out-to vote mobilization programs on the voting days in elections in the Fourth Republic. But they are also enthusiastic facilitators of their respective party and candidates' vote-buying, mobilization and deployment of violence and intimidation in internal and inter-party elections. The pro-Rawlings thugs' violent assault against the governing NDC's firebrand women's organizer Frances Assiam and other perceived "internal enemies" at the party's delegates' congress in the 2005; repeated violent clashes between supporters of the NPP presidential candidate Akufo-Addo and those of the then party chairman Paul Afoko, culminating in the assassination of the party's Northern Region chair and ardent Akufo-Addo loyalist Adams Mahama in May 2016, the fatal shooting of a member of the HAWKS, an NDC-affiliated vigilante group member at the party's regional executives' meeting at Amakom in

¹⁶⁰ Examples include the trial and conviction of former ministers Sipa Yankey, Kwame Peprah, Ibrahim Adam for willfully causing financial loss to the state in the Aveyime rice project; the judicial probe into Kufuor-NNP officials Wereko Brobbey, Kwadwo Mpiani's management of state funds allocated for the celebration of the 50th anniversary of Ghana's independence in 2009; the prosecution and attempt to retrieve state funds illegally paid to NDC financier Alfred Woyome since 2012.

¹⁶¹ Former president Rawlings has publicly complained about the prevalence of this phenomenon in the current national executive team of the party he founded, NDC -- individuals who appeared to be only trying to buy protection from prosecution for crimes committed while in government office.

Kumasi in February 2019¹⁶², etc are some of the more dramatic examples of party leadership orchestrated electoral violence in Ghana's 4th Republic.

Party executives at all levels become involved in facilitating the diversion of state funds and other resources into party coffers (and their own pockets) to service the party's patronage networks, especially if their party wins the presidential polls and becomes the governing party. They are also almost solely responsible for the increasing monetization of Ghanaian politics -- taking advantage of Ghana's very weak and poorly enforced political party and campaign financing regulations, to mobilize funds for party and candidate election campaigns, some of which are increasingly coming from highly questionable, and possibly, illicit sources. It is instructive to note that, like all Ghanaian political parties, the NPP and NDC (who have taken turns serving in government) hardly derive their revenue from membership dues or even legitimate party-run business investments. But, once in power, they never lack resources and become particularly flush with funds.

The growing prominence in both the NDC and the NPP of "foot soldiers"—activists who offer unquestioning in-kind support to the party and its candidates during election season and, in turn, extort private payoffs in return for their continued loyalty—has added a new dimension to the politics of patronage. The spectacle of impatient foot soldiers of the party in government using extra-legal means to wrest local control of income-generating public facilities (municipal parking lots and pay toilets, for example), local council, national health insurance offices, etc from their appointed custodians (who are invariably tagged as supporters of the rival party) has become commonplace, especially during a changeover in government. This "tribalization" of party politics is distorting democratic institutions and processes, deepening corruption, degrading public administration, especially by promoting the appointment of incompetent political hacks to important government jobs, turning elections into proxy wars for state capture, etc. The NPP and NDC and their respective supporters have turned the country's electoral campaigns into "do-or-die" affairs between the NPP and NDC, leading some observers to note the increased vote-rigging along ethnic lines and warning that NDC and NPP electoral misconduct could delegitimize the outcome of future elections. In short, multi-party politics whose animating force is the "sharing of the national cake" and treatment of state institutions and resources as nothing more than the spoils of politics is undermining public confidence in Ghana's democratic and national development project.

Representation is severely undermined by the strong patronage networks that prevail in NPP and NDC structures and operations. Participants in party primaries and congresses are typically sponsored by the party or individual patrons. And it is relatively easy for contestants to bribe delegates with their own or the party's resources in the NPP and NDC parliamentary primaries, which involves a few largely handpicked local delegates (so called "constituency polling executives) (the numbers range from under 100 to over 600 delegates per constituency). No wonder Ghanaian MPs are able to get away with spending very little time in their constituencies, and not listening to the concerns of voters (even when they do visit) – as Martin Acheampong correctly notes.¹⁶³ MPs only need to be in the good books of their respective parties to win the parliamentary primaries and become MPs, especially in the NPP and NDC's safe seats.

The involvement of the governing party's national chair and general secretary in cabinet under NDC and NPP administrations completes the circle of fusion of the governing party with the government

¹⁶² It is noteworthy that the party's National Chairman Samuel Ofose-Ampofo and General Secretary Samuel Ofose-Ampofo were both at that meeting.

¹⁶³ Martin Acheampong, "Why members of parliament in Ghana can get away with ignoring voters" in *The Conversation* Oct 5, 2020.

and the state. Most importantly, it facilitates party and government leadership's capture of the nation's democratic political processes, decision making and resource allocation.

5. The president/executive branch in democracy capture in Ghana

The presidency, which sits on top of the power pyramid in Ghana, practically encompasses the executive branch and state as well as quasi-state and parastatal agencies, including state regulatory and commercial bodies; state boards and trusts; state security agencies, etc). In addition, specially targeted initiatives to fund SMEs, social services (education, health insurance), youth employment, promote provincial/local industrialization and development as well as national trust funds are typically located in the Office of the President.

With power legally and constitutionally concentrated in the hands of the executive branch in general, and especially the president and governing political party, it comes as no surprise that the presidency is the most coveted prize in Ghanaian political contestation.

The behaviour of the president, presidency, ministers, key executive appointees and governing parties under NDC and NPP administrations has been remarkably convergent/similar. Immediately upon achieving victory in the presidential polls, the attention of the president-elect and incoming governing party is intensely focused not necessarily on what to do to deliver socio-economic development and effective governance BUT on mobilizing the sort of resources they would need to sustain themselves in power politically, and particularly enhance their chances of winning the next general elections, and how to position themselves to achieve this ultimate goal.

It typically begins with the installation of a chief of staff at the presidency who serves the pivotal function of coordinating the presidency, executive branch and governing party's democracy capture schemes and activities. Under successive administrations, the leadership of the Office of Chief of Staff, such as Nana Ato Dadzie (Rawlings-NDC), Kojo Mpiani (Kufour-NPP), Martey Newman (Mills-NDC), Julius Debrah (NDC-Mahama) and Fremah Opere (Akufo-Addo-NPP) are some of the most powerful politicians in the country. They literally decide who gets what, when and how from this vast central warehouse of state economic, bureaucratic and symbolic resources.

Working closely with the governing party's leadership, the president and office of chief of staff packing key loyalists, supporters and allies as well as family members in the leadership of ministries (especially ministries that control allocation such as finance, and the largest budgets such as education, health, works and housing, transport infrastructure, interior etc); and strategic state and quasi-state bureaucratic and security sector institutions, commercial enterprises, marketing boards, trusts, regulatory commissions and trust funds (such as the Ghana Cocoa Board, Ghana National Petroleum Commission, Ghana Ports and Harbour Authority, Tema Oil Refinery, Social Security and National Insurance Trust, Ghana Education Trust Fund, etc). The governing party-linked leadership of public and quasi-public and executive branch institutions, in turn, serve as transmission belts in the distribution of patronage. They service government and governing party's clientelist networks through kick-back schemes, including the award of hyper-inflated state supply and construction contracts, steeply discounted (heavily under-priced) state mineral, forestry and land concessions, etc to handpicked private sector allies. From the same vantage, they perform crucial downstream functions in the Ghanaian president and governing party's democracy and state capture schemes: financing the president and governing party's hugely expensive internal elections and general election; facilitate employment for party foot soldiers/supporters.

Executive branch capture of Ghanaian democracy doesn't end with capture of executive branch positions. It also includes the annexation of public policy and legislation. In Ghana, the president or minister acting on his behalf rides roughshod over parliament in setting the national legislative agenda, timetable, and effectively the initiation and passage of legislation. A strong party whip system and presence in parliament of MPs who are also ministers guarantees the passage of bills and approval of international loan and contract agreements (typically laden with mark ups/ profit for the presidency, executive appointee and governing party) the government submits to the House.

The executive branch/presidency also serves as a money-making/wealth acquisition facility for the president, presidency, ministers, other executive branch appointees and their cronies as well as governing party¹⁶⁴. From that vantage, they cook crooked kickback-rich deals with private parties by exploiting programs established to address crucial national problems such as youth unemployment,¹⁶⁵ urban waste management¹⁶⁶, erratic power supply/"dumsor";¹⁶⁷ national emergencies, and programs responding to national passions such as international football tournaments, particularly the World Cup¹⁶⁸ and Africa Cup of Nations; Ghana@50 celebrations. The latest example of this form of executive branch capture is the award of bogus "judgement debts" against the state in favor of individuals and private companies alleging some form of damage by the state, who then turn around and share the proceeds with the well-placed government-linked politicians, incumbent government and party officials.¹⁶⁹

The constitutional authority and vast patronage resources at the disposal of the president and executive branch have also been typically used to blunt parliamentary oversight. Appointing ministers from parliament to ministerial positions far in excess of the threshold set by the constitution, appointing MPs to remunerative positions as chairs and members of state boards, councils, and trusts, compromises their ability to exercise their oversight function.

Presidents have used the same powers to shield presidential and executive appointees, supporters, and financiers who steal or divert public funds for their own and other partisan use. When the Mills administration transitioned into the Mahama administration, this practice continued. In 2014, the minister for youth and sports, Elvis Afriyie Ankrah, facilitated the attendance of over 500 NDC foot soldiers to the World Cup tournament in Brazil; supervised the inflation of the budget;

¹⁶⁴ Special sweetheart deals from the president to friends and family members include the Hotel Kufuor deal; friend of president Mahama, Roland Agambire/LRG/Asontaba youth in guinea fowl and laptops to students supply schemes; Ibrahim Mahama under Mahama-NDC; president Mahama's brother Ibrahim Mahama being granted a concession to mine 58% of Ghana's bauxite deposits a few days prior to the exit of his brother from power; Adam Mahama, close family member of President Mahama's involvement in the alleged bribery by the Airbus company to influence Ghanaian decision makers in the purchase Airbus airplanes; president Akufo-Addo's close family members (Gabby Otchere Darko, Ken Ofori-Atta) and their associates at the center of the Agyapa Royalties Ltd deal in which the government has allocated the rights to 75 percent of royalties from several gold mining leases to a company known as Agyapa Royalties Limited apparently provide immediate funding to the state for (unspecified) developmental projects.

¹⁶⁵ Programs to promote youth employment and supply laptops to students in tertiary educational institutions by Roland Agambire/LRG/Asontaba under Mahama-NDC.

¹⁶⁶ Municipal authority/local government sanitation and refuse collection services to Country and Waste Company Ltd under Rawlings/NDC; and to Joseph Agyapong/Jospong Group under Kufuor-NPP; Mills and Mahama-NDC; and Akufo-Addo-NPP;

¹⁶⁷ Ministry of Energy, The Committee to Restructure the Build, Own, Operate and Transfer Agreement Between the Government of Ghana (Represented by the Ministry of Power) and Africa&Middle East Resources Investment Group LLC, 2017 <<https://www.ghanacelebrities.com/wp-content/uploads/2017/03/AMERI-FINAL-REPORT-160217.pdf>> [accessed 13 November 2020].

¹⁶⁸ See Manasseh Azure Awuni, *The Fourth John* (2019) pp. 226-231 -- for a chronicle of the scandals around Ghana's participation in the 2013 World Cup soccer competition; also the report of the Justice Senyo Dzamefe Commission reports; and the 'White Paper On The Report of the Commission Of Inquiry Into Matters Relating to the Participation of the Black Stars team in the World Cup Tournament in Brazil 2014', 2015.

¹⁶⁹ Presidency of Ghana, 'White Paper on the Report of the Commission of Inquiry into Payments from Public Funds Arising from Judgement Debts & Akin Matters (C.I. 79/2012', 2012, 1-107.

misappropriated funds; and inflicted international humiliation on Ghana by facilitating the airlifting of £1.76m in cash to Brazil ostensibly to clear unpaid allowances and bonuses of the Black Stars players who were boycotting the games over the outstanding bills. His only “punishment” was to be reshuffled out of the sector ministry to the Flagstaff House/seat of government as minister of state. A government whitepaper on the report and recommendations of a presidential commission established to investigate the world cup saga vetoed almost all the adverse findings and punitive sanctions recommended by the commission against Elvis Afriyie Ankrah and other NDC members.

The Nana Addo government has continued this practice of shielding appointees and cronies from credible investigation and punishment. Internal investigations into scandals involving president Akufo-Addo’s appointees (e.g., disappearance of 600 litres of fuel the Bulk Oil Storage company (BOST), ministry of sports; disappearance of excavators confiscated by the inter-ministerial committee on illegal mining; and visa fraud at the sports ministry, etc have all ended in some form of official exoneration of those appointees. In 2019, a presidential staffer and secretary to the Inter-ministerial committee on illegal mining, Charles Cromwell Bissue, was caught on tape taking a bribe from an undercover agent in an Anas Aremeyaw Anas investigation dubbed Galamsey Fraud. The bribe was allegedly set up to secure Mr Bissue’s help in circumventing governments efforts to stop illegal mining.¹⁷⁰ More than a year on, the office of the Special Prosecutor is still investigating the allegation of bribery against Mr Bissue, an investigation he believes will also exonerate him.

6. Parliament, Members of Parliament (MPs) in democracy capture

The Parliament of Ghana and MPs take the second prize in the country’s democracy capture games. Constitutionally responsible for representation, law-making and executive oversight, parliament and MPs are principal players in democratic governance in Ghana. As part of its oversight mandate, the constitution grants committees of parliament the power to investigate the activities of ministries and departments. This power includes the ability of committees to enforce witness attendance, compel the production of documents, and issue requests to examine witnesses abroad.¹⁷¹

The legislative assembly has certainly delivered on some of its formal obligations under the Fourth Republic. Notably, it has helped to move law-making in Ghana from the crude decree mode, including those with retroactive effects of the Rawlings-Provisional National Defence Council (PNDC) era (1981-92) to a more deliberative and transparent process of law making. The House has contributed positively to executive branch oversight through the process of vetting nominees of the president to various positions within government and high-level public office, including supreme court judges and ministers of state; as well as undertaking a review of the Auditor General’s annual reports. And it has made government more formally representative in terms of geographical spread (275 Constituencies across the country) and political party representation (mainly NPP and NDC).

However, the Ghanaian parliament and parliamentarians are key actors in the capture of Ghana’s democracy – both as victims and as perpetrators. The House, its leadership and nearly all its members have been appropriated by the president and governing party or at least the political parties on whose ticket they got elected. And the parliamentarians themselves seem to have appropriated the institution and the processes under their care for personal gain, self-gratification and personal aggrandizement.

¹⁷⁰ ‘Presidential Staffer Denies Bribe Taking Allegations In Anas’ Galamsey Video’ <<https://www.modernghana.com/news/919025/presidential-staffer-denies-bribe-taking-allegatio.html>> [accessed 16 October 2020].

¹⁷¹ *The Constitution of the Republic of Ghana*, 1992, I, p. article 103 <<https://doi.org/10.2307/20455798>>.

Key manifestations of Ghanaian MP and parliamentary capture include the rubber stamping of executive branch initiatives, proposals and draft international agreements; near abdication of the duty to scrutinize and independently review proposals and bills presented to the House; and perfunctory review and casual approval of draft loan agreements. Examples of parliament/MP superintendence over the approval and passage of dubious and questionable executive branch initiatives, proposals, draft international agreements, loans, and financial agreements include the parliament of Ghana approving a loan sum of \$98,869,000 to finance electrification projects in the country in 2015 – a loan agreement presented to parliament under a certificate of urgency on its last day of sitting, and approved without due diligence on the same day;¹⁷² the controversial Agyapa deal passed by parliament on Friday August 14 2020, the last day before parliament went on recess (The deal which Ghanaian civil society as well as the Economist magazine and Financial Times criticized as lacking in transparency and value for money, included provisions for shareholders of Agyapa Royalties Limited, an offshore company located in a tax haven (Jersey) to keep future gold revenues); granting questionable tax waivers, including a recent one in which Meridian Port Services was given a \$832 million tax waiver for a \$1.5 billion investment (representing a 55% tax waiver for each dollar invested) in addition to exemption from paying the national health insurance levy for its workers. A tax waiver of \$23.9 million for the Pullman Accra City Hotel and serviced apartment project by Platinum Properties limited (a company reportedly owned by the brother in law to the president), which was decried by the NDC as “nepotistic self-seeking tax waiver” was also given parliamentary approval.¹⁷³

Not only has the Parliament of Ghana abdicated its responsibility to oversight the executive branch and protect the public purse, it has practically blocked investigations into various public scandals, national disasters, misuse of emergency relief funds, and/or just engaged in more performative rather than scrutinous investigations. It refused to investigate allegations (subsequently confirmed) of Rawlings receiving \$5M from General Abacha in the late nineties; it failed to independently investigate the violent encounters between NDC and NPP supporters in the Ayawaso West Wuogun by-election in 2019 (necessitated by the death of the MP for the constituency), in which national security personnel physically assaulted an NDC MP during an altercation.¹⁷⁴ In 2017, Parliament set up a committee to investigate accusations of bribery made by the MP for Bawku Central Mahama Ayariga and some minority members against the president’s nominee for the energy ministry. Boakye Agyarko, the Energy Minister designate, was alleged to have paid GH¢3,000 to each minority member of the Appointments Committee of Parliament to facilitate his smooth and speedy confirmation as Energy Minister. The Committee instituted by the speaker of parliament to investigate this allegation (the Joe-Ghartey Committee), made no indictments; instead it demanded an apology to the House from Mr Ayariga. Similarly, the Speaker of Parliament, Professor Mike Oquaye, turned down the request from members of the House to invoke Order 191 of the Standing Orders of Parliament to initiate a probe into allegations of impropriety against erstwhile government officials in February 2017– arising from allegations that the Airbus company had paid bribes to top officials in the Mills-Mahama Administration for them to facilitate the sale of the company’s Airbus C295 planes to the Ghana government. He chose instead to defer to the Office of the Special Prosecutor.

¹⁷² This was done despite the involvement of Smarttys, a company linked to governing party insiders, that had been involved in an earlier public procurement scandal in which it had been paid an outrageous sum of money for re-branding state buses with president Mahama’s posters, leading to the resignation of the sector minister).

¹⁷³ ‘Akufo-Addo Gives His in-Law GH¢136.7 Billion Tax Exemption’ <<https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Akufo-Addo-gives-his-in-law-GH-136-7-billion-tax-exemption-852712>> [accessed 16 October 2020].

¹⁷⁴ Note that a government committee to investigate the altercation (in which most victims belonged to its main opposition NDC), the Emile-Short committee, ended its probe without any clear indictments; and the government rejected significant portions of their findings. It notably dismissed the recommendation to prosecute Mohammed Sulemana, the national security official caught on video tape slapping the opposition NDC MP, Sam George.

Ghanaian MPs have a penchant for self-service, self-dealing and careerism. They enjoy relatively high salaries and lavish perks, making them reportedly among the top five highest paid MPs in the world (the rest are Nigeria, Kenya, Indonesia and South Africa).¹⁷⁵ They also receive subsidized/interest-free loans for their personal housing and purchase of cars; committee allowances; lavish pension packages, etc largely determined by themselves. And yet, the Ghanaian legislators are notorious for using their perch as MPs to help themselves, children, relatives and friends to receive public benefits such as tractors for farmers in the savannah belt in 2009; and scholarships to pursue studies abroad (while in service).¹⁷⁶ On top of this, MPs (and parliamentary service staff) demand enhanced emolument/ex-gratia, and preferential treatment. Indeed, MPs have recently successfully lobbied for the state to provide them with armed police escorts following the death of the MP for Mfantseman on 9 October 9 at the hands of armed robbers – despite the fact that they are paid 10% of gross salary to take care of their personal security. In addition, anecdotal reports of MPs and parliamentary clerks extorting bribes from government, NGO and private sector sponsors of draft bills and subsidiary legislation submitted to the House, and applicants for tax exemptions, which is constitutionally entrusted to Parliament. And what’s worse, successive parliaments of the Fourth Republic have resisted all attempts to reform the existing public office-holder asset disclosure regime to improve verifiability and inclusiveness of the declarations made by affected public office holders, including MPs – thus depriving the nation of a vital instrument for curbing political corruption.

The House/MPs have on their own accord or in connivance with other public or private actors subverted the public interest and perverted the cause of democracy in order to maximize their interest or that of their patrons by giving legal backing to poor/anti-developmental international agreements and loans; colluding with ministers and investors they front for to allow agreements with dubious/anti-developmental clauses to pass through parliament and accepting bribes/special treats from the executive branch and other sponsors of bills and LIs.

7. Captured secondary democratic institutions

State commercial/industrial enterprises: State owned enterprises (SoEs) are some of the most important – and lucrative assets in the modern Ghanaian economy and politics. As such, they are prime targets for capture in the democratic political setting. Presidents and incumbent parties convert the SoEs into political assets for rewarding their loyalists, who are appointed to state enterprise CEO and board director positions. Presidents in the Fourth Republic are increasingly appointing not only the CEOs and Board chairs of state enterprises, but also their deputies as well as other ordinary members; and they are almost exclusively drawn from the ranks of the president’s party. It is also instructive to note that it has become commonplace for the CEOs of state firms to use their positions as launchpads for political careers as MPs or national level party executives.

The partisan SoE leadership, in turn, oversees the skewing of staff recruitment in favour of presidential and ruling party loyalists, and channelling of the corporate funds and other resources into party and

¹⁷⁵ Awich, Luke, ‘New House Allowance Puts MPs’ Salary Way above World Super Powers’, The Star, 2019 <https://www.the-star.co.ke/siasa/2019-05-11-new-house-allowance-puts-mps-salary-way-above-world-super-powers/>.

¹⁷⁶ See MyJoyOnline.com, ‘CHRAJ: MPs, Others Benefited from Tractor Facility’, 2010 <<https://www.myjoyonline.com/news/chraj-mps-others-benefited-from-tractor-facility/>> [accessed 11 November 2020]; A special audit undertaken by the Auditor General of Ghana on the Ghana Education Trust Fund (GETFund) Scholarships between 2012 and 2018 made stunning revelations about top- state officials and parliamentarians from the two major political parties grabbing these scholarships meant for deserving but needy students for themselves. The list included the MP for Manhyia Constituency Mathew Opoku Prempeh and Sarah Adwoa Safo, MP for Dome Kwabeny receiving \$24000 and \$30,000 for short courses at Harvard University. See ‘Napo, Adwoa Safo, Baffour-Awuah Fingered in GETFund Scandal’ < www.ghanaweb.com/GhanaHomePage/NewsArchive/Napo-Adwoa-Safo-Baffour-Awuah-fingered-in-GETFund-scandal-875173> [accessed 19 October 2020]; Ghana Audit Service.

presidential coffers for use in election campaigns. That's the only way to understand why, for instance, in Ghana, all current SoE CEOs, board chairmen, and in some cases, their deputies are senior figures in the ruling New Patriotic Party, including its current national chairman and former campaign manager.¹⁷⁷ State-owned firms and industries, ostensibly created to prevent the elite from dominating the economy, have instead become the dominion of the political elite.

State Boards/SOE and state commercial authorities are abusing their right to enter into loan and supplier service agreements and contracts without parliamentary approval (following a recent Supreme Court of Ghana ruling.¹⁷⁸ This has opened the floodgates for Ghanaian commercial enterprise and marketing boards, mainly led by politicians to secure expensive foreign loans that is rigged to enrich themselves and their political party, while saddling the nation with debt. In addition, governing parties are using the SOEs as havens where they pack partisan hacks with protected tenure that could last beyond the term of office of the appointing president.

The media: Ghana has seen a vast expansion in the media sector and opportunities for political expression. Reporters Without Borders ranked Ghana the 30th best country in the world for press freedom in 2020 (albeit a decline from previous years); and Freedom House has given Ghana its best rating in the area of press freedom every year since 2002. In addition to the country's numerous newspapers, broadcast outlets have proliferated, multiplying from a single government-controlled television and radio station in 1995 to more than 608 licensed private commercials, 12 community and campus FM radio stations and thirty-six (five of which are state-owned) television operators in 2020. And as many as fifty two Internet service providers and at least twelve mobile-phone companies serve most of the country's population.¹⁷⁹ Ghanaians now have unprecedented access to uncensored news, commentary, and opinions from multiple sources, including international news outlets. Every community in the country is now served by multiple broadcast outlets, the most popular of which carry programming in local languages.

However, the media has been a crucial target of political party and business elite capture thereby significantly undermining the realm's ability protect the public interest and safeguard the country's democracy. The process of control and co-optation of the media began under the Rawlings-NDC administration has continued and assumed greater intensity from one administration to another. Politicians, parties and politically-aligned private investors taking ownership of media houses or prominent media practitioners has become commonplace.

In the early years of the 4th Republic, the Rawlings-NDC administration seemed to want to continue with the state's monopoly over the media that prevailed in the quasi-military Rawlings-PNDC era. When provisions of the 1992 constitution would not allow full media monopoly, the newly-elected government turned to the creation of political party-aligned media. The initial licenses for the operation of private commercial radio stations in Ghana in the 1990s tended to favor individuals associated with Rawlings or the NDC – Joy FM and Gold FM. This practice has continued in one form or another under successive administrations: licences to stalwart NPP parliamentarian and businessman Kennedy Agyapong to operate Net 2 Radio and TV stations under Kufuor-NPP;

¹⁷⁷ Freddie Blay, National Chairman for the NPP, and Board Chairman of the Ghana National Petroleum Corporation (GNPC) has been accused officially by the GNPC CEO of directly interfering in the day to day operations of GNPC and of using his "position as chairman of the ruling party to force your way through on matters which must be handled professionally. *Freddie Blay and K.K. Sarpong Turn GNPC into a Boxing Ring*. (2019, February 18). Retrieved from <http://www.peacefmonline.com/pages/local/news/201902/375702.php>

¹⁷⁸ See *Klomega v Attorney General and Others* (J1/10/2012)[2013] GHASC 134 (16 January 2013) | Ghana Legal Information Institute; and *GNPC wins court case filed by MPs – Citi Business News* [citibusinessnews.com > gnpc-wins-court-case-filed-mps](http://citibusinessnews.com/gnpc-wins-court-case-filed-mps) (2015)

¹⁷⁹ Source: <https://www.nca.org.gh/industry-data-2/licenses-and-authorisations/>, <http://www.ispquicklist.com/internet-service-providers-list-in-Ghana.aspx>, <https://afritechnews.com/top-7-internet-service-providers-in-ghana/>

establishment of Radio XYZ by the late politician cum businessman and close associate of the late president Mills, David Lamptey; Class Group of media companies owned by businessman Seidu Agongo, a close political ally of former president Mahama and NDC; and more recently, Asaase owned by NPP stalwart, cousin of president Akufo-Addo (widely perceived as the de-facto prime minister) Gabby Otchere Darko etc.

The focus on the broadcast media as targets of capture has been particularly intense. Powerful individuals, many with political ambition and “political money,” have come to see the acquisition of radio and TV licenses as a means of expanding their media footprint and to facilitate political control.¹⁸⁰ In addition, the National Communications Authority, the state body in charge of radio and TV frequency allocations, whose CEO, board chair and several other members are typically appointed by the president, has tended to grant more broadcast licenses in election years. And the allocations have tended to favor individuals aligned with the incumbent president and/or governing party.

Ghana’s politically exposed media establishment also includes individuals who are well known as NPP or NDC insiders and mouthpieces such as editors (cum publishers) Kweku Baako of the Crusading Guide, Ebow Quansah of the Chronicle, Kwesi Pratt of the Insight, Ben Ephson of the Dispatch, Ken Kurankye of the Searchlight, Larry Dogbe of the Herald Newspaper. Many of them are directly or indirectly funded from state and or party coffers, and frequently deployed to pollute public debates with partisan lies and obfuscation, churn out rumours, and incite hatred and aggression against their respective political opponents.

Politicians and others seeking to control the media and particularly assertive journalists have deployed various forms of repression. In the 1990s, the Rawlings-NDC administrations gleefully deployed the criminal libel laws on the books. And following the decriminalization of libel in 2001 by the Kufuor-NPP government, Ghanaian governments and politicians, particularly after 2008, have been resorting to extra-legal methods of media repression. There appears to be resurgence in intimidation and repression as tools for media control and capture.¹⁸¹ The recent murder of Ahmed Suale, an investigative journalist who had been involved in undercover operations that exposed match-fixing and other corrupt practices among Ghana Football Association officials and others (a few months after a leading MP from the ruling party revealed his identity on national television) and the temporary involuntary exile of investigative journalist Manasseh Azure following threats to his life after he released a video documentary exposing a pro-ruling party vigilante group’s misuse of a state-owned building for its operations, are recent examples of this sordid practice.

While the Ghanaian media landscape appears over-developed, journalism remains underdeveloped, and the sector’s capacity to defend the country’s democracy against capture is severely stunted. With politics or vanity (rather than serious journalism or credible profit making prospects) as the primary motivation for the setting up of media houses, the industry is generally poorly capitalized. Thus, there is little investment in training or decently remunerating journalists, leaving many journalists unprofessional, poorly paid and highly susceptible to co-optation. Consequently, there is a large pool of media personnel available for hire to undertake political hatchet jobs. For those willing to be co-opted, there are vast opportunities for recruitment into high level positions in government as information and communications ministers or presidential or government spokespersons or political party propagandists, or to join the burgeoning class of media celebrities who serve as spokespersons

¹⁸⁰ Prominent examples include the Starr media group, owned by for governor of the central bank and finance minister, respectively under Mills-NDC and Mahama-Mills; and GN media houses owned by Dr Kwasi Nduom, founder of the Progressive Peoples Party and its presidential candidate in the 2012 and 2016 elections. There is also the Daily Guide Group owned by Freddie Blay, NPP national chair and husband of current envoy to Germany

¹⁸¹ According to the Media Foundation for West Africa, there were 72 attacks on journalists in their line of work between 2016 and October 2020.

and mouthpieces of the political and business class spearheading the capture Ghana's democracy and state. For journalists resistant to co-optation and/or keen to checkmate politicians and others who seek to pervert the course of Ghanaian democracy and capture the state, there is isolation and a growing risk of physical harm.

Civil Society/Private Sector/Traditional Rulers/Prominent Clergy: A dense network of secular, faith-based, research, and advocacy civil society organizations have flourished in Ghana's 4th Republic. They have helped to enrich national debates and policy processes. Some civil society organizations such as the IMANI Center for Policy and Education, the Ghana Center for Democratic Development, and the African Center for Energy Policy are deploying reason and evidence to track progress and failings in national policy and governance; while others, notably Citizen Ghana, Occupy Ghana and individual citizen activists such as US-based accounting professor and lawyer Stephen Kwaku Asare have been undertaking public interest constitutional and legal litigation. Democratic development in Ghana, particularly election fairness and peacefulness has also greatly benefitted from the active and constructive public and behind-the-scenes interventions of the very influential leadership of the faith communities (Protestant/Catholic/Evangelical/ Charismatic Christians; Sunni and Ahmadiyya Muslim) and traditional leaders.

Political and party elites bent on holding Ghanaian democracy and the state hostage display an increasing tendency to contain the sector. Successive politicians and parties, particularly incumbent presidents and governing parties, have been persistent in their efforts to co-opt and compromise prominent traditional rulers and clergy – appointing them to positions in prestigious state institutions; awarding them lucrative construction and supply contracts; and plying them with expensive gifts.¹⁸² The NPP, NDC and their respective activists have persistently sought to draw independent think tanks and other CSOs into their partisan fray. CSO interventions deemed unfavourable to the NPP or NDC are typically denigrated by the respective party's activists.

But perhaps the gravest damage to the standing and continued effectiveness and independence of democracy and good governance advocacy CSOs and civic advocates comes from the ranks of the sector itself. It has manifested in the co-optation of top civil society executives by successive governments; who then behave discredibly and call into question the values and principles they espoused in civil society. In politics, some have not behaved as good ambassadors for checking the abuse of executive privilege and state capture, but as corruption apologists and elements complicit to democratic capture. Examples of prominent civil society figures betraying their pro-democracy principles include Yaw Buabeng Asamoah, first head of the Ghana Integrity Initiative (Transparency International chapter in Ghana), who joined the Kufuor NPP government in the 2000s, and is now an MP and NPP spokesperson and Daniel Batidam, the second head of the Ghana chapter of TII boss, who became the anti-corruption czar under president Mahama. In government, Yaw Asamoah has failed to canvass anti-corruption and pro-integrity positions in public and Daniel Batidam staunchly defended president Mahama in the scandal exposed by Manasseh Azure's undercover investigative report which revealed that the president had accepted a gift of a Ford Expedition vehicle from a government of Ghana road contractor from Burkina Faso. Similarly, Nana Oye Lithur, head of the Commonwealth Human Rights Association, with a sterling record as a human rights campaigner prior to her appointment as Minister for Gender and Social Protection acquired notoriety as bossy and aloof

¹⁸² The Mahama government drew widespread criticism for giving V8 Toyota Land Cruisers to dozens of traditional rulers ahead of the 2016 polls. See 'Government to Distribute Vehicles to Chiefs' <<https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Government-to-distribute-vehicles-to-chiefs-1046914>> [accessed 19 November 2020]; 'Mahama's Cars To Chiefs Are "Corruptible Gifts" & "Naked Politics" | Politics | Peacefmonline.Com' <<https://www.peacefmonline.com/pages/politics/politics/201407/207462.php>> [accessed 19 November 2020].

of the issues she had once passionately advocated, lining up to sign a petition by party supporters demanding a presidential pardon for three staff of the pro-NDC Muntie FM who had been convicted and jailed for threatening to rape the chief justice and kill other supreme court judges whose ruling on an opposition party election petition was considered hostile to the governing party's interest. These developments have promoted the narrative that, all that government needs to do to mute civil society organizations is to give them juicy appointments.

8. Democracy capture in Ghana: overall negative consequences

The capture of democracy in Ghana is best reflected in the emergence of a distinctive class of super privileged Ghanaians (politicians from both the governing and opposition parties, their supporters and allies in the private sector, media and civil society; leadership of state and para-statal bureaucratic agencies who typically owe their positions to the incumbent government) that enjoy lopsided access to the dividends of economic and social development as well as democracy, good governance and the rule of law. In addition to enjoying all manner of hidden life-changing perks, such as subsidized housing, luxury travel, medical care, ex-gratia pay-outs, etc., this elite group also benefits disproportionately when it comes to purchasing government cars and real estate at fire sale prices, award of state construction and supply contracts, and acquisition of cheaply prized concessions for extraction of resources in the mining, forestry, oil, and gas sectors.

Indeed, this politically entitled class of Ghanaians has somehow turned the country's democracy into an instrument of state predation. They have fostered extreme polarization of Ghanaian politics, which has in turn degraded the substance and tone of public-policy debates, but also made it nearly impossible to build a broad and enduring political consensus on a national-development agenda. Unhindered and unmotivated by ideological, philosophical and or deep public interest commitments, today's class of Ghanaian politicians and their cohorts in the public service, parastatals, private sector, media and civil society can be counted upon to line up behind their partisan cohorts to defend their respective actions and inactions, and protect them from punishment for corruption and criminal breach of the law. They can be trusted to agree on policies and programs that serve their individual or partisan interests (e.g., fat ex-gratia pay-outs to executive branch appointees; relaxing restrictions on the use of the oil and gas "heritage fund," etc) but not on investment in qualitative public goods such as rule of law, the strengthening of regulatory institutions, and improved education.

NPP-NDC and their affiliates partisanship seems to disappear only when it comes to resisting or blocking reforms that would strengthen institutional checks and balances, governmental transparency and accountability, and thereby counter democracy and state capture. Thus, successive NDC and NPP presidents and parliamentary majorities have blocked the democratization of the local government system which would have allowed for the election of M/M/DCE's.

The hijacking of the benefits of economic and social development by this class of political entrepreneurs and "tenderpreneurs" has also been a leading cause of Ghana's non-inclusive economic growth and worsening GINI coefficient (in spite of fairly strong average economic growth rates in the period of multi-party democratic rule). While Ghana's poverty rate has declined from over 50 percent in the early 1990s to under 16 percent in 2013/14, it still leaves over 6 million Ghanaians unable to afford three Cedis and 60 pesewas to spend on food per day; and the high Gini coefficient of around 42, places Ghana in the top 30 percent of unequal countries. It is also partly caused by the persistence of significant north-south, rural-urban, and male-female income inequalities and urban squalor reflected in the large percentage of Ghanaians apparently resorting to open defecation.¹⁸³ In short,

¹⁸³ Ghana, a middle-income country, now aiming to put itself "beyond aid," still ranks high on the league of African countries whose citizens resort to open defecation. 4 in 10 Ghanaians reported having access to toilet inside their home or

Ghana's democracy has been practically reduced to government of the people, by and for the narrow band of NPP and NDC politicians and their allies in the state bureaucratic agencies, private sector, media and civil society.

9. Enablers/Facilitators of democracy capture

A number of factors and developments have made possible or facilitated the capture of Ghanaian democracy. Some are structural, others are cultural; some are international, and others are episodic. **The 1992 Constitution:** Ghana's constitutional framework has major design flaws: it gives an extraordinarily wide range of power to the executive; it wittingly or unwittingly over-centralizes power in the hands of the executive branch at the same time as it disempowers the legislature¹⁸⁴; it grants vast appointing powers to the president; it gives the president near monopoly control over the public purse. The 1992 Constitution creates what has rightly been described as an "imperial" presidency. The 1992 Constitution attempts to set up a structure of constitutionalism, but does not do it well enough. It leaves us over-exposed to the president and the executive branch. As aptly put by constitutional law scholar H. Kwasi Prempeh, "*the 1992 Constitution grants too much power for a good president to need, and too much power for a bad president to have.*"¹⁸⁵ The 1992 Constitution as it is currently understood and practised, largely facilitates, or at least, inadequately protects Ghana's democratic institutions and processes from capture, especially by the president, executive branch appointees and governing party leaders as well as their allies and sundry co-optees. It is ultimately responsible for the weak levels of transparency in Ghanaian government/public office-holder actions, inactions, and decisions.

The constitutionally-enabled concentration of powers in the hands of the president and executive branch appointees, significantly weakens all the guardrails erected by the same constitution to ward off presidential, executive branch and other public official abuse of office. It leaves very little institutional defence against the capture of Ghana's democracy, and in many ways, promotes it. The president's ability to pick an unlimited number of ministers from parliament and appoint MPs to state board positions as well as heavy involvement in the selection of Speaker (typically from the governing party), for example, compromises the independence of the legislature and undermines the exercise of its oversight functions.

The 1992 Constitution, and the manner in which it has been commonly interpreted and applied does nothing to prevent abuse of the vast and poorly regulated discretionary authority at the disposal of the president, ministers and other executive branch appointees. By design or default, the constitution leaves the government and the presidency with nearly unfettered power over public service appointments, allocation and deployment of state resources and assets, including national security and intelligence resources, mining rights, lands, real estate, airwaves, broadcast frequencies, etc). And this authority is typically deployed to benefit ruling party leaderships and supporters. Thus, high-value state lands and forests, state-enterprises and other public and community assets are routinely awarded to relatives, cronies, partisans of the incumbent president, and ministers, with scant regard to transparency, accountability or the public interest rationale – all without breaching the letter of Ghanaian law and constitution.

within the compound house in 2017 in the Afrobarometer R7 survey; nearly 1 in 10 report lack of access to latrine facility inside or outside the house.

¹⁸⁴ Particularly Articles 78 (stipulating that a majority of ministers should be selected from among MPs); and 108 (barring Parliament from proposing, on its own initiative, any Bill that imposes a financial encumbrance on the State)

¹⁸⁵ See H. Kwasi Prempeh, *Reforming the Constitution of Ghana for a New Era: Averting the Peril of a Constitution Without Constitutionalism*; H. Kwasi Prempeh; CDD-Ghana Constitution Review Series, No. 3.

The Constitution has enabled successive presidents, governing parties and parliamentary majorities to thwart the aspirations for effective, participatory accountable decentralized local government. The constitution envisages non-partisan decentralized local government.¹⁸⁶ But the president and his party are able to capture the local government bodies (District Assemblies) and their mayors – thanks to the extensive discretionary powers given to the president to appoint all Metropolitan/Municipal/District Assembly chief executive officers and a third of the members of the Assemblies.¹⁸⁷ Having been appointed not on merit but almost exclusively on the basis of loyalty to the president and/or party, and expectations of kickbacks to the ruling party, these district mayors preside over the award of public construction and supply/service-delivery contracts to ruling party executives and their cronies, thereby blocking any prospects for meaningful decentralization, and local authority responsiveness and accountability to the citizenry.

The existing legal and constitutional regime, together with permissive Electoral Commission leadership and power-seeking main political parties are responsible for the extremely weak and poorly enforced party and election campaign financing. Typically, they enable political campaign funds to be informally and furtively sourced, and givers, recipients and custodians of political donations to remain secretive.¹⁸⁸

Domestic political economy factors: The Ghana has been recording relatively high levels of growth in recent years. But the poor-quality of the economic growth and extremely inequitable distribution of the benefits of that growth, leave behind a large pool of unemployed and therefore economically disenfranchised citizens, particularly youth, who are susceptible to vote buying and other forms co-optation through political patronage. This is the pool from which the NPP and NDC have been recruiting their militant foot-soldiers.

Notwithstanding the Rawlings/PNDC era neo-liberal economic reforms (eighties and early nineties), the state maintains dominance over the formal economy. The domestic private sector has remained relatively small as well as weak, and hardly provides a viable avenue for wealth, influence or even secure employment. In addition, the Ghanaian state holds near monopoly control over minerals and forests. It also controls some of the best land and real estate as well as commercial enterprises together with lucrative construction and supply contracts as well as employment which is dispensed as patronage to allies and cronies.

The extremely limited opportunities available for accumulation of personal wealth and influence outside of the state sector, in turn, makes the capture of the state and control of the economic, political, and social resources concentrated in that realm the main object of electoral competition. This reduces the private sector, civil society, and citizens to the “clients” of the government and ruling party/group. It also causes pervasive fear of official reprisals and consequently, self-censorship among Ghanaians.

¹⁸⁶ The constitution provides for a system of decentralized local government with non-partisan elected and appointed assembly members. The philosophy informing that design was to insulate local government administration from excessive partisanship to enable it focus on development at the grassroots level.

¹⁸⁷ The power granted to the President to appoint 30% of the local assembly was in recognition of the possibility that popular elections may fail to produce people with the necessary technical skills to make the assembly effective. It was designed to allow the executive to fill potential technical gaps. In practice, the 30% has been filled by party lackeys. The President’s M/M/DCEs are approved as long they meet the two third vote requirement in the Assembly. However, there have been many instances in our recent experience when failure to get the president’s nominee approved has provoked the summary dismissal of the government appointees and their replacement by a more loyal slate of appointees.

¹⁸⁸ As aptly captured by *Lolan Ekow Sagoe Moses* it is “an opaque campaign finance system that allows anonymous donors to spend large sums on political parties, with the expectation that they will be rewarded if the party wins” (New York Times Op. Ed., “How to Unmask Corruption in Ghana” (May 2017).

Reflecting the attainment of (lower) middle income status, there has been a decrease in reliance on external grants. However, indirect taxes (particularly, from the export of primary commodities, notably cocoa¹⁸⁹, gold and, more recently, oil and gas together with VAT, service tax, etc) as well as external loans remain the main source of government revenue in Ghana. In addition to low tax to GDP ratio, very little of tax revenue comes from direct taxes (e.g. income tax and property rates¹⁹⁰). This reliance on indirect tax revenue together with external loans and grants undermines the demand for accountable governance. With extremely limited appreciation of the real sources of government revenue (export duty on primary commodities and other indirect taxes, external loans and grants), many Ghanaians fail to see the need for prudent and honest management by its custodians, and continue to regard state services and development projects as gifts from a benevolent ruler.

In addition to the dramatic reduction in dependence on Western/G7 development assistance and its accompanying economic and political conditionalities, the emergence of oil and gas resources have given recent Ghanaian administrations hugely expanded capacity to borrow from Eurobonds and other private international finance capital markets. It has also resulted in significant expansion in the resource envelope at the disposal of government and governing party for financing state and democracy capture manoeuvres -- such as appointment of a large number of ministers (120 ministers and over 1700 staffers and apparatchiks at the presidency under Akufo-Addo-NPP); outsized budgetary allocations for the maintenance of the incumbent administration (notably, propaganda campaigns and national security activities), and white elephant projects (such as construction of a new National Cathedral in Accra).

Cultural and political culture factors: Many of the factors undermining inclusive governance in Ghana grow out of historical social and cultural patterns of behaviour. The “in-group focused” communitarian values of traditional Ghanaian society appear to be antithetical to and corrosive of democratic and accountable governance. The traditional emphasis on group solidarity as opposed to universalism, and service to one’s ethnic, religious, or partisan group as opposed to promoting the public interest, appear conducive to the perversion of democratic institutions and processes for partisan and sectarian benefit. At the very least, it means very few Ghanaians frown on the conversion of public goods into “private” goods and diversion of resources meant for the delivery of public goods into the pockets of private individuals.

These pre-democratic cultural dispositions are reflected in the tendency for Ghanaians to condone the deployment of state resources as political patronage, nepotistic (as opposed to merit-based) appointments, and granting of contracts to pre-selected insiders, if such actions favour the group of which we are a member – be it a political party, an ethnic group, a region, or school alumni club. In the same vein, our political culture is too often tolerant of discrimination against those from groups to which one does not belong. Some findings from Afrobarometer surveys in Ghana are instructive in this regard: In the Round 5, 2012) survey, forty-three per cent of adult Ghanaians expressed the belief that “political party foot-soldiers in Ghana toil for their parties because they expect material rewards after winning political power”; yet, fifty-seven per cent agreed with the proposition that “the demands of political party foot soldiers who toiled to get their parties elected are legitimate and should be satisfied by government”; and nearly 1 in 5 indicated an acceptance of the practice of incumbent governments giving public service jobs and awarding public contracts to the governing party’s “foot-soldiers” – even when they lack the requisite qualifications.

¹⁸⁹ The cocoa is privately produced and whose internal and external marketing is government controlled under the aegis of the Ghana Cocoa Board.

¹⁹⁰ The revelation by the head of the Ghana Revenue Authority in November 2017 that only 1.2 million people pay taxes ostensibly to cater to the needs of all 27 million Ghanaians was indeed sobering) mean there simply isn’t enough to go around.

Afrobarometer data also reveal weak development of democratic citizenship in Ghana. Four in 10 Ghanaians seemed to deny their own agency as citizens, as they saw government like a parent rather than their agent; and only about a third of adult Ghanaians interviewed in the sixth round of the surveys (2014/15) believed that “after losing an election, opposition parties should monitor and criticize the government in order to hold it accountable.”

Research in Uganda and Ghana by University of Birmingham’s Professor Nic Cheeseman and associates concluded “Ghanaians seem to accept troubling practices as part of how democracy works.” Although vote buying made for sensational headlines, our survey reveals that many politicians and voters do not consider giving gifts to voters to be an illegitimate act.” Some 43% of Ghanaians believed that bribing voters was “not wrong at all” or “was wrong but should not be punished.” The ruling party’s response to the allegations of voter bribery in the 2016 election season was that there was nothing wrong or unusual in giving out money.”¹⁹¹

International enablers of democracy/state capture in Ghana: Today’s overall external environment for democracy building and consolidation in Ghana as in the rest of Africa is inauspicious - in marked contrast to the global and regional setting that prevailed during the first decade and a half of Africa’s democratic rebirth¹⁹². A number of recent developments and factors have made it relatively easy for incumbent presidents and parties to get away with democratic backsliding and perversion at the domestic level in the current continental and global environment.

First, the West/G7’s retreat from democratic governance foreign policy engagements in recent years, and adoption of largely transactional approaches in their relations with Ghana. Seeing Ghana as “an island of stability” in the West Africa sub-region providing the West with a relatively secure base for counter-terrorism facilities/activities¹⁹³ and/or expanding their trading and investment footprint in West Africa, western nations have been giving a “get out of jail pass” for incumbent Ghanaian administrations. Indeed, Ghana’s democracy and political governance practices increasingly appear to be placed beyond reproach by western donors who are constantly holding it up as a “beacon of democracy in Africa.”

The second factor is the emergence of China and other so-called non-traditional development partners, as major sources of development aid and other resources. The vigorous courtship of Ghana by these external partners, who have little or no interest in matters of democracy and accountable governance in their African client states, has been enabling for democracy capture in Ghana as elsewhere in Africa.

Finally, a plethora of external rogue actors have emerged in recent years as important players in Ghana’s domestic politics, particularly elections. Leaders of African kleptocratic regimes such as Congo-Brazzaville, Guinea Bissau, and Equatorial Guinea; assorted money-bags from the sub-region,

¹⁹¹ Cheeseman, Gabrielle Lynch, Austin Willis “Ghana shows a troubling willingness to accept political corruption, our recent survey shows” Monkey Cage, Washington Post, December 21, 2016.

¹⁹² External factors and support had significant impact on the Ghanaian democratization project. The decision by the quasi-military Rawlings administration to transition to multi-party democracy in the late 1980s and early 1990s was at least indirectly influenced by the push of the World Bank/IMF/western donors for client nations like Ghana to open up their political systems in the early 1990s. Sustained direct external democracy support was particularly helpful in making the machinery for election administration relatively efficient and the electoral process generally transparent, peaceful and credible. It also helped to promote human rights, media freedoms and civil society participation in the democratic and governance process in the Fourth Republic. See E. Gyimah-Boadi and Theo Yakah, “Ghana: The Limits of External Democracy Assistance” (with Theo Yakah) in Danielle Resnick and Nicolas van de Walle eds, *Democratic Trajectories in Africa: Unravelling the Impact of Foreign Aid* (Oxford University Press, 2013), pp. 256-280.

¹⁹³ Considerable controversy has arisen in Ghana over the nature of US-Ghana military cooperation, including allegations in 2018 of the establishment of a military base in Accra. See <https://gh.usembassy.gov/category/press-releases/>.

particularly Nigeria;¹⁹⁴ crooked international investors and “hired gun” political consultants, especially election and electronic surveillance technology vendors,¹⁹⁵ have been reportedly involved in Ghanaian elections. Together, they reinforce the advantages of incumbent power holders and undermine the prospects of vertical accountability through elections or citizen activism.

10. Countering democracy capture: Recommendations

On the constitutional and legal front

- ❖ Selective constitutional and statutory reforms to curb excessive presidential/executive branch office-holder power and, above all, entrench democratic constitutionalism. Among other specific proposals, the threshold for parliamentary approval of presidential nominees must be raised to increase the chances that such a cross-party majority approve such nominees; make it mandatory for key and sensitive executive appointments to be brought under parliamentary vetting and approval, and for the president to go beyond the minimum requirement of “consultation with the Council of State” or “on the advice of the Council State” in granting pardons to convicted political allies and in appointing heads of independent constitutional bodies (CHRAJ, EC, NCCE), state security agencies (IGP, CDS, etc), Governor of Bank of Ghana, etc. -- to enhance consensus over the choice of leadership of those institutions.
- ❖ More effective regulation of the president and executive branch appointees’ exercise of discretionary authority.
- ❖ Develop better legal and constitutional tools to ensure that the president, ministers and other appointees exercise transparency in the legitimate exercise of their legal and constitutional powers (to reduce insider dealing and political partisanship in the business of running our country). For instance, make it mandatory for high-value state lands, forestry and mineral concessions, state enterprises, and other public assets to be sold through open competitive bidding, and for the “local content” provisions in the oil and gas block allocations to be subjected to the antiseptic of sunshine (to counter the tendency for public benefits to be hijacked by the president’s family, friends and party members).
- ❖ Outright abolition of the practice whereby government and party functionaries double as CEOs/Chairs and members of the boards of public enterprises; and legally prohibit government officials and party functionaries from securing contracts for government projects.¹⁹⁶
- ❖ To realize the lofty ambitions behind the provisions of the 1992 constitution and related programs for decentralized local government in Ghana, break/relax the president and executive branch’s grip on district/municipal/metropolitan assemblies and their substructures. This should begin with an amendment to the constitution to make the appointment of district chief executives/mayors elective.

¹⁹⁴ In his tribute to the late President of Ghana, President John Evans Atta Mills, one Chief Momodu, revealed that Mr. Ibrahim Jimoh, the founder and owner of Energy Bank and business man, provided significant funding to enable President Mills win the 2008 Presidential elections in Ghana. According to Chief Momodu’s testimony, the former President could not successfully prosecute his election campaign without the financial support from the Nigerian business man. Read further at <https://ghanasoccernet.com/revealed-how-mills-won-the-2008-elections>. Former President John Jerry Rawlings was equally accused of receiving about 5 million dollars from President Abacha of Nigeria. Read more at <https://www.myjoyonline.com/politics/2017/June-5th/abacha-2m-was-used-for-nationalistic-purposes-rawlings.php>; <https://www.myjoyonline.com/politics/2016/july-13th/abacha-gave-rawlings-5m-not-2m-baako-insists.php>

¹⁹⁵ See Alexander Haynes Investigative Journalism reports Cambridge Analytica’s involvement in Ghanaian elections under both the Mahama-NDC and Akufo-Addo NPP governments.

¹⁹⁶ Cadman Atta Mills, the brother of late President Mills and an insider in Mills and Mahama NDC administrations noted correctly that “it is an affront to economic efficiency and justice that contracts are awarded exclusively to party financiers, party faithful and family members” in “Politics, policy and implementation: the Ghanaian Paradox” (Brookings Institute: Africa in Focus, Wed July 18 2018).

- ❖ And last, but not the least, the time has come for credible regulation of election campaign financing and rigid enforcement of those laws.

On the economic and political economy front

- ❖ Accelerate the rate of economic growth; significantly improve the quality of growth.¹⁹⁷ But because economic growth alone would not automatically generate inclusion or reduce inequality, it is essential to improve the quality of growth, especially by ensuring that growth creates jobs.
- ❖ Enhance the mobilization of domestic revenue; increase the percentage of domestic revenue in the overall government revenue basket; and empower local authorities to increase the ratio of internally generated funds relative to central government allocations.
- ❖ Equitably tax profits in the private sector to support government investment in development and wealth distribution.

On the culture and political culture front

- ❖ Intensify civic and democracy education throughout the country, to reduce citizens' deferential attitudes to authority, enhance civic competence, and, build political efficacy.
- ❖ Deepen popular understanding of the tenets of democracy beyond elections and majority rule
- ❖ Provide training in democratic citizenship and corresponding leadership for the youth of the "born free" generation.

On the international front

The future of Ghanaian democratic development will significantly depend on domestic factors and actors, and less on external assistance particularly from the advanced democracies. Therefore:

- ❖ Progressive and liberal philanthropic foundations and international NGOs must step in to fill the void left by western bilateral and multilateral donors, and revive African sub-regional and continental programs for monitoring and reporting on country-level democratic governance progress and backsliding.
- ❖ Strengthen Pan-African, and international alliances/solidarity in defense of democratic governance norms and practices, including possible reinvigoration of Africa's continental and sub-regional structures for monitoring and promoting democratic governance, upholding democratic governance standards, countering backsliding, such as the African Peer Review Mechanism and the African Charter on Democracy, Elections and Governance (ACDEG).

¹⁹⁷ This is a key lesson from the experience of China and the other Asian Tigers. See Lawrence J. Lau "East-Asian Economic Growth: Miracle or Bubble" Yukichi Fukuzwa lecture. 2001 Far-Eastern meeting of the Econometric Society. Available at www.stanford.edu/~ljlau/Presentations/Presentations/010720.pdf; Arvind Virmani, "China's Socialist Market Economy: Lessons of Success," Occasional Policy Paper, ICRIER, April 2005; also Lewis, P. *Growing Apart: Oil, Politics and Economic Change in Indonesia and Nigeria*. Ann Arbor: The University of Michigan Press, 2007; Woo-Cumings, M. (Ed.) *The Developmental State*. Ithaca: Cornell University Press, 1999.

CHAPTER 5

DEMOCRACY CAPTURE IN KENYA

Migai Akech



1. Introduction: Democracy Capture in Kenya

Democracy is a system of government in which a group of people who belong to a political organization such as a nation-state govern themselves. The essence of democracy is that the people have the right to choose their governors, participate meaningfully in how they are governed and hold government to account. As commonly practiced, democracy entails citizens delegating their sovereignty to popularly elected representatives, who in turn delegate their authority to bureaucrats. Together, the elected representatives and the bureaucrats are supposed to use the powers of government to protect the rights of citizens and pursue the public good. But this can only happen if an election produces a government that respects and acts in the interests of citizens, who have the power to remove it should it fail to do so. Appreciating that citizens can sanction it by removing it from power, government should thus be responsive to the needs of the people, and accordingly endeavour to ensure that it engages agents who will enable it to be faithful to citizens' wishes. Elections should therefore produce efficacious horizontal accountability mechanisms. In turn, horizontal accountability mechanisms should facilitate vertical (that is, electoral) accountability in so far as they enable citizens to understand and engage government on a day-to-day basis.

In practice, however, citizens do not always choose their governors, participate meaningfully in governance, or hold government accountable, even where elections are a regular ritual. These aberrations occur particularly where a cohort of powerful actors, situated in and out of the state, manage to capture the processes of democracy and ensure they primarily serve their private interests. In this scheme, elections are neither free nor fair but are nonetheless considered important for conferring regime legitimacy. Further, although the resulting governments hardly deliver public goods, the democracy capturers are adept at containing the citizenry by manipulating its social characteristics such as ethnicity. Accordingly, democracy capture is much more insidious than the oft-cited phenomenon of state capture, which denotes efforts by powerful public and private actors to influence public institutions with a view to obtaining a favourable regulatory environment. Defined in this manner, state capture is about influencing the formation and interpretation of policies, laws and regulations by providing private benefits to public officials. In contrast, democracy capture is much more pervasive and entails the distortion of democracy.

This paper evaluates the nature and scope of democracy capture in Kenya. It argues that democracy capture in Kenya has predominantly taken the form of the manipulation of the electoral process and the institutions of public or horizontal accountability. As a result, elections, which ought to facilitate vertical accountability, are largely inconsequential as they do not enable citizens to approve or disapprove the performance of government but are merely held to give government a veneer of legitimacy. Further, the democracy capturers, who straddle the public-private divide, have corralled the institutions of horizontal accountability and turned them into regime maintenance instruments. Consequently, the elaborate horizontal accountability framework that Kenya's Constitution of 2010 establishes has quickly been rendered moribund. In the rare case that a horizontal accountability mechanism threatens the interests of the state, it is quickly neutered through resource deprivation, co-optation, manipulation, infiltration, discreditation, control of member appointment and dismissal processes, and other unscrupulous means.

The paper is organized as follows. Part II examines the nature and evolution of the infrastructure of democracy capture. Part III interrogates the rationale and manifestations of capture. Part IV grapples with whether on-going reform initiatives will address the problem of democracy capture. Part V concludes.

2. The Infrastructure of Democracy Capture

The Kenyan state was not designed to be democratic. Britain acquired control of the territory that came to be known as Kenya in 1895, having declared it a protectorate and taken over from the Imperial British East Africa Company, which it had hitherto deployed as the instrument of colonization. Colonial governance was decidedly undemocratic and was characterized by the subjugation and domination of the colonized African population. The paternalistic and despotic colonial government decided what was best for African, without consulting them. Following independence, Kenya's political elites retained the autocratic structures of the colonial system of government. Independence for the most part therefore meant continuity, as the independence government sought to maintain the colonial edifice. The culture of authoritarianism, now taking the form of an "imperial presidency", thus persisted.¹⁹⁸ Arguably, though, colonialism's most notable legacy was the establishment of an informal system of governance that operated alongside, and often overrode, a formal system of governance.¹⁹⁹

Formally, the British imposed on the Kenya colony a formal system of indirect governance, derived from norms and practices then prevailing in England, including the English common law. The protectorate was headed by a Commissioner (later Governor when Kenya became a colony in 1920) who was the chief executive officer of the territory and was only answerable to the Colonial Secretary, who was based at the Colonial Office in Whitehall, England. The Commissioner/Governor had extensive powers, including the powers to make laws, establish courts and appoint judicial officers.²⁰⁰ A team of administrators – consisting of an executive council supported by a bureaucracy and local administrators (consisting of district commissioners) – supported the Commissioner. The district commissioners were "in charge of interpreting, modifying, and implementing policy in light of local conditions".²⁰¹ In turn, co-opted native chiefs working through native institutions assisted the district commissioners.²⁰² Together, these officials constituted what came to be known as the Provincial Administration and was "designed to insure stability and continuation of British rule" by, among other things, controlling and containing African politics.²⁰³ In this scheme of administration, there was very little control of senior officials by Whitehall, and by senior officials of their juniors.²⁰⁴ A legislative council was subsequently introduced, although it did not exercise any real power, the colonial enterprise being based on the principle that the legislature was subordinate to the executive.²⁰⁵ In fact, until 1948 the Commissioner/Governor was the Speaker of the Legislative Council.²⁰⁶ In addition, although there were courts, they had no will to control the administration.²⁰⁷ In any case, the safeguards of the imported legal system were only available to the white settlers, a special system of

¹⁹⁸ See H. Kwasi Prempeh, "Presidents Untamed" (2008) 19 *Journal of Democracy* 109 at 110. The term "imperial presidency" denotes presidential supremacy, which is created through the appropriation by the president of the powers reserved by the constitution to other branches of government.

¹⁹⁹ See Migai Akech, "Judicial Review in Kenya: The Ambivalent Legacy of English Law", in *Judicial Review of Administrative Action: Origins and Adaptation Across the Common Law World*, Swati Jhaveri and Michael Ramsden, eds, Cambridge University Press, 2020 (forthcoming).

²⁰⁰ Y.P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to Present* (Oxford University Press, Nairobi, 1970) at 37.

²⁰¹ Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* 74 (Princeton University Press, 1996).

²⁰² Mamdani, *Citizen and Subject* at 77.

²⁰³ Susanne D. Mueller, "Government and Opposition in Kenya, 1966-1969", Working Papers in African Studies No. 85, African Studies Center, Boston University at 3 (1983).

²⁰⁴ Ghai and McAuslan at 24.

²⁰⁵ Ghai and McAuslan at 35.

²⁰⁶ J.B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (ACTS Press, Nairobi, 1990) 31.

²⁰⁷ Ghai and McAuslan at 24, 135.

courts (known as native tribunals that only had jurisdiction over matters of customary law) having been established for the natives.²⁰⁸

An informal system of governance emerged alongside this formal system. The functionaries of the colonial service were members of the English upper-class society recruited from its public schools and Oxbridge.²⁰⁹ These men formed “an informal organization that ultimately became far more important than formal rules and bureaucracy”.²¹⁰ The “collective wisdom” of this organization, rather than any notions of the rule of law, dictated how the colony was governed. In any case, the formal rules were broad and permissive since the system trusted the judgment of “the man on the spot”. Apart from the administrators, other whites in the colony were also included in this informal organization. It was thus common for white settlers and English firms with subsidiaries or branches in Kenya to seek and obtain favourable decisions from the colonial government through informal channels, which served in the stead of formal control devices.²¹¹ The informal organization was later strengthened when the colonial government created boards to regulate industry and agriculture, which the settlers and expatriate entrepreneurs unsurprisingly dominated.²¹² Invariably, these boards enjoyed wide-ranging rule-making powers.²¹³ To protect their interests, white settlers simply invoked the informal organization. Accordingly, they had no real need to resort to the formal, court-enforced norms of English law.²¹⁴ The boards enabled the establishment of monopolies in favor of the white settlers.²¹⁵ Further, the power of government and the financial muscle of the monopolistic settler industry and agriculture enabled this informal organization to control the politics of the colony.

This is the system of governance that independent Kenya inherited in 1963. The colonial state was authoritarian and decidedly unaccountable. One would have expected that independence would herald a turn towards more democratic governance, so that the long-oppressed masses would at last have a responsive government. Unfortunately, the independence government preferred the familiar authoritarian colonial system of governance. Independence therefore merely Africanized the oppressor. Amidst the masses’ euphoria of gaining independence from Britain, the new government quickly rendered useless the promising Independence Constitution of 1963, which Whitehall technicians had designed to establish democratic methods of governance. This was achieved by enacting a series of amendments that consolidated power in the president.²¹⁶

The independence government also retained, and even strengthened, the colonial informal system of governance. As independence dawned, the colonial government facilitated the maintenance of the status quo by replacing English district administrators with a number of the co-opted native chiefs in appreciation of their collaboration in the execution of the colonial agenda, including suppressing the Mau Mau war.²¹⁷ Again, although the Independence Constitution established a federal system of government, the Kenyatta government quickly dismantled it, preferring to strengthen the Provincial

²⁰⁸ Sandra F. Joireman, “The Evolution of the Common Law: Legal Development in Kenya and India” (2006), Richmond School of Arts & Sciences, Political Science Faculty Publications, Paper 68, at 4.

²⁰⁹ Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press, 1996) at 77.

²¹⁰ Robert B. Seidman, “Administrative Law and Legitimacy in Anglophonic Africa: A problem in the Reception of Foreign Law” (1970) 5 *Law & Society Review* 161 at 196.

²¹¹ Seidman, “Administrative Law and Legitimacy in Anglophonic Africa” at 197.

²¹² Seidman, “Administrative Law and Legitimacy in Anglophonic Africa” at 198.

²¹³ Seidman, “Administrative Law and Legitimacy in Anglophonic Africa” at 171.

²¹⁴ Seidman, “Administrative Law and Legitimacy in Anglophonic Africa” at 198.

²¹⁵ See Colin Leys, *Underdevelopment in Kenya: The Political Economy of Neo-Colonialism 1964-1971* (1974).

²¹⁶ See H.W.O. Okoth-Ogendo, “The Politics of Constitutional Change in Kenya Since Independence, 1963-69” 71 *African Affairs* 9 (1972).

²¹⁷ Daniel Branch and Nicholas Cheeseman, “The Politics of Control in Kenya: Understanding the Bureaucratic-Executive State, 1952-78”, 33 (107) *Review of African Political Economy* 11 at 20 (2006).

Administration.²¹⁸ Further, the colonial government empowered and enriched the African chiefs, and facilitated the education of their children in England and elsewhere, aiming to create a native socio-economic and political class that it could entrust with governing Kenya once it left.²¹⁹ Consequently, these chiefs and associated loyalist political and economic interests were the primary beneficiaries of the colonial government's policy of accelerated class formation that it deployed to contain the Mau Mau war.²²⁰ For their collaboration, these individuals were rewarded with "private land titles that guaranteed security of tenure, access to expanding cash crop production, and preferential access to the labour market."²²¹ In addition to unequally extending economic opportunities to these elites, the colonial government manipulated the electoral system (by, for example, disenfranchising many voters and gerrymandering) in their favor and gave them preferential treatment in Africanizing the Provincial Administration.²²² The scene was therefore set for these collaborators and their scions to dominate the politics, public service and economy of independent Kenya in perpetuity.²²³

Thus, the Provincial Administration, which has typically been a department in the Office of the President, remained a key governance apparatus. Prior to the promulgation of the Constitution of 2010, Kenya was divided into eight administrative provinces, which in turn were divided into districts, districts into divisions, and divisions into locations and sub-locations. Provincial Commissioners headed the provinces, District Commissioners headed the districts, District Officers headed the districts, and Chiefs and Sub-Chiefs headed the locations and sub-locations respectively. All were appointees of the Presidency and ensured the government's presence was felt throughout the republic. Loyalty was key, and appointees to the top ranks were either family members, co-ethnics or carefully chosen members of other ethnic groups.²²⁴

The Provincial Administration was an authoritarian and repressive apparatus that largely operated in informal ways, with little legal regulation of its operations.²²⁵ It even had a special police force, which was called the Administration Police and was commanded by the Minister in charge of the Provincial Administration.²²⁶ Kenya therefore had a dual policing regime, consisting of the Kenya Police Force and the Administration Police. And while the Independence Constitution recognized the former²²⁷, it was silent on the latter which was merely governed by a permissive statute.²²⁸ Where the law attempted to regulate the operations of the Provincial Administration, it tended to confer wide discretionary powers that were often abused, thereby making the Provincial Administration extremely unpopular particularly at the local level.²²⁹ Indeed, although the Provincial Administration was the primary instrument for exercising executive authority, it had no status under the Constitution.²³⁰

²¹⁸ Constitution of Kenya Review Commission (CKRC), Report of the Constitution of Kenya Review Commission 28 (2005); Cherry Gertzel, "The Provincial Administration in Kenya", 4(3) *Journal of Commonwealth Political Studies* 201 (1966).

²¹⁹ See, for example, Nicholas Githuku, "From Moral Ethnicity to Moral Anarchy: The Colonial Ideology of Order and Political Disorder in Postcolonial Kenya" (2019), available at <http://africanperspectives.co.ke/the-colonial-ideology-of-order-and-political-disorder-in-postcolonial-kenya/>.

²²⁰ Branch and Cheeseman at 19.

²²¹ Branch and Cheeseman at 19.

²²² Branch and Cheeseman at 19 (Observing that in Central Kenya, for example, in 1957 only 7.4 per cent of the adult population was registered to vote).

²²³ See, for example, E.S. Atieno-Odhiambo, "Democracy and the Ideology of Order in Kenya", in *The Political Economy of Kenya* (M.G. Schatzberg, ed, Praeger, 1987); B. Kipkorir, "The Inheritors and the Successors", 2 *Kenya Historical Review* 11 (1974).

²²⁴ Hassan at 594.

²²⁵ See, for example, Obuya Bagaka, "Restructuring the Provincial Administration: An Insider's View", Society for International Development, Working Paper No. 3, at 4 (2011).

²²⁶ Administration Police Act, Chapter 85, Laws of Kenya.

²²⁷ Independence Constitution, section 157.

²²⁸ Administration Police Act, Chapter 85, Laws of Kenya.

²²⁹ See, for example, Chiefs' Authority Act, Chapter 128, Laws of Kenya; Public Order Act, Chapter 56, Laws of Kenya.

²³⁰ CKRC, Report of the Constitution of Kenya Review Commission 34.

Second, Jomo Kenyatta, Kenya's first president, introduced an Africanization program, ostensibly to transfer the control of the economy to Kenyan Africans, whom the colonial state had excluded from participating in private enterprise. In order not to disrupt the economy, the departing colonists and the Kenyatta government agreed that the apparatus of the monopolistic economy would be transferred intact to Kenyan Africans.²³¹ Thus, maintaining the general fabric of state monopoly was considered the best means of providing African businessmen with protected opportunities in an economy in which open competition would only have benefitted a minority Asian community that on the eve of independence owned "nearly three-quarters of the private non-agricultural assets of the country".²³² In implementing the Africanization program, however, Kenyatta favoured the native upper-class consisting of the native chiefs that had collaborated with the colonial regime and their children. Invariably, these individuals were mostly members of Kenyatta's ethnic community, the Kikuyu and monopolized major state institutions and economic opportunities. Ergo, virtually all the significant national executive posts and public enterprises passed into Kikuyu hands and the large capitalists that emerged were Kikuyu elites with close links to Kenyatta.²³³

In these ways, the colonial informal system of governance was reconstructed. Indeed, this reconstruction had begun in the 1950s as the colonial government enabled the collaborators to capture the legislature, the executive, the Provincial Administration, and the economy.²³⁴ After independence, a political and economic elite, now consisting of ethnic barons that straddled government and the economy and had been grafted onto existing European and Asian economic elites²³⁵, thus came to control a state in which the president enjoyed unfettered power. As Branch and Cheeseman have aptly observed:

"In the process of decolonization, members of African elites were recruited to man the provincial administration, won seats in the legislature and emerged as large farmers and traders. Together with representatives of transnational capital, it was this group that maintained political and economic control and who were amongst the chief beneficiaries of independence. These elites not only attained control of the commanding heights of the Kenyan economy, they also assumed, through their dominance in the legislature and the bureaucracy, the capacity to reproduce that position...[Thus] the post-colonial state represented a 'pact-of-domination'... between transnational capital, the Kenyan elite, the provincial administration and the executive."²³⁶

The fortunes of the ethnic barons were bolstered further when, in the early 1970s, the government decided to allow public officers to engage in private enterprise.²³⁷ As a result, public officers often used their positions for private gain. In turn, corruption and abuse of office became widespread. This largely remains the current state of affairs. These individuals also consider regime maintenance to be significant for ethnic hegemony, and so have become willing and active schemers and players in capturing the democratic process through means such as funding political campaigns and manipulating elections and accountability institutions. Together with other actors drawn from the private and security sectors, these individuals are inducted into an entrenched "deep state" that has a remarkable ability to reproduce itself and determines the country's destiny and in many ways

²³¹ Leys at 38.

²³² Leys at 45.

²³³ See David Himbara, *Kenyan Capitalists, the State, and Development* (1994).

²³⁴ Branch and Cheeseman at 20; Mueller at 6 (observing that the colonial government sought to create a middle class to stabilize its rule and guarantee continuity after independence).

²³⁵ Branch and Cheeseman at 21.

²³⁶ Branch and Cheeseman at 15.

²³⁷ Republic of Kenya, Report of the Ndegwa Commission (1971).

governs informally, much like in colonial times.²³⁸ Although it is difficult to prove the existence of this deep state, it is the subject of considerable discussion in Kenya today.²³⁹ In the last two elections, for example, business titans and top government officials have funded the government's political campaigns.²⁴⁰ They do so primarily to protect vested interests and retain their influence over, and control of, the state.²⁴¹ It is also noteworthy that the law prohibits government officials from engaging in such activities, yet they do so without any fear of reprisal.

Further, an opaque and unaccountable security and policing framework has bolstered this informal system of governance. In this framework, the Provincial Administration has played a key role in coordinating central government policies and development programs, gathering intelligence for the state, coordinating security, maintaining law and order at the local level, regulating local political activity, administering elections, controlling access to resources such as land and even collecting local authority taxes at one point.²⁴² In particular, its intelligence capabilities have been instrumental in monitoring and suppressing opposition movements and civil society.²⁴³ It has also always been politicized, despite proclamations that the public service should remain neutral. For example, chiefs and assistant/sub chiefs have often been appointed from the youth wing of the ruling party and expected to deliver votes for preferred candidates, while District Commissioners have often been responsible for ballot-stuffing and disrupting electoral processes.²⁴⁴ Further, chiefs and assistant chiefs have been tasked with gathering information on regime opponents and mobilizing citizens, sometimes forcibly.²⁴⁵

In a nutshell, the Kenyan state has always had an infrastructure for capturing democracy, which consequently will not gain traction until the infrastructure is dismantled. This infrastructure, or deep state, consists of an informal system of governance constructed around public and private institutions, including the Provincial (and its successor the National) Administration as the primary instrument for exercising executive authority and political control, a political and economic elite that straddles the public-private divide, and an opaque and unaccountable security and policing framework. It is a well-entrenched and resilient oligarchy whose power is inter-generational and largely defies presidential term limits.

The following section explains why and how this democracy capture infrastructure has been, and continues to be, deployed in containing the clamour of the masses for a more participatory and accountable system of governance.

²³⁸ See, for example, Migai Akech, "Judicial Review in Kenya: The Ambivalent Legacy of English Law", in *Judicial Review of Administrative Action: Origins and Adaptation Across the Common Law World* (Swati Jhaveri & Michael Ramsden, eds, Cambridge University Press, forthcoming) (Describing the nature of the colonial deep state and how it governed).

²³⁹ See, for example, Dennis Mwangi, "Ruto Isolation: The Workings of Deep State, Unconventional Politics and Betrayal", *Brief*, 12 January 2020, available at <https://www.thebrief.co.ke/opinion/opinion-ruto-isolation-the-workings-of-deep-state-conventional-politics-and-betrayal/>; Tom Kagwe, "Deep State Doesn't Want Ruto as President", *Star*, 9 February 2020, available at <https://www.the-star.co.ke/siasa/2020-02-09-deep-state-doesnt-want-ruto-as-president>; Curtis Otieno, "Kenya's Next President Will Be Decided by Deep-State", *Hivisasa*, 3 December 2019, available at <https://hivisasa.com/posts/99566682-its-the-deep-state-who-will-decide-the-next-president-not-kenyans-analyst>.

²⁴⁰ See, for example, Jared Too, "Trustee of Friends of Jubilee Foundation Reveals 13 Billionaires Funding President Uhuru Kenyatta", *Kenyans*, 10 June 2017, available at <https://www.kenyans.co.ke/news/19891-trustee-friends-jubilee-foundation-reveals-13-billionaires-funding-president-uhuru-kenyatta>; Gakuu Mathenge and Justus Wang'a, "How Uhuru Kenyatta Dinner Raised Millions in Two Hours", *Daily Nation*, 11 June 2017, available at <https://www.nation.co.ke/kenya/news/politics/how-uhuru-kenyatta-dinner-raised-millions-in-two-hours-408928>.

²⁴¹ George Kegoro, "The Invisible Hand in Ballot Boxes: The Phenomenon of the Deep State in Kenya's Electoral Competition", in *New Constitution, Same Old Challenges: Reflections on Kenya's 2013 General Elections* 119 (Fred Otieno, ed, Society for International Development, 2015).

²⁴² See, for example, Gertzel at 210-211.

²⁴³ Hassan at 594.

²⁴⁴ Hassan at 594.

²⁴⁵ Hassan at 596.

3. The Rationale and Manifestations of Democracy Capture

The primary rationale of democracy capture is to facilitate the exploitation of the resources of the state whilst muzzling any dissenting voices that threaten this enterprise. This explains the need for firm control of the mechanisms of vertical and horizontal accountability, such as elections, civil society, political parties, legislatures and judiciaries. Whilst in colonial times the goal was to facilitate the extraction of state resources and their transfer to the colonizer, today the extraction, which takes different forms including corrupt and unlawful means, mainly benefits the ruling class that the colonial government created to succeed it. In the first place, the concentration of immense and discretionary powers in the president – who then acts as the grand patron, dispensing state resources to the chosen few but ensuring to keep large chunks for himself and family – facilitates this extraction enterprise. This is why capturing and controlling the presidency is vital. This is also how capture is legitimized, as the ethnic communities that produce the president are led to believe that they will gain preferential access to state resources. In practice, the state resources hardly trickle down to the masses. A second strategy for ensuring the success of the extraction enterprise is to capture the state through the collusion of bureaucrats, businessmen and powerful politicians.²⁴⁶ The government is then “repurposed for the benefit of rent seeking elites”.²⁴⁷

Although the Independence Constitution established an accountable parliamentary system of government, the country quickly shifted to a largely unaccountable presidential system following a series of constitutional amendments enacted in the 1960s, which consolidated power in the president and emasculated the institutions of accountability such as the legislature and the judiciary. Further, multipartyism was abolished, making Kenya a one-party state.

Taming the powerful and unaccountable president has, therefore, been at the heart of the clamour for democracy. The hope has been that an accountable president would facilitate democratic governance and distribute public resources and services equitably. Thus, although the Constitution of 2010 retains the presidential system of government, it seeks to facilitate the accountability of the executive. Among other things, this Constitution establishes a number of horizontal accountability mechanisms and requires the legislature to approve the appointment of their members. It, therefore, either circumscribes or removes altogether the power of the president to appoint or dismiss the members of these accountability mechanisms. It also seeks to enhance public accountability by mandating the transparent and competitive recruitment of public officers. Second, this Constitution entrusts the governance of national resources to institutions such as the National Land Commission and establishes mechanisms for the sharing of national resources, thus promising to tame political patronage and clientelism. Third, it grants the legislature better resources and autonomy from the executive, which, for example, no longer controls its calendar. It similarly seeks to liberate the judiciary from the shackles of the executive. Fourth, it guarantees funding for political parties and establishes a framework to facilitate their efficient and effective operation.

Since the president has had unfettered powers over the distribution of national resources, the quest for the presidency has historically been a zero-sum game in which losing is not an option, as its capture guarantees almost exclusive access to national resources and public sector jobs. Elections, which have been held under a first-past-the-post system, have therefore been exceedingly divisive rituals. The Constitution of 2010, however, retains this electoral system, even if it introduces proportional representation to secure the representation of women and other special interest groups in the legislature, which is to be achieved through party nominations. The appointment of the members of the electoral management body, known as the Independent Electoral and Boundaries Commission

²⁴⁶ Wachira Maina, “State Capture: Inside Kenya’s Inability to Fight Corruption, Africa Centre for Open Governance (AfriCOG), 2019 at 7.

²⁴⁷ Maina, State Capture at 7.

(IEBC). now requires the legislature's approval. Further, the Constitution mandates the IEBC to ensure that elections adhere to the principles of simplicity, accuracy, verifiability, security, accountability and transparency.

Ultimately, therefore, the Constitution of 2010 seeks to facilitate the attainment of meaningful multi-party democracy and dispersal of the powers of the president thereby making the presidency less salient so that its capture, which has led to perennial conflicts over elections, will no longer be vital. In practice, however, critical promises of the 2010 Constitution are yet to be realized a decade after its promulgation, thanks largely to the machinations of the democracy capturers, including influencing the constitutional reform process to ensure it did not threaten their interests²⁴⁸. In particular, the democracy capturers ensured the Constitution of 2010 did not unduly diminish the powers of the president. Thus, for example, they were opposed to the creation of the position of prime minister on the pretext that this would establish two centres of power, which to them was a recipe for instability.²⁴⁹ In short, the democracy capturers had no real interest in reducing the powers of the president. In addition, the country has unsurprisingly failed to transform a large number of the statutes that bolster authoritarianism. On the contrary, the executive has railroaded the legislature into enacting more oppressive security laws.²⁵⁰ The democracy capturers' strategy thus seems to be to claw back as much presidential power as possible.

The Constitution of 2010 also failed to dismantle key components of the infrastructure for democracy capture. Hence, the Provincial Administration (now called the National Administration) was retained although the public wanted it abolished and replaced by elected bodies²⁵¹, while the security and policing framework remains as unaccountable as it has always been.

Although the Constitution of 2010 mandated the restructuring of the Provincial Administration to accord with and respect the system of devolved government,²⁵² the state has merely changed its name and continues to deploy it as an instrument of informal governance and regime maintenance. Instead of restructuring the Provincial Administration as the Constitution demands, the state has simply reconfigured it into what it calls the "National Administration", which is identical to it in terms of structure, functions and personnel.²⁵³ The National Administration consists of County Commissioners, Deputy County Commissioners, Assistant County Commissioners, Chiefs, and Assistant Chiefs.²⁵⁴ Ostensibly, the function of the National Administration is to "coordinate" the functions of the national government. In reality, however, the National Administration continues to perform virtually all the functions of its predecessor, the Provincial Administration. Further, it constitutes a core component of the national security intelligence machinery.²⁵⁵ For example, Provincial Commissioners and District Commissioners respectively chaired the Provincial and District security and intelligence

²⁴⁸ See, for example, Nzamba Kitonga, "Is the Ghost of Naivasha Beginning to Haunt Us?", *Nation*, 23 August 2014, available at <https://nation.africa/kenya/news/politics/is-the-ghost-of-naivasha-beginning-to-haunt-us--1017410>; Walter Menya, "How Lawmakers Mutilated Draft in Naivasha", *Nation*, 27 August 2020, available at <https://nation.africa/kenya/news/politics/how-lawmakers-mutilated-draft-in-naivasha-1926434>.

²⁴⁹ See, for example, Godwin R. Murunga & Shadrack W. Nasong'o, "Bent on Self-Destruction: The Kibaki Regime in Kenya", 24 *Journal of Contemporary African Studies* 1 at 10 (2006).

²⁵⁰ See, for example, Human Rights Watch, "Kenya: Security Bill Tramples Basic Rights, 13 December 2014", available at <https://www.hrw.org/news/2014/12/13/kenya-security-bill-tramples-basic-rights>.

²⁵¹ CKRC, Report of the Constitution of Kenya Review Commission 235.

²⁵² Constitution of Kenya 2010, Sixth Schedule, Clause 17.

²⁵³ Hassan at 588.

²⁵⁴ National Government Coordination Act, No. 1 of 2013, section 15. Kenya now has a devolved system of government consisting of a national government and 47 county governments.

²⁵⁵ Report of the Commission of Inquiry into Post Election Violence at 360-374.

committees.²⁵⁶ Historically, the practice has also been that on matters of law and order both arms of the police report to the Provincial/National Administration, as the local agent of the executive.²⁵⁷

Thus, the National Administration remains the most important agency that the state uses to wield executive power and ensure political control given its capacity to monitor and influence political developments. It is also accountable only to the President, who does not require legislative approval in appointing its officers. The Executive has resisted accountability to the legislature arguing that these appointments are a matter of “national security” for which it is not, and should not be, accountable to anyone.²⁵⁸ Loyalty remains the overriding consideration in the making of these appointments. Accordingly, a new president always reshuffles the top ranks of the National Administration, ensuring to strategically place trusted co-ethnics in politically salient parts of country.²⁵⁹ In addition, the National Administration continues to enforce executive orders, invariably without oversight.²⁶⁰ And despite the fact that the Constitution of 2010 sought to bring the Administration Police under the control of the National Police Service (Article 243), it appears that the executive retains primary control over the former.²⁶¹ The outcome is that despite the attempts of this Constitution to constrain the imperial presidency, the president continues to wield considerable unchecked power.

4. The manifestations of Democracy Capture

The democracy capturers have sought to capture both vertical and horizontal institutions of accountability. But they have devoted most of their capital to capturing the electoral process and the institutions of horizontal accountability.

Capture of the Electoral Process. Since 1992, Kenya has regularly held multi-party elections. But these elections have largely been rituals that the democracy capturers use to coronate incumbents or maintain the status quo. The manipulation of elections has stripped them of efficacy to such an extent that they hardly matter as a mechanism for the people to hold government to account. Elections are inconsequential save for giving government a semblance of legitimacy. In this environment, government has been inclined to only appoint agents that will help it to maintain the status quo as opposed to safeguarding the public interest.²⁶² Authoritarian modes of governing remain the order of the day since increasingly common violations of the Constitution have little or no consequence for the government. Thus, electoral authoritarianism²⁶³ ensures regime maintenance, irrespective of whether government is accountable to the people. Further, and as we shall see, the government habitually violates the laws that mandate transparent and competitive appointment processes, instead opting to handpick public officials or refusing to appoint nominees it deems unpliant.²⁶⁴ Such

²⁵⁶ Report of the Commission of Inquiry into Post Election Violence at 360-374.

²⁵⁷ Gertzel at 205.

²⁵⁸ See Minister for Internal Security and Provincial Administration versus Centre for Rights & Education Awareness (CREAW) & 8 others [2013] eKLR.

²⁵⁹ Hassan at 595.

²⁶⁰ Hassan at 588.

²⁶¹ See, for example, Ndichu Wainaina, “Mating’i Reshuffles Nyandarua Police Bosses”, *Star*, 15 June 2020, available at https://www.the-star.co.ke/amp/counties/central/2020-06-26-matiangi-reshuffles-nyandarua-police-bosses/?utm_term=Autofeed&utm_medium=Social&utm_source=Twitter&twitter_impression=true.

²⁶² See, for example, Francis Fukuyama, “What is Governance?”, 26(3) *Governance: An International Journal of Policy, Administration, and Institutions* 354 (2013) (observing that “All professional education... embeds a string normative element in which service to one’s profession and broader public goals is paramount.”)

²⁶³ Electoral authoritarianism denotes the practice of a regime presenting the illusion of multiparty democracy while stripping elections of efficacy by manipulating them. See, for example, Andreas Schedler, “Elections Without Democracy: The Menu of Manipulation”, 13(2) *Journal of Democracy* 36 (2002).

²⁶⁴ See, for example, Susan Muhindi, “Omtatah Asks Court to Annul Appointment of NHIF Boss”, *Star*, 13 April 2020, available at <https://www.the-star.co.ke/news/2020-04-13-omtatah-asks-court-to-annul-appointment-of-nhif-boss/>; *Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR.

authoritarian practices also compromise intra-governmental accountability mechanisms so that they predominantly serve the interests of the state, not the people. In addition, the bureaucracies of public accountability institutions typically comprise civil servants, a considerable number of whom are officers of the Provincial Administration.²⁶⁵ In this way, the democracy capturers infiltrate these institutions and keep informed of what they do.

The democracy capturers control all facets of the electoral process, including the appointment of the electoral management body, the administration of elections, and the adjudication of electoral disputes. They also seek to control the media and civil society, lest they expose electoral malpractices and mobilize citizens against government.

The President has always appointed the managers of elections. In the single party era, although the Constitution of Kenya of 1963 had established an Electoral Commission, the President tasked the Provincial Administration and a “Supervisor of Elections” in the Office of the Attorney General with managing elections.²⁶⁶ In this period, these officers were appointees of the President and simply did his bidding. Following the reintroduction of multiparty politics in 1991, the legislature abolished the office of Supervisor of Elections and recognized the Electoral Commission as the sole institution responsible for the conduct of elections. However, the President still unilaterally appointed the members of this Commission, who were consequently beholden and answerable to him. Opposition political parties only managed to secure representation in the Electoral Commission following an informal agreement with the government in 1997 (the Inter-Parties Parliamentary Group Agreement). But this agreement was short-lived and was only honoured in 2002. Some months before the 2007 elections, President Mwai Kibaki ignored it when he unilaterally appointed members of the Commission, setting the scene for Kenya’s most fractious election. Today, the President appoints the members of the Commission only after the approval of the legislature.

In the multi-party era, the members of the Electoral Commission have invariably failed to conduct free and fair elections. Thus, the requirement of legislative approval of members of the Commission has not made a difference in outcomes. This can partly be attributed to executive control of the legislature, in turn facilitated by manipulating the outcomes of elections to produce pliable parliamentary majorities. The result is that the regime retains control of the appointment process and always ensures it appoints complaisant individuals. And although these Commissions are always disbanded because of poor performance, their members are rarely held to account, even where they have committed egregious violations of the law. On the contrary, they are invariably rewarded with hefty severance packages at the expense of the taxpayer. In the 2013 elections, for example, apart from committing all kinds of irregularities in counting and tabulating votes, the Electoral Commission violated public procurement laws in awarding a tender for electronic poll books which were to be used to verify the biometric data of registered voters, but which dramatically failed to work on election day. A criminal case in which only the executive officer of the Commission and his deputy have been indicted for these violations is still pending in court, more than seven years later.²⁶⁷ Again in 2017, the IEBC on two occasions contemptuously disobeyed orders of the Supreme Court requiring it to allow access to its computer servers to determine whether its electronic system for transmitting votes had been compromised.²⁶⁸ The responsible officers are yet to be punished for disobeying the court.

²⁶⁵ Hassan at 592.

²⁶⁶ B.A. Ogot, “The Politics of Populism,” in *Decolonization & Independence in Kenya 1940-93* 187 (B.A. Ogot & W.R. Ochieng, eds, East African Educational Publishers, 1995); David Throup and Charles Hornsby, *Multi-Party Politics in Kenya* 244 (James Currey, 1998).

²⁶⁷ See, for example, Susan Muhindi, “Court Rules ex-IEBC Boss Oswago Has Case to Answer Over Election Device Procurement Malpractices”, *Star*, 27 May 2020, available at <https://www.the-star.co.ke/news/2020-05-27-court-rules-ex-iebc-boss-oswago-has-case-to-answer-over-election-device-procurement-malpractices/>.

²⁶⁸ See, for example, “Kenya Court Blames Election Commission IEBC for Botched Vote”, *Independent*, 20 September 2017, available at <https://www.independent.co.ug/kenya-court-blames-election-commission-iebc-botched-vote/>.

In these circumstances, future members of the Electoral Commission can therefore expect state protection and rewards when they inevitably bungle elections. Conversely, officers of the Commission who do not toe the line are simply disappeared, as happened in the run-up to the 2017 election when the Commission's officer responsible for its computerized voting system was found dead, having been strangled and severely tortured.²⁶⁹ To date, this officer's murder remains a mystery.

Yet, large segments of the public have somehow been led to believe that the outcomes of the invariably fraudulent elections were genuine. Two actors have helped to legitimize these elections. First, international observers have typically ignored electoral malpractices, instead choosing to celebrate the absence of violence during and after elections. Second, the courts have invariably declared the elections to be largely free and fair, an outcome that has been made almost inevitable due to the considerable constraints that opposition parties face in challenging the incumbent. The Supreme Court's 2017 decision in the presidential election petition, in which it nullified the election, hopefully changed this narrative, and explains why the Uhuru Kenyatta government initiated the Building Bridges Initiative, which I discuss below, in an endeavour to gain much needed legitimacy.

The democracy capturers also control the administration of elections. In this process, the Provincial/National Administration and the security infrastructure continue to be invaluable in two respects. First, these organizations are instrumental in securing favourable electoral outcomes for the regime. This is achieved by suppressing regime opponents, and intimidating, bribing or otherwise influencing often-fearful masses into voting for regime candidates.²⁷⁰ Where this does not work, they simply manipulate the electoral process, as happened in 2007 when the government deployed security officers "to disrupt polling and where possible ensure that government supporters amongst the candidates and voters prevailed".²⁷¹ Another strategy is to make it difficult for the opposition to access some polling stations, by for example, failing to provide security. In such cases, election outcomes can be manipulated at will, without the noise of the opposition. Second, these organizations are instrumental in managing protests against unfair electoral processes and outcomes, which they invariably attain through the use of excessive force.²⁷² The result is that Kenya's elections are always defined by gross human rights violations, much of it involving the police brutalizing citizens in opposition strongholds protesting against what they perceive as unfair outcomes.²⁷³ It has also been alleged that the National Intelligence Service has infiltrated the electoral process, with the support of senior public servants.²⁷⁴

²⁶⁹ See, for example, Dennis Onsarigo and Moses Michira, "Slain Electoral Agency Manager Was Picked Up in South B Before Torturous Death", *Standard*, 1 January 2018, available at <https://www.standardmedia.co.ke/article/2001264645/slain-electoral-agency-manager-chris-msando-was-picked-up-in-south-b-before-torturous-death>.

²⁷⁰ See, for example, Kenya National Human Rights Commission, *Mirage at Dusk: A Human Rights Account of the 2017 General Election (2018)* (Giving examples of instances in which the Provincial Administration bribed voters to vote for the government); CKRC, *Report of the Constitution of Kenya Review Commission 167*; Mai Hassan, "Continuity Despite Change: Kenya's New Constitution and Executive Power", 22 *Democratization* 587 at 588 (2015); CKRC, *Report of the Constitution of Kenya Review Commission 233*.

²⁷¹ Kenya National Dialogue and Reconciliation, *Commission of Inquiry into Post-Election Violence 407* (2008);

²⁷² See, for example, Human Rights Watch, "Kill Those Criminals: Security Forces Violations in Kenya's August 2017 Elections, 12 August 2017, available at <https://www.hrw.org/report/2017/10/15/kill-those-criminals/security-forces-violations-kenyas-august-2017-elections>.

²⁷³ See, for example, Kenya National Commission on Human Rights, "Mirage at Dusk: A Human Rights Account of the 2017 General Elections" (2017).

²⁷⁴ "Updated: Kimemia, Gichangi and Karangi Complicit in General Election Manipulation", cordkenya.blogspot.com/2013/02/kimemia-gichangi-and-karangi-complicit.html; 'CORD alleges plot to rig polls', *Daily Nation*, elections.nation.co.ke/news/Raila-alleges-OP-plot-to-aid-Uhuru-pollbid/-/1631868/1696332/-/format/xhtml/-/7jisjcz/-/index.html.

Furthermore, the democracy capturers endeavour to control the process of adjudicating electoral disputes. For the most part, they succeed. Here, the absence of administrative justice mechanisms in Kenya's system for the adjudication of electoral disputes aids the democracy capturers. The system favours post-election dispute resolution on the basis that voters, not courts, should decide elections. Hence the need for the electoral process to play out before courts can be asked to resolve any arising issues. But this approach, while valid, favours incumbency. As Kenya's 2013 presidential election demonstrated, once the electoral management body has, rightly or wrongly, publicly declared that an individual has been elected president and the state machinery has begun treating that individual as president, the pomp and public display of presidential power immediately colours, and, arguably, even pre-determines, the nature of any judicial adjudication of a dispute arising from such an election. Indeed, such an individual is then likely to prevail upon his opponents not to contest the outcome, in exchange for positions in government or other rewards. In addition, the Constitution establishes stringent timelines for the determination of presidential election petitions, which do not usually facilitate the sufficient ventilation of issues and incline the Supreme Court to adopting a technical approach to handling these petitions.²⁷⁵

Another strategy is to weaken opponents by co-opting their partners, as President Mwai Kibaki did following the 2007 elections. And on the very rare occasion that a court nullifies a presidential election and orders a fresh one, as the Supreme Court did in 2017, the situation still favours the incumbent as there is never enough time for the electoral management body to address its mistakes so that it can hold a valid poll, assuming it is interested in doing so. For these reasons, a system of pre-election dispute resolution could be helpful. Such a system could enable complainants to seek the intervention of the courts before the electoral management body issues the result of an election. In this way, errors such as miscounting of votes or tallying mistakes could be corrected in a timely manner. But because the system continues to only permit post-election dispute resolution, and as we shall see, the courts (particularly the Supreme Court given its monopoly in adjudicating presidential election disputes) become an institution that the democracy capturers must control. Unfortunately, the democracy capturers also control the legislature and determine its agenda. Consequently, proposals to introduce pre-election dispute resolution mechanisms are unlikely to be placed on the agenda of the legislature or succeed any time soon, given, for example, the Jubilee-dominated legislature's resistance to enacting laws that enhance the integrity of elections.²⁷⁶

Capture of Other Institutions of Vertical Accountability. Having captured the electoral process, the democracy capturers next turn their attention to controlling citizen access to information and the media, and civil society, the goal here being to propagate a narrative of peace and credible elections irrespective of the reality.

In the media's case, control is secured by withdrawing or threatening to withdraw advertisements. This works because government advertisements remain a significant source of revenue for the media, constituting some 30% of the revenue of newspapers.²⁷⁷ Media houses threatened with the withdrawal of such significant revenues are wont to do the government's bidding. Further, the government continues to put media houses under immense pressure not to publish critical reports and

²⁷⁵ Article 140(2) of the Constitution of Kenya 2010 gives the Supreme Court only fourteen days to hear and determine presidential election petitions.

²⁷⁶ See, for example, "Jubilee Passes Law Allowing Manual Voting as CORD Moves to Court", *Standard*, 22 December 2016, available at <<https://www.standardmedia.co.ke/article/2000227661/jubilee-passes-law-allowing-manual-voting-as-cord-moves-to-court>>.

²⁷⁷ George Ogola, "How African Governments Use Advertising as a Weapon Against Media Freedom", *Conversation*, 18 April 2017, available at <<https://theconversation.com/how-african-governments-use-advertising-as-a-weapon-against-media-freedom-75702>>.

commentaries.²⁷⁸ The government also controls the media regulatory framework and uses it to keep media houses in line.²⁷⁹ Although the social media promises to enhance the quality of public discourse, it remains constrained due to its limited reach (for example, many citizens do not have access to cell phones or the Internet). In any case, the social media also remains susceptible to government propaganda, which is achieved through the manipulation of social media discussions and content by pro-government commentators, bots or trolls.²⁸⁰

Yet another strategy is to keep the citizenry divided, in some cases by instigating ethnic conflicts.²⁸¹ Ethnic differentiation continues to hinder homogeneity among citizens, thereby making it easy for the democracy capturers to not only divide citizens but also co-opt or compromise civil society groups and media houses.²⁸² This also partly explains the absence of issue-based and stable political parties, which are nothing more than ethnic vehicles or alliances for seeking power or relevance. Invariably, political parties, coalitions or pacts are instruments for mobilizing voters around ethnic leaders, the goal being to capture the presidency or share its powers.

From the viewpoint of the democracy capturers, the political parties or alliances are becoming instruments for legitimizing the acquisition or retention of power, as the recent success of the Jubilee Alliance illustrates. In the run-up to the 2013 elections, the International Criminal Court had indicted Uhuru Kenyatta of the Kikuyu ethnic group and William Ruto of the Kalenjin ethnic group of crimes against humanity, claiming that they were two of six people that bore primary responsibility for the 2007-2008 post-election violence. The two then formed the Jubilee Alliance, with the primary objective of acquiring power as a shield against prosecution by the ICC. But they adroitly sold the Alliance as a means of establishing peace in the country by bringing their warring communities together.²⁸³ This “peace narrative” became so entrenched that the public and the international community were persuaded that it sufficed that the 2013 elections were peaceful, even though they were characterized by all kinds of malpractices.²⁸⁴

In the case of civil society, co-optation has been the favoured approach. But where it fails, the democracy capturers either intimidate or undermine the civil society organizations they consider to

²⁷⁸ See, for example, Henry Owino, “Kenya Still Chasing for Press Freedom”, Reject, [date/], available at <<https://www.awcfs.org/index.php/component/k2/item/1236-media-in-kenya-still-chasing-for-press-freedom>>; Jillo Kadida, “Sacked Editor Says Nation Killed Corruption Stories”, *Star*, 17 March 2016, available at <https://www.the-star.co.ke/amp/news/2016-03-17-sacked-editor-says-nation-killed-corruption-stories/?__twitter_impression=true>.

²⁷⁹ See, for example, Judith Lohner et al, “Mapping Structural Conditions of Journalism in Kenya”, Media, Conflict and Democratisation Working Paper (2016), available at <http://www.mecodem.eu/wp-content/uploads/2015/05/Lohner-Banjac-Nevela-2016_Mapping-structural-conditions-of-journalism-in-Kenya.pdf>; Jaspheer Otieno, “Regulation of Media Content in Kenya: In Search of a Paradigm in the Era of Convergence”, 2(7) *Saudi Journal of Humanities and Social Sciences* 556 (2017).

²⁸⁰ See, for example, Larry Madowo, “How Cambridge Analytica Poisoned Kenya’s Democracy”, *Washington Post*, 21 March 2018, available at <<https://www.washingtonpost.com/news/global-opinions/wp/2018/03/20/how-cambridge-analytica-poisoned-kenyas-democracy/>>; Jacinta Mwendu Maweu, “Disinformation, “Fake News” and Propaganda in the 2017 Elections in Kenya”, in *Propaganda in the Information Age: Still Manufacturing Consent* 141 (Alan MacLeod, ed, Routledge, 2019).

²⁸¹ See, for example, Kenya National Dialogue and Reconciliation, *Commission of Inquiry into Post-Election Violence* 407 (2008); Republic of Kenya, Report of the Judicial Commission of Inquiry into Tribal Clashes in Kenya (1999).

²⁸² See, for example, Wanjala S. Nasong’o, “Revisiting ‘the Two Faces of Civil Society’ in Constitutional Reform in Kenya”, in *Kenya: The Struggle for a New Constitutional Order* 97 (Godwin R. Murunga et al, eds, Zed Books, 2014). (Observing that “civil society is encumbered by the social, economic and political cleavages that characterize Kenyan society at large”); Tome Francis Simiyu, “Media Ownership and the Coverage of the 2013 General Election in Kenya”, 8(1) *Global Media Journal* 114 (2014).

²⁸³ See, for example, Gabriel Lynch, Nic Cheeseman and Justin Willis, “From Peace Campaigns to Peaceocracy: Elections, Order and Authority in Africa”, 118 *African Affairs* 603 at 618 (2019).

²⁸⁴ See, for example, Mwangi S. Kimenyi, “Kenya: A Country Redeemed after a Peaceful Election”, Brookings Institution, 2 April 2013, available at <<https://www.brookings.edu/blog/up-front/2013/04/02/kenya-a-country-redeemed-after-a-peaceful-election/>>.

be recalcitrant. In this endeavour, the legal order (in contrast to the constitutional order) has been a particularly handy instrument as it remains authoritarian in significant respects.²⁸⁵ No wonder the democracy capturers continue to delay or frustrate its reform, or reinforce it²⁸⁶, so that it can conform to the Constitution of 2010. At any rate, vague criminal law and regulatory instruments drawn from this legal order such as the Public Order Act²⁸⁷ have been instrumental in containing civil society organizations and other government critics. For example, the government has unlawfully deregistered²⁸⁸ various civil society organizations or frozen their accounts.²⁸⁹ Further, the government continues to use the legal order to either disallow or control meetings and public demonstrations, despite the constitutional guarantee of the freedom of assembly. In a recent case filed by a member of the Jubilee party, for example, the High Court has effectively imposed on conveners of demonstrations the exceedingly onerous duties of ensuring that demonstrations do not adversely affect non-demonstrators and indicating the persons to be liable for loss of life or property, or injury, where a member of the public is aggrieved by a demonstration.²⁹⁰

Capture of Institutions of Horizontal Accountability. Kenya has established various inter- and intra-governmental accountability institutions or sought to enhance their effectiveness, particularly since the promulgation of the Constitution of 2010, which seek to provide oversight and/or sanction the actions and decisions of public officials. The key institutions here are the legislature, the judiciary, the Auditor General, the Ethics and Anti-Corruption Commission, and the human rights institutions (namely the Kenya National Commission on Human Rights, the Commission on Administrative Justice, the National Gender and Equality Commission, the Independent Policing Oversight Authority, and the National Cohesion and Integration Commission). However, accountability mechanisms are only effective where citizens, as the account-holders, can impose credible sanctions against public officials. In a democracy, the effectiveness of public accountability accordingly hinges on the ability of citizens to remove governments that do not act in their interests (by, for example, engaging public officials who exercise public power for private gain). Elections must therefore matter. Where elections do not matter, public accountability mechanisms merely become instruments for regime maintenance, meaning instruments that undemocratic and illegitimate regimes capture and deploy to retain power.

This is precisely what has happened in Kenya, given that elections have rarely led to political change. Ergo, public power is not exercised for the people, but primarily to promote the interests of the democracy capturers. Further, the elaborate public accountability framework that the Constitution of 2010 establishes has quickly been rendered moribund due to capture. The democracy capturers have ensured that these institutions either actively enhance or do not undermine their interests. This is primarily achieved by influencing the appointment process to ensure that appointees are either regime insiders or pliable individuals. In this scheme, the sons (mostly) and daughters of former Provincial and District Commissioners and other regime actors fare exceedingly well.²⁹¹ In the rare case that a public accountability mechanism threatens the interests of the democracy capturers, it is quickly neutered through resource deprivation, co-optation, coercion, manipulation, discreditation, control of member appointment and dismissal processes, infiltration and other unscrupulous

²⁸⁵ Migai Akech, "Constraining Government Power in Africa", 22(1) *Journal of Democracy* 96 at 102-103 (2011).

²⁸⁶ See, for example, Public Order Amendment Bill 2019.

²⁸⁷ Public Order Act, Chapter 56, Laws of Kenya.

²⁸⁸ See, for example, Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR.

²⁸⁹ See, for example, Muslims for Human Rights (MUHURI) & another v Inspector-General of Police & 5 others [2015] eKLR.

²⁹⁰ Ngunjiri Wambugu v Inspector General of Police & 2 others [2019] eKLR.

²⁹¹ See, for example, "President Kenyatta Picks Noordin Haji as Next DPP", *Nation*, 13 March 2018, available at <<https://www.nation.co.ke/kenya/news/president-kenyatta-picks-noordin-haji-as-next-dpp-21670>>; "President Kenyatta Nominates Justice Kihara Kariuki to AG's Post", *Nation*, 13 March 2018, available at <<https://www.nation.co.ke/news/Uhuru-names-more-Cabinet-members/1056-4340130-jt767dz/index.html>>.

means.²⁹² Capture is, therefore, very costly, as it undermines the quality of democratic governance. Public service delivery also suffers since the institutions that ought to ensure government serves the people are rendered incapable of performing effectively.

The Legislature

Kenya's flawed electoral process has tended to result in the ruling party or coalition having the majority of seats in both Houses of Parliament (namely the National Assembly and the Senate). In the current Parliament, for example, the ruling Jubilee Party and its affiliates hold 67 percent of the seats in the National Assembly and 57 percent of the seats in the Senate.²⁹³ Accordingly, the ruling party controls the agenda of the legislature, which consequently does its bidding. In addition, this control enables the ruling party to determine how the legislature operates, giving opposition parties very little room to scrutinize the actions of the executive. Thus, the legislature has adopted a majoritarian approach to decision-making in its Standing Orders (which constitute its primary rules of procedure), with the result that the ruling party always determines the composition and agenda of its committees. In the recent past, for example, the ruling party has either chaired or constituted the majority of the membership of oversight committees.²⁹⁴ From the perspective of the democracy capturers, therefore, the strategy is fairly straightforward, namely, manipulate the electoral process to produce a pliable legislature then control its operations.

Co-optation of opposition parties has also been an effective strategy for emasculating the legislature, as the on-going Building Bridges Initiative (BBI) demonstrates. Realizing that he had no significant mandate after the 2017 elections, President Uhuru Kenyatta informally sought out Mr. Raila Odinga, the leader of the Orange Democratic Party (ODM), which is the main opposition party, in early 2018 in a bid to reach a political settlement to the unfolding governance crisis. They announced their rapprochement in March 2018, shaking hands in public and declaring their commitment to creating a program that would ensure inclusivity in governance and stem the culture of divisive elections. Shortly thereafter, the President appointed a taskforce on "Building Bridges to Unity" to evaluate these national challenges and suggest how they could be addressed to build lasting unity, considering the views of citizens.²⁹⁵ The Building Bridges Initiative or BBI, as it has come to be known, has since presented a report to President Kenyatta. The hope is that the recommendations of this report will form the basis of changes to the Constitution that will address national challenges such as the perennially divisive elections. Its immediate outcome, however, has been to deprive the legislature of an effective opposition.

In these circumstances, the attempts of the Constitution to enhance the legislature's independence and effectiveness have unsurprisingly not led to any discernible increase in the accountability of the state. Additionally, the legislature's weakness can partly be explained by the absence of mechanisms to regulate lobbying, conflicts of interest, misconduct and abuse of power by legislators. The absence of such mechanisms has made the legislature vulnerable to influence from special interest groups, including the democracy capturers. For example, committees of the legislature have often consisted of legislators against whom credible allegations of corruption have been made.²⁹⁶ Ironically, it is difficult for the electorate to recall non-performing or corrupt legislators. This is due to the fact that although the Constitution gives voters the right to recall Members of Parliament (MP), the Elections

²⁹² See, for example, Gertrude Chawatama, Berhanu Dinka and Ronald C. Slye, "Kenya Truth Commission Report Doctored by State House", *Pambazuka News*, 6 June 2013, available at <<https://www.pambazuka.org/resources/kenya-truth-commission-report-doctored-state-house>> (explaining how the Office of the President and the Office of the Attorney General coerced the Truth, Justice and Reconciliation Commission to change the contents of its report).

²⁹³ See, for example, Alphonse Shiundu, "Factsheet: Kenya's New Parliament by Numbers", 31 August 2017, available at <<https://africacheck.org/factsheets/factsheet-kenyas-new-parliament-numbers/>>.

²⁹⁴ Migai Akech, "Building a Democratic Legislature in Kenya", *East African Law Journal* 100 at 119 (2015).

²⁹⁵ Gazette Notice No. 5154, 31 May 2018.

²⁹⁶ Migai Akech, "Building a Democratic Legislature in Kenya" at 116.

Act 2011, which seeks to implement this provision of the Constitution has for all intents and purposes rendered it useless by imposing unduly stringent conditions for the exercise of this right.²⁹⁷ A court has since ruled that these conditions are unconstitutional.²⁹⁸ However, the legislature has not yet amended this law so that it complies with the Constitution.

The Judiciary

In the case of judiciary, capture efforts have largely revolved around controlling the composition and operations of the Judicial Service Commission (JSC). The Constitution of Kenya 2010 sought to enhance the accountability and independence of the judiciary by democratizing the membership of the JSC and limiting the President's power over the appointment and removal of judges. The JSC now consists of the Chief Justice (as chairperson), a judge of the Supreme Court elected by the judges of this court, a judge of the Court of Appeal elected by the judges of this court, a judge of the High Court and a magistrate – both elected by the members of the association of judges and magistrates, the Attorney General, two advocates elected by the members of the Law Society of Kenya, a person nominated by the Public Service Commission, one man and one woman, and who are not lawyers, to represent the public interest, and the Chief Registrar of the Judiciary (who serves as the Commission's Secretary) (Article 171, Constitution). To ensure the JSC remains subservient, the democracy capturers have ensured the appointment of regime loyalists to the two positions of representatives of the public and sought to influence the elections of the other members of this institution.²⁹⁹ The regime loyalists can then be trusted to the execute the orders of the democracy capturers whenever the judiciary or its officers "step out of line".

A second strategy is to deny the judiciary legitimacy by questioning the appointment decisions of the JSC. This is achieved by the President claiming a power to review the appointment recommendations of the JSC when the Constitution clearly stipulates that these recommendations bind him.³⁰⁰ On this basis, the President has severally claimed that some individuals recommended for appointment as judges have "integrity issues".³⁰¹ In doing so, the President not only deprives the judiciary of much-needed human resources, but also undermines its legitimacy since the public will in all likelihood question the integrity of the affected individuals should they subsequently assume office. In addition, President Uhuru Kenyatta has sought to enhance his power over the appointment of the Chief Justice and Deputy Chief Justice by prevailing upon the National Assembly to amend the applicable statute to require the JSC to forward the names of three persons nominated for recommendation for appointment to the President, so that he could decide whom to appoint.³⁰² The amendment sought to give the President discretion where the Constitution granted him none, since it mandates the President to appoint whomever the JSC recommends. Although the High Court thwarted this attempt to grab power, the Government appealed the decision.³⁰³ The Government has similarly appealed a High Court decision requiring the President to appoint forty-one judges that the JSC recommended

²⁹⁷ Constitution of Kenya 2010, Article 104.

²⁹⁸ *Katiba Institute & another v Attorney General & another* [2017] eKLR, para 71.

²⁹⁹ See, for example, "What Jubilee's Judicial Service Commission Appointments Really Mean", *Sunday Nation*, 22 March 2015.

³⁰⁰ See, for example, Geoffrey Mosoku, "LSK Files Petition Seeking to Compel President Uhuru Kenyatta to Swear in New High Court Judges", *Standard*, 10 July 2014, available at < <https://www.standardmedia.co.ke/article/2000127681/lsk-files-petition-seeking-to-compel-president-uhuru-kenyatta-to-swear-in-new-high-court-judges>>; Carol Tanui, "AG Defends President Kenyatta's Refusal to Appoint 41 Superior Court Judges", *Capital News*, 9 June 2020, available at < <https://www.capitalfm.co.ke/news/2020/06/ag-defends-president-kenyattas-refusal-to-appoint-41-superior-court-judges/>>.

³⁰¹ Tanui, "AG Defends President Kenyatta's Refusal to Appoint 41 Superior Court Judges".

³⁰² Statute Law (Miscellaneous Amendments Act) 2015.

³⁰³ *Law Society of Kenya v Attorney General & another* [2016] eKLR.

for appointment in 2019.³⁰⁴ Evidently, there are likely to be further attempts to enhance the President's powers over the appointment of judges.

A third strategy is to undermine the judiciary by denying it resources. The Constitution creates a Judiciary Fund into which monies for the operations of the judiciary should be paid directly once the National Assembly approves the judiciary's budget (Article 173). Initially, the executive respected this provision of the Constitution, even if it ensured that the judiciary received only a small proportion of the national budget which also declined over the years (typically less than one percent).³⁰⁵ In recent times, however, the executive has simply ignored this provision, and has ordered the judiciary to take its budget estimates to the Ministry of Finance (Treasury), instead of taking them directly to the National Assembly.³⁰⁶ Essentially, this makes the judiciary's budget an item in the budget of the Governance, Justice, Law and Order Sector institutions (such as the Ministry of Internal Security, the Police, the Attorney General and the IEBC).³⁰⁷

Yet another strategy is to derail the judiciary by making frivolous complaints against judges. For example, a Member of Parliament belonging to the ruling party filed a petition with the Judicial Service Commission in 2017 seeking to remove the Chief Justice. This MP claimed that the Chief Justice had committed a judicial coup by annulling the presidential election of August 2017 and had unduly influenced other Supreme Court Judges in making this decision.³⁰⁸ Such complaints can be an effective strategy against the judiciary due to weaknesses in the design of the process of removing judges from office, which make it prone to abuse.

The problem here is that the Constitution establishes a low threshold for the removal of judges in one significant respect, making it an instrument that the democracy capturers can deploy to keep the judiciary under control.³⁰⁹ Hence, a judge can be removed from office on the ground of "incompetence" (Article 168(1)(d)), meaning the incompetence need not be "gross", that is, of such a nature that it destroys confidence in the judge's ability properly to perform the judicial function. Further, there are no procedural safeguards to ensure fairness in the removal process, as the frivolous attempts to remove former Supreme Court Justice J.B. Ojwang from office demonstrated.³¹⁰ The case against this judge was that he had supposedly participated in the making of a decision despite having a conflict of interest, including receiving a bribe in the form of a road built for his personal use. The petition against the judge was filed in February 2016, but the JSC did not pursue it until January 2019 (three years later!). The JSC did not conduct any preliminary inquiry to establish the credibility of the claim yet proceeded to request the President to establish a tribunal to investigate the suitability of the judge to remain in office. The President obliged, but the tribunal found that the allegations against the judge were frivolous. For example, it found that the road the judge was supposedly bribed with had been a public road since 1969. This case clearly demonstrates that in the absence of fair procedures for the consideration of complaints against judges, the JSC will remain an instrument that can be deployed to undermine or control the judiciary.³¹¹

³⁰⁴ Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties) [2020] eKLR.

³⁰⁵ David Maraga, "Statement by Chief Justice David Maraga on the Judiciary Budget Cuts", 4 November 2019.

³⁰⁶ Maraga, Chief Justice Maraga's Statement.

³⁰⁷ Maraga, Chief Justice Maraga's Statement.

³⁰⁸ See Lilian Kwamboka, "MP Ngunjiri Wambugu Files Petition Seeking to Oust CJ Maraga", *Standard*, 14 September 2017; Miriam Musyoki, "NASA MP Reveals How Petition to Remove Maraga Was Secretly Prepared", 14 September 2017, available at <https://www.kenyans.co.ke/news/22721-nasa-mp-reveals-how-petition-remove-maraga-was-secretly-prepared?page=1&fb_comment_id=1521251337937355_1522513711144451>

³⁰⁹ See Migai Akech, *Administrative Law* 441 (Strathmore University Press, 2016).

³¹⁰ Republic of Kenya, Tribunal of Investigation into the Conduct of Hon. Mr. Justice (Prof.) Jackton B. Ojwang 2019.

³¹¹ See Akech, *Administrative Law* at 443, 447-452.

The Auditor General

For a long time, Kenya endured inefficient, unaccountable and unfair public finance management that often led to the embezzlement of public funds and inequitable national resource distribution. The Constitution of 2010 sought to address this problem by making public finance management more efficient, effective, participatory and accountable. It establishes two critical offices. One is the Controller of the Budget, whose function is to oversee the implementation of the budgets of the national and county governments by authorizing withdrawals from public funds (Article 228). It is the duty of this office to ensure that all withdrawals of public money are authorized by law. Two is the Auditor General, whose function is to audit and report on the accounts of all entities funded from public funds six months after the end of each financial year and report to Parliament or the relevant County Assembly (Article 229).

The Auditor General is captured in various ways. First, the National Treasury, which ironically is one of the entities subject to audit, determines the Auditor General's budget, which "could lead to unwarranted pressure on the Office and result in the withholding of necessary funds thus compromising its independence."³¹² This is why it has been suggested that the Auditor General should submit its annual budget estimates directly to the legislature.³¹³ At any rate, the Auditor General has not been given adequate resources.³¹⁴

Second, the President nominates and appoints the Auditor General, even if the appointment requires the legislature's approval. Regime actors thought that the first holder of the office was unduly critical and has sought to ensure the appointment of a more pliable successor, who would not expose the government to the embarrassing audits.³¹⁵ A selection panel was established in September 2019 and subsequently forwarded the names of three candidates for the President to nominate one of them and forward it to the legislature for its approval. Contrary to the Public Audit Act, however, the panel did not submit a report of the interview proceedings to the legislature. At any rate the President rejected the list, citing "discomfort" with the individuals, forcing the panel to re-advertise the position.³¹⁶ However, a citizen obtained court orders stopping the re-advertisement on the grounds that the selection panel lacked legal competence and validity to consider any applications as its term had expired and it had failed to submit to the legislature a report of the interview proceedings.³¹⁷ Ironically, the President has now nominated one of the candidates he had earlier expressed discomfort with to be the next holder of the office.³¹⁸ Furthermore, the integrity of this recruitment process has been questioned. For example, it has been alleged that the shortlisted candidates, including the President's nominee, lacked the requisite competency for the position. Second, the selection panel considered the candidates despite the above court order declaring it lacked the legal competence and validity to consider applications for the re-advertised vacancy for the position.

Probity in public finance management largely remains elusive, in part because the Auditor General lacks the power to compel compliance with its recommendations. The legislature, whose capacity to

³¹² ICPAK, "Position Paper on Independence of the Auditor General's Office Kenya" (2015) at 1, available at < <https://www.icpak.com/resource/position-paper-on-independence-of-the-office-of-the-auditor-general-in-kenya/>>.

³¹³ ICPAK at 2.

³¹⁴ Transparency International Kenya (TI-Kenya), "Strengthening Public Audit Accountability in Kenya: A Baseline Survey Report" (2019) at 27, available at < <https://tikenya.org/strengthening-public-audit-accountability-in-kenya/>>.

³¹⁵ See "Why Uhuru is Yet to Name Auditor General Replacing Ouko", *Star*, 9 December 2019.

³¹⁶ Noni Ireri, "Explained: Why Kenya Lacks Auditor General 6 Months On", 24 February 2020, available at < <https://www.kenyans.co.ke/news/50068-why-kenya-doesnt-have-auditor-general-6-months>>.

³¹⁷ *Okiya Omtatah Okoiti v National Executive of the Republic of Kenya & 2 others*; Katiba Institute (Interested Party) [2020] eKLR, para. 136.

³¹⁸ See, for example, "Uhuru Nominates Nancy Gathungu for Auditor General Job", *Star*, 19 June 2020, available at < <https://www.the-star.co.ke/news/2020-06-19-uhuru-nominates-nancy-gathungu-for-auditor-general-job/>>.

interrogate public audit reports is limited, is equally helpless, as it is also unable to compel unresponsive public entities to comply with these recommendations.³¹⁹ The result is that “most audit queries repetitively appear in subsequent audit reports without proper action”.³²⁰

The Ethics and Anti-Corruption Commission

Successive governments have acknowledged the pervasiveness of corruption in the public sector and established numerous laws and mechanisms to fight it. Powerful political and economic elites have hatched, and continue to hatch, all manner of schemes to embezzle public funds or otherwise defraud the public. These schemes invariably succeed.

The latest anti-corruption mechanism is the Ethics and Anti-Corruption Commission (EACC) that is established pursuant to the Constitution of 2010 (Article 79). The EACC shares its mandate with other entities, the main one being the Office of the Director of Public Prosecutions, which is responsible for prosecuting corruption cases. In general, the anti-corruption institutions have failed to prevent corruption or punish the corrupt. The majority of those accused of corruption, especially the powerful elites, are never held to account, and have even continued to hold public office. These elites use their ill-gotten wealth to undermine the public accountability system thereby ensuring they are never punished for their crimes. Because of government’s persistent prevarication and the ineffectiveness of the anti-corruption institutions, many citizens have had little or no confidence in the government’s commitment to fight corruption. Indeed, ruling parties have lacked the commitment to fight corruption because they have used its proceeds for electioneering and maintaining power.³²¹

The EACC and its predecessor have been ineffective due to three principal factors. First, they have lacked independence, and the democracy capturers has ensured they are not only headed by pliant individuals but also remain unstable.³²² Thus, the heads of the anti-corruption commissions hardly stay in office for a sufficient period, and the commissions have been disbanded and reconstituted on several occasions.³²³ The process of appointing the heads of these commissions has also lacked rigor, in one case resulting in the appointment of an individual with questionable integrity.³²⁴ Second, the commissions have been denied the resources they need to succeed.³²⁵

Third, successive governments have ensured that the commissions share their mandate with other agencies. In this arrangement, an anti-corruption commission investigates corruption cases and refers them to a prosecuting agency (typically the Attorney General or the Director of Public Prosecutions) to prosecute. Unfortunately, this shared mandate has meant that there is no clarity of responsibility, and the agencies then blame each other for not performing. It is therefore not uncommon for the prosecuting agency to return cases to the anti-corruption commission claiming that the latter has not provided sufficient evidence to enable successful prosecutions. In these instances, the anti-corruption commission invariably insists that it has provided the necessary evidence. The outcome of these inter-agency blame games is a perennial merry-go-round that results in the corrupt avoiding prosecution

³¹⁹ TI-Kenya at 27-28.

³²⁰ TI-Kenya at 38.

³²¹ AfriMap, *Effectiveness of Anti-Corruption Agencies in East Africa 7* (Open Society Foundations, 2015); John Githongo, “Kenya and Corruption: The Temporary End of Truth”, *Elephant*, 30 January 2020, available at <<https://www.theelephant.info/op-eds/2020/01/30/kenya-and-corruption-the-temporary-end-of-truth/>>; Wachira Maina, “State Capture: Inside Kenya’s Inability to Fight Corruption” Africa Centre for Open Governance (AfriCOG), 2019, available at <<https://africog.org/wp-content/uploads/2019/05/STATE-CAPTURE.pdf>>.

³²² AfriMap at 8.

³²³ AfriMap at 23.

³²⁴ See, for example, *Trusted Society of Human Rights Alliance v Attorney General & 2 others* [2012] eKLR.

³²⁵ Migai Akech, “Evaluating the Impact of Corruption (Perception) Indicators on Governance Discourses in Kenya, in *The Quiet Power of Indicators: Measuring Development, Corruption and the Rule of Law* 248 (Sally Engle Merry et al eds, Cambridge University Press, 2015); AfriMap at 8.

and punishment. In addition, the anti-corruption commission decides whether or not to investigate any matter. Because there are no objective standards regulating how this important decision should be made, the power to investigate is prone to abuse and can be subjective. Similarly, the prosecuting agency decides whether or not to prosecute a matter that the anti-corruption commission submits to it. As a result, investigations and prosecutions in cases of corruption and economic crimes are in many cases selective and often influenced by politics.³²⁶ Even worse, the corrupt elites rarely get punished, which contributes to the entrenchment of a culture of impunity.³²⁷

The Human Rights Institutions

There are five commissions or authorities responsible for ensuring government upholds human rights. Three of these commissions are established pursuant to Article 59 of the Constitution of 2010. These are the Kenya National Human Rights Commission (KNHCR), the Commission on Administrative Justice (CAJ) and the National Gender and Equality Commission (NGEC). These three are responsible for promoting respect for, and protection of, human rights. The other two are creatures of statute. Ergo, a statute establishes the Independent Policing Oversight Authority (IPOA), which is responsible for holding the police accountable to the public. Another statute establishes the National Cohesion and Integration Commission (NCIC), which is responsible for encouraging national cohesion by outlawing discrimination on ethnic grounds and regulating hate speech.

The members of these institutions are appointees of the President, who controls the appointment process, including selecting the panels that consider applications to fill vacancies. The legislature essentially plays a nominal role in this process, which consists of approving the names of successful applicants that the President forwards to it. As in the case of the other accountability institutions we have considered, however, the legislature typically rubberstamps the choices of the President, who controls it. The result is that these institutions are more accountable to the executive than to the public. On occasion they do bark, but just never too loudly. The government has also sought to undermine the effectiveness of these institutions. The case of IPOA, in respect of which there have been two such attempts, is instructive. In 2015, the government unsuccessfully tried to dispense with the requirement of establishing a tribunal to determine whether a member of the authority should be dismissed so that the President could remove them at will.³²⁸ Again in 2016, the government tried to amend the IPOA Act to empower police officers to refuse to produce documents or information where the IPOA did not comply with the procedures for producing such materials.³²⁹

Further, these institutions are invariably under-resourced and budgetary allocations to them have generally declined over the years.³³⁰ IPOA's situation is particularly dire since it does not have the capacity to absorb the many cases reported to it.³³¹ Some 12,000 cases of police misconduct have

³²⁶ See, for example, David Ndi, "A Deeper Reflection on Uhuru's War on Graft", *Daily Nation*, 3 July 2015, available at <<https://www.nation.co.ke/oped/opinion/A-deeper-reflection-on-Uhurus-war-on-graft/440808-2774522-w5rpvc/index.html>>; Chrispin Mwakideu, "Uhuru Kenyatta's War on Graft: A Turning Point or Just Scoring Points?", *DW*, 31 July 2019, available at <<https://www.dw.com/en/uhuru-kenyattas-war-on-graft-a-turning-point-or-just-scoring-points/a-49814142>>.

³²⁷ See, for example, Akech, "Ethics of the Rule of Law: Impunity, Public Perceptions of Justice and Governance in Kenya", in *Governance, Institutions and the Human Condition* 81 (Luis Franceschi et al eds, Strathmore University & Law Africa, 2009).

³²⁸ Statute Law (Miscellaneous Amendments) Bill 2015.

³²⁹ Statute Law (Miscellaneous Amendments) Bill 2016.

³³⁰ Kenya UPR Stakeholders' Coalition, "Kenya's Second Cycle Universal Periodic Review Mid Term Report" 17, 27 (2019); Kenya National Commission on Human Rights (KNHCR), Annual Report and Financial Statements 2017/2018 at 38.

³³¹ Kenya UPR Stakeholders' Coalition at 23.

been reported to IPOA thus far, yet it has only secured a paltry six convictions.³³² Poor coordination among these institutions has also hampered efforts to ensure accountability for human rights violations.³³³ Further, these institutions have limited presence outside Nairobi, which limits their accessibility to the public.³³⁴ For the most part, the duty-bearers also tend to fail to cooperate with their investigations, or ignore or delay compliance with their decisions and recommendations creating a “high-degree of non-responsiveness”.³³⁵ To make matters worse, there is relatively limited public awareness of the mandates of these institutions.³³⁶ In any case, the public does not seem to have much trust these institutions and so is often not inclined to engage them.³³⁷

5. The Building Bridges Initiative: Resolving Democracy Capture?

Kenya’s case clearly demonstrates that until the formal and informal actors that control the state respect the people by holding credible elections, real democracy will remain a distant mirage. With each successive election, the performance of the IEBC continues to deteriorate, citizens continue to grow further apart as their human rights are grossly abused and ethnic animosities fester, and the little legitimacy that government enjoys is eroded further. The government thus feels compelled to retain power and rule by fiat as far as possible, in the process ignoring, undermining, compromising, discrediting or controlling institutions of accountability. The government and opposition parties acknowledge that this state of affairs is not sustainable yet lack the political will to address it. As we have noted, they are now making an attempt to address the problem of elections under the auspices of the Building Bridges Initiative, but regime maintenance considerations continue to derail these efforts. As in the case of the constitutional review process of the 1990s and 2000s, it seems that the democracy capturers are busy scheming to neuter any reform proposals that could undermine their interests.

It, therefore, remains to be seen whether the BBI will lead to any meaningful and sustainable reforms, given its doubtful legitimacy.³³⁸ Coming at a time when the country is preparing for yet another cycle of elections in 2022, there is considerable but reasonable apprehension that the BBI is merely an instrument for political realignments while keeping the regime intact.³³⁹ Although the BBI Report says

³³² Isaac Otidi Amuke, “Who is Policing the Police? Kenya’s Lame Duck Oversight Mechanism”, *Elephant*, 5 December 2019, available at <<https://www.theelephant.info/features/2019/12/05/who-is-policing-the-police-kenyas-lame-duck-oversight-mechanism/>>

³³³ Kenya UPR Stakeholders’ Coalition at 24.

³³⁴ See, for example, KNHCR Annual Report 2017/018 at 38.

³³⁵ See, for example, KNHCR Annual Report 2017/2018 at 38-39.

³³⁶ Twaweza, *Guarding the Guardians: Public Views on the Independent Police Oversight Authority* (Twaweza East Africa, 2017); National Cohesion and Integration Commission, *Building a Cohesive Kenyan Society: The NCIC Experience* 54 (2013).

³³⁷ Twaweza, *Guarding the Guardians*.

³³⁸ See, for example, Muema Wambua, “Building Bridges Initiative: Is the Kenyatta-Odinga Handshake the Panacea for Kenya’s Peacebuilding Agenda?”, *Kujenga Amani*, 14 November 2019, available at <<https://kujenga-amani.ssrc.org/2019/11/14/building-bridges-initiative-is-the-kenyatta-odinga-handshake-the-panacea-for-kenyas-peacebuilding-agenda/>>.

³³⁹ See, for example, Akoko Akech, “BBI: A Ploy to Subvert Democracy through Deception”, *Elephant*, 13 December 2019, available at <<https://www.theelephant.info/features/2019/12/13/bbi-a-ploy-to-subvert-democracy-through-deception/>>; David Ndii, “From Handshake to the BBI Report, Hope to Disillusionment: My Side of the Story”, *Elephant*, 13 December 2019, available at <<https://www.theelephant.info/op-eds/2019/12/13/from-the-handshake-to-the-bbi-report-hope-to-disillusionment-my-side-of-the-story/>>; Agatha Ndonga & Ruben Carranza, “Can Building Bridges Break the Cycles of Corruption and Political Violence in Kenya”, Briefing Paper, International Center for Transitional Justice (2019), available at <https://www.ictj.org/sites/default/files/ICTJ_Briefing_Kenya_Cycle%20of%20Corruption%20Brief-Web.pdf>; Dauti Kahura, “Building Bridges to Nowhere: Some Reflections One Year After ‘The Handshake’”, *Elephant*, 7 March 2019, available at <<https://www.theelephant.info/features/2019/03/07/building-bridges-to-nowhere-some-reflections-one-year-after-the-handshake/>>; Yash Ghai, “Selfish Political Elite at Heart of Push to Change Supreme Law”, *Standard*, 21 June 2020, available at <<https://www.standardmedia.co.ke/article/2001375819/selfish-political-elite-at-heart-of-push-to-change-supreme-law>>.

all the right things about the national challenges, it is awfully woolly on how they should be addressed. For example, it correctly acknowledges that there is a need to abandon the winner-take all presidency model and recommends the adoption of a consociational model that would ensure that the executive reflects the face of Kenya.³⁴⁰ But it fails to stipulate how its vaunted consociational model is to be achieved and simultaneously seeks to retain the existing presidential system of government, this time stipulating that the president will share power with a largely ceremonial prime minister that he will appoint and could dismiss at will.³⁴¹ The haziness of these recommendations is arguably a ploy of the regime to maintain the status quo yet appease the masses clamouring for change. Regime actors are thus going around the country seeking to popularize the report's recommendations. But these do not seem to be genuine efforts to consult the public and consider their views, or account to them how their views have been incorporated into policy proposals.³⁴² As is the norm in Kenya, these are merely ploys to hoodwink the public into believing that their views matter.

At the same time, there has been a major falling out in the ranks of the ruling party, revolving around efforts to ensure that the Deputy President does not succeed the President come 2022, in a context in which the government's dismal economic performance has seen the President lose considerable legitimacy in his core constituency.³⁴³ The irony is that the BBI is claiming to build bridges to "national unity" yet ensuring that its brittle rungs do not reach the Deputy President and his constituency, or anyone else who opposes it.³⁴⁴ Thus, many people see the BBI as an instrument for the regime to prevail in the succession wars, and not a genuine effort to address national governance challenges, especially the divisive elections.

The prospects of the BBI leading to genuine reforms are therefore minimal, at best. In particular, democracy will not thrive in Kenya whilst the infrastructure for its capture remains intact. Dismantling this infrastructure must therefore be the citizenry's priority. Thus, the National Administration must give way for a democratic system of local administration that conforms to the system of devolved governance that the Constitution of 2010 created. Unfortunately, the other elements of the insidious informal system of governance, which as we have seen have a long history and are deeply entrenched, will be much harder to displace. Hopefully, however, devolution and other mechanisms for the distribution of economic and political power that the Constitution establishes will, in the fullness of time, reduce the salience of the informal system of governance, and create room for more inclusive, transparent and accountable governance.

Judicial review also has the potential to enhance the quality of Kenya's democracy by ensuring that the process of appointing the members of the institutions of accountability is both transparent and accountable. In this respect, the High Court's decision in *Okoiti v National Executive*³⁴⁵ is encouraging. Here, the court decided that the selection panel had a duty to disclose its interview proceedings on the reasoning that "[t]here would be no public confidence in the Auditor General if the Selection Panel

³⁴⁰ Kenya, Report of the Presidential Taskforce on Building Bridges to Unity Advisory 45 (2019)

³⁴¹ See, for example, Jill Cotrell Ghai, "Why BBI Will Not Solve Kenya's Problems", *Democracy in Africa*, 6 January 2020, available at < <http://democracyinafrica.org/bbi-process-kenya/>>.

³⁴² See, for example, Ngala Chome, "Where is the BBI Headed?", *Elephant*, 21 February 2020, available at < <https://www.theelephant.info/op-eds/2020/02/21/where-is-the-bbi-headed/>>.

³⁴³ See, for example, Akoko Akech, "BBI: A Ploy to Subvert Democracy through Deception"; Odhiambo Jamwa, "Jubilee Fight Contemptuous of Kenyans' Plight", *Star*, 15 April 2020, available at <https://www.the-star.co.ke/amp/opinion/star-blogs/2020-04-15-jubilee-fight-contemptuous-of-kenyans-plight/?utm_term=Autofeed&utm_medium=Social&utm_source=Twitter&__twitter_impression=true>

³⁴⁴ See, for example, Laban Wanambisi, "DP Ruto Calls for Inclusivity in the Building Bridges Initiative", *Capital News*, 16 February 2020, available at < <https://www.capitalfm.co.ke/news/2020/02/dp-ruto-calls-for-inclusivity-in-the-building-bridges-initiative/>>.

³⁴⁵ Okiya Omtatah Okoiti v National Executive of the Republic of Kenya & 2 others; Katiba Institute (Interested Party) [2020] eKLR.

was not transparent and accountable” in its appointment decision-making.³⁴⁶ According to this court, the people of Kenya would only have been assured that extraneous considerations had not influenced the recruitment process had the Selection Panel released the interview proceedings.³⁴⁷

Nevertheless, glaring inconsistencies in the requirements of the various statutes governing the processes of appointing the members of the institutions of accountability, and which ironically all claim to be implementing the Constitution’s exacting standards of leadership and integrity, undermine this potential of judicial review. For example, while the Public Audit Act³⁴⁸ requires a selection panel established to consider applications for the position of Auditor General to submit to the legislature a report of its interview proceedings, no similar obligation is imposed on the Judicial Service Commission (JSC) in respect of the appointment of judges. In the case of the JSC, a court has preposterously claimed that there is no need to scrutinize its appointment decision-making on the grounds that the public can trust its discretion since its broad-based membership makes it credible.³⁴⁹ Further, instead of championing transparency in the process of appointing judges, this court considered it was more important to protect the rights of applicants since publicizing the JSC’s interview proceedings could violate their rights to privacy and prejudice their career advancement.³⁵⁰

It is also plausible that the citizenry will sooner rather than later tire of the democracy capturers’ effective divide and rule tactics, which in any case only impoverish them. Were this to happen, there would be an environment in which real change could happen. In such an environment, a transitional government that truly represents all voices in society could then be established to midwife a new political dispensation.³⁵¹ The transitional government would perform three functions. First, it would work with the people to design a genuinely inclusive system of government. Second, it would reorganize the public service and the institutions of accountability so that their membership reflects the face of Kenya. Achieving the second objective would then create an environment in which the transitional government could perform its third function, namely hold credible elections without the interference of the democracy capturers so that Kenyans could finally have a government that reflects and respects their will.

6. Conclusion

This paper has demonstrated that long before the advent of multiparty democracy in Kenya in the early 1990s, an infrastructure that would ensure its capture already existed. This infrastructure consisted of an informal system of governance constructed around public and private institutions, including the Provincial (and its successor the National) Administration as the primary instrument for exercising executive authority and political control, a political and economic elite that straddled the public-private divide, and an opaque and unaccountable security and policing framework. Successive regimes have effectively deployed this infrastructure to contain the citizenry’s clamour for a more participatory and accountable governance system. Evidently, democracy will not gain much traction in Kenya until this informal system of governance is dismantled. However, deconstructing this system will be a tall order, given its entrenchment, ability to sustain itself, its formidable political and economic power that enables it to control the electoral process and accountability institutions, and its effective divide and rule tactics. Indeed, the democracy capturers seem to control the Building Bridges Initiative, which is the latest attempt to address the problem of divisive elections, and

³⁴⁶ *Okoiti v National Executive* at para. 94.

³⁴⁷ *Okoiti v National Executive* at para. 95.

³⁴⁸ Public Audit Act, section 11(5).

³⁴⁹ *Andrew Omtatah Okoiti v Attorney General & 2 others* [2011] eKLR.

³⁵⁰ *Andrew Omtatah Okoiti v Attorney General & 2 others* [2011] eKLR.

³⁵¹ Ndii, “From Handshake to the BBI Report”.

consequently unlikely to produce meaningful change. In these circumstances, attaining genuine and sustainable democratic governance in Kenya will take some time. Nevertheless, judicial review, devolution and other mechanisms for the distribution of economic and political power that the Constitution of 2010 establishes could, in the fullness of time, help to dismantle the democracy capture infrastructure, and create room for more inclusive, transparent and accountable governance.

CHAPTER 6

DEMOCRACY CAPTURE IN MOZAMBIQUE

Adriano Nuvunga



1. Introduction: Democracy Capture in Mozambique

Since the late 1980s, political and economic liberalization have taken place simultaneously with no clear distinction between electoral competitors who aim to govern the country, and those who wish to boost the economy. Scholars have studied and identified successes and failures in these transition phases, by observing the degree of political change towards a society where citizens ably enjoy their rights and freedoms, peace and political stability, or by observing systematic changes in the provision and quality of welfare. In Sub-Saharan Africa, there are a number of cases that are considered to be successful, such as Cape Verde, South Africa, Ghana and Namibia. Other countries, as the Economist Intelligence Unit (EIU) democratic index and the Freedom House suggests, are in a 'blurred zone', such as Kenya, Tanzania, Zambia and Malawi (EIU 2019, FH 2019), however, there is also a large portion of fully unclear or significantly failed cases, those include Côte d'Ivoire, The Democratic Republic of Congo (DRC), Guinea-Bissau, Zimbabwe, to name just a few.

The liberation movements that led to political transitions as a result of the fall of the Berlin Wall, or by civil wars, or proxy wars supported by the West or the Soviet Union, are not consistent in welfare. Those movements that became political parties during or after the Cold War "have failed to evolve into vibrant political parties that foster inclusion and a good governance culture" (IDEA 2019:73), and those include Mozambique, Angola and Zimbabwe. There is a trend of "state capture," as Hellman, Jones and Kaufman (2000) have coined, where there is collusion between the ruling elites' interests and the powers of "heavy-duty firms." Whatever the means, corruption, bribery, lack of transparency, and exclusion are common.

It is in the realm of political and economic liberalization that "state capture" occurs. Hellman, Jones and Kaufman (2000:1) defined it as "shaping the formation of the basic rules of the game [...] through illicit and non-transparent private payment to public officials." But the complexity of the cycle suggests that there are other forms of capture under state capture. The government in its three branches; the executive, the legislature and the judiciary, collude against the welfare of the people they are supposed to represent and serve. Mainly, factions within the dominant political parties, as Scott (1969) coined it "political machinery" or oligarchic system. In fact, that is what slipped into democracy capture (Alonso 2018), hence a capture within a capture.

Beyond a certain point in democratization and economic liberalization, a group of rascals may decide to build and reinforce their political machinery. It is in this case where democracy may become the worst form of government for voters and the best for political leaders, who build the oligarchy and stay in power at the expense of the people. At this point, the ruling "nondemocrats are most successful at staying in power" (Bueno de Mesquita & Smith 2009) at the expense of taxpayers, without providing any welfare in return. The machinery arrangement opens a comfortable zone for oligarchs to transform a democracy into autocracy as they benefit from private gains. The longer they stay in power, the more exclusion and factionalism expand (Scott 1969, Bueno de Mesquita & Smith 2009, Baturo 2014).

The collusion among the ruling elites, and its impact on transition and welfare, is the main focus of this paper. Focusing on Mozambique, we seek to trace, understand and explain the weaknesses of the state, and the stage of democracy. Which actors guide political and economic liberalization? To what extent can these actors or institutions be considered 'captors'? If they are considered as 'captors', to what extent do private interests undermine democratic governance? In a nutshell, is there democracy capture in Mozambique? If yes, how does it evolve, function, and impact on the lives of citizens?

This work proceeds as it follows. The second section scrutinizes the underlying literature for the study, the conceptual framework, and relates it to democracy capture in Mozambique. The third section addresses the genesis of democracy capture a number of years before the Rome Peace Agreement in 1992, and addresses the approval of the 1990 Constitution that introduces multiparty democracy,

seeking to demonstrate that Frelimo approved the political and economic liberalization for its own benefit, *and* for political survival. The fourth section discusses economic liberalization and the ways in which the ruling elites have overseen and managed the process. In the fifth section, the paper identifies and discusses the core democratic institutions that have been captured i.e. the legislature, judiciary and electoral administration in collusion with the executive and parts of the media. The last section of the paper presents recommendations for key interventions to counterbalance democracy captors' power, in order to minimize permanent political and economic conflicts among the elite, the opposition, and society in general.

2. Conceptual Framework: Democracy and Democracy Capture

All the key arguments behind the transition paradigm declare that at some point in history, the polity underwent a process of political and economic liberalization. The failure to democratize is not necessarily a failed attempt to democratize, as the political elites determine the game for a relatively large section of a political party, or factions within it. The *democracy capture* follows the same path, as elites control political change and private economic gains. But before we proceed with our argument, the concept of democracy matters. In this paper we go beyond the procedural definition and agree with Brinkerhoff and Crosby, in that a political regime is considered to be democratic when it follows:

- (1) procedures that assure meaningful competition among individuals and groups for political power;
- (2) broad participation in the choice of leaders and policies, in the allocation of societal resources;
- and (3) a high degree of civil, political, and economic liberties (2002:7).

Only under such conditions do democratic regimes face pressure to be efficient, effective, accountable, transparent, and responsive (*ibid*). The resistance to follow the rules of the game or an attempt to arbitrarily change the rules may lead to a state capture. However, the capture can be premeditated, and the formal process may conceal the arrangement of interests. Scott wisely put it when he stated that; 'influence before legislation is passed often takes the form of "pressure-groups"; influence at the enforcement stage often takes the form of "corruption" and has seldom been treated as the alternative means of interest articulation which in fact is' (1969:1142).

Democracy capture requires the setting of *political machinery*: '(1) the selection of political leaders through elections; (2) universal suffrage, and (3) a relatively high degree of electoral competition over time between political parties or, in certain cases, within a dominant party' (Schumpeter 1942, Scott 1969, Huntington 1991, highlight added as per Scott's definition which does not equate to the procedural concept of democracy). While the literature on the fractures of democracy's impact on people's lives has been discussed, there are still gaps that need to be covered. When the transition to democracy fails, one consensual conclusion is that the regime is undemocratic. However, this becomes debatable when that regime becomes an autocracy or dictatorship. Simply look at the classification of some institutions, such as the Polity IV project, Freedom House, Economist Intelligence Unit as a practical method to escape from the theoretical discussion.

Similarly, as stated above, Hellman, Jones & Kaufman (2000:1) defined captured state as "shaping the formation of the basic rules of the game [...] through illicit and non-transparent private payment to public officials", which casts a strong lens on the economy and society, while overlooking the actual state of democracy which appears to be implicit. That is the reason why we have adopted the concept of democracy from the beginning, in order to make it suitable for the purpose of this paper. We argue that democracy capture entails values, a process of democratization failing to reach people's expectations regarding welfare. That is, lacking not the ability, but the willingness to provide benefits to the citizenry who choose the decision-makers.

Democracy capture involves forms of collusion between the executive and legislature, and indirectly the judiciary determined by both the executive and the legislative as a form of power distribution. Some kind of separation between the executive and legislative may depend on the form of government, either presidential, parliamentary, semi-presidential, or semi-parliamentary. Previous works suggest that presidentialism is more vulnerable to democracy capture due to the concentration of power on the president (Knutsen 2011), who can easily form an oligarchy or small political elite. In fact, this is the trend that Alonso (2015:11) finds in the “Hijacking of Democracy,” therefore, we adopt her approach on the features of democracy capture:

- (1) Influencing public policies, laws and regulatory frameworks – elites use their influence to shape public policies and legislation in their favor, establish social and economic priorities for their own economic or political benefit.
- (2) Corruption – appropriation of resources and state properties with the purpose of obtaining payments or other economic benefits such as economic support.
- (3) Patronage – trading of votes or political support for personal benefits, employment, public goods or services. The use of public funds or policy for political gain.
- (4) Control of media – elites use public and private resources to buy media and opinion makers in order to promote either messages that benefit them or discredit ideas that go against their interests (it includes threats and attacks against journalists).

The features above are similar to those that scholars have identified in Sub-Saharan Africa, including Mozambique. Such evidence is presented and discussed later, but for now we emphasize that democracy capture entails values, and fits well with the Brinkerhoff and Crosby concept of democracy we have adopted. Collusion follows the structure that Scott has suggested in terms of pressure that is exerted before legislation is passed, that is, a small executive elite determining what the parliament should approve, and later deciding to follow or ignore the judicial opinion or controlling enforcement. In addition, civil society opinions are either ignored or accepted as convenient. Though the parliament is dominated by Frelimo, the executive elite controls the cycle.

3. Democratization from Above

It is no coincidence that in 2017, the executive asked the legislature to legalize the so-called hidden debts in Mozambique. Surprisingly, the judiciary did not formally approve this, which is why they are now called illegal debts, the Constitutional Council (CC) declared them unconstitutional and null (CC 2020, FMO 2020). It is the citizens that have had to pay the price, and the small elite still managed to win the election in October 2019. Even though the CC has declared the debts illegal, and CSOs have held protests in disagreement, the government is still paying the debt (Chiúre 2020). These are signs of democracy capture, the rules of the game are violated, but there is no accountability.

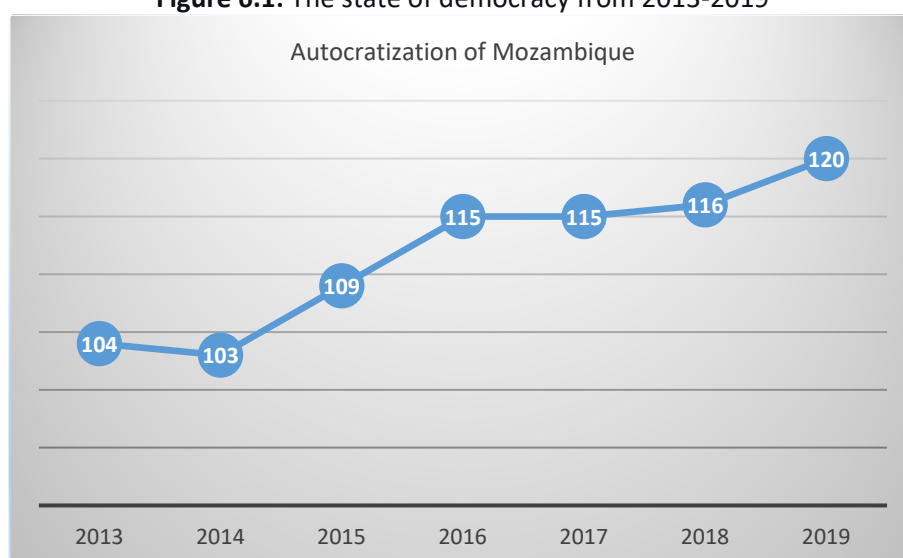
The modus operandi of Mozambican democratic processes clearly reveals its subordination to the interest of the Frelimo elite, and shrinks the essential civil, political, and economic liberties that Brinkerhoff and Crosby (2002) prescribe for democracy. The capture of democracy and its confiscation to the interests of the governing elite consists of the arrest of the following democratic institutions: the legislative, the judiciary, the electoral administration bodies. In this sense, we highlight that democracy capture entails an interdependency cycle among the legislative and the judiciary, led by the executive. Each of these bodies operates in the interest of the elite, a fact that is remote from the socialist regime in which the merger between the roles of the party, the state, and the nation was an official government policy (Sumuch & Honwana, 2007).

Democratization and economic liberalization seem to have been designed before the peace agreement, which appears to be an addendum to the 1990 constitution. During the democratic transition process, due to the external and internal pressure combined with the civil war, Frelimo

shaped political and democratic institutions for its benefit and self-preservation, even with the implementation of political liberalization, which was classified as “preservation through transformation” (Pitcher, 2002). In “Transformation without change,” Forquilha & Orre (2011) argue that the political transition in Mozambique was marred by a “concentration and absence of separation of powers, endemic corruption, exacerbated clientelism, lack of political programs, anaemia of administrative apparatus, repeated electoral fraud and weak legitimacy of institutions”.

Since the roots of transition, as Abrahamsson & Nilson (1994) argue, Frelimo built political interests to enhance their concentration of power, and to control the distribution of power for political survival. As economic transition could not improve the people’s standards of living, poverty and social instability could undermine the democratization process. Therefore, the ruling party aimed to satisfy the interests and ambitions of the alternative elites at the national, and subnational level. It can be argued that by the time that the post-Peace Agreement demobilization started, the implicit interests of the key military actors – the freedom fighters – had been economically accommodated. “The way it took place, meant a pure corruption in the government” (Abrahamsson & Nilson 1994:322) since the take-off for economic liberalization.

Figure 6.1: The state of democracy from 2013-2019



Source: EIU (2013 – 2019)

4. Liberalization for elite enrichment

Frelimo elite used the liberalization process as an opportunity for enrichment. The majority of the elite’s enrichment is illicit, resulting from corruption. It did not happen under the socialist regime (Morier-Genoud, 2011: 154). As Mosse argues (2004: 4), under the previous authoritarian regime, corruption was not tolerated, and political leadership was vigorous in punishing those who abused the public good, so liberalization was the first opportunity for *rascals*.¹ Similar to what happened in South Africa, where privatization led to the elite’s enrichment, in Mozambique elites are enriched through corruption. As an illustration, during the privatization process of Banco Austral, the elite plundered millions of US dollars (Hanlon, 2002).

The economic reforms adopted since 1989 consisted of liberalizing the economy, privatizing public companies, and strengthening foreign investment to the country. New investments consisted of large mega-projects such as the aluminium transformation company (MOZAL) based in Maputo, and gas production in Inhambane, and other mega-projects, which led to the country’s economic growth - in

¹ Term used by President Samora Machel for corrupts. The same can be found in Bueno de Mesquita & Smith 2009.

1998 the rate of economic growth was set at 12%. With this economic growth, peace and regular holding of elections led the country to gain a great international reputation (Morier-Genoud, 2011: 156).

Economic liberalization conveyed a number of problems. Since 1994, the country's economic development was oriented towards exports and not geared towards industrialization, a fact that led to little sustainable development at the local level as well as low employment for the larger adult population (Castel-Branco, 2003). In addition, the economic growth was unbalanced, and a large part of investments took place in the southern region. For example, between 2002 and 2004, 47% of production had been concentrated in the south.

With this economic liberalization, the Frelimo elite found an opportunity for enrichment. These facts were the result of the failure to regulate the liberalization process, which allowed a handful of people to become increasingly wealthy at the expense of the majority of the population, and in the process, defrauded their expectations. Much of the elite's enrichment is illicit, resulting from corruption. This did not occur under the socialist regime (Morier-Genoud, 2011: 158).

Mosse (2004: 4) highlights that in the previous socialist regime, corruption was not tolerated, and political leadership was vigorous in punishing those who abused the public good, also enabling high morale levels of condemnation, despite low salaries in the civil service and a general lack of essential consumer goods. However, political and economic liberalization have not been followed by an effective institutional redesign to guard against the development of corruption. The privatization has led to the elite's enrichment, through corruption. As an illustration, during the privatization process of Banco Austral, the elite plundered millions of US dollars (Hanlon, 2002).

As Nuvunga (2014) explains, Frelimo's political elite has become a business elite, using the State to pursue their economic interests. As an illustration, adds Nuvunga (2014), this transition is verified through the involvement of the State in the oil and gas exploration sector. Frelimo elites are seeking licenses to exploit these mineral resources and coal. Here, the State is used as a facilitator, by having direct involvement in business, allowing the transfer of state assets to the private sector through non-transparent mechanisms, such as the lack of transparency in the issuance of contracts (Nuvunga, 2014: 157).

Corruption is at the root of the country's underdevelopment. The so-called hidden debts of EMATUM, Proindicus, and MAM, of more than the US \$ 2 billion, contracted by the Frelimo government, and then sponsored by Frelimo in the Assembly of the Republic, are clear evidence that the parliament is yet another entity in the service of the governing administrations interests. As stated elsewhere, the executive branch, the legislature, and the judiciary operate in a collusion for private gain. The peculiarity of democracy capture in this argument is that it occurs within a captured state, that is, the ruling elite in the executive dictates the rules of the game and the parliament, the judiciary and a number of public servants face a zero-sum-game, in Scott's "pressure-groups,-approach.

According to CIP (2016),² the impact of corruption on the economy is severe. Corruption is accountable for the loss of US \$ 2.5 billion or more than 17% of the average value-added (VA) between 2012 and 2014, which means that each person has lost US \$ 98 per year due to corruption or about 18% compared to what their income would be without corruption. Mostly, corruption affects construction, as well as fisheries, services, transport, and communications.

² Centro de Integridade Pública (CIP). 2016. *Os Custos de Corrupção Para a Economia Moçambicana*: porque é que é importante combater a corrupção num clima de fragilidade fiscal. Maputo. Accessed on June 1, 2020 from http://cipmoz.org/images/Documentos/Anti-Corruptao/CIP-Custos_da_Corruptao.pdf.

The cost of corruption in Mozambique is not just monetary, economic, or social. More than that, it has the potential to determine the country's destination and place in the world arena. Corruption can affect foreign affairs policy, as well as national and citizen security.

The more Mozambique is tainted with the image of a corrupt state and a facilitator of trafficking and illicit financial flows, the greater the challenge will be for Mozambican political leaders to convince the world of the opposite (CIP, 2016: 77).

Corruption was aggravated by the rise of Guebuza to the leadership of Frelimo in 2002 and the presidency of the Republic in 2005, as Mosse (2003) had already predicted. The hidden debts of more than the US \$ 2 billion contracted by President Guebuza during his term demonstrate this point. Frelimo's commitment to the political struggle with Renamo diverted attention from development, and the party used corruption as an instrument for maintaining power; on the other, it was born with privatizations in the process of political and economic liberalization. The hidden debts can be used as a support for the political survival perspective.

Illegal debts are a catch within the capture of democracy, that is, they occur within Frelimo's factionalism, by allowing resources to turn from groups into groups that are born in the party as time goes on, diverting state resources to the party. As Mr. Manuel Chang, the former Ministry of Finance during the Guebuza Presidency, and member of parliament (MP) when he was imprisoned in South Africa in December 2019, state resources have been used to pay fees to the lawyers. As Mr. Chang was an MP when he was imprisoned thus enjoying immunity, the state had to pay the fees that could have been used for public welfare. Actually, up to January 2020, the amount for those fees have not been disclosed by Office of the Attorney General (CIP 2020).³

President Guebuza is yet another example of an increase at the expense of the country's development and to the detriment of Mozambicans. In 2002, Guebuza had access to a 2,500,000 USD credit for the purchase of a fishing boat. This figure surprised many of the people connected with fishing in Mozambique, who reported that the most expensive boats, with the latest equipment, were around 500 thousand USD (Mosse, 2003:11). This supports the argument of democracy capture in Mozambique. Public resources have been diverted from the public welfare and used for political hegemony of the ruling Frelimo party. This has been perpetrated by oligarchs with collided interests either between themselves or among a number of factions who capture democracy within a greater framework that involves the party versus the State and Society.

How Frelimo was using corruption to enrich its staff. Since the entrepreneurship of political elites began with the shift to the market economy, individuals linked to Frelimo have contracted funds granted by the Mozambican State, among donations and credits aimed at strengthening the balance of payments (Nuvunga, 2014; Mosse, 2003). Mosse (2003) adds that donations from Japan, USAID, RFA, and credits from the African Development Bank and IDA (World Bank), among others, have already been passed on to Mozambican companies without public competition, without guarantees of return and the concessional interest rates. This suggests that the State only finances companies formed by individuals known for their activism within the Frelimo Party, such as the ones below:

³ Procuradoria-Geral da República deve ser Transparente nos gastos com honorários de Advogados das "dívidas ocultas." Accessed on August 7, 2020 from <https://cipmoz.org/2020/02/11/procuradoria-geral-da-republica-deve-ser-transparente-nos-gastos-com-honorarios-de-advogados-das-dividas-ocultas/>

Table 6.1. Some state-funded Frelimo staff companies between 2001-2002.

Company Name	Amount in MT	People involved (Partners)
Nhama Comércios Lda.	5,186,000	Marina Pachinuapa, veteran of the national liberation war.
Mecula	12,304,000	Alberto Joaquim Chipande (veteran of the armed conflict and sniper of the first shot of the uprising against colonialism).
TransAustral,	61,000,000	João Américo Mpfumo (veteran of the liberation war).
Scanmo Grupo Mecula	1,500,000	This company operated in partnership with the assembly of Veículos Automóveis, LDA (MOVA), one of the companies where Armando Guebuza is a partner.
Mavimbi	2,500,000	Armando Guebuza, Moisés Massinga and Jesus Camba Gomes (Frelimo staff).
Colégio Alvor Manhiça	1,000,000	Amélia Narciso Matos Sumbane, Adriano Fernando Sumbane, Filomena Panguene e Fernando Andrade Fazenda (Frelimo staff).

Source: Mosse (2003).

Within the framework of conceptions of financing Frelimo's staff for the construction of the desired bourgeoisie, it was clearly based on the plundering of public funds. They withdraw from the State and always withdraw, without returning (Mosse, 2003: 13).

1. Political Implications of democratization from above

The capture of legislative power. The CRM establishes that the Assembly of the Republic is the Assembly representing all Mozambican citizens, where the member of the Parliament represents the entire country and not the circle by which he is elected.⁴ Being the highest legislative body of the Republic of Mozambique, its function is to determine the rules that govern the functioning of the State and economic and social life through laws and deliberations of a generic nature.⁵

What we see in practice is that it functions as a body in the interest of the Frelimo party. The capture of this body by Frelimo derives from 3 factors, namely, the absolute majority of Members of the Parliament (MP) and, in other terms, a majority of more than 2/3, a fact that allows the party to pass laws for its benefit, even against the opposition vote. The second factor is the party discipline of its MPs, which consists of everyone voting in the same direction, even against their will. The third and last factor is the fact that, according to article 187 of CRM, the legislative power can be dissolved by the President of the Republic if he rejects, after the discussion, the Government's program (Macuane, 2009).

Concerning the privileges of former Frelimo officers

In March 2014, the Frelimo party assisted by MDM passed a law that provides benefits for former heads of state with a budget impact of more than one million euros. The law established that former heads of state are entitled to a reintegration allowance equivalent to ten years of the updated basic

⁴ Números 1 e 2 do artigo 167.

⁵ Números 1 e 2 do artigo 168.

salary (DW, 01.04.2014)⁶. The approval of this instruction intended to accommodate Armando Guebuza, the former Head of State, whose presidential term ended in January 2015.

Concerning the approval of hidden debts

As stated by Caldeira (2017), Frelimo deputies are not in the Assembly of the Republic representing the Mozambican people. The finding resulted from the fact that, in April 2017, the party's parliamentary bench legalized the unconstitutional and illegal debts of EMATUM, Proindicus and MAM companies, when in fact the US \$ 2.2 billion were taken out for the benefit of Frelimo. Of these debts, 10 million American dollars were channelled to the bank account of the Frelimo Central Committee, and another million dollars to finance the campaign of its candidate Filipe Nyusi in 2014 (CIP, 2017).⁷

Concerning electoral laws

The approval of electoral laws is the most evident proof of how the legislative power has been captured and is in the service of the party's interest. Frelimo, through its parliamentary majority, is elected for its representation in greater number in CNE, to the detriment of the opposition, as a way to ensure the perpetuation of its domination through electoral fraud.

With Law No. 6/2013, of 22 February, the electoral legislation that governed the 2013 municipal elections, Frelimo ensured its overrepresentation in the CNE, through representatives linked to the party, a judge and an Attorney of the Superior Council of the Judiciary and Public Prosecutor respectively, and through members of Civil Society co-opted by the party. These are some illustrative cases of how the legislative power is captured by the Frelimo elite so that it is at the service of the party's interest.

The capture of the judiciary. Despite the Rule of Law⁸ consecrated in the Constitution (CRM, 2018)⁹ and thereby establish that the sovereign bodies are based on the principle of separation and independence of powers that, in turn, must obey the Constitution and laws¹⁰, this is not the case. In fact, the judiciary is subordinated to political power and thus, serving the benefits of the elite, to the point that some legal professionals live in the houses of the party (Ucama & Azevedo-Harman, 2013: 10).

Also, according to Article 11 (1) of the 2018 CRM, the courts (one of the five Mozambican sovereign bodies)¹¹, aim to guarantee and reinforce legality as a factor of legal stability, guarantee respect for laws, ensure rights and freedoms, as well as legal interests of different bodies and entities with legal existence. CRM also establishes that in the exercise of their functions, judges are independent and must only obey the law, having the guarantees of impartiality and accountability (paragraphs 1 and 2 of article 206).

The Mozambican judiciary sector consists of the Ministry of Justice, Judicial Courts, Administrative Court, Attorney General's Office (PGR), or Public Prosecutor (MP), Ministry of Interior, the Bar

⁶ DW. Nova lei em Moçambique Prevê regalias milionárias para antigos chefes de Estado. 01.04.2014. Accessed on June 08, 2020 from: <https://m.dw.com/pt-002/nova-lei-em-mo%7Aambique-prev%AA-regalias-milion%C3%A1rias-para-antigos-chefes-de-estado/a-17535559>.

⁷ CIP. *Partido Frelimo recebeu 10 milhões de dólares das dívidas ocultas*. Maputo, 28 de Junho de 2017. Accessed on May 30, 2020 from: <https://cipmoz.org/wp-content/uploads/2019/11/Pressbook-2019.pdf>.

⁸ Article 3 of the CRM of 2018.

⁹ The 2018 Amendment of the Constitution (CRM) is based on the Lei n.º 1/2018, de 12 de Junho, Lei da Revisão da Constituição da República de Moçambique.

¹⁰ Article 134 of the CRM of 2018

¹¹ According to article 133 of the CRM of 2018, sovereign organs refer to the President of the Republic, the *Assembleia da República* (Parliament), the Courts and the Constitutional Council.

Association, and Community Courts. The Superior Council for the Judiciary (CSMJ) and the Coordination Council for legality and justice (CCLJ) are also part of the legal and judicial system. The judicial sector operates based on the principle of judicial independence, which means that the judge must be free from inappropriate connections with the executive and legislative, and bad influences from these other powers. However, for the judge to be independent, should appear free in the eyes of a reasonable observer. It is the ratio of articles 134 and 217, both from CRM and article 4 of Law nr. 10/91, of 30 July that approves the Statute of Judicial Magistrates (Ucama and Azevedo-Aarman, 2013: 7).

This ratio, which embraces the Singhvi Declaration, is also known as one of the United Nations (UN) Fundamental Principles on the Independence of the Judiciary, adopted by the UN in 1985 and the UN Declaration on the Independence of Justice adopted at the 7th United Nations Congress. In Mozambique, the judicial power is characterized by the principle of independence and impartiality of courts and judges, expressed in:

- a. The court, represented by the respective judges, is a sovereign body, equal to the others and functions separately and interdependently, complying with its powers attributed by law, that is, judicial independence means, here, non-interference.
- b. Within the scope of their duties, judges do not depend on anyone and must obey only the law.
- c. Magistrates cannot be held accountable (criminally, civilly, and disciplinarily) for their judgments and decisions, except in the cases provided for by law.
- d. The magistrate cannot be moved (transferred, suspended, promoted, retired, dismissed) or in any other way, except in the cases provided for by law.
- e. Be impartial, and the magistrate should not intervene in processes involving a person who is connected to him by social ties such as marriage, life communion, kinship or affinity (Ucama and Azevedo-Harman, 2013: 7-8).

Factors leading to the capture of the judiciary. The capture of the judiciary and its consequent subordination to the interests of the Frelimo party is associated to institutional settings. The legislative and labour conditions that prevent them from exercising their judicial power independently, in particular when the matter involves political and public individuals as the processes for appointing legal professionals.

The lack of professional environment

Due to the lack of houses for judges, legal professionals are required to live in the houses of Frelimo party or District Administration; the lack of other conditions, such as transportation and office commodities, makes it impossible to take steps, leading the staff of judicial institutions to depend on the means of individuals, the executive sector and even Frelimo party (Ucama and Azevedo-Harman, 2013: 9-10). As Gilles Sistac said (April 1, 2011)¹² the vulnerability of the Judiciary is also caused by the Constitution itself, which, despite proclaiming it as an independent body, does not create conditions for its functioning, making it, in practice, dependent on the Executive either in financial or material terms (Ucama and Azevedo-Harman, 2013: 9-10).

Appointments and dismissals of judges for political party affiliation

Although the Mozambican Constitution (CRM) establishes that judges are immovable, they cannot be transferred, suspended, retired or dismissed if not in the cases provided for by law (paragraph 3 of article 216 of the CRM of 2018), in practice, people are appointed, exonerated, transferred and assigned certain conditions through the exchange of favours or simply because they are close to those

¹² SAVANA, Jornal Semanário, Abril 1, 2011, Nr. 899, Maputo.

accountable for the nomination processes, leading to this that the judges feel obliged to obey political office holders to achieve working conditions that, at the outset, they should be immediate. “As a result, many magistrates exercise their functions by minimizing efforts, justifying that they do so because “here there is no environment” (idem, 2013: 10).

The process of appointment, promotion, and dismissal of professional judges are established, on the one hand, in CRM as mentioned above, and on the other hand, in the Organic Law of the Judicial Courts¹³ and the Statute of Judicial Magistrates.¹⁴ The CRM¹⁵ gives the President of the Republic (Head of State) the power to appoint the President and Vice-President of the Supreme Court (higher body of the hierarchy of judicial courts),¹⁶ although having heard the Superior Council for the Judiciary (CSMJ), and in turn, those who make up the CSMJ are, in their majority, Magistrates and other entities appointed by the PR.

‘Now, this reading shows that at the center of the process of appointing legal professionals, maximally, is the President of the Republic, with exclusive powers to do so. This situation of exclusive appointment by the President of the Republic feeds a condition of dependency.

The assessment made in Mozambique by African Peer Review Mechanism (MARF) concluded that it is common practice for judges to be appointed on a political basis, which compromises their independence. MARF concluded that, the case of the former TS President, Mário Mangaze, who has held the position since its creation in 1988, but who, nevertheless, and as determined by President Joaquim Chissano, managed to be reappointed in 2004, despite Renamo’s objection to the Assembly of the Republic.

According to the MARF, the President of the TS is automatically appointed to the position of President of the CSMJ, an institution whose central role is to appoint judges to judicial courts. Since that the President of the TS is appointed by the PR and that the ruling party holds a majority in the Parliament, the PR and his party can exert influence over a number of appointments to the CSMJ’ (Ucama & Azevedo- Harman, 2013: 12).

2. Some illustrative cases of Frelimo’s capture of judiciary power

The case of hidden debts

Concerning hidden debts, Frelimo received US \$ 10 million, which was transferred to the account of the Central Committee of the Party, domiciled at (Millennium BIM), in Maputo, between March to July 2014. The three projects financed by hidden debts were not designed by the Government of Mozambique. Privinvest conceived a project called Exclusive Economic Zone (EEZ) Monitoring & Protection System and sent to President Guebuza. Jean Boustani, Teófilo Nhangumele, and other stakeholders lobbied Guebuza to approve the project (CIP, 2017).¹⁷ Also, during his trial in Brooklyn,

¹³ Artigos 52º e 53º, todos da Lei n.º 24/2007, de 20 de Agosto.

¹⁴ Artigo 19º, al. a) e b) da Lei n.º 10/91, de 30 de Julho.

¹⁵ N.º2 do artigo 225 da CRM.

¹⁶ N.º 1 do artigo 225 da CRM.

¹⁷ CIP, *Partido Frelimo recebeu 10 milhões de dólares das dívidas ocultas*. Maputo, 28 de Junho de 2017, accessed on May 2020 feom: <https://cipmoz.org/wp-content/uploads/2019/11/Pressbook-2019.pdf>.

Jean Boustani in revealed that Filipe Nyusi received a bribe of US \$ 1 million from Privinvest (VOA ENGLISH, Nov. 20, 2019)¹⁸.

Despite the facts mentioned above, the Public Prosecutor's Office did not initiate an investigation against Frelimo party along with Filipe Nyusi, as well as Armando Guebuza, Head of State at the time, which reveals that the Mozambican justice bodies are at the service of the ruling party, preventing them from laying hands on the party and its leaders.

The case of the murder of Anastácio Matavele

Regarding the murder of social activist Anastácio Matavele, the Public Prosecutor's Office decided to move away from the final accusation in the scope of the trial, of Mr. Henriques Machava, a senior Frelimo member, even though knowing that he is, in legal terms, the real owner of the vehicle used by the Special Operations Group (GOE) operatives to pursue the crime. The action of the Public Prosecutor's Office was aimed at removing political connotations from crime since Mr. Machava is the Mayor of the Municipal Council of Chibuto.

The Public Prosecutor's Office fought to remove the state civil accountability, arguing that the defendants committed the crime in their name and their interest, but all the elements show that the murder of Matavele was a state crime ordered by Frelimo leaders.¹⁹

The capture of electoral bodies. As an illustration, the way the October 2019 elections were organized revealed that the CNE assumes a role as a player and not as a referee, a fact that demands the urgency of the professionalization of that body, under penalty of Mozambican democracy becoming, in short, a front army (CDD, April 30, 2020, n^o. 7, pg. 1).

The electoral administration system represents an obstacle to the Mozambican democracy, and this is main reason that leads to their distrust is their composition (Nuvunga, 2005). In fact, out of the 17 members that compose the current CNE body, Frelimo has supremacy of representation and control, through its five-party representatives and four other co-opts from civil society. Renamo has four party representatives and two more co-opted by it, and finally, MDM with only one representative and one co-opted. The implication of this is what happened in last October's elections where the opposition voted against the fraudulent results of the elections, however, Frelimo, through its representatives and other co-opted members of CSOs, approved the results. Though the structure was negotiated and legally established, we argue that it is vulnerable to manipulation from the powerful elite.

As argued by the Archbishop of the Diocese of Beira and AGP mediator, Jaime Gonsalves (2005, in Nuvunga 2005:27), the Mozambican electoral process is disappointing, from logistical problems to the electoral results, transforming itself into a source of conflicts. For the Archbishop,

'Democracy is a conviction and, therefore, must be implemented by people who believe in it (...). In our case [Mozambique], it is being put into action by people who do not believe in it. The conviction that we can be democratic is not yet deep-rooted. [...] Mozambique is known as a country incapable of having fair and transparent elections (*ibidem*)'.

¹⁸ VOA Português. *Dívidas ocultas*: Filipe Nyusi recebeu um milhão de dólares, diz Jean Boustani, 20 nov. 2019. Accessed on May 30, 2020 from: <https://www.voaportugues.com/a/d%C3%ADvidas-ocultas-filipe-nyusi-recebeu-um-milh%C3%A3o-de-d%C3%B3lares-diz-jean-boustani/5174964.html>.

¹⁹ Centro para Democracia e Desenvolvimento (CDD). COMUNICADO DE IMPRENSA. *CDD congratula órgãos de justiça pelo julgamento do assassinato de Matavele, mas manifesta reservas quanto ao esclarecimento deste crime de Estado*. Accessed on May 30, 2020 from: <https://cddmoz.org/>.

3. How Frelimo handles electoral processes: the 2018 and 2019 cases

Census: the process was hampered in the opposition's bastions

The first thing Frelimo did to manipulate the 2018/2019 voter registration was gerrymandering, that is, manipulated constituencies in its favor. Firstly, it moved obsolete equipment to the opposition's bastions, specifically the central region of the country, and make the census more difficult. And second, the amount of registration equipment decreased, leading to an increase in the number of voters per registration brigade, which led to an overload on obsolete machines, abstention, and extortion of monetary values to voters (EISA, 2019).²⁰

The second thing was the registration of ghost voters, which led to over registration in the bastions of Frelimo (with emphasis on Cabo Delgado and Gaza). The registration of more than one million voters in Gaza between 2018/2019, a province with over 800,000 citizens of voting age, is an evidence of how the Mozambican electoral process is in the interest of the elite of Frelimo. On this basis alone, Frelimo was granted 22 seats in the parliament. However, "Statistics do not lie, but there are those who use them to lie without fear" (Francisco 2019).

Election Campaign: CNE granted late financing

Within the scope of the electoral campaign, the process was manipulated by CNE, through the late disbursement of financing to political parties, an aspect that affected the participation of many competitors in the campaign (MOEUE, 2019). The late disbursement of financing had an intent to harm opposition parties for the benefit of Frelimo, since it would illegally use public resources (vehicles, public places, public officials, etc.), enjoying the advantage of being in power.

The filling of voting polls

On voting days, what happened was the late opening of polling station locations, with particular emphasis on the province of Nampula (FORCOM, 2019). The other way in which the fraud occurred was the polling station, where citizens in connivance with polling station members fraudulently introduced ballot papers already voted in favor of Frelimo and Filipe Nyusi. In the 2019 elections, in particular, only the ballot box contributed with 7.3% and 6.8% to the victory of Frelimo and its candidate Filipe Nyusi respectively.²¹ The image below shows a case of a citizen with ballot papers voted in favor of Filipe Nyusi, already destined to the filling of ballot boxes in Nampula. It is an attack on the democratic rule of law enshrined in the Constitution. As Karl Popper said in his publication *The Open Society and its Enemies* (1945), democracy is a regime in which citizens can remove the government through elections.

Adulteration of electoral results during counting

The calculation of electoral results in Mozambique obeys 4 phases, namely, partial counting (which takes place at the polling stations after the end of the ballot and counting of votes); the district counting (through the District Election Commissions or City); the provincial counting (through the Provincial Election Commissions); and, finally, the general counting (done at central level by the National Elections Commission).²² At the national level, CNE is responsible for national aggregation of the minutes and notices of the provincial tabulation. Several times, CNE produces election results in

²⁰ EISA. Instituto Eleitoral para a Democracia Sustentável em África. *Notas Sobre gerrymandering no recenseamento eleitoral de 2019: fortes sinais de manipulação intencional?* ed. 3. Maputo: EISA. May 6, 2019.

²¹ CDD – Democracy Review. Eleições Gerais de 2019. Enchimento de Urnas Reforçou a Vitória de Nyusi em 6.8% e da Frelimo em 7.3%. ed. 7. Maputo: CDD. 2019, accessed on May 23, 2020 from http://eleicoes.cddmoz.org/wp-content/uploads/2019/12/Enchimento_de_urnas_reforcou_a_vitoria_de_Nyusi_e_Frelimo.pdf.

²² Lei n.º 8/2013, de 27 de Fevereiro, alterada e republicada pela Lei nº 2/2019, de 31 de Maio.

the cabinet. The table below illustrates the case of Marromeu when CNE manipulated the data in 2018, contrasting with the results from CDE.

Table 6.2. Results of intermediate and general municipal clearance of the village of Marromeu in 2018

	Intermediate Clearance (CDE)		General Clearance (CNE)		Difference
Registered Voters	28,211	100%	28,211	100%	0
Voters	20,207	71.63%	19,559	69.33%	-649
Abstentions	8,004	28.37%	8,652	30.67%	+648
Blank votes	553	2.74%	533	-----	0
Null votes	647	3.20%	668		+61
Valid votes	19,007	94.06%	18,338	100%	-669
CANDIDATES					
Frelimo	9,143	48.10%	8,395	45.78%	-748
MDM	1,493	7.86%	1,594	8.69%	+101
Renamo	8,371	44.04%	8,349	45.53%	-22

Source: CIP²³

In the 2018 elections, in Matola City, within the scope of the district tabulation, three notices were produced with different results each, one of which gave victory to Renamo. The Elections Commission of Matola City chose and officially validated the announcement that gave victory to Frelimo.²⁴ Also, in the Moatize municipality, Renamo had won the 2018 elections with 11,166 votes against Frelimo's 9,786, at the end of the vote counting. On the night of October 12 (two days after the voting), the door of the district STAE was broken down by the decision of the Election Commission of the City of Moatize, and, at that time, 1,400 Renamo votes were invalidated, thus lowering their votes from 11,166 to 9,742 votes, thus, Frelimo won the elections.

Another evidence that the electoral results were produced with the electoral bodies, in the framework of the counting of the voting results, was the discrepancy between the number of voters for the presidential election and for the legislative election in the 2019 elections. In other words, if each citizen received two ballot cards, namely, one to elect the president and another to elect the Assembly of the Republic, it was assumed that the total number of votes in the ballot box (considered the total number of voters) would be equal in each election (given that the voting was simultaneous), which did not happen. In the presidential election 6,823,926 voted and in the legislative 7,766,414 voters. This means that the ballot box was higher for Filipe Nyusi than for Frelimo.²⁵ The announcement of the partial counting of one of the polling stations in the province of Gaza, a bastion of Frelimo (which registered ghost voters) shows an evident filling scenario. The number of registered voters between 2018/2019 was 800 voters, and everyone went to vote (no one became ill or died for a year). Of these, 799 voted for Nyusi. The same notice says that there were still 8 abstentions, which means that MMVs intended to fill the table up to 816 votes.

Violence during the election campaign to deny votes to the opposition

²³ CIP: Political Process in Mozambique Bulletin 81 - 29 November 2018, p. 1. Accessed on May 23, 2020 from: https://www.open.ac.uk/technology/mozambique/sites/www.open.ac.uk.technology.mozambique/files/files/Eleicoes_Autarquicas_81_29November2018.pdf.

²⁴ <http://opais.sapo.mz/video/matola-uma-eleicao-tres-editais-e-tres-resultados-diferentes>. Matola: uma eleição, três editais e três resultados diferentes. STV: Jornal da Noite. 16/10/2018. Accessed on December 5, 2018.

²⁵ CDD – Democracy Review. Eleições Gerais de 2019. Enchimento de Urnas Reforçou a Vitória de Nyusi em 6.8% e da Frelimo em 7.3%. ed. 7. Maputo: CDD. 2019. Accessed on June 20, 2020 from: http://eleicoes.cddmoz.org/wp-content/uploads/2019/12/Enchimento_de_urnas_reforcou_a_vitoria_de_Nyusi_e_Frelimo.pdf.

Another means that Frelimo uses to make the electoral process its monopoly is violence against the opposition and its supporters, as well as civil society. Frelimo does this in connivance with the police, on the one hand, against opposition leaders and candidates and, on the other hand, against election observers and journalists who want to contribute to electoral transparency. Table 2 below shows the number of cases of violence carried out by the police and Frelimo supporters against opposition leaders and candidates during the 2019 election campaign. An illustrative example of how the police is used as an instrument of electoral violence by the Frelimo elite is the murder of social activist Anastácio Matavel by police officers in Gaza, a bastion of Frelimo.

Table 6.3. Number of cases of violence carried out by the police and Frelimo members against opposition candidates and social activists*

Protagonist of violence	Number of Occurrence
Violence by Frelimo supporters without police cooperation	9
Police violence	8
Violence carried out by Frelimo in connivance with the police	3
Violence by unidentified individuals	6
Total	26

Source: *Data compiled by authors

4. Consequences of capturing electoral processes

Higher rate of electoral abstention

The capture of Mozambican electoral processes and their subsequent subordination to the interest of the Frelimo elite are holding back people from voting. As Brito argues (2010: 91)²⁶, the problems and conflicts that have marked electoral processes since 1994 also contribute to the “disaffection” of citizens concerning political and governance issues. A fieldwork conducted by the Center for Democracy and Development Studies (CEDE) reveals that the quality and transparency of the electoral administration affects abstention. About 33 percent of respondents did not trust CNE and STAE (Brito, 2007, pg. 8-9). Accordingly, electoral abstention erodes democracy and, therefore, can no longer be seen as a threat to the government's legitimacy (Brito, 2007:1). As shown in table 3 below, voter turnout in Mozambique was below the 50% from 2004 to 2014, after a high level in the 1994 and 1999, respectively 87.9% and 69.5%.

Table 6.4. Voter turnout 1994 - 2014

Election year	Turnout
1994	87.9
1999	69.5
2004	36.3
2009	44.4
2014	47.8

Source: ADS-Elections, 2019. 1st Ed. May 9, 2019, pg. 4.

Post-election conflicts

²⁶ BRITO, Luís de. 2010. Revisão da Legislação Eleitoral: algumas propostas para o debate in Desafios para Moçambique 2011. Maputo: IESE.

As MDM president said, “Post-election political-military conflicts are indicators of STAE’s inoperability because when popular wills are addicted, there are reactions.”²⁷ In our viewpoint, political-military tensions that have been installed in the country since 2012, emerge from electoral processes. The opposition, at the national level, has been continuously contesting the election results since the founding multiparty elections, held in 1994. Since then, the opposition, Renamo in particular, has been contesting electoral results, which culminated on violence in late 2012. For Efraime Júnior (2013: 251), “In Mozambique, the use of violence remains a way of doing politics, a continuation of politics.”

The 2019 elections were the only ones held in the light of electoral legislation of the previous cycle, which meant a slight evolution concerning the previous elections, given that each election had specific legislation (Brito, 2010). As a result of the 2019 general elections that gave victory to Frelimo and Filipe Nyusi, Renamo, the largest opposition party, threatened to organize a national demonstration, to challenge the electoral results.

5. Media capture

The press is a central element in contemporary democratic societies, whose role is to convey information and propaganda. It can bring down governments, decide an election, and even generate wars. It is through this that media is, generally, conceived as the fourth power. In addition to informing and transmitting an impartial view of events, media monitors government action, ensuring the good management of public affairs and offering a balance to public authorities, which, without due social control, can be abused for private and partisan purposes (Chichava and Pohlmann, 2009:1).

In his recent work, “Why is it so difficult for the media to denounce corruption in Mozambique: a shaken counterpower?”, Nhanale (2020)²⁸ denounces some of the obstacles the media coverage faces in cases of corruption in Mozambique, it is difficult to access to sources of information, censorship, acts of coercion against press freedoms against journalists, just for a few. All of this aims to prevent report of cases of corruption involving Frelimo leaders. Recent examples of violence against media professionals include the arrest of Arsénio Sebastião from DW and Jorge Malangazi, a Freelancer trying to report Frelimo’s atrocities in Sofala. They were arrested as they intended to cover the case of a store belonging to Manuel Ramissane, a Frelimo officer, who is also a member of Parliament. The store was secretly operating at night, and people were consuming alcoholic beverages, violating the State of Emergency clauses in force in the country. The police arrested the journalists and confiscated their working material staff.²⁹

Frelimo’s fight against freedom of the press, especially from the independent media, has as its historical landmark the murder of Carlos Cardoso on November 22, 2000. At the time, Cardoso was investigating corruption cases involving Frelimo leaders. Cardoso’s death meant the disappearance of investigative journalism from the excesses of political power (Chichava and Pohlmann, 2009: 132). In fact, according to CDD (May 3, 2020)³⁰, the current context of armed conflict in Cabo Delgado is used by the regime to justify violations of freedom of the press and the right to information. This political pressure against non-state media is frequently evident in electoral processes and anti-corruption tracing. The Reporters Without Borders (RSF) 2020 report reveals that from 180 studies countries,

²⁷ O País. Má actuação do STAE causa conflitos em Moçambique. 16 de Julho de 2019. Accessed on May 23, 2020 from: <http://opais.sapo.mz/ma-actuacao-do-stae-causa-conflitos-em-mocambique->

²⁸ Ernesto Nhanale is the current president of the Center for Interdisciplinary Communication studies and the Executive Director of Misa-Moçambique

²⁹ Lusa. Jornalistas detidos por alegada “corrupção passiva” postos em liberdade. Accessed on June 19, 2020 from: <https://noticias.sapo.mz/actualidade/artigos/jornalistas-detidos-por-alegada-corrupcao-passiva-postos-em-liberdade>

³⁰ CDD - Política Moçambicana. 8ª ed. Violação dos Direitos dos Jornalistas e Tentativas de Silenciamento marcam as Celebrações em Moçambique. Maputo: CDD, May 3, 2020, accessed on May 30, 2020 from: <https://cddmoz.org/>.

Mozambique fell from 103rd to the 104th position. This is associated to the political capture of the press and its subordination to the Frelimo Party (DW, April 21, 2020).³¹

During the 2014 elections, the European Union Election Observation Mission (EOM-EU, 2014)³² monitored a range of public and private media from September 24 to October 15, 2014. The results of the survey, as documented in Table 4 below, illustrate the subordination of state media to Frelimo's interest. The election campaign coverage made by TVM greatly violated article 11 of the Press Law, which obliges the public media to guarantee impartial and balanced coverage. TVM is the most evident body in terms of the capture of Mozambican media by Frelimo.

Table 6.5 The state media showed favouritism to Frelimo to the detriment of other candidacies in covering the electoral campaign in 2014.

Media Channel	Time allocated to each application in %					
	Nyusi	Frelimo	Dhlakama	Renamo	Simango	MDM
TVM	64%	56%	17%	22%	19%	17%
Jornal Notícias	60%	60%	23%	12%	17%	14%
RM	39%	47%	33%	23%	28%	23%

Source: MOE-UE, 2014.

6. Final Remarks and Recommendations

As illustrated throughout this paper, Mozambican democracy is currently captured by the Frelimo elite. The cardinal captured democratic institutions are the legislative, judiciary, media, and electoral administration bodies, all of which are acting in the interest of the party elite. The Guebuza Administration has moved the country to political and democratic closure (Nuvunga 2014), and President Nyusi seem to take the same path that has put Mozambique as an autocracy. In practice, the argument of captured democracy goes further, since competition has become weaker as the dominant Frelimo won more than 2/3 of the seats in the Parliament. The tentative democratization in Mozambique is currently a conundrum.

More than the predicted stage for the opposition to possibly win pockets of power with Frelimo conceding their victory (Nuvunga 2014), this may apply only at the local level where Renamo and MDM won in 6 municipalities in the 2018 election. In fact, besides the aforementioned institutions that have been captured, the late Renamo leader, Mr. Afonso Dhlakama, seem to have left a gap in the opposition. However, after the Guebuza Administration, more than benefiting from its political monopoly, this paper suggests that Frelimo has fallen into factionalism. The disapproved candidacy of Samora Machel Júnior for the mayor of Maputo City, the hunting of former President Guebuza and senior Frelimo members linked to the illegal debts, also suggest a significant harm not simply for the party, but the society as a whole. The findings in this paper suggest that democratization from above may lead to hamper transition and strengthen the state and ruling party overlap (Nuvunga 2014) and ultimately cause factionalism within the dominant ruling party.

The democratization from above has built and strengthened a *leviathan* elite that has strongly captured democratic institutions. The legislative power capture is associated to party discipline, on the one hand, and labour conditions, on the other, that prevent itself from exercising its power independently, especially when dealing with cases involving key elite captors. The lack of institutional

³¹ Liberdade de Imprensa piora na Guiné-Bissau e em Moçambique. Accessed on May 31, 2020 from: <https://m.dw.com/pt-002/liberdade-de-imprensa-piora-na-guin%C3%A9-bissau-e-em-mo%C3%A7ambique/a-53201313>.

³² Missão de Observação Eleitoral da União Europeia (MOE-UE) – Eleições Gerais 15 Outubro 2014. Accessed on June 22, 2020 from: [www.eods.eu/library/EUEOM PR MOZAMBIQUE 24.09.2014 pt.pdf](http://www.eods.eu/library/EUEOM_PR MOZAMBIQUE 24.09.2014 pt.pdf).

professionalism as representatives of the people, expecting political and private gains promotes democracy capture with strong ties of (inter)dependency which may frustrate key Frelimo members' expectations and promote factionalists. Moreover, the cycle of uneven interdependency between the prime elite against the legislative and judiciary officials undermines transparency at the cost of the society. And, attached to that, those who risk being professional, put their lives in danger.

The capture of legislative is by nature more complex inasmuch as they arise from the same political party and intra-party democracy is less known by regular citizens, including Frelimo members. Only an equilibrium in the Parliament could improve the level of political debate, which is less likely when presidential and legislative elections take place in parallel. But equilibrium between the legislature is less likely in the near future because even if the MPs decide to rebel, article 187 of CRM gives the power for the Head of State to dissolve the Parliament if it refuses to approve the Social and Economic Plan (the annual executive plan).

The media capture consists of threats against independent media and, therefore, threats against the freedom of the press. Independent media has the historical landmark of the murder of Carlos Cardoso, in 2000, while investigating cases of corruption involving the Frelimo elite. Public media is historically pro-regime, but the parliament can exert some pressure for a balanced intervention. The fight against corruption is one of the main sources of threats to journalists, and, due to controlled public servants, including the police as well as the captured judiciary and legislative power, improvements require a strong intervention from civil society. Media could improve the legitimacy of election results – and thus reduce election-related conflicts – but coverage is restricted. Based on the aforementioned reform on electoral bodies, we argue that it could allow a relatively less controlled media on electoral affairs.

Finally, the capture of electoral processes by the Frelimo elite consists of the supremacy and control of the electoral bodies, contributing to the manipulation of the entire electoral administration process in favor of the party in all its phases, namely, electoral registration, voting, counting of the results down to the level of electoral litigation. The poor performance of electoral bodies is the cause of political-military conflicts post-election processes in the country, calling into question the construction of a rule of law and effective peace. The period from 2020 to 2023 is an opportunity for the executive and the Parliament (all political parties) to reform STAE and CNE structure and build institutions based on meritocracy. Moreover, STAE could be the only permanent electoral body and CNE, a temporary body for election years. Instead of depending on its subjugation to CNE, STAE would administer electoral processes. This way, both institutions could be less vulnerable to political influence.

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CHAPTER 7

DEMOCRACY CAPTURE IN

NIGERIA

Idayat Hassan



1. Democracy Capture in Nigeria

After prolonged years of military rule, Nigeria transitioned to democracy in 1999. But even as a democracy, Nigeria is challenged by gross human rights violations, developmental stagnation and a lack of government accountability. What explains Nigeria's poor outcomes despite its democratic status?

Democracy is a complex system, comprising both procedural and ideological frameworks. Procedurally, democracy is determined by its regularly scheduled elections – which ascribe political power to citizens. Ideologically, the democratic agenda runs deeper. Democracies are ostensibly bastions of human rights, and accountability. They seek to address the gap between popular demand and supply of democratic provisioning; and they aim at the structural transformation of the state and the economy for wealth redistribution and economic wellbeing of the citizenry. A true democratic polity is therefore not only democratic in its formal procedures but in its ideology.

Pertaining to Nigeria, scholars have argued that lack of democracy is the precipitating factor that causes poverty and underdevelopment in the post-1999 era.¹ These scholarly arguments seem counterintuitive in that they assert that a democratic state (post 1999 Nigeria) lacks democracy. In reality, they highlight the concept of democratic capture – an important framework for understanding democracy in many states today. “Democratic capture” comprises all the processes, individuals and institutions by which democratic ideals are co-opted, undermined or circumvented within a constitutionally democratic state.²

Since its transition, Nigeria's democracy has comprised periodic elections and little else. While the country exhibits the trappings of electoral politics every four years, several fundamental institutions of democracy are lacking or non-existent. Democratic institutions, such as judicial independence, press freedom, human rights, and legislative accountability, are weak despite two decades of democracy. Even elections themselves are flawed in important ways. The Nigerian experience is therefore largely a procedural democratic arrangement, lacking the substance of democratic ideals but abounding in defective elections and other shallow processes.

Section 3 of this paper analyses the institutions in Nigeria that are most vulnerable to democratic capture, and how this capture has occurred within those ostensibly democratic institutional trappings. Section 4 explores salient dynamics and processes that underpin why state capture occurs in Nigeria; and Section 5 highlights the indirect contributory factors of state capture. In Section 6, the paper identifies the key actors who sponsor and organise democratic capture. The final sections reflect on the consequences of state capture and areas in need of urgent improvement.

2. Captive Institutions

The majority of the nominally democratic institutions in the Nigerian system operate in a manner that is inconsistent with democracy. In this paper, we refer to these as “captive institutions.” While their founding documents espouse principles of accountability and fairness, their operations are characterised by unilateral decision making, impunity and corruption. In this section, we will detail the nature of democratic capture in five key areas: elections, the census, the executive, legislature and judiciary, the party system and the press.

¹ Lewis, Peter M., and Darren Kew. 2015. “Nigeria's Hopeful Election.” *Journal of Democracy* 26 (3):

² Hellman, Joel; Jones, Geraint; Kauffmann, Daniel Seize the state, seize the day: state capture and influence in transition economies *Journal of Comparative Economics*, Volume 31, Issue 4, 2003, pp751-773.

<https://doi.org/10.1016/j.jce.2003.09.006>.

Elections – manipulation of electoral process

One of the most significant elements of democratic capture is seen through the poor conduct of elections in the country. Elections in Nigeria remain highly problematic. They are rife with organisational shortcomings, as well as issues of ethics and validity. Nigeria's most recent presidential elections, held in February 2019, were so disorganised that hours before voting was to begin the election was postponed by a week.³ The national electoral body (INEC) cited "logistical" problems as the cause of the delay, even after previously assuring Nigerian and international observers of their preparedness.

Beyond disorganisation in election conduct, electoral outcomes in Nigeria are heavily determined by patronage networks, electoral fraud and increasing rates of organised violence. Allegations of brazen vote buying by major political parties at all stages of the process frequently make newspaper headlines during election season.⁴ While there is little quantification of the scale of vote buying within Nigeria, repeated qualitative accounts confirm its prevalence. In their 2018 review of vote buying in Nigeria, authors Freedom Onuoha and Jide Ojo recorded over five first-hand or press-reported accounts of vote buying, with individuals being paid between 5000 NGN and 5000 USD per vote (1.9 Million NGN by the present exchange rate).⁵ According to Le Van et al, Nigeria's post-1999 democratic trajectory has been parabolic in that the conduct of elections (1999-2019) has been marred by elite monetised politics, rigging, manipulations, and violence.⁶ Since the widely anticipated 1999 transition election, subsequent elections held at four year intervals have been characterised by elite accommodation,⁷ distribution of patronage⁸, political nomadism and money politics.⁹ Elections have, in essence, been reduced to ruthless competitions for access to state resources.¹⁰ These state resources are almost invariably misappropriated for personal gains, and for repayment of campaign sponsors.

INEC resident electoral commissioners, national commissioners and the chair are all appointed by the President subject to the approval of the Senate. This raises concerns about their independence, particularly as the political class has taken advantage of this appointment process to capture the institution by influencing the appointment of cronies as part of the patronage system. For example, ahead of the Bayelsa governorship elections in 2019, the Cross-River State resident electoral commissioner resigned and joined the All Progressive Congress (APC) to contest the governorship primaries in the state. He did not win the ticket but neither was he punished, since INEC cannot do so, given they did not appoint him. The second instance was the post-2019 general elections nomination of a self-confessed member of the APC leadership in Osun State as the REC nominee for the state. The discussion during the confirmation hearing of his nomination in the Senate raised legitimate concerns about how many closet active party partisans have been confirmed by the Senate to this important state-level position¹¹.

The allegation, or perception, that INEC is subservient to every ruling party is hard to throw off. For instance, the 2007 elections organised by Prof Maurice Iwu as the Chairman on Nigeria's Independent

³ <https://www.premiumtimesng.com/news/headlines/313310-breaking-why-we-postponed-2019-elections-inec-chairman.html>

⁴ <https://guardian.ng/politics/cash-for-votes-fears-before-nigerian-general-election/>

⁵ <https://www.accord.org.za/conflict-trends/practice-and-perils-of-vote-buying-in-nigerias-recent-elections/>

⁶ LeVan Carl. 2015. *Dictators and Democracy in African Development: The Political Economy of Good Governance in Nigeria*. Cambridge: Cambridge University Press. p. 282.

⁷ Ibid

⁸ Lewis, Peter M., and Darren Kew. 2015. "Nigeria's Hopeful Election." *Journal of Democracy* 26 (3): 94–109.

⁹ Mustapha M (Opcit)

¹⁰ Amuwo, A. (2009). "The Political Economy of Nigeria's Post-Military Elections, 1999-2007". *Review of African Political Economy* 36 (119): 37-61.

¹¹ Centre for Democracy and Development (2020), *Reviving Reform: Improving Nigeria's election processes*

National Electoral Commission (INEC) were viewed as one of the worst elections in the history of Nigeria. The European Union Election Observation Mission, described them as “marred by very poor organisation, a lack of essential transparency, widespread procedural irregularities, substantial evidence of fraud, widespread voter disenfranchisement at different stages of the process, lack of equal conditions for political parties and candidates and numerous incidence of violence”. Across the country, there was unprecedented rigging, ballot stuffing, falsification of results, intimidation of voters, and direct assault on the people. In some extreme instances, voting did not take place. According to Human Rights Watch report¹², “in collation centres in Kamara Primary School, Jekada Fari and the local government INEC office in Gombe town, observers witnessed the stuffing of ballot boxes by two young men who added ballot papers to a ballot box whose results were in the process of being counted by electoral officials, the filling in of result sheets by INEC officials together with PDP party agents, and the changing of results from one form to another”. A closer observation of electoral processes in Nigeria suggests that electoral umpires either at the state or national level often pander to the interest of the ruling party in power.

It is in the same way that elections at the local government have been captured by the elites and state governors. The local government elections are conducted by the State Independent Electoral Commissions (SIECs) whose chairperson and members are appointed by the state governor¹³ who also funds their operations. But instead of conducting local elections, state governors appoint their cronies into caretaker committees to run the local government area. The caretaker committees are appointed and removed at the will of the governors. This means that hundreds of thousands of citizens are denied the opportunity to exercise their franchise and determine who governs them at this local level. Government officials often lack a popular mandate from the people they serve.

Even the design of electoral act is another process which has been captured in Nigeria. The post electoral reform process provides an opportunity for incumbents and political elite to influence the rules of the game. Successive electoral act amendment process in Nigeria has captured the interest of the political class as against the interest of the citizens. For instance during the 2010 electoral amendment process, a previously adopted amendment that allowed INEC to disqualify candidates was removed by the National Assembly during the second alteration.

Following the release of timetable for the 2019 elections, announcing that the presidential and National Assembly polls would be held on 16 February, with the governorship and state assembly elections to take place on 2 March. The National Assembly passed a bill reordering the order of the vote – with the presidential vote to come at the end of the cycle - to aid voter turnout and prevent bandwagon effect. Again this was a case of politicians looking out for themselves as if their presidential candidate doesn't win, their chances of winning in the National Assembly elections go down.

But the assent was declined by President Muhammad Buhari who claimed it infringes on INEC mandate to organise, undertake and supervise elections¹⁴.

The Census

The national census is an incredibly important part of most democracies, as it allows the government to understand the dynamics and demographics of the population and to design policies and interventions accordingly. However it also determines, in part, the allocation of national resources as well as the relative political clout of subnational regions. Nigeria is no exception. But it has a history

¹² <https://www.hrw.org/news/2007/04/25/nigeria-presidential-election-marred-fraud-violence>

¹³ 1999 constitution as amended

¹⁴ Section 15(a) third schedule of the 1999 constitution as amended. <https://www.vanguardngr.com/2018/03/buhari-rejected-assent-polls-re-ordering-bill/>

of census politics and inconsistencies. Its first election as an independent country, held in 1962, was extremely controversial. The North accused Southerners of inflating population figures, while Southerners claimed that inflation was the way to match a British installed Northern hegemony.¹⁵ As population size determined parliamentary seats, Southerners saw the census as their way to reassert political influence. Unwilling to accept the results, the Northern elite ensured that the census was withdrawn. When it was re-done in 1963, the North had inflated its own figures to match the South, such that the proportions were restored -- and a Northern majority reaffirmed. Since then, censuses have been more of a political battle than an accurate demographic exercise.

Between 1976 and 2020, Nigeria's population has grown from 65.2 million to an estimated 200 million.¹⁶ This inflation on its own is suspect. But more so when you consider that the proportions of inhabitants in each region in Nigeria have basically remained the same in that period. The state by state analysis conducted in 2018 by Nigerian political commentator Feyi Fawehinmi revealed almost exact equality between each state's population share in 1991 and 2006.¹⁷ All but two states retained their exact 1991 population proportions, Abuja and Abia. Furthermore, another author's analysis of the period up to 1991 showed that the population share of the Northern, Southwestern and Southeastern regions remained constant at 55%, 25% and 19% respectively since 1953. He lamented:

“According to the data, in 39 years (1953 to 1991) all regions, North and South, have grown at about the same pace. Rural to Urban drift had not occur in Nigeria in 39 years! The relative proportion has remained the same! Nigerians don't migrate. I did not say so; the Nigerian Population Commission said so” -- Kalu Aja January 2020.¹⁸

Nigeria's only post-transition census of 2006 was mired with inconsistencies, and reflected the historical North-South rivalry. The results were widely rejected by Southern states, Lagos in particular, while they were affirmed in the North.¹⁹ In several areas, the lack of motorable roads was taken as an opportunity to conjecture the populations in inaccessible regions. In the Muslim North, census counters were disallowed from viewing women in *Purdah*. Therefore, an unverifiable verbal account of the number of women in a household sufficed as a substitute for counting. At one point during the 2006 census, thousands of enumerators resigned from counting citing unpaid salaries.²⁰ The state of censuses is so deplorable that former chairman of the National Population Commission, Festus Odimegwu decried the deep flaws of Nigerian censuses. Leading up to the 2016 census, he is reported to have said:

“No census has been credible in Nigeria since 1816. Even the one conducted in 2006 is not credible. I have the records and evidence produced by scholars and professors of repute; this is not my report. If the current laws are not amended, the planned 2016 census will not succeed”²¹

Although infrastructural and financial constraints were cited for the cancellation of Nigeria's second post-transition census in 2016, analysts believe that the political elite are tactically preventing elections from holding. Beneficiaries of the present legislative constituency, and local and state revenue allocations are determined to block an accurate census or any census at all from taking place even though the last census was conducted in 2006. This is because the results of the national census

¹⁵ <https://qz.com/africa/1221472/the-story-of-how-nigerias-census-figures-became-weaponized/>

¹⁶ <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=NG>

¹⁷ <https://qz.com/africa/1221472/the-story-of-how-nigerias-census-figures-became-weaponized/>

¹⁸ <https://nairametrics.com/2020/01/27/census-and-its-import-to-national-growth/>

¹⁹ <https://www.prb.org/objectionsovernigeriancensus/>

²⁰ Ibid <https://www.prb.org/objectionsovernigeriancensus/>

²¹ <https://www.premiumtimesng.com/news/146783-jonathan-sacks-festus-odimegwu-as-population-commission-boss.html>

in Nigeria determine both the revenue available to states from the Consolidated Revenue Fund (distributed by the Federal Allocation Account FAAC), as well as each region's representation in the national legislative body, the National Assembly.

Although the exact revenue sharing formula is undisclosed, all state governments are allocated roughly 27% of the national revenue, while local government councils are allocated 21%²². Local governments (and to a lesser extent state governments) have been created in part, based on the size of populations, which is why some states have over 40, with others less than ten. But the fact that population determines where state/local government areas will be created gives leaders a powerful incentive to inflate their population figures. This explains in part the explosion of local governments since the landmark local government reforms of 1976. Since 1976, the number of local governments in Nigeria has more than doubled, from 301 to 774.²³ Each newly created local government gets its share of the "the national cake" through the federal revenue formula.

Similarly, there is a great incentive for regional zones to inflate population sizes in order to lobby for state creation, and gain access to federal government allocations. States are created based on issues ranging from preserving ethnic authenticity to promoting development. However, since the promulgation of Decree 13 of 1970, scholars have argued that a major consideration has been their population size.²⁴ Decree 13 was a watershed moment in state creation lobbies in Nigeria, as for the first time, revenue to states factored in population size. The decree centralised revenue aggregation to one federal account, and based 50% of each state's allocation from that federal account on the state's population size.²⁵ The effect was two-fold. Some regions (notably Northern Nigeria) artificially increased their population figures in order to justify the creation of new states, while existing or new states (notably in Southern Nigeria) increased their population figures in order to gain access to greater state allocation.²⁶ The result was further population inflation.

Although several states and local governments areas were entrenched during the military regime, they have retained their structure post 1999 re-democratisation. In this way, Nigeria's three-tier federalism had been co-opted through census politics even before democratisation. But since the structures put in place have not been reviewed or overhauled, they remain compromised, or "captive" despite the present democratic regime.

The democratic system has also reinforced this. The seats allocated in Nigeria's lower federal chamber - the House of Representatives - are entirely dependent on population.²⁷ The House comprises 360 members, three each from 120 constituencies across the country. All constituencies are ideally of approximately the same population size, and no constituency can span more than one state. As Constituency delineations are conducted after each census, the greater the population of a state, the more constituencies, and more House of Representative members it can send. A more populous region stands to gain greater influence in policy-making.

²² <https://www.neiti.gov.ng/index.php/revenue-allocation#:~:text=Revenue%20is%20shared%20in%20accordance,State%20and%20Local%20Governments%20respectivel>
v.

²³ The Politics of States', Local Governments' Creation and Nigeria's Search for Geo-Political Balancing Ojo, Emmanuel O. & P. F. Adebayo

²⁴ Suberu, Rotimi T. "The Struggle for New States in Nigeria, 1976-1990." *African Affairs*, vol. 90, no. 361, 1991, pp. 499–522. *JSTOR*, www.jstor.org/stable/722841. Accessed 17 July 2020.

²⁵ Military decree 13 of 1970, Nigeria

²⁶ The Politics of States', Local Governments' Creation and Nigeria's Search for Geo-Political Balancing Ojo, Emmanuel O. & P. F. Adebayo

²⁷ 1999 Nigerian Constitution

Judiciary. In the modern democratic system, the judiciary has the functions of checking the excesses of executive power and impartially dispensing justice to offenders. The situation with the Nigerian judiciary is in deep contrast to that ideal. According to a former justice of the supreme court, Justice Kayode Eso, there exist many “billionaire judges” in Nigeria, whose billions are made through accepting bribes from wealthy defendants.²⁸ In a similar vein, a former president of the Nigerian Bar Association, Joseph Daudu described justice in Nigeria as “purchasable”. Within the 28-month tenure of the Chief Justice of Nigeria, Mariam Aloma Mukhtar (July 2012 to November 2014, 198 cases were filed against corrupt judges.²⁹ Ultimately the majority of the cases were dismissed, which called into question the independence of the oversight bodies. In 2018, the head of one such oversight body, the Code of Conduct Tribunal -- Nigeria’s highest anti-graft court-- Judge Danladi Umar, was charged with collecting bribes of over NGN 11million (28,480 USD according to 2020 exchange rates).³⁰

One of the highest profile instances of the compromised nature of the Nigerian judiciary was the 2011 suspension of Justice Ayo Salami, then president of the Court of Appeal. Salami had ruled against the President’s party People’s Democratic Party (PDP) in several electoral fraud cases -- including the gubernatorial elections of Ekiti, Oyo, Edo, Osun and Ondo states. The Sokoto gubernatorial elections had devolved into a similar legal battle when the Chief Justice of Nigeria, Justice Aloysius Katsina-Alu allegedly asked Salami to dismiss the case - a move which would favor the PDP.³¹ After public words and threats of law suits had been exchanged, the national judicial oversight organisation, the National Judicial Council (NJC), stepped in to conduct its own probe. They exonerated Katsina-Alu and indefinitely suspend Salami from his post as the President of the Court of Appeal. But the NJC is not a statutory court of law, which led many observers, including Salami himself,³² to view the NJC’s actions as undemocratic, and lacking legitimacy.³³ Moreover, Katsina-Alu, was also the constitutionally appointed chair of the NJC³⁴ -- which presented a blatant conflict of interest. An article in the Premium Times NG described the whole ordeal as:

“A politically orchestrated move by the ruling party, leaning on a politicised judiciary to remove an uncompromising judge.”³⁵

With a PDP president, and ostensibly PDP NJC, Salami was never reinstated and retired two years later. But many analysts do not doubt the veracity of Salami’s claims. Judges across multiple states, including Akwa Ibom, Anambra and Osun states have been dismissed for accepting bribes to influence the outcomes of election tribunals.³⁶

At the state level, the governors control the judiciary as they determine who is appointed judges and who becomes the chief judge of a state. In Kebbi State, a deserving chief judge was prevented from ascending the position for being a Christian. In a face-off between the governor and the chief judge in Kogi State in 2019 over the payment of salaries, led to the chief judge being removed by the governor for allegedly spending beyond budgetary allocation. The Rivers State judiciary was engulfed in a crisis between August 2013 and May 2015 over the appointment of a new chief judge. Upon the expiration

²⁸ <https://punchng.com/jailing-corrupt-judges/>

²⁹ Ibid <https://punchng.com/jailing-corrupt-judges/>

³⁰ <https://www.dw.com/en/head-of-nigerias-anti-graft-court-charged-with-accepting-bribe/a-42439344>

³¹ <http://saharareporters.com/2011/02/08/katsina-alu-asked-me-compromise-sokoto-gubernatorial-petition-ayo-salami>

³² <http://saharareporters.com/2014/01/18/chief-justice-nigeria-should-not-chair-njc-justice-ayo-salami-recommends>

³³ <https://www.vanguardngr.com/2011/08/katsina-alu-vs-salami-salami-vows-to-fight-on/>

³⁴ 3rd schedule of the constitution, section 20

³⁵ <https://www.premiumtimesng.com/news/5228-why-jonathan-can-t-reinstate-justice-salami.html>

³⁶

https://www.researchgate.net/publication/272433000_Rigging_Through_the_Courts_The_Judiciary_and_Electoral_Fraud_in_Nigeria

of Justice Iche Ndu, then Governor Rotimi Amaechi forwarded the name of his successor to the NJC as required by law. But the NJC refused to confirm the appointment proposing another candidate instead.³⁷ With neither side willing to cede ground there was a total shutdown of the judiciary in Rivers State until Governor Nyesom Wike was sworn in in 2015.

Legislature

The legislature presents another institution where democratic processes have been disregarded or abused. Senators leverage their budget oversight roles to illicitly solicit money from Ministries, Departments and Agencies (MDAs). 13 out of the 109 senators in Nigeria's 8th Senate were being investigated or prosecuted for corruption as of May 2018.³⁸

In 2018, the news of a stalling annual budget approval process made headlines. It was rumoured that legislators had been harassing the heads of federal agencies for kickbacks in order to vote in favor of their requested budgets.³⁹ Not only is this a perversion of the democratic process of investigating and thoroughly interrogating budget requests, but the illicit funds gained from these practices are used to fund subsequent political campaigns. This further skews the electoral process in their favor, as they have greater funds at their disposal than other candidates running for the same posts.

The fervent attempts by APC political figures in the executive, notably APC chairman Adams Oshiomole to remove Bukola Saraki from his position as the Senate President is a recent example of the co-optation of the legislature by external actors.⁴⁰ In 2015, Saraki, a then APC member, allied with the PDP to secure votes for the position of Senate president. His party visibly disapproved of his victory, as he had clinched the position by capitalizing on APC's ongoing internal strife and disorganization during the election period. After being sworn in, Saraki was bombarded with case after case. Saraki was charged with forgery and criminal conspiracy surrounding the senate election in 2016.⁴¹ In another case, a 16 count charge of corruption by false asset declaration was levied against him by the Code of Conduct Bureau.⁴² In a strange turn, Saraki's opposition even tried to implicate him in an armed robbery scandal.⁴³ Each of these cases was either withdrawn or dismissed by a higher court.⁴⁴

State legislature referred to as the State Houses of Assemblies in Nigeria are a deeply captured institution. While the law provides that the mandate of the house of assemblies shall include law making, oversight and representation, since 1999, most of the assemblies have remained deeply captured institutions working at the will of the governors. The governors are able to capture the state legislature as they determine who emerge principal officers of the house such that once a governor is not happy with a principal officer, he can be removed from office. In Kogi State, five lawmakers, in a house comprising twenty members, impeached the Speaker, Mr. Momoh Jimoh Lawal with the Governors backing in 2016. The uproar that ensued in the state led the National Assembly to invoke

³⁷<https://www.premiumtimesng.com/news/top-news/182546-absence-of-rivers-chief-judge-will-not-stall-my-swearing-in-wike.html>

³⁸<https://www.premiumtimesng.com/news/headlines/269939-13-nigerian-senators-face-corruption-probe-trial.html>

³⁹ <https://www.premiumtimesng.com/news/headlines/262815-nassembly-members-harassing-us-for-bribes-to-pass-budgets-heads-federal-agencies.html>

⁴⁰ <https://www.premiumtimesng.com/features-and-interviews/206446-analysis-sarakis-trial-understanding-position-law.html>

⁴¹ <https://www.bbc.com/news/world-africa-36638627>

⁴² <https://allafrica.com/view/group/main/main/id/00049733.html>

⁴³<https://www.thisdaylive.com/index.php/2019/03/16/i-was-tortured-to-implicate-bukola-saraki-says-offa-robbery-suspect/>

⁴⁴<https://www.premiumtimesng.com/news/headlines/212228-nigerian-government-withdraws-forgery-charges-against-saraki-ekweremadu.html>

her powers under the constitution⁴⁵ and take over the State Legislature⁴⁶. Another way the governors capture the legislature is the denial of monthly allocations and salaries. While the governors at times allow contractors and special budgetary provisions as incentives for members, they can also deny non loyal members of the house of assemblies their salaries. For instance in 2019 the Plateau state House of Assembly had to suspend screening of nominees for commissioners to negotiate their unpaid allowances.⁴⁷

Most laws in the state house of assemblies are executive bills and rarely receive scrutiny. For instance, the Kano State House of Assembly passed the 2019 Kano Emirate Council Bill into law in a day, and transmitted to the Governor, who assented immediately⁴⁸. The law to create additional four emirates in Kano was largely to support the Governor in a dispute with the depose Emir of Kano, Muhammad Lamido Sanusi. The emir was removed for alleged insubordination and refusal to attend meetings⁴⁹ even though it is alleged the real reason was his failure to publicly support the Governor's re-election bid.

Executive

State capture is not limited to the legislative or judiciary. At the executive level, the President and Governors are routinely a product of sponsorship by political godfathers whom they must repay once elected to office. Thus, their loyalties are to these third party actors rather than to Nigerians as a whole.

Governance reforms are needed for better accountability and responsiveness from the side of the government. However the feasibility of any type of governance reforms should be assessed against the background of power relations and rent-seeking behaviour of the various stakeholders involved. Any reform to improve the institutional, economic or political framework, which might undermine stakeholders' highly concentrated advantages, is likely to be strongly opposed. They also have the political influence to succeed in doing so.

There are even different capture dynamics within the executive, given the power that state governors have. In order to address the challenge posed by the lack of financial autonomy of the legislature and judiciary, President Muhammad Buhari signed an executive order⁵⁰ granting financial autonomy to the legislature and the judiciary. The executive order seeks to implement an already existing provision in the constitution⁵¹. But Nigeria's state governors jointly responded by threatening to sue the Federal government. Without this fiscal autonomy, the legislature or judiciary cannot uphold the principles of checks and balances, but this is in the interest of governors, who can use their influence to control finances across these legislative bodies.

The Nigeria Sovereign Wealth Fund is an example of how institutions can be held to ransom without incentives. Following the enactment into law of the Nigeria Sovereign Investment Authority (NSIA) Act 2011 aimed at building a savings base to develop infrastructure and attract local and foreign direct investments for the country. The 36 state governors on the enactment of the law claimed it is illegal and unconstitutional. According to then Chairman of the Nigerian Governors Forum, Rotimi Ameachi,

⁴⁵ Section 11 (4) of the 1999 constitution as amended.

⁴⁶ <https://www.thisdaylive.com/index.php/2016/04/07/the-kogi-state-assembly-crisis/>

⁴⁷ <https://allafrica.com/stories/201909250107.html>

⁴⁸ <https://www.premiumtimesng.com/news/headlines/366798-ganduje-signs-law-creating-new-emirates-in-kano.html>

⁴⁹ <https://guardian.ng/news/ganduje-removes-sanusi-as-emir-of-kano/>

⁵⁰ <https://businessday.ng/lead-story/article/buhari-signs-executive-order-on-financial-autonomy-for-state-legislature-judiciary/>

⁵¹ Section 121(3) of the 1999 constitution of Nigeria as amended.

the implementation of the SWF will amount to a mere kidnapping of money.⁵² His words: 'The conduct of the government of the federation and her officials is a violation of the principle of the Rule of Law and breach of the independence of the judiciary and constitutes a violation of the principle of the Rule of Law handed down by the Supreme Court. The Rule of Law eliminates completely the rule of man...Governors agree that the Federal Government should save but the law has to be respected. What the Federal Government has done is mere kidnapping of our money⁵³. Nigeria is funding her budget deficit by record borrowings.

Political Parties

Since 1999, Nigerian ruling parties the PDP, All Nigerian People' Party (ANPP) and now APC have been subject to serious internal strife. Politicians jostling for influence and power, rely heavily on personal wealth or connections to wealthy backers. Parties are also used as machinery for accumulation. Politics and the democratic space have been reduced to inter and intra elite competition.⁵⁴ In spite of two decades of democratisation, party politics lacks political ideology. Political parties are vehicles for accessing power than agenda setting. A politician will vie on a party platform today and move to another when denied tickets to run.

The 2020 September Edo governorship election is a good example. The disqualification of Governor Obaseki from contesting on the APC governorship ticket saw him defecting, along with his deputy, to the PDP. The APC candidate, Osagie Ize-Iyamu, contested for the 2016 Edo State governorship election on the platform of the PDP. In the 2020 elections, the two candidates are exchanging platforms to run on just to serve their interest.

This intense competition for primitive accumulation by elites has led to a lack of internal democracy among political parties. In 2019, disaffection over party primaries led to mass defections by aggrieved party members who accused APC leadership and some state governors of anointing their cronies to contest key positions without proper conduct of primary elections. Different factions of the same party were holding party primaries to select multiple candidates for the same set. This for instance led to the APC inability to field candidate in Rivers states for all elected offices in the 2019 elections. And the nullification of the APC Victory by the Supreme Court in the Zamfara governorship elections for not conducting a valid primaries⁵⁵.

Nigerian politicians are bereft of party loyalty that is defined by reformist ideology leading to the culture of 'political nomadism' – politics without principles underpinned by political defections by elites in search of greener pastures, or resources to be looted at both state and national levels, has characterised Nigeria's democracy.⁵⁶ Carpet crossing is a persistent feature of state politics. This underscores how minimal the party ideologies are. In 2018, the former Chairman of the PDP joined the APC, its major opposition.⁵⁷ In the early months of Buhari's government, party politics was characterized by the kleptocratic elites' mass defections to the ruling APC to evade an anti-corruption probe by the Economic and Financial Crimes Commission (EFCC).

In short, patrimonialism, prebendalism, and patronage have become the salient features of political party processes.

⁵²<https://uk.reuters.com/article/nigeria-fund/nigerian-governors-oppose-sovereign-wealth-fund-idUKLDE65E2GS20100615>

⁵³ <https://www.thenigerianvoice.com/news/73246/sovereign-wealth-fund-why-governors-are-kicking.html>

⁵⁴ Amuwo, A. (2009). Ibid

⁵⁵ <https://allafrica.com/stories/201905240330.html>

⁵⁶ Ikechukwu, U. G. 2015. "Political Nomadism and its Implications on Political Development in Nigeria: A Critical Analysis." *International Journal of African and Asian Studies* 9: 75–86.

⁵⁷ <https://www.pulse.ng/news/politics/adamu-muazu-ex-pdp-national-chairman-joins-apc/hl9sbhq>

Press

As the “fourth estate” of democracy, the press of a liberal state should be free from influence. The capture of the media in Nigeria can be framed around two major factors: media willingness to concede space and intimidation of the media by the state and other actors. Nigeria’s media are both co-conspirators in, and victims of, state capture.

Media in Nigeria is a mixture of state and privately owned. State media largely operates as the government mouthpiece and provides space for the circulation of political propaganda at the federal or state levels. Critical voices are not allowed to air views nor are opposition agendas regularly aired. Beyond owning media, government is also the biggest spender on media, such that any media outlets not favourable to the government may lose out on important advertising revenue. This quest to remain profitable has made some media vulnerable to state capture. To remain viable and guarantee steady income, some Nigeria media organisations are developing and maintaining relationships with politics, business and social religious interests at the cost of objectivity and independence.

For those who try and remain independent and free from political influence they face the threats of intimidation, censorship, arrest and closure. There have been several attempts to introduce laws restricting civic space in the last five years, but even without these the frequent harassment and imprisonment of journalists and efforts to control news outlets in Nigeria are increasingly common. The press has been harassed in Nigeria for filming protests, exposing corruption, while on election duties, espousing critical views of the government, state governors and elected government official and even social media posts deemed offensive.

The issuing and revocation of broadcast license has also been used as a tool to capture the media in Nigeria. The Nigerian Broadcast Corporation (NBC) regulates the broadcast media. In 2019 it suspended the license of Daar Communications Plc. owners of Africa Independent Television (AIT) and Ray Power radio allegedly for failure to abide by NBC code. However the founder of Daar Communications Raymond Dokpesi accused the presidency of intimidation. “I have it on strict authority and very assured information that the highest echelon of the government, the Presidency, queried and challenged the NBC that they were not doing their jobs: ‘How on earth could they be hearing and seeing on AIT what they termed hate speech?’⁵⁸

The recent review of the NBC code includes provisions regulating online broadcasting and those which will increase the fine for hate speech tenfold even though there is no clear definition of what constitutes hate speech.⁵⁹

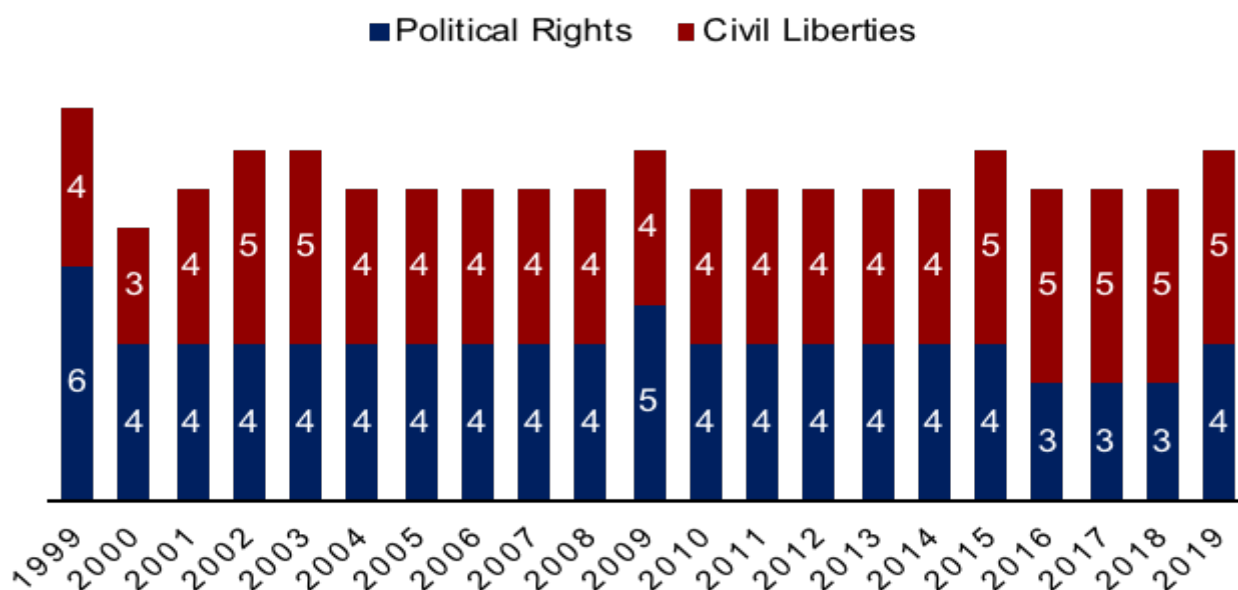
Beyond ownership of media, at the level of journalists, the lack of an adequate salary and the fact that some media outlets expect their staff to accept money from the high profile political and private sector figures they come across, comprises their ability to write stories. In an article by BBC Africa, a newspaper reporter recounted her bosses’ justification for withholding salaries. The newspaper boss reportedly asserted: “I’ve given you a platform to make money. Use it.”⁶⁰

⁵⁸ <http://saharareporters.com/2019/06/06/breaking-nbc-shuts-down-ait-ray-power>

⁵⁹ <http://saharareporters.com/2019/06/06/breaking-nbc-shuts-down-ait-ray-power>

⁶⁰ <https://www.bbc.com/news/world-africa-31748257>

Figure 7.1. Freedom in Nigeria, 1999-2019 (1= most free, 7= least free)



SOURCE: Freedom House.

Politicians are acutely aware of this. The term “brown envelope journalism” describes the common practice of circulating cash-filled brown envelopes to journalists during news briefings, or other political events.⁶¹ The unspoken agreement is that journalists will write favourable stories for politicians that give them favourable envelopes. Newspapers that resist this model and expose the wrongdoings of the political elite become financial and physical targets. In 2011, Nigeria’s newly established investigative newspaper 234Next folded citing a lack of funds.⁶² After writing a report on oil sector corruption, all its major advertising contracts were withdrawn. Undoubtedly these advertisers were pressured informally by politicians to do so.

The capture of the media space has led to the marginalisation of the majority of Nigerians and the interest of the poor. The elite set the agenda and topics for conversation, driven in part by their ownership or media houses, or close relationships with established media houses. The impact of this capture is that media contents are more likely to disinform and divide the citizenry. The lack of objective reporting has led to decline in trust for the media in Nigeria, accompanied by decline in sales of the newspapers as well as drops in listenership and viewership.⁶³ The 2018 Afrobarometer surveys showed declining support for free (unregulated) media throughout Africa since 2011. In Nigeria, that decline was by 13 percentage points. While in 2011, 58% of Nigerians were against government interference into press activities, in 2018 the number dropped to 45%.⁶⁴ This suggests that Nigerians’ trust and value of the press is less so now than it was in the past. Too much of the press is captive to the will of politicians and other wealthy actors. With objective journalism scarce, democracy is diminished as a result.

⁶¹ <https://www.refworld.org/docid/5a82f31d4.html>

⁶² <https://www.premiumtimesng.com/news/headlines/240103-interview-investigation-alison-maduekes-corruption-killed-next-newspaper-dele-olojede.html>

⁶³ <https://allafrica.com/stories/201004121635.html>

⁶⁴ https://afrobarometer.org/sites/default/files/press-release//ab_r7_pr_africans_support_for_media_freedom_declines_01052019_1.pdf

3. The Dynamics and origin of Democratic Capture in Nigeria

The co-optation or capture of democracy in Nigeria takes place through diverse methods. In interrogating the phenomenon of democracy capture in Nigeria, it is important to take into account: deep-seated historical-structural factors and socio-economic conditions have facilitated the process of democracy capture in the country; political elites' greed -- state power co-opted for personal interests, and neoliberal political economy and market-led democracy

Historical-Structural: Colonial Legacy

Literature on liberal democracy often tends to interrogate how colonialism resulted in what Mamdani⁶⁵ calls the "bifurcation" of the postcolonial state in Africa with implications for democratic stability. The imposition of western-style of democracy has produced distortions because the culture, history and values of the local setting are important in any development and governance framework.⁶⁶ But the illegitimacy and the weakness of African states does not only stem from the lack of democratic culture and the fact that the system imposed was alien to African population but also from their incapacity to protect their citizens.⁶⁷ The democratic relationship between a state and its society is usually based on a social contract. In Africa, however, many citizens do not feel loyalty to often inefficient and weak governments, which provide a minimum level of security and a lack of basic services. The modern state, which was imposed on the African continent, lacks the necessary legitimacy for democratic progress.⁶⁸ Thus, the colonial system can be seen as having given birth to the modern prebendal and patron-clientelistic model that most post-colonial states, like Nigeria, exhibit.⁶⁹

Additionally, colonialism bequeathed ethno-religious fragmentation with attendant consequences for democratisation and peace.⁷⁰ The European balkanization of Africa without regard for the existing social heterogeneity and pre-existing social formations has driven ethnic politics.⁷¹ The three most important political parties during Nigeria's leadup to independence – National Congress of Nigeria and the Camerouns (NCNC), Action Group (AG) and Northern People's Congress (NPC) - were almost entirely ethnicised. In Nigeria's 1959 elections, which took place a year before independence, each party's prime ministerial candidates represented one of the three major ethnic groups – the Yoruba of the Southwest, the Igbo of the Southeast, and the Hausa/Fulani of the North. Predictably, the NCNC's Igbo candidate, Dr Nnamdi Azikiwe won majority of the South Eastern seats; the AG's candidate Chief Obafemi Awolowo, a Yoruba man, won the majority of the South Western seats; and the NPC's candidate Alhaji Tafawa Balewa, who was of Fulani heritage, won the majority of the Northern parliamentary seats.⁷² Even after decades of military rule and the return to democracy since 1999, the colonially-originated trend of ethnic voting persists. It is one of the lasting vestiges of a colonial state arbitrarily formed from distinct ethnic groups, without a unified national identity.

⁶⁵ Mamdani, M. (1996), *Citizens and Subject: Contemporary Africa and the Legacy of Late Colonialism*: Princeton NJ; Princeton University.

⁶⁶ Adejumo A D (2019), Western style "democracy" in Africa is just a way of pushing the neoliberal agenda. <https://www.opendemocracy.net/en/oureconomy/western-style-democracy-in-africa-is-just-a-way-of-pushing-the-neoliberal-agenda/>

⁶⁷ Schuster, L (2002), *What are the Main Impediments to Democracy in Africa*, Published by GRIN Verlag: UK.

⁶⁸ Salter (2012) Opcit

⁶⁹ Lewis, P. (1996), "From Prebendalism to Predation: The Political Economy of Decline in Nigeria". *Journal of Modern African Studies* 34 (1): 79.

⁷⁰ Mustapha, AR (2004), Ethnicity and the Politics of Democratisation in Nigeria, In B Berman, E Eyoh, and W Kymlicka, (eds.), *Ethnicity and democracy in Africa*, Oxford: James Curry Publication, 257

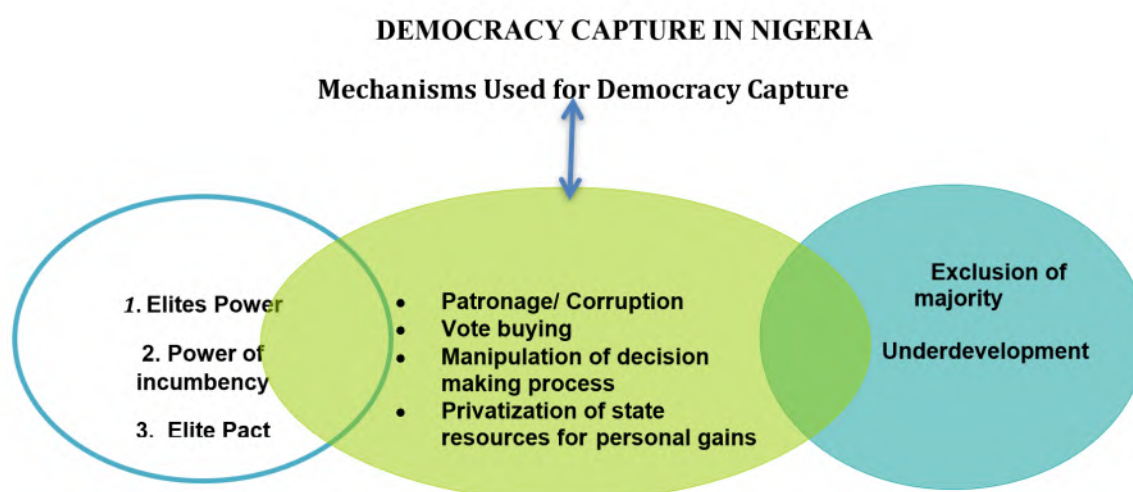
⁷¹ Mamdani (Opcit)

⁷² African Elections Database (Accessed 7/8/2020)

http://africanelections.tripod.com/ng_detail.html#1959_House_of_Representatives_Election

Perhaps the most direct cause of the state capture is the greed of the Nigerian political elite. Nigerian politicians are renowned for incessant accumulation of state resources into private accounts. The post-1999 democratisation process opened up the spaces for deepening corruption by embedding politics of patrimonialism and elite state capture in these new structures. Under military rule patronage fuelled ethnic polarisation as rulers steered government resources either to their kin or to groups allied with the ruling coalition of elites. But in the last two decades of democratic transition neo-patrimonialism and corruption have continued to be a dominant feature of Nigerian politics.

Figure 7.2. Democracy Capture in Nigeria



Elites' wealth accumulation via grand corruption, the politics of neo-patrimonialism built on patronage and cronyism, the politicisation of ethnicity, materialistic politics, deepening inequality and the debilitating impact of "neoliberal globalization" have defined Nigeria's style of democracy and restrains democratic legitimacy.⁷³

Neoliberal Political Economy and Democratic Agenda

Part of Nigeria's crisis of democratisation is linked to its ongoing shift towards neoliberalism. Neoliberal economic reform has taken deeper roots since the country's return to democracy in 1999.⁷⁴ Nigeria's repeating pattern of economic recessions, which has contributed to the erosion of state legitimacy, is historically tied to the reliance on oil and the neoliberal Structural Adjustment Policies imposed on Nigeria by the IMF and World Bank in the 1980s. The Programme, introduced by the Nigerian (neo) liberal apologist elites, first by the Babangida and Abacha military regimes and later by the Obasanjo democratic government, has drastically reduced the government's policy space and fed kleptocratic elites.⁷⁵

⁷³ Mustapha, M (2017), The 2015 General Elections in Nigeria: New Media, Party Politics & the Political Economy of Voting. *Review of African Political Economy*, 44 (152), pp. 312-321.

⁷⁴ Amuwo, A. (2009). "The Political Economy of Nigeria's Post-Military Elections, 1999-2007". *Review of African Political Economy* 36 (119): 37-61.

⁷⁵ Ikpe, E. 2014. "The Development Planning Era and Developmental Statehood: The Pursuit of Structural Transformation in Nigeria." *Review of African Political Economy* 41 (142): 545-560. International Crisis Group. 2015. "Nigeria's Election: A Perilous Postponement." <http://blog.crisisgroup.org/africa/nigeria/2015/02/12/nigerias-elections-a-perilouspostponement/>. Olukoshi, A. 2003. "The Elusive Prince of Denmark Structural Adjustment and the Crisis of

The embedding of neoliberalism through economic reform packages in the 1980s changed not only the political economy but also weakened the capacity of state institutions. Neoliberalism has even taken deeper roots since the country's return to democracy in 1999.⁷⁶ The privatisation of public assets by the Nigerian elites has become the basis for private accumulation. State assets like the aluminium smelting company ALSCON, which was built at staggering \$3.4 billion, but sold for mere \$120m.⁷⁷

The increased privatisation, trade liberalisation and the sale of state institutions by the elites in collaboration with international capital have tremendously reduced the government's sphere of influence in the economy. This has deepened exclusion and driven inequality. According to a 2017 report by Oxfam on inequality in Nigeria, the richest man in the country could with his annual earnings alone, lift 20 million Nigerians out of extreme poverty for a year.⁷⁸ The implication is that the lives of approximately 1 in 5 Nigerians could be transformed by one man alone; Nigeria's socioeconomic inequality is best described as stark.

Since 1999, past presidents have used state parastatals to cultivate national political allies and provincial patrons. These institutions have been a cornerstone for competition.⁷⁹ Market reforms during Obasanjo's government from 1999 to 2007 and beyond, fuelled dramatic corporate and private profits for transnational capital and the state political elites through the misuse and abuse of the oil industry.⁸⁰ The deepening neoliberal market policies therefore led to the reduction of politics to an elite competition among rentier groups jostling for influence and power as a vehicle for the accumulation of oil resources. In the face of these challenges, the Nigerian state is yet to break away from the mantra of externally and donor-driven neoliberal pills conceived and controlled by the Bretton Woods Institutions – the International Monetary Funds (IMF), the World Bank and the World Trade Organization (WTO) - which are designed to liberalise national economies and facilitate alignment with the emerging market society. Attracted by the hypothesis of efficient global market society, Nigeria adopted reforms to its finance sector, health sector, pensions, civil service and industry.⁸¹ The problem is that neoliberal led economic reforms have deepened poverty and social inequalities undermining democratic reforms.⁸² They have widened the space for spoils and corruption as well as deepened income inequalities among the poor majority.⁸³

4. Enabling Factors – Underlying Facilitators of Democratic Capture

The issue of democratic capture is further complexified by indirect, or background factors. There are several conditions and processes that indirectly enable or predispose Nigeria to democratic capture, including ethnoreligious heterogeneity of the state; high poverty rates; and, weak accountability mechanisms and impunity.

Governance in Africa." In *African Voices on Structural Adjustment: A Companion to our Continent, Our Future*, edited by P. T. Mkandawire, and C. C. Soludo, 229–275. London: Africa World Press.

⁷⁶ Amuwo (2009) Opcit

⁷⁷ Oladeinde, O (2018), Nigeria's unemployment rate rises to 23.1% – NBS Premium Times Newspaper December 19 (Online) <https://www.premiumtimesng.com/news/headlines/301896-nigerias-unemployment-rate-rises-to-23-1-nbs.html>

⁷⁸ https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/file_attachments/cr-inequality-in-nigeria-170517-en.pdf

⁷⁹ Smith, D. J. 2008. *A Culture of Corruption: Everyday Deception and Popular Discontent in Nigeria*. Princeton: Princeton University Press.

⁸⁰ Amuwo (2009), Opcit

⁸¹ Mustapha (2017), Opcit

⁸² Ibid

⁸³ Ibid

Ethnic and religious diversity

Electioneering in Nigeria prominently features ethno-regional politics. While in advanced economies, political cleavages are mostly along class or ideological lines; in Nigeria, cleavages are often about issues of ethnicity and religion.⁸⁴ This leads to the absence of constructive debate during election times. In place of serious discussion of reforms, politicians adopt rhetoric espousing ethno-religious chauvinism. In place of townhalls with constituents, and conversations of substantive issues, politicians adopt a strategy of identity politics. Page et. al argue that Nigeria's strong tradition of ethnic politics (which is built on elite coalition for democracy capture) has led to successive electoral violence.⁸⁵ In a multicultural state, it is easier for elites to exploit the inherent ethnic and religious divisions for their own political gains. David Laitin (1998) has described this practice of exploiting cultural divisions for politics as "ethnic entrepreneurship."⁸⁶ By creating in-group and out-group narratives and sponsoring violence against outgroup actors, these politicians can score cheap wins at the expense of real development.

These ethnic divisions can be a huge challenge to political stability because the clash of diverse cultural traditions fosters political tension between groups, threatening the democratic system. Problems created by such fragmented societies may even result in civil wars creating social and political chaos and making democratic governance impossible. Furthermore, the major characteristic by which the various emerging parties differentiate themselves, fall along ethnic fault lines.⁸⁷

This politicisation of ethnicity and widening inequality has resulted in social fragmentation and manipulation of factionalism whereby political elites foster the interests of their ethnic group against, or above, national interests. For instance, during the 2015 elections, citizens split along familiar ethno-regional lines, with northerners and south westerners mainly backing the APC while southeasterners and coastal minorities supported the PDP. This led to dramatic cases of increased 'hate speech' and 'war-like' elections.⁸⁸

Poverty and vote buying

Money has become a dominant determinant factor in Nigeria's politics, as materialism and political patronage have infiltrated the electoral process in Nigeria. "Stomach infrastructure" a term that describes the practice of distributing food and other small material incentives to secure votes of the masses captures this well. The poor are most susceptible to vote buying and stomach politics because their limited resources predispose them to accepting material inducements including offers of basic commodities.⁸⁹ Elite control of state resources and building of patronage network paves the way for vote buying in Nigerian politics.⁹⁰ In such a context, money politics is used not only to bribe political and electoral process through vote buying and vote rigging, but also to attempt to buy justice.⁹¹

⁸⁴ Carl LeVan C A, Page, M T and Ha Y (2018) From terrorism to talakawa: explaining party turnover in Nigeria's 2015 elections. *Review of African Political Economy*, 45 (157): 432–450

⁸⁵ Page et. al (Opcit)

⁸⁶ Laitin David D. (1998): *Identity in Formation: The Russian-Speaking Populations in the Near Abroad*. Ithaca: Cornell University Press

⁸⁷ Nnoli, O. (1978), *Ethnic politics in Nigeria*. Enugu, Fourth Dimension Publishers

⁸⁸ Ezeibe, C. C. 2015. "Hate Speech and Electoral Violence in Nigeria." <http://www.inecnigeria.org/wp-content/uploads/2015/07/Conference-Paper-by-ChristianEzeibe.pdf>.

⁸⁹ Matenga, G (2016), *Cash for Vote: political legitimacy in Nigeria*. *Open Democracy*. <https://www.opendemocracy.net/en/cash-for-votes-political-legitimacy-in-nigeria/>

⁹⁰ Page et al (*Ibid*)

⁹¹ Amuwo, A. (2009). "The Political Economy of Nigeria's Post-Military Elections, 1999-2007". *Review of African Political Economy* 36 (119): 37-61.

Lamidi Adedibu, strong man of Ibadan politics of Oyo state gained popularity as the purveyor of a brand of politics called “Amala politics.” Every day, this politician would kill multiple cattle and prepare the traditional dish of the town -- amala and ewedu with gbegiri for the masses. Although his track records on infrastructure, education and other service provisioning was underwhelming, he had a loyal following till his death.⁹²

Weak accountability mechanisms and Impunity

Weak accountability mechanisms and a lack of political will have encouraged impunity and ensured that reforms are not taken seriously. The Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices Commission (ICPC) are Nigeria’s leading anti-corruption agencies. But the modus operandi of the corruption agencies has damaged their credibility, with the EFCC’s efforts to engage in public trials of offenders, securing very few high profile convictions. A more recent push to settle cases has seen more convictions, but still high-profile cases elude them. Furthermore, the recent suspension of the acting Chairman of EFCC, Ibrahim Magu⁹³ on suspicion of corruption and insubordination, have further eroded confidence in accountability mechanisms and their effectiveness. Equally problematic is President Buhari's perceived tolerance for corruption despite his avowed disposition as an incorruptible man. The President was seen campaigning for many kleptocrats during the 2019 general elections.⁹⁴

Oversight institutions such as the Auditor General of the federation, the National Human Rights Commission and the National Assembly all continue to publish reports indicting government agencies, or security forces for non compliance to accountability regimes and human rights principles. But these institutions have been rendered ineffectual and unable to carry out oversights. For example, in the 2017 audit report, 265 agencies defaulted in the submission of audited accounts; while 11 agencies have never submitted a financial statement since inception⁹⁵. The NHRC also published a report indicting the Nigerian security forces of killing eighteen people in two weeks while enforcing lockdowns to halt the spread of COVID 19⁹⁶. None of the reports of these agencies of government have been acted upon. The weakening of relevant state institutions that promote accountability have made it difficult for them to effectively deliver their mandates which in turn has led to falling citizen trust in their ability to do so.

5. Key Actors

The individuals and institutions who perpetuate the capture of democracy in Nigeria are multiple and diverse. The primary unifying factor for this group of so-called democratic “captors” is that each of them has an interest in unaccountable democracy. Some captors are more aware of their role in eroding democracy, while others are unwitting contributors. In this section, the paper will analyse some of these actors and how they factor into the captive democracy existing in today’s Nigeria.

The “Cabal”

The Nigerian “cabal” is a slippery term. It is used across several contexts, and does not hold a single definition for all who use it. Generally, the cabal refers to unelected informal advisors and

⁹² <https://www.vanguardngr.com/2019/03/2023-and-our-grammar-blowing-politicians/>

⁹³ <https://www.pulse.ng/news/local/magu-buhari-suspends-12-efcc-directors-as-probe-continues/5fyl8x1>

⁹⁴ <https://guardian.ng/news/buhari-still-condoning-corrupt-practices-alleges-cdd/>

⁹⁵ Centre for Democracy and Development (2020), Buhari’s Corruption Fight: A Five year Assessment. CDD Publication

⁹⁶ <https://www.nigeriainights.gov.ng/nhrc-media/press-release/100-national-human-rights-commission-press-release-on-covid-19-enforcement-so-far-report-on-incidents-of-violation-of-human-rights.html>

stakeholders who pull strings within a ruling government.⁹⁷ The cabal comprises political sponsors, long-time colleagues, family/kin members and political allies. The uniting feature of its membership is that each one is empowered as a direct and intentional result of having their man in office. For the time that the elected official is in power, they influence policy, receive patronage in form of government contracts and other spoils, and they become untouchable in their own circles of influence. They become immune to arrests, accountability or scrutiny. The mission of any cabal is to remain in proximity to power -- to retain membership of the new ruling cabal at the end of every election cycle. They hold a regime to ransom and by so doing contribute significantly to the weakening of the state system.⁹⁸

Successive administration since the return to democracy in Nigeria have always had his own cabal who control the levers of power. One of the most infamous Nigerian cabals was the group that surrounded then President Musa Yar'adua in 2010. Comprising, among others, an ex-military Head of State, the First Lady and the executives of a major newspaper⁹⁹ this cabal reportedly issued memos and instructions in Yar'adua's name while he was incapacitated at a hospital in Saudi Arabia.

There are suspicions of similar cabal activity within the current Presidency. In fact, Senior Special Assistant on Media and Publicity, to President Muhammadu Buhari's Garba Shehu, openly admitted to the existence of cabal within the presidency:

"Every president must have people who advise him. It is not a sin, it is not an offence to have people that you take into confidence. Shehu goes on to claim who are accused of being members of the cabal are actually making sacrifices for the country".¹⁰⁰

In February 2020, there were reports of the Chief of Staff chairing security meetings,¹⁰¹ instead of the President - a situation which led to the National Security Adviser denouncing the chief of staff in a leaked letter. The in-fighting within the cabal was a scandal that cast doubt on the President's control over his own team. It complements the repeated claims made by Aisha Buhari, Nigeria's first lady, of the president's lack of control of national affairs. In 2016, she asserted that the influence of "few people" had led to 90% of the appointments by her husband the President.¹⁰² According to her, his oversight had been hijacked by others who did not share APC's values. In another interview in 2018, Aisha specified that "two men" were holding Buhari hostage, but refused to share their names.¹⁰³

Beyond political cabals, Nigeria has also seriously powerful sector cabals in the oil and power generation sectors for example. In 2020, the Minister for Power, Mamman Sale, in a press statement issued by his special adviser claimed; "cabals" are bent on denying Nigerians electricity, despite billions of dollars spent by the administration to make electricity available. "It is the same "untouchables" who want to perpetuate themselves in power that are now resisting any form of re-organisation meant to reposition the ministry for optimum performance. The ministry should not be tied down by individuals whose only concern is the retention of power at the expense of service delivery."¹⁰⁴

⁹⁷ <https://guardian.ng/opinion/a-curious-cabal-in-government/>

⁹⁸ Issac Olawale Albert. The Securitized Elite: A Deconstruction of the "Cabals" in Nigerian Political Economy https://www.academia.edu/2919471/Cabals_in_Nigerian_Politics

⁹⁹ <http://saharareporters.com/2010/03/13/enemies-nigeria-otherwise-known-cabal-profile>

¹⁰⁰ <https://www.thecable.ng/garba-shehu-its-not-wrong-to-have-a-cabal-at-the-presidency>

¹⁰¹ <https://www.sunnewsonline.com/fight-of-the-cabal/>

¹⁰² <https://www.bbc.com/news/world-africa-37642282>

¹⁰³ <https://www.thecable.ng/fight-the-two-men-hindering-this-government-aisha-buhari-tells-nigerians-video>

¹⁰⁴ <https://www.thecable.ng/minister-cabal-in-power-ministry-denying-nigerians-of-electricity>

Cabals continued political power hinges on economic strength. Therefore the dual effect of cabals is to drain resources of the country and deplete democratic accountability in doing so.

“Godfathers”

“Godfatherism”, a term coined within Nigerian political circles, constitutes another major flaw in Nigeria’s electoral politics. Godfathers are an elite group of financial and political heavyweights, who hand-pick and install candidates to contest for political office by funding campaigns and leveraging their state connections.¹⁰⁵ Modern “kingmakers”, Nigerian godfathers effectively bypass the democratic process by single-handedly selecting candidates and ensuring their success. Rather than candidates appealing to the electorate through credible reform propositions and coherent manifestos, they appeal to godfathers whose power reigns absolute over democracy. In the past, godfathers have been implicated in all manners of electoral malfeasance including violent intimidation of political rascals, bribing INEC officials, and vote buying.

Bola Ahmed Tinubu is arguably Nigeria’s most prominent godfather. Popularly known as the “Jagaban” of Lagos, he is so powerful that some observers believe he was a key determinant of the outcome of Nigeria’s 2015 presidential election, in which his party’s candidate Muhammadu Buhari ascended to the presidency.¹⁰⁶ Tinubu was the first Governor of Lagos, Nigeria’s economic epicentre, after the country’s return to democracy in 1999. Since then, he has had a firm hold over the politics of the state, having extensive personal involvement in the (s)election of all subsequent governors. In the 2019 gubernatorial election, Tinubu withdrew support from his former godson, the incumbent Governor Akinwunmi Ambode, citing the latter’s failure to ‘follow the party blueprint.’¹⁰⁷ The news made headlines, as pundits speculated that the “party blueprint” in question was a euphemism for Tinubu’s personal bidding. Apparently, Ambode had begun to exert his independence while in office, resisting Tinubu’s efforts to control him. To re-establish his power, Tinubu threw his weight behind a different candidate – Babajide Sanwo-Olu – who won the 2019 vote. A stark reminder of Tinubu’s power in deciding who runs Lagos. Tinubu is just one example of a number of godfathers that continue to pull the strings behind the scenes before voters even have a chance to have their say.

Godsons and other subsidiary kingmakers

Godfathers do not act on their own. They enlist the aid of a variety of relatively less-powerful collaborators who are essential to a successful operation. This includes local figureheads such as traditional or religious rulers, who have high social capital and can deliver the votes of large groups of citizens.

Although traditional rulers have no formal role in Nigeria’s constitution, they are revered as cultural and spiritual symbols. Their opinions hold enormous sway over the hearts and minds of their subjects; and in quite a few (especially rural) communities, their words are treated as law. According to a series of surveys by Afrobarometer, Nigerians have greater trust in their traditional rulers than in politicians across all levels of government. The data reported that 69%, 63%, and 64% of Nigerians trusted their Local Government councillors, members of the Parliament, and the President respectively.¹⁰⁸

¹⁰⁵ A Dictionary of African Politics <https://www.oxfordreference.com/view/10.1093/acref/9780191828836.001.0001/acref-9780191828836-e-156?rsk=ysmRql&result=162>

¹⁰⁶ Reuters <https://www.reuters.com/article/us-nigeria-godfather/how-the-godfather-of-lagos-could-shape-nigerias-government-idUSKBNOND17820150422>

¹⁰⁷ Oshin, Jadesola <https://www.nigerianbulletin.com/threads/bola-tinubu-the-jagaban-of-lagos-politics-by-jadesola-oshin.348798/>

¹⁰⁸ <http://afrobarometer.org/online-data-analysis/analyse-online>

Contrastingly, the trust rating of traditional rulers was 81%. A similar trend was recorded in the relative approval ratings of each group.¹⁰⁹

In precolonial Nigeria, traditional governance systems typically incorporated a democratic feed-back arrangement, where subjects could express their approval or displeasure with the decisions of the monarch.¹¹⁰ This could be through a panel of elders, age grades, vocational associations or other community based groups.¹¹¹ During the colonial experience, however, many such accountability mechanisms were eroded. Traditional civil society groups were repressed or outlawed, and the British government actively displaced the most effective and progressive Nigerian rulers. In their place, Britain installed acquiescent individuals who would implement colonial policies without question.¹¹² The result was the transformation of traditional government into the top-down structure it remains today. Post-independence, traditional rulership has evolved; but the participatory (democratic) aspects of the system have not fully returned. Combined with poor education in rural environs -- which often leaves citizens unable to form critical political views-- traditional rulers have become unilateral political kingmakers in the electoral politics of certain communities. Lamentably, their potent endorsements are often made available to the highest bidder.

In the most recent Presidential election, President Muhammadu Buhari benefited from the endorsement of Oba Akiolu, the monarch of Lagos - a critical swing state,¹¹³ and opponent Abubakar Atiku from the endorsement of several prominent traditional rulers in the Southeastern region.¹¹⁴ The effect of religio-traditional leaders is even more pronounced in the Northern regions of the country where educational attainment is significantly lower.¹¹⁵

Across Nigeria, royals participate either directly or indirectly in the political process. Many actively contest for elections. Independent research by CDD showed that 40% of the elected state governors in 1999 were either direct descendants of traditional title holders or had close family proximity with royals. The present governor of Imo state, Hope Uzodinma, for example is the son of the highest cultural leader in his region, the Igwe of Ozu Omumah.¹¹⁶

International Actors – Governments and Corporations

Western donors contribute to democratic failure in Nigeria. Often, Western observers endorse elections as broadly free and fair, even when there are serious flaws. In this context, democracy has

¹⁰⁹ Afrrobarometer ibid

¹¹⁰ Ayittey, George B. N. "Traditional Institutions and the State of Accountability in Africa." *Social Research*, vol. 77, no. 4, 2010, pp. 1183–1210. *JSTOR*, www.jstor.org/stable/23347124. Accessed 14 July 2020.

¹¹¹ One example of the traditional accountability framework in the Oyo empire and other ancient Yoruba kingdoms Olaniyan, Richard ed. (1985). *Nigerian History and Culture*. London: Longman Group Limited.
Smith, Robert S. (1969). *Kingdoms of The Yoruba*. London: Methuen & Co. Ltd.

¹¹²

<https://books.google.com.ng/books?id=6knAMseFPpIC&pg=PA85&lpg=PA85&dq=how+colonialism+replaced+revolution+with+puppet+leaders+africa&source=bl&ots=Zm-gEUx83b&sig=ACfU3U2Y9tmieLyyG0b6ceDWpEJ98vK1ag&hl=en&sa=X&ved=2ahUKewixou3guszqAhWUFMAKHfnJAF0Q6AEwEHoECAoQAQ#v=onepage&q=how%20colonialism%20replaced%20revolution%20with%20puppet%20leaders%20africa&f=false> AND Perham, Margery. "SOME PROBLEMS OF INDIRECT RULE IN AFRICA." *Journal of the Royal Society of Arts*, vol. 82, no. 4252, 1934, pp. 689–710. *JSTOR*, www.jstor.org/stable/41360130. Accessed 14 July 2020.

¹¹³ <https://dailypost.ng/2019/02/09/buhari-vs-atiku-traditional-rulers-predict-winner-presidential-election/>

¹¹⁴ <https://ru.reuters.com/article/worldNews/idUSKCN1NX1NG>

¹¹⁵ <https://allafrica.com/stories/202001160052.html> AND <https://www.copenhagenconsensus.com/publication/nigeria-perspective-education>

¹¹⁶ <https://thenews-chronicle.com/from-4th-position-to-governor-elect-10-things-you-didnt-know-about-hope-uzodinma/>

been equated with multiparty elections even when citizens' votes do not count.¹¹⁷ By consistently funding democratic processes without guaranteeing their legitimacy, Western state and non-state actors often inadvertently prop-up unsavoury politicians. Furthermore, countries in the West have for many years served as off-shore tax havens for illicit financial flows, extracted by corrupt state and nonstate actors in Nigeria.¹¹⁸ Kleptocrats are enabled to purchase luxury houses, and vehicles, and to keep foreign bank accounts containing inexplicably large sums, because they know that scrutiny from foreign authorities is minimal.

In addition to this unintended impact on democratic capture, international governments and corporations are also sometimes involved in the **deliberate** co-optation of democracy. In a famous leaked audio tape, top executives of Cambridge Analytica, a British data firm, admitted to influencing elections in Nigeria and several other African countries.¹¹⁹

Nigeria-based foreign corporations have also been accused of directly payrolling corrupt politicians to overlook their corporate excesses. In April 2019, Nigeria filed a lawsuit against oil giants Royal Dutch Shell Plc and Eni SpA, accusing their executives of having ties to over USD 1 billion worth of bribes.¹²⁰ In another instance, the Panama Papers revealed that American oil-field company Haliburton had disbursed bribes of over \$180 million to various officials in the Nigerian government of 1994, including two military Heads of States.¹²¹ Haliburton had done so in a bid to secure contracts and preferential status. While the Haliburton bribes occurred during non-democratic regimes, the more recent case of Siemens AG shows that even in democratic times, foreign companies continue to pay bribes to Nigerian government officials. US and German investigations revealed that the company had doled out thousands of dollars to individuals within Nigerian government between 2001 and 2007, seeking priority awarding of state contracts.¹²²

Organised Crime

Throughout Nigeria, politicians employ political thugs to influence voting patterns. In some cases, these thugs use intimidation tactics to prevent the electorate from turning up to vote; in others, they use force or the threat of force to inspire voting for their sponsor-candidate. In South Western Nigeria, one of the key actors in organised political violence is the National Union of Road Transport Workers (NURTW). The NURTW, officially a trade union, has the primary duty of advocating for the interests of transport workers. Informally, the NURTW harasses road users, transport workers, local businesses, and even private citizens within the community for money. Its members, called "agberos" are mostly young men, who politicians use to do their bidding during elections. These thugs engage in blatant ballot box snatching, and voter harassment in favor of their political sponsors.

One of the most commonly used and effective techniques is to make voting so unsafe that voter turnout reduces dramatically as only allies feel safe enough to turn up. In present day Lagos state, MC Oluomo, the chairman of the NURTW is a very prominent political figure. He is thought to be a

¹¹⁷ Adejumo A D (2019), Western style 'democracy' in Africa is just a way of pushing the neoliberal agenda. <https://www.opendemocracy.net/en/oureconomy/wester-style-democracy-in-africa-is-a-way-of-pushing-the-neoliberal-agenda/> (Accessed 5/05/2020)

¹¹⁸ <https://qz.com/africa/1137681/nigerian-corruption-kleptocrats-like-diezani-alison-madueke-have-a-love-affair-with-londons-expensive-real-estate/>

¹¹⁹ Channel 4 News, as cited in Daily Nation <https://www.nation.co.ke/news/politics/How-Cambridge-Analytica-influenced-Kenyan-poll/1064-4349034-le7xbuz/index.html>

¹²⁰ Gilblom et al. Bloomberg. <https://www.bloomberg.com/news/articles/2019-05-07/shell-eni-executives-named-in-1-billion-nigeria-bribery-suit>

¹²¹ <https://punchng.com/panama-papers-eminant-nigerians-in-another-corruption-cesspool/>

¹²² <https://www.reuters.com/article/nigeria-corruption/nigerian-police-probe-siemens-bribery-scandal-link-idUSLDE64I2GA20100519>

powerbroker in the successful ascent of some candidates into the Lagos State Legislature, as well as the various Local Government chairmen seats.¹²³ He is also a close ally of Lagos godfather, Bola Tinubu.

In the South South axis, and notably in Rivers state there is significant gang violence and targeted killings. Unlike the NURTW, which is simultaneously a formal and informal organization, the groups in the Southsouth are known as “cults” and were violent groups at their foundation.¹²⁴ Such gangs are frequently seen stationed with automatic weapons at election booths; they have shot and killed voters and INEC officials; and they have waged inter-communal war to secure refinery locations within their locales.¹²⁵ In the North, political thugs are known by different names, , but their modus operandi is the same as in other parts of the country. They are paid by politicians to engage in electoral violence and intimidation.¹²⁶

Throughout the country, the activities of political thugs undermine the democratic process. In the south-south significant gang violence and targeted killings are undertaken by “cults” like the Supreme Vikings Confraternity, whilst in the North political thugs such as “Yan kallare”, “Banu-Isra’il” or “Yan daba” are paid by politicians to engage in electoral violence and intimidation.¹²⁷ These groups ensure that elections are co-opted, citizens franchise is intimidated away, and unaccountable leaders are emboldened since they have the power of force to back them up.

6. Consequences And the Way Forward

Nigeria’s undemocratic political environment has a myriad of impacts on the nation. Economically, the country has had difficulties attracting and retaining the amounts of foreign investment it needs for development.¹²⁸ Investors are discouraged by a business environment, characterised by officials who solicit bribes for providing services they ought to as part of their jobs. Other major concerns are the protection of their capital considering the ineffective or biased Nigerian courts; and the fickle policy environment. The example of Gokada and Max.Ng is illustrative in this case. Both ride hailing services, these two companies had invested millions of dollars into motorcycles and app software, when in 2020, commercial motorcycles were suddenly banned in Lagos state -- Nigeria’s largest consumer market.¹²⁹ The two companies had served millions of Nigerians; created employment for hundreds of out-of-work youth; paid taxes to the state government; and had secured millions in venture capital. All of this was obliterated by the unexpected policy change. Further, in the mining sector, Nigeria’s greatest source of exports, democratic failures have led to economic underproductivity. As corrupt

¹²³ <https://www.thisdaylive.com/index.php/2020/01/02/mc-oluomo-is-coming-for-us-all/>

¹²⁴ <https://www.sbmintel.com/2020/06/rivers-of-blood-gang-violence-in-nigerias-garden-state/>

¹²⁵ IBID SBM Intel

¹²⁶ https://d1wqtxts1xzle7.cloudfront.net/5577229/2011_1.1-10_.pdf?response-content-disposition=inline%3B+filename%3DPOLITICS_OF_THUGGERY_AND_PATRONAGE_IN_TH.pdf&Expires=1595940803&Signature=DKCpkly-U4tK0y-F~7fLF75AdnDW9zrvxbd8Zfg7onhBBUd13WUwvuuAab7b-iAXD7NjHbnv4HrohWdDxYIHg~EpAA4x6tDKZgYv2NjG7Ss9hZuRxu1qIMlaxO1AOwnYwSRUjaT4wflGDoM~MZJtRMN3kFQwwPoZy9TxlQw~Otf7EfZu~61a~q4hrJbGLTi7RV8pRS5dBiTj3m-4aGswAE9OplzQcq6KKO1gffdAOmQ-bUF0F4JB8i5hpef6k5BfJVC~sQdW0~7svItLLqCDxtycfkCPGFKYK05GYoLIK5ttEb~nmaK3g5ssSvE8xTF7Hx6NHuFTMQ7RWO10uHFygA__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA

¹²⁷ https://d1wqtxts1xzle7.cloudfront.net/5577229/2011_1.1-10_.pdf?response-content-disposition=inline%3B+filename%3DPOLITICS_OF_THUGGERY_AND_PATRONAGE_IN_TH.pdf&Expires=1595940803&Signature=DKCpkly-U4tK0y-F~7fLF75AdnDW9zrvxbd8Zfg7onhBBUd13WUwvuuAab7b-iAXD7NjHbnv4HrohWdDxYIHg~EpAA4x6tDKZgYv2NjG7Ss9hZuRxu1qIMlaxO1AOwnYwSRUjaT4wflGDoM~MZJtRMN3kFQwwPoZy9TxlQw~Otf7EfZu~61a~q4hrJbGLTi7RV8pRS5dBiTj3m-4aGswAE9OplzQcq6KKO1gffdAOmQ-bUF0F4JB8i5hpef6k5BfJVC~sQdW0~7svItLLqCDxtycfkCPGFKYK05GYoLIK5ttEb~nmaK3g5ssSvE8xTF7Hx6NHuFTMQ7RWO10uHFygA__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA

¹²⁸ <https://www.forbesafrica.com/current-affairs/2018/12/11/how-nigeria-can-attract-and-keep-the-right-kind-of-foreign-direct-investment/>

¹²⁹ <https://techcabal.com/2020/01/27/oride-maxng-gokada-banned-in-lagos/>

and unaccountable politicians loot money intended for mineral plants, the country's productivity capacity deteriorates tremendously. The lack of infrastructure has resulted in minimal production output and lower revenue than would be predicted by the country's potential.

The focus of politicians on election is to the detriment of development in the social, infrastructural and security sectors. All of which has negative outcomes for citizens.

Politically, the undue interference of the actors perpetuating state capture has significant consequences for the citizens. Citizens voices are left out of the democratic process; their interests are sidelined, as the priority is the preservation of the wealth and influence of elites. The schools, pipe borne water and roads promised to improve the quality of life of ordinary Nigerians have been neglected election cycle after the other. Only 19% of Nigerians can access safe drinking water, and in rural areas, only 54% have ready access to any clean water at all.¹³⁰ In fact, 90% of homes in Nigeria drink water that has been contaminated by faeces, E coli, or other pathogens.¹³¹ Human rights violations, notably from the police force and the Special Anti-Robbery Squad plague youth populations and foster a sense of intimidation. According to the data from the World Prison Brief, 72.7% of Nigeria's prison population are pre-trial detainees and individuals in remand custody.¹³² This is an alarming statistic, as by approximation, only one in four inmates has actually been pronounced a guilty criminal under the law. The rest remain in jail despite never being convicted of crimes.¹³³ The lack of accountability extends to issues of sanitation, criminal justice rights, and every sphere of the citizens lives. Summarily, when the government exists without providing meaningful benefits to its citizens, they face immense and avoidable vulnerabilities.

What is the way forward?

The fight against corruption is one of the most potent avenues by which opposition to democracy can be targeted. Buhari's reform agenda and anti-corruption crusade, promised in 2015, has faced its greatest threat from corrupt old-school politicians within his own party. Five year into President Buhari's anti-graft fight, corruption remains a major impediment to good governance and democratic consolidation. Though his policy stance on fighting corruption has strengthened state-led anti-corruption agencies such as the EFCC and ICPC, his government has failed to tackle corruption within the APC and has turned a blind eye to institutionalised corruption and malfeasance by his cronies and political allies.¹³⁴

The political settlement approach may be another viable plan for Nigeria's advancement. The approach recognises the present character of Nigeria as rule by law state, rather than a rule of law polity, and opts for the strategy of incremental progress, rather than immediate sweeping change. This approach focuses less on the mere presence or absence of institutional frameworks, but takes into consideration the individuals and coalitions occupying them.¹³⁵

It argues that when powerful elites are securely entrenched in government, they may have fewer incentives to plunder the national wealth extensively; and are perhaps more likely to invest in long term development -- since this development will be to their credit. However, when powerful groups believe that their stay in government is evanescent, they are more likely to steal large sums, with the

¹³⁰ <https://theconversation.com/how-nigeria-is-wasting-its-rich-water-resources-83110#:~:text=In%20fact%2C%20only%2019%25%20of%20water%20supply%2C%20access%20is%20uneven.>

¹³¹ <https://allafrica.com/stories/201809180234.html>

¹³² <https://www.prisonstudies.org/country/nigeria>

¹³³ <https://qz.com/africa/892498/up-to-three-quarters-of-nigerias-prison-population-is-serving-time-without-being-sentenced/>

¹³⁴ Centre for Democracy and Development (2020), Buhari's Corruption Fight: A Five year Assessment. CDD Publication

¹³⁵ <https://academic.oup.com/afraf/article/117/469/636/4690667>

intention of accumulating enough loot to sustain them for life.¹³⁶ In Nigeria, these analyses can be leveraged to broker elite power-sharing agreements across ethnic and party lines that are beneficial for development. Leading up to more stable and ideal democratic tenets, stakeholders can facilitate minor wins by working alongside longstanding elite coalitions, encouraging these coalitions to implement developmental policies, rather than unilaterally pushing to dismantle the coalitions.¹³⁷ It is a piecemeal strategy, but may be more sustainable, as it will face less resistance from powerful actors and may allow for incremental gains that can become more transformative over time.

The future

This paper has attempted to interrogate the nature and dynamics of how democracy has been captured by Nigeria's political elites and how state predominantly is designed to serve their interests. It argues that the electoral polity that emerged in the aftermath of prolonged military rule in 1999 has not ensured reduction in inequality, poverty and public welfare provisioning. Instead it has institutionalised patron-clientelist politics, corruption, cronyism, the politics of nomadism, electoral manipulation and vote buying.

In the last two decades, democracy in Nigeria has been captured by kleptocratic elites more focused on their own interests than addressing inequality, facilitating social transformation or democratic reforms. As the crisis of democracy deepens, the legitimacy of the state weakens. This results in the further exclusion of the majority, the exact opposite of what a democratic system strives to achieve. There is still reasons to believe that democracy can work in Nigeria especially if systems are built and citizens continue to pursue accountability from the elected government officials.

¹³⁶ <https://www.open.edu/openlearn/ocw/mod/oucontent/view.php?id=84717§ion=5>

¹³⁷ <https://eprints.soas.ac.uk/24854/1/ACE-WorkingPaper002-Nigeria-AntiCorruption-170822.pdf>

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