Law, Institutions and Corruption Cleanups in Africa

JOHN MUKUM MBAKU, University of Utah
ABSTRACT
Since independence, virtually all African countries have suffered and continue to suffer from extremely high rates of bureaucratic corruption. Today, corruption remains one of the most important constraints to social, political and economic development. Despite the efforts made, in several countries, to deal with corruption and other forms of political opportunism (e.g., rent seeking), these phenomena remain entrenched in these countries and continue to constrain entrepreneurship and creation of the wealth that is needed to deal with extremely high rates of poverty and material deprivation. Part of the reason why many African countries have not been able to effectively cleanup corruption from their public services is that virtually all the national anti-corruption programs that have been developed and implemented in these countries during the last five decades have failed to put corruption in its proper perspective. Corruption is a form of post-constitutional opportunism, and hence, an effective cleanup program must begin with a negotiated change of existing rules in order to provide participants in both economic and political markets incentives that discourage them from engaging in the subversion of rules for their own benefit. The solution to the corruption imbroglio in Africa, then, lies in reconstruction and reconstitution of the post-colonial state through democratic (i.e., bottom-up, people-driven, inclusive and participatory) constitution making to provide each country with a locally-focused development-oriented constitution, which enhances peaceful coexistence, provides market incentive structures that promote the creation of wealth, but, at the same time, adequately and effectively constrains state custodians (civil servants and politicians) and prevents them from engaging in opportunistic behaviors.

I. INTRODUCTION

A. European Annexation and the Imposition of New Institutions
Following annexation of African territories, the European colonialists proceeded to introduce institutional arrangements that were expected to enhance their ability to exploit
Africans and their resources for the benefit of the metropolitan economies.¹ Part of the process of colonization involved restructuring property rights, especially in land, in order to enhance the ability of European mercantile companies to exploit the newly “acquired” resources for metropolitan economic development.² For example, shortly after British interests in the Niger Delta were recognized by other European countries at the Berlin Conference in 1885, it became apparent that “the [British] Government was not yet prepared to provide the costly administration that would be necessary if these immense areas were to be brought under control.”³ The British Government opted for a policy for the management of these newly acquired African territories that had been adopted by other European powers operating in the continent—the government in London offered to grant “monopoly rights” to any British mercantile company willing to provide both the human and physical capital needed to bring the territories under control, exploit and develop the newly acquired resources, and ship them to London to feed a rapidly expanding metropolitan economic

¹ See generally SIR A. C. BURNS, HISTORY OF NIGERIA (1963) (examining British annexation of the territories that would later become the colony of Nigeria) and H. R. RUDIN, GERMANS IN THE CAMEROONS, 1884-1914: A CASE STUDY IN MODERN IMPERIALISM (1938) (detailing the founding of the German colony of Kamerun and its subsequent exploitation by Germany).
² See, e.g., Burns, supra note 1, at 158.
³ Id. Note that “acquired,” as used here, does not imply that ownership of the territories was secured by any type of mutually beneficial voluntary arrangements between the Europeans and Africans. The Europeans used their comparative advantage in the employment of police and military violence to expropriate properties belonging to various African population groups and subsequently alienate them to metropolitan-based mercantile companies for exploitation and “development.” In fact, the various ethnic and nationality groups that inhabited the Niger Delta (at the time of British invasion and subsequent occupation) and the Cameroon River District (at the time of German annexation), for example, never recognized British and German claims to the region, even as European nation-states were granting such recognition at the Berlin Conference. This is evident in the violent struggles of the men of Brass (Niger Delta) and the Bakweri (Cameroon River District) against British and German mercantile companies respectively. See generally Burns, supra note 1 & Rudin, supra note 1.
base. On July 10, 1886, for example, the British Government granted the National African Company (which later changed its name to the Royal Niger Company) an exclusive license or charter to exploit, develop and manage the resources of the Niger territories. The Royal Niger Company, with the help of the colonial government, proceeded to reconstruct and reconstitute institutional arrangements, as well as other critical domains, within these territories to provide governance structures that enhanced the company’s ability to exploit the resources of its concession for its benefit and that of the metropolitan economy. In the process, entrepreneurial activities among the many African groups that inhabited the Niger Delta were stunted as the post-annexation participation of these groups in their economies—as well as in other aspects of life in the territories—was limited only to activities that advanced and/or maximized the interests of the Royal Niger Company in particular and those of Britain in general.

This approach to European involvement in the continent of Africa was not unique to Britain. The Germans, who expropriated lands belonging to the Bakweri peoples along the Cameroon River district in the 1880s, adopted a similar approach as that used by the British in the Niger Delta. Shortly after forcefully removing the Bakweri from their rich and fertile lands at the foot of the volcanic Cameroon Mountain, the Germans introduced private property rights and reassigned ownership and management of the territories to German planters.

---

4 Burns, supra note 1.  
5 Id.  
6 Id.  
7 Id.  
8 Rudin, supra note 1, at 249. The first German plantations in Kamerun were established by the firms C. Woermann and Jantzen & Thormählen.
Using military and police force to seize lands belonging to African groups was a well-known and highly popular strategy in the history of European colonization of Africa. This view was well articulated by then French Governor of Algeria, General Bugead, in 1841, when he declared that “[w]henever the water supply is good and the land fertile, there we must place colonists without worrying about previous owners. We must distribute the lands [with] full title to the colonists.”

Similarly, Earl Grey, a British colonial officer of great distinction, expressed the view of most of his fellow settlers towards Africans when he declared that if and whenever and wherever there arose a conflict between English settlers and Africans, especially over land, the interests of Africans must be ignored and that “facilities should be afforded the white colonist for obtaining the possession of land theretofore occupied by the Native tribes.”

Colonialism, hence, was not a mutually beneficial voluntary arrangement between Africans and Europeans. Instead, it was a cruel, repressive, violent and extremely exploitative

---

9 R. M. BRACE, MOROCCO, ALGERIA, TUNISIA 48 (1964). From the point of view of the European mercantile companies, in particular, and the colonial enterprise in general, the policy’s effectiveness lay in the fact that it was specifically designed to ignore the interests of the various population groups that inhabited the annexed territories. Perhaps more important is the fact that there was little or no criticism of the policy’s brutal, opportunistic, inhumane, and especially, exploitative nature (emphasis added).

10 Quoted in B. M. MAGUBANE, THE POLITICAL ECONOMY OF RACE AND CLASS IN SOUTH AFRICA 71 (1979). “Native tribes,” in the eyes of the European colonists—farmers, planters, miners/prospectors, and even missionaries—were peoples whose only function was to serve European interests. Hence, these “native tribes” had to be converted to Europe’s brand of Christianity; they had to give up their customary and traditional pursuits and take up wage employment in European enterprises, including serving as domestic servants in European households; Africans had to voluntarily surrender their lands to European economic pursuits or be forced to do so; and finally, Africans had to aspire to the European cultural ideal. See generally V. T. LeVine, THE CAMEROONS: FROM MANDATE TO INDEPENDENCE (1964) (examining, among other things, colonial policy towards Cameroonians in the U.N. Trust Territory of Cameroon under French administration; note, especially, France’s politique d’association—policy of association).
system designed to generate benefits for the metropolitan economies at the expense of the colonies and its peoples.\textsuperscript{11} Thus, the laws and institutions which the Europeans sought to impose and did, indeed, impose, on the Africans were never intended to maximize African values nor enhance the ability of Africans to govern themselves and allocate their resources efficiently and equitably. This European-imposed legal and institutional framework was the heart and soul of a well-articulated comprehensive scheme designed to enhance and maximize the transfer of resources, specifically raw materials, from the colonies to the metropolitan economies.\textsuperscript{12} According to Lord Frederick Luggard, the architect of British colonial policy in Nigeria, Britain’s colonies represented not only an important source of raw materials for its manufacturing capacity but were also critical export markets needed to support the country’s domestic production effort.\textsuperscript{13} The mission of the entire colonial enterprise, then, was to exploit Africans and their resources for the benefit of the metropolitan economies. That goal was to be accomplished by imposing on the colonies a new set of laws and institutions, one designed to enhance the ability of Europeans, especially their mercantile companies, to exploit colonial resources for Europe’s benefit.\textsuperscript{14}

Colonial laws and institutions were not democratic, “nor were they participatory, accountable to the people, or transparent.”\textsuperscript{15} In fact, the European colonialists made no


\textsuperscript{12} See, \textit{e.g.}, Sir Frederick Luggard, \textit{The Dual Mandate in British Tropical Africa} (3rd ed., 1926).

\textsuperscript{13} \textit{Id.}

\textsuperscript{14} Fatton, \textit{supra} note 11, at 455-65.

effort to effectively utilize indigenous institutions, which, in the past, had proven quite
effective and efficient in the peaceful resolution of conflict. In many instances, the
conquering Europeans destroyed African institutions in an effort to subjugate and exploit
Africans. \textsuperscript{16} The emphasis was on introducing and sustaining laws and institutions that were
expected to enhance European seizure, forceful possession, and exploitation of the colonies
for the benefit of the metropolitan economies, as well as that of Europeans resident in the
colonies. \textsuperscript{17}

not democratic. No one who understood the nature and the objectives of colonialism could
have expected the enterprise’s proponents to develop and implement democratic institutions
in the new colonies, for, such a move would have defeated the purpose of colonialism. The
Europeans came to Africa to forcefully possess African resources. They did not come to the
continent to engage in mutually beneficial free exchange with Africans. Thus, given the
brutal nature of the mission, it was inevitable that the laws and institutions that the
Europeans brought to these territories, and which were supposed to provide them with the
wherewithal to capture and exploit African resources, were “purveyors” of violence,
oppression, and inhumanity, not of liberty and enterprise.

\textsuperscript{16} For example, during his reign, Sultan Njoya-Arouna (c. 1870-1933) of the Kingdom of
Bamoun in Cameroon, developed a writing system for his people based on Arabic, Western
forms, and traditional Bamoun divination signs. The new script was utilized widely
throughout the Kingdom to record historical events and cultural practices. In addition, King
Njoya established schools in which children were taught the new script, as well as subjects
such as art, sculpture, culture and history of the Kingdom. After the partition of the German
colony of Kamerun between France and Britain after World War I, the Kingdom of Bamoun
became part of the League of Nations Mandate under French administration. French
colonial authorities proceeded to bring about changes designed to foster a system of
assimilation to the French cultural ideal that emphasized the destruction of African
traditions, cultures and customs. The French language was made the only legally permissible
medium of instruction in schools, a French curriculum was introduced, and the King’s
script, as well as his printing press, were destroyed. All royal schools were closed down,
publication in the Bamoun language was banned and the King was forced into internal exile.
\textit{See}, e.g., \textsc{Suzanne P. Blier}, \textit{The Royal Arts of Africa: The Majesty of Form} 169-72
(1998); \textsc{Monica B. Visonà, Robin Poynor, Herbert M. Cole & Michael D. Harris}, \textit{A
History of Art in Africa} (2001); \textsc{Richard Bjornson}, \textit{The African Quest for
Freedom and Identity: Cameroonian Writing and the National Experience}
(1991); \textsc{Claude Tardits}, \textit{La Royaume Bamoum} (1996) (\textit{The Kingdom of Bamoun}) &
\textsc{J. M. Mbaku}, \textit{Culture and Customs of Cameroon} 72-73 (2005).

\textsuperscript{17} Ihonvbere & Mbaku, \textit{supra} note 15.
B. Impetus to the Decolonization Project

Africans, especially those who joined and participated fully in the struggle against continued European rule, recognized that mass poverty, extremely high levels of material deprivation, as well as feelings of hopelessness, among the indigenous peoples were due to the monopolization of the structures of economic and political governance by the European colonialists, whose objectives were in direct conflict with those of Africans. Thus, an important strategy to eliminate the psychological impacts of many years of foreign occupation and significantly improve opportunities for social, economic and political development, involved the expulsion of the European interlopers from the continent. The general expectation was that the departure of the Europeans from Africa would allow the people to rid their societies of the laws and institutions imposed by the colonialists and replace them by more locally-focused and relevant governance structures.\(^{18}\)

The strategy was to reconstruct and reconstitute the state captured from the colonialists and provide the people with more effective institutional arrangements.\(^{19}\) Specifically, Africa’s new post-independence leaders were expected to engage all relevant stakeholder groups

\(^{18}\) *Id.* at 3. While many African freedom fighters recognized the fact that the economies they would inherit from the European colonizers at independence had been “integrated” into the metropolitan economies through colonial economic and trade practices and that complete and immediate separation could cause economic collapse in the new countries, they expected the post-independence relationship between the African economies and the European countries to be based on mutually beneficial arrangements. However, what emerged between the new African countries and the economies of their former colonizers was a continuation of the colonial arrangement in which the African economies were used as sources of raw materials for metropolitan industrial growth and markets for excess (albeit obsolete) output from European factories. Today, most African economies remain, as they had been during the colonial period, on the periphery of the global economy and operating, not as full members, but as “appendages” of the economies of their former colonizers—the industrial market economies of the West.

\(^{19}\) *Id.*
within each country in a participatory, inclusive, bottom-up and people-centered (i.e.,
democratic) constitution making process to develop laws and institutions that were locally-
focused (i.e., based on each country’s traditions, customs, collective historical experience,
aspirations, worldview, relationship to the environment, and concepts of equity and fairness)
and capable of enhancing the ability of the people to govern themselves and deal effectively
with their multifarious problems.20 The new institutional arrangements, which the freedom
fighters hoped would replace the colonially-imposed legal framework, were expected to (1)
promote and sustain peaceful coexistence of all of each country’s diverse population groups;
(2) provide the wherewithal for indigenous entrepreneurial activities, maximize wealth
creation, and advance the equitable distribution of income and wealth; (3) protect the
environment and ensure ecosystem sustainability; (4) adequately constrain the state and
minimize corruption and financial malfeasance by preventing civil servants and politicians
from engaging in opportunistic behaviors; and (5) make the welfare of the African peoples
(especially those who had been pushed by colonialism’s perverse policies to the economic
and political periphery—women, rural inhabitants, urban poor, and ethnic minorities) a top
priority in public policy.21 The new people-centered post-independence dispensation was
expected to represent a major departure from the European governance system, which had
made the welfare of the metropolitan economies the center and heart of political and
economic policies in the colonies. With independence and a new political and economic
dispensation, public policy would be re-oriented toward serving the needs of Africans. Thus,

20 Id. See also J. M. Mbaku, Transition to Democratic Governance in Africa: Learning from Past Failures, in POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN AFRICA: LESSONS FROM COUNTRY EXPERIENCES 17-49 (J. O. Ihonvbere & J. M. Mbaku eds., 2003).
21 Ihonvbere & Mbaku, supra note 15, at 3.
independence was understood as a process that would allow Africans to rid themselves of
the Europeans and their anachronistic institutions and bring about an African-centered
governance system, one that was locally-focused and designed specifically to maximize
African, not European, values.  

C. The Reluctant Decolonization Project

Decolonization, if it had been undertaken properly and with the intention of preparing
Africans to take full and effective control of their own governments and economies, should
have included, at the very least, “the transformation of the critical domains to make them
more suitable for governing post-independence African societies.” Had the decolonization
process fully involved all relevant stakeholder groups (i.e., had the process been democratic),
the outcome of the pre-independence constitutional deliberations could have been
dispensations that were based on and reflected the people’s values and not those of a small
group of urban elites and their European benefactors.

Regardless of whether the colonial power of record was French, British, Spanish,
Portuguese or Belgian, decolonization and preparation for independence were dominated
and, to a great extent, controlled, by three main actors: (1) the colonial government; (2)
European entrepreneurs and business leaders resident in the colonies; and (3) a small group
of urban-based indigenous elites, virtually all of whom had been educated at European
universities, had resided in Europe for many years, and had adopted European cultures,

---

24 Id. at 41.
customs and values. This group of elites—colonial administrators, European entrepreneurs, and indigenous urban elites—was not representative of each colony’s diverse population, nor was it selected by the people to represent them in pre-independence constitution making. In addition, these elites were not well-informed about “social, political and economic conditions then existing in most of the colony.”

In some colonies, the only Africans participating in the decolonization project were members of a few politically dominant ethnic or ethno-regional groups, depriving most of the colony’s population from participating in the process of compacting the post-independence constitution. For example, in the colonies that became the Union of South Africa in 1910, constitution making was dominated and controlled exclusively by European settlers and Africans were denied participation in the compacting of the rules to regulate their post-independence socio-political interaction.

European colonialists were not enthusiastic participants in Africa’s decolonization project. In fact, the colonial powers only reluctantly participated in the process and in many instances, continued to oppose independence for Africans until the latter seized the opportunity through violent mobilization. In the colonies that had large populations of European settlers, these so-called colonists were against decolonization and independence, preferring instead to maintain the status quo—implying their continued domination of

---

25 Id.
26 Id.
27 Id.
28 Fatton, supra note 11, at 457-58. Many African countries gained their independence through violent confrontations with the resident colonial powers. While long and extremely bloody wars in Angola, Mozambique, Algeria, Zimbabwe and Namibia, which resulted in the needless death of many people come to mind, it is important to note that other less known struggles for independence also produced enormous casualties, displaced thousands of people, and destroyed many African communities and social systems.
political and economic markets and subjugation of Africans to a life of servitude, poverty and deprivation. In Algeria and Southern Rhodesia (now Zimbabwe), interference in the decolonization process by colonists produced extremely bloody liberation wars. In the South African colonies, settler control of the pre-independence constitution making process produced a racially-based set of institutional arrangements, which helped subject the country’s majority to the cruel, inhuman, and exploitative apartheid system (made official policy in 1948) and delayed genuine political and economic independence for more than 80 years.

The European-led institutional reforms undertaken during the pre-independence period failed to address critical issues associated with post-independence governance. First, the process did not adequately address the issue of “full and effective participation by indigenous peoples in post-independence governance and resource allocation.” Second, the opportunistic and reluctant institutional reform process failed to provide the facilities for all relevant stakeholder groups to participate fully and effectively in constitution making to compact relevant laws and institutions for governing post-independence socio-political interaction. Finally, constitution making at this time, often took place in Europe and away from the people, with the people's interests and concerns represented by an opportunistic urban-based elite, which had become imbued with alien values (mainly European). Such a

---

29 Mbaku, supra note 23, at 41.
30 Id.
32 Mbaku, supra note 23, at 41.
highly tainted constitution making process did not effect the transformations necessary to make the critical domains (economic, cultural, and bureaucratic) effective tools of post-independence governance.\textsuperscript{33}

The main goals of the majority of these European-dominated pre-independence constitutional exercises were to establish within the new African countries institutional arrangements that would (1) make it possible for the departing Europeans to continue to have full and effective access to the enormous resources of their former colonies; and (2) make certain that governance structures in the post-independence society were handed over to African elites who were willing and able to allow such continued European domination of their new nation-states.\textsuperscript{34} Thus, the constitutional rules that brought many African countries to independence failed to have the legitimacy, which, as argued by Professor U. Sundhaussen, only derives from the “understanding and voluntary acceptance of the constitution by the people as a prescription for settling conflict within society.”\textsuperscript{35} Although these constitutional compacts were, indeed, legal instruments, they and the leaders that they brought to office lacked the legitimacy needed to govern effectively.

\textit{D. The Legitimacy Problem and the Road to Corruption and Underdevelopment}

\textsuperscript{33} \textit{Id.}
\textsuperscript{34} Professor V. T. LeVine provides a rigorous examination of pre-independence constitution making in the UN Trust Territory of Cameroons under French administration and shows how the French had manipulated the decolonization process, to grant the colony independence on terms that allowed France to maintain its dominant position in the new country’s political and economic spheres. V. T. LeVINE, THE CAMEROONS: FROM MANDATE TO INDEPENDENCE (1964). See also RICHARD A. JOSEPH, RADICAL NATIONALISM IN CAMEROUN: SOCIAL ORIGINS OF THE UPC REBELLION (1977) (describing the heroic struggles of the \textit{Union des populations du Cameroun} (UPC), which at the time, was the Trust Territory’s most important and relevant indigenous political organization, to seize political and economic power in the territory from the French).
Why did many of Africa’s independence constitutions lack legitimacy and why did many citizens consider them and the institutions that they established alien impositions? An important reason for the lack of legitimacy is that these constitutions did not reflect the values of the relevant stakeholders, that is, the people whose lives and socio-political interaction would be governed by the rules selected. But, why did the new constitutions not reflect the values of the African peoples? First, as mentioned earlier, constitution making in the pre-independence period was not democratic—it was top-down, elite-driven, and non-participatory.\textsuperscript{36} Second, these elites adopted European constitutional models, often with virtually no modifications, and in the process, produced constitutional compacts that “did not reflect the realities or specificities of the colony in question.”\textsuperscript{37} Borrowing ideas and constitutional models from other countries was not the main source of Africa’s difficulty with constitution making; the important issue is that these imported models did not reflect the values of the various population groups within each country and neither these peoples nor their elected representatives were given the opportunity to thoroughly examine and either accept or reject these models. Nor were these models explained to the people so they could understand them and appreciate what impact their adoption would have on their daily lives, as well as their relationship with their neighbors and to their government.\textsuperscript{38} Thus, this top-down, elite-driven, non-participatory process effectively disenfranchised each colony’s relevant stakeholders and prevented them from determining their own institutional

\textsuperscript{36} See, e.g., LeVine, \textit{supra} note 34, for an excellent examination of the constitution making process in the UN Trust Territory of Cameroons under French administration, and Cowen, \textit{supra} note 31, for an informative discussion of constitution making in the four British colonies, which in 1910, became the Union of South Africa.

\textsuperscript{37} Mbaku, \textit{supra} note 23, at 42.

\textsuperscript{38} LeVine, \textit{supra} note 34.
arrangements. Instead, the final constitutional compacts reflected the ideals, interests and values of urban-based elites and their European benefactors.

Third, as has already been mentioned, the meetings at which the constitutional rules were “selected” were held at the metropolitan capitals, far away from the African peoples, and conducted in the colonizer’s language. African interests were represented by an opportunistic and parasitic urban-based elite, whose values and interests had converged with those of the departing Europeans. It was very rare for these elites to be elected by the people; usually they were appointed by the colonial administration, based on the willingness of these Africans to maintain post-independence governance frameworks that guaranteed effective European access to the new country’s resources.39

Fourth, in virtually all the colonies, particularly those of France, what emerged as the final constitutional compact was usually a “thinly disguised” copy of the constitution of the new country’s former colonizer.40 Finally, almost without exception, no effort was devoted

39 The manipulation of the conditions for independence in French Cameroons provide an excellent illustration of this process. See generally LeVine, supra note 34 for an in depth analysis.

40 The first constitution of the République du Cameroun (the former UN Trust Territory of Cameroons under French administration which gained independence in 1960) was actually a thinly disguised copy of the constitution of the French Fifth Republic (1958). See generally LeVine, supra note 34 and J. M. MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE (1997) (detailing how poorly constructed and nonviable institutional arrangements have contributed significantly to underdevelopment, poor economic performance, political instability, and the failure to effectively manage ethnic diversity in post-independence Africa). The Republic of Cameroon was not unique among French colonies. As argued by Mohameden Ould-Mey, Mauritania’s post-independence constitutions, including the one submitted to a national referendum on July 12, 1991 in an effort to initiate the country’s transition to democracy, were “essentially based on the Constitution of the French Fifth Republic of 1958, which strengthened the executive at the expense of parliament and, within the executive, strengthened the constitutional prerogatives of the presidency.” Mohameden Ould-Mey, Structural Adjustment Programs and Democratization
to securing the opinions of the relevant stakeholders regarding governance and resource allocation in the post-independence society or to providing these constituencies with the facilities to participate fully in the process of constitution making. In the rare cases where citizens were offered the opportunity to participate in debating the draft constitution, “the exercise was opportunistic, reluctant and carefully controlled and monitored by the government to achieve pre-determined results.”

LeVine summarizes the process as follows: “Constitutional debates were only rarely conducted outside the assizes of the drafting groups, and in most cases the finished product, while often the subject of intense public discussion, remained intact.”

In the immediate post-independence discussions about constitutionalism and constitution making in Africa, it was suggested that most of Africa’s independence constitutions may have been the outcomes of political exigency. Proponents of this school of African constitution making argued that during the decolonization period, Africans were so desirous of achieving independence and ridding themselves of the European interlopers that they were willing to forego democratic constitution making, at least temporarily, gain independence, as well as capture the apparatus of government, and then revisit the question of constitution making once political power was firmly in the hands of indigenous elites.

The expectation was that after independence, the new political rulers would bring together all relevant stakeholders and begin the process of reconstituting and reconstructing the state


41 Mbaku, supra note 23, at 43.


43 LeVine, supra note 34.

44 Id.
captured from the colonialists. This process would be democratic (i.e., participatory, bottom-up, inclusive and people-driven) and would seek to (1) compact a locally-focused and development-oriented set of rules, one built on the traditions, customs, values and aspirations of each country’s relevant stakeholder groups; (2) ensure that post-independence governance, unlike that in the colony, would be based on the rule of law; (3) make certain that the government derived its legitimacy to govern from the people; (4) promote transparency and accountability in the public sector; and (5) require that all citizens, regardless of their social and economic positions, be schooled, at government expense, in constitutionalism and governance, in an effort to cultivate the type of robust civil society that was needed to sustain democratic governance.\footnote{Mbaku, supra note 23, at 43.}

Unfortunately, for virtually all African countries, the elites who captured the evacuated structures of colonial hegemony did not engage the people in the type of state reconstruction through democratic constitution making that would have provided appropriate structures for popular participation in governance and resource allocation. Instead, the continent’s new leaders engaged primarily in opportunistic institutional reforms that erected significant barriers to popular participation; basically, the leaders of the newly-independent African countries, almost without exception, privatized the post-colonial state and proceeded to utilize the state’s redistributive powers for their own private capital accumulation purposes. What emerged from this approach to governance were “venal societies in which access to profitable opportunities in the [national] economy [was] being sold by corrupt civil servants

\footnote{Mbaku, supra note 23, at 43.}
As will be examined later, corruption emerged as one of the most important economic institutions in the post-independence society in Africa. It would, beginning in the early years of independence, and extending into the post-Cold War years of democratic transition, become the most important determinant of “success” in the African economies—entry into and success of entrepreneurs in the formal sectors of African economies would hence, be determined not by managerial expertise and acumen, but by the ability of enterprise owners to engage in corrupt dealings, which usually involved paying bribes to, or doing other types of favors for, regulators.

II. WHAT IS CORRUPTION?

A. Introduction

In one form or another, corruption has been part of human interaction for a very long time. Although virtually all human economies have suffered from some form of corruption, the latter’s impact on each one of these economies has not been uniform. As shall be made evident later on in the discussion, the extent to which corruption affects human societies is determined by the nature of each society’s institutional arrangements. Where the laws and institutions adequately constrain state custodians (i.e., civil servants and politicians or those whose job it is to govern and carry out the state’s regulatory function), corruption’s impact

---

on society is likely to be minimized.\textsuperscript{48} However, where the rule of law does not exist or does not function properly, corruption is most likely to be pervasive, frustrating entrepreneurial activities and preventing citizens from engaging in productive or wealth-creating activities.\textsuperscript{49}

\textit{B. The Universal Nature of Corruption}

Throughout history, the word “corruption” has been used to express a variety of human behaviors. In ancient Rome, Aristotle argued that the “corruption of kingship is tyranny.”\textsuperscript{50} According to Carl J. Friedrich, corruption is “deviant behavior associated with a particular motivation, namely that of private gain at public expense.”\textsuperscript{51} Friedrich’s view of corruption raises at least one important question: whose norms should be used to determine if a particular behavior is deviant? Confronting this question brings us to the heart of this paper—to understand corruption and find ways to deal with it fully and effectively, one must begin with a comprehensive analysis of the country’s institutional framework. Once such a foundation has been laid, one can then explore Friedrich’s discussion of when and where corruption is likely to occur. According to him, corruption occurs “whenever a power holder who is charged with doing certain things, that is a responsible functionary or office holder, is by monetary or other rewards, such as the expectation of a job in the future, induced to take actions which favor whoever provides the reward and thereby damage the group or organization to which the functionary belongs, more specifically the government.”\textsuperscript{52}

\begin{itemize}
\item \textsuperscript{48} Mbaku, \textit{supra} note 46, at 151-78.
\item \textsuperscript{49} See Mbaku, \textit{supra} note 46 for a discussion of the impact of corruption on wealth creation activities in Africa.
\item \textsuperscript{50} The Politics of Aristotle 373 (E. Barker ed., 1946).
\item \textsuperscript{52} Id. at 15.
\end{itemize}
Corruption, however, has been examined from a much broader perspective as is evident in Lord Acton’s proclamation that “all power tends to corrupt and absolute power corrupts absolutely.”\(^{53}\) Lord Acton’s dictum, while it can be used to describe bureaucratic opportunism, it more appropriately fits the “moral depravity which power [particularly unconstrained power] is believed to cause in men [and women]; they no longer think about what is right action or conduct, but only about what is expedient action or conduct.”\(^{54}\) This approach to corruption, however, is rooted specifically in Western Christian philosophy and touches or relies on its effectiveness on morality.

One must distinguish between “institutional decay,” a broader concept, and the much narrower concept of “bureaucratic corruption,” which involves the misuse of a public position by a civil servant for personal gain. For example, while it is possible to find several instances of corrupt civil servants and politicians within the U.S. system of state, local and federal governments, it would be a stretch to conclude that the country’s institutional structure is currently undergoing decay. Yet, President Richard Nixon’s subversion of national laws and abuse of power—the so-called Watergate Affair—in an effort to undermine the opposition Democrats and gain another term in power, threatened the country’s political system and could have triggered institutional decay had it not been nipped in the bud by the judiciary with the help of the country’s robust independent media. Nixon’s power-induced “moral depravity” did not cause institutional decay in the United States because of the effectiveness of the country’s laws and institutions—specifically, an

\(^{53}\) *Quoted in* Friedrich, *supra* note 51, at 16.

\(^{54}\) *Id.* at 16.
independent judiciary, a professional and neutral military, a free press, well-constrained local and national police forces, and most importantly, a robust civil society.

One important by-product of the Watergate Affair is that it revived interest in the study of political corruption, which has been defined as behavior, whether by private or public individuals, which “violates and undermines the norms of the system of public order which is deemed indispensable for the maintenance of political democracy.”

We distinguish between political corruption and bureaucratic corruption. Bureaucratic corruption, which I explore later in greater detail, can be defined as the misuse of public office for private gain. Political corruption, on the other hand, involves the subversion of national laws and institutions, specifically to capture leadership positions in the nation-state’s political system. Hence, political corruption usually encompasses such behaviors as vote-rigging, registration of unqualified voters, falsification of election results, buying and selling votes, illegally wiretapping the phones of opposition leaders and candidates, soliciting and accepting illegal campaign contributions, assassination of opposition leaders, intimidation of the supporters of the opposition—through, for example, using the apparatus of government to threaten their well-being (e.g., illegal auditing of the tax returns of opposition supporters), ethnic cleansing, rape of females belonging to the opposition, and destruction of communication structures belonging to the opposition.

---


56 This list, of course, is not exhaustive. In fact, since the Watergate days, improvements in technology have brought significant changes in the practice of political corruption. For example, while interference with phone communications was a major method to illegally gain advantage over one’s political opponents, destroying an opponent’s ability to communicate with supporters through the Internet is likely to be a much more effective way for morally depraved politicians to gain political advantage in today’s technologically-oriented society.
Whether in developed or developing countries, most bureaucratic corruption usually does not have a political dimension. Those who are engaged in bureaucratic corruption do so almost exclusively to secure extra-legal income for themselves and in the case of many African civil servants and politicians, for their extended families (usually a village or ethno-regional group, of which the civil servant is a member). In Africa, for example, the corrupt police officer subverts the law to secure additional income for himself or herself; the business owner who pays bribes to the police officer does so in order to minimize regulation-induced costs on his business operations; and the student who wants to study abroad, pays bribes to the immigration officer so that he can secure the travel documents needed for his trip to the foreign university. None of these individuals necessarily thinks of or has interest in capturing public office or helping build political machines.  

Today, there are virtually no governments that can boast of having totally escaped infection by corruption. However, “there are striking differences in the extent of corruption between governments which are formally similar, such as Great Britain, Switzerland, and the United States, all functioning democracies . . .” As argued by Friedrich, “the degree of corruption varies inversely to the degree that power is consensual.” A major problem here

58 Friedrich, supra note 51, at 16.
59 Id.
is that it is often quite difficult to determine if power is consensual or not. For example, the United States, which is a constitutional democracy, has nevertheless, had institutional arrangements that have, at various points in the country’s history, not been consensual for all of its diverse population groups. While historically, power has been consensual for Anglo-Saxon, protestant whites, this has not been the case for African-Americans and many other minority groups. Where power appears to be universally consensual while in practice, but several groups (e.g., ethnic minorities, immigrants, women) are denied full and effective participation in political and economic markets, corruption is likely to be pervasive as these disadvantaged groups seek ways to change the status quo and minimize further marginalization. A much more effective way to determine levels of corruption in a country, besides the extent to which power is consensual, is the extent to which the country is an open and free society. For, in relatively open and free societies, political opposition elites are likely to expose incidents of corruption. In countries in which freedom of expression is constitutionally guaranteed and protected, and where there is a robust civil society, both political and bureaucratic corruption are likely to be minimized.

In countries with authoritarian political systems, a type of corruption referred to as the “perversion of legal rules by misinterpretation” is quite common. This kind of “moral corruption” has occupied the interest of many philosophers (e.g., Aristotle, Plato and Machiavelli) throughout history. For example, in his theory of the “corrupted” and “perverted” constitutions, Plato argued that these opportunistic regimes were operated almost exclusively for the benefit of the rulers and not for the interest or benefit of the

---

60 Id. at 17.
Rousseau wrote extensively about moral corruption and argued that equality is a natural phenomenon and that the main purpose and value of good laws should be to sustain equality and make certain that it (i.e., equality) is not perverted by the corrupting influence of morally-depraved and power-hungry elites. Rousseau’s pre-occupation with equality, which today can be seen as “equality before the law,” provides a foundation for understanding corruption and how to minimize or eradicate it. As will be discussed later, countries can use a democratic constitution making process to design constitutions that effectively constrain civil servants and politicians and prevent them from engaging in opportunistic behaviors, including rent seeking and corruption. Engaging in democratic constitution making can offer the people with the opportunity to constitutionally entrench structures that significantly raise the opportunity cost of corrupt activities and hence, make it much more difficult for state custodians (i.e., civil servants and politicians) to practice corruption and other forms of opportunism.

C. Defining Corruption

The contemporary social science literature provides several definitions for corruption, most of which are linked to such terms and expressions such as “bribery,” “perversion or misuse of public office or position,” “nepotism,” “patronage,” “sale of public office,” “ privatization of the state,” and “political prostitution.” Generally, the contemporary social science literature defines corruption in terms of three models: (1) corruption has a close relation to

---

61 Id.
62 Id. at 20.
63 A thorough review of the definitions for corruption found in the social science literature is provided by Mbaku, supra note 46, at 11-35.
the performance of the duties of a public office; (2) corruption is linked to the economic concept of exchange; and (3) corruption is related to the public interest concept.\textsuperscript{64}

1. Corruption and the Performance of the Duties of a Public Office

The bulk of studies of corruption in Africa have been devoted to an examination of the misuse of public office and how that depravity on the part of civil servants and politicians affects social, political and economic development.\textsuperscript{65} In his definition, Bayley argues that “[c]orruption, while being tied particularly to the act of bribery, is a general term covering misuse of authority as a result of considerations of personal gain, which need not be monetary.”\textsuperscript{66} Bayley links corruption to what has been termed “political prostitution,” which involves the sale of one’s public office with the benefits accruing to the office holder.\textsuperscript{67}

When one talks of political prostitution as a process that involves the sale of public office for private gain, it is common for people to think of high-ranking office holders. However, in Africa, political prostitution is not limited to senior civil servants (i.e., bureau managers) and politicians or other individuals who serve in the higher echelons of the civil service. Even the “little guy” who has control of any type of government office that has the potential to serve the public, can engage in political prostitution. For example, a janitor at a government-operated hospital can secure significant extra-legal income for himself, and of course, his superiors, by charging patients for supplies, which are supposed to be free to them—these

\textsuperscript{64} Mbaku, \textit{supra} note 46.

\textsuperscript{65} \textit{See generally} CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE STUDIES (K. R. Hope, Sr. & B. Chikulo eds., 2000).


\textsuperscript{67} Mbaku, \textit{supra} note 46, at 15.
may include, but are not limited to, toilet tissue, water, bed sheets, toilet soap, and even a mattress for the bed.

Werlin conducted several studies of corruption in Ghana in the late 1960s and early 1970s and described corruption as the “diversion of public resources to nonpublic purposes.” In this type of corruption, which is quite common in many African countries today, the public office holder illegally appropriates resources meant for public use for his own private use. For example, in studies of corruption in Mobutu’s Zaire, it was determined that military officers routinely and illegally appropriated for their own private use, resources allocated by the government for the use of their troops. In the last several decades, African ruling elites have taken this process a step further and have engaged in what has been variously described as a “privatization of the state” for the sole purpose of using the latter’s structures as instruments of economic plunder for the benefit of the civil servants and politicians involved. While the bureaucrat who heads the central bank or other government ministry has more opportunities and a much larger “warehouse” to plunder once the ministry or bank has been literally removed from the public sphere, the lowly janitor or custodian of a government-owned and -operated hospital wing is equally equipped to enrich himself at the expense of the public. If the hospital wing needs ten rolls of toilet tissue on a weekly basis, the janitor will requisition twenty or more, then sell the excess to businesses that retail to the public. Usually, the janitor will keep a portion of the proceeds

---


69 *Id.*

from the sale and remit the rest to his superior, a tribute that is required in order for him to retain ownership of this important “cash cow.” In a study of corruption in Cameroon, Professor Nantang Jua found a variation of this scheme and described it as follows:

An office needs reams of paper. Thus, they are ordered. An agreement is made to pay 8 million or 10 million CFAF (CFA francs, Cameroon’s currency) for paper that would cost 5 million CFAF. How is the 3 million or 5 million CFAF surplus shared? It is shared between the boss (the linchpin), the store’s accountant (the controller) and the businessman (the architect) for sure.72

Nye provides a multifaceted definition of corruption in which he argues that corruption involves,

behavior which deviates from the normal duties of a public role because of private-regarding (family, close private clique), pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence. This includes such behavior as bribery (use of reward to pervert the judgment of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit); and misappropriation (illegal appropriation of public resources for private-regarding uses).73

2. Corruption and Economic Markets

In market-centered definitions of corruption, there are two main actors—the bureaucrat or regulator of economic activities and the entrepreneur or business owner. As argued by Van Klaveren, the bureaucrat considers his public office as a “business” from which he can

extract income, albeit illegally.\textsuperscript{74} As a result of this view, the bureaucrat’s total compensation package “does not depend on an ethical evaluation of his usefulness for the common good but precisely upon the market situation and his talents for finding the point of maximal gain on the public’s demand curve.”\textsuperscript{75} Under these conditions, the total income received by the bureaucrat is made up of his official salary (that is, the compensation paid by the government or taxpayers) plus all legal and extra-legal income generated through the bureaucrat’s engagement in outside activities.\textsuperscript{76} Thus, there is a tendency for civil servants, regardless of their training and expertise, to prefer those public jobs, which offer them the best opportunities for extra-legal enrichment as opposed to those from which they can use their talents and skills more effectively to serve the public. This approach to work in the public sector can severely distort public policy and result in arbitrariness and capriciousness in the allocation of public goods and services. As argued by Professor John Mukum Mbaku, if “bureaucrats are able to earn more income from external sources (e.g., from interest groups seeking government transfers or relief from government regulation) than from their regular employment, they may pay more attention to the demands of interest groups than to the needs of society as a whole.”\textsuperscript{77}

Some public agencies and ministries offer more lucrative plundering opportunities than others. In Cameroon, for example, the presidency is considered the most desirable public


\textsuperscript{75} \textit{Id.}


\textsuperscript{77} \textit{Id.}
institution in which to receive an appointment. Outside of the presidency, the customs and exercise department offers the individual adept at corrupt practices enormous opportunities for private capital accumulation. This is evident in the fact that many high-ranking civil servants who are serving in other government departments, often voluntarily seek lower-level appointments in the customs and excise department where they are definitely expected to earn significantly lower legal salaries and benefits. Although such a career move may, on its face, appear illogical, when one takes into consideration the enormous corruption-related pecuniary benefits that a job (regardless of its level) in the customs and excise department offers, it becomes clear that the individual did, indeed, make a rational decision. One can get a bird’s eye view of the nature and extent of corruption in Cameroon’s customs and excise department by examining import data on French champagne. In 1987, for example, the country imported 92,500 kilograms of champagne from France, valued at francs CFA (FCFA) 164.3 million, according to official customs and excise data. Foreign trade data from the French, however, showed that Cameroon had actually imported as much as 287,700 kilograms of champagne, valued at FCFA 776 million. The official tariff rate for champagne at the time was 240 percent, however, the customs and excise department deposited into the national treasury only FCFA 214 million. The customs and excise department, according to French data, should have deposited FCFA 1.85 billion worth of tariff revenue from champagne imports into the national treasury. The lost revenues, of course, accrued to customs and exercise workers and the business enterprises that had imported the champagne. Officers of the customs and excise department help importers minimize the

78 Mbaku, supra note 46, at 62-63.
79 Id.
80 AFRICA CONFIDENTIAL xvi (June 1989).
burden of government regulations (specifically import tariffs) on their operations and in exchange, the customs and excise workers are paid a pre-arranged percentages of the tariff “savings.”

According to N. H. Leff, who in the 1960s, studied the relationship between corruption and development,

[c]orruption is an extra-legal institution used by individuals or groups to gain influence over the actions of the bureaucracy. As such, the existence of corruption per se indicates only that these groups participate in the decision-making process to a greater extent than would otherwise be the case. Leff, together with several other researchers, argued then that corruption can have significantly beneficial impacts on both political and economic development since corruption can be used to clear the way for more participation in policy making by all sectors of society, including especially those groups and individuals who had been historically deprived, excluded and marginalized. In the process, as the argument went, popular participation can be significantly improved. This view has since been discredited and rejected by virtually all researchers of corruption and its impact on African economies. Corruption, on the other hand, has significantly improved and enhanced the ability of civil servants, politicians, and politically-influential individuals and ethno-regional groups to illegally enrich themselves and

---

81 Mbaku, supra note 46 at 62-63.
83 Id.
for a few inefficient but politically well-connected business enterprises to remain operational indefinitely.  

C. J. Friedrich is among a group of researchers who argue that corruption can be more effectively defined if the definition is couched in terms of the public interest. In line with this approach, Friedrich argues that,

[the pattern of corruption may therefore be said to exist whenever a power holder who is charged with doing certain things, that is a responsible functionary or office holder, is by monetary or other rewards, such as the expectation of a job in the future, induced to take actions which favor whoever provides the reward and thereby damage the group or organization to which the functionary belongs, specifically the government.]

In Friedrich’s view, since the corrupt activities of civil servants and politicians can impose significant damage on the public interest, such opportunism should be considered an important variable in the study and evaluation of corruption and its impact on economic, social and political development. Friedrich’s approach to the study of corruption implicates various forms of political opportunism that have severely adverse impacts on the African economies. These include, but are not limited to, rent seeking and unproductive government redistributive activities. The owner of a business enterprise, for example, may, through lobbying, campaign contributions, and even bribery, get a legislator to sponsor and eventually enact legislation that generates benefits for the entrepreneur’s operations. The

---

85 Mbaku, supra note 46, at 17.
86 Friedrich, supra note 51, at 15.
87 Id.
88 Id. at 15-24.
new law, on the other hand, may severely damage the welfare of society, by, for example, increasing income inequality, lowering overall output in the economy, and reducing public revenue collections, forcing the government to raise taxes. Of course, in exchange for helping the business owner artificially improve the profitability of his enterprises, the legislator is provided “the support that he or she needs to retain his or her public position.”

Professor M. S. Alam views corruption as a deviation from modern bureaucratic practices. The majority of Africans, on the other hand, view corruption more in terms of impediments to their ability to organize their lives and function properly on a daily basis. For example, a poor urban dweller, one forced by various circumstances to live on the political and economic periphery, sees corruption as a process that prevents him from entering the formal sector where he can significantly improve his welfare through engagement in productive activities. If he wants to start his own business (e.g., to retail socks and toilet tissue on a street corner), even if he has successfully obtained all the necessary government permits, he must still pay bribes to an assortment of government officials who stop by his business regularly to question the authenticity of his permits. These may include individuals from the health ministry, public works, police, trade, treasury, and customs, and even immigration service (supposedly to make sure that the entrepreneur is not in the country illegally). Such incessant harassment increases the cost of doing business significantly and makes it virtually impossible for such individual operators, already faced with a very thin profit margin, to stay operational in the formal sector.

---

89 Mbaku, supra note 46, at 18.
Also, poor urban dwellers see other practices of corrupt bureaucrats as having severely damaging impacts on their welfare. For example, they see theft of public resources, embezzlement of public funds, nepotism, and the arbitrary and capricious distribution of public goods and services as activities that benefit bureaucrats but have negative impact on the poor. Continuous harassment of poor urban entrepreneurs by corrupt government officials, as well as “capriciousness on the part of the police and other public servants threatens the welfare and even the lives of [these] poor families and forces the latter to consider these so-called ‘servants of the people’ morally depraved, and corruption, an evil institution.”

The most common behavior associated with corruption in Africa is bribery, usually of a civil servant or politician. Who pays the bribe and why? Usually, an entrepreneur bribes the regulator in order to obtain certain services from the latter. These include, but are not limited to (1) a reduction in the entrepreneur’s tax obligations; (2) exemption from compliance with all or some government regulations; and (3) reduction or elimination of certain legally-required paper work.

Corruption has also been defined in terms of the agent-principal relationship. In this approach to the study of corruption, the principal (i.e., the people) grants the agent (i.e., civil servants and politicians or the government) the power, usually through a constitution or some other form of social contract, to tax and use the revenues collected to provide the people with certain public goods and services (e.g., police protection, national defense, primary health care, public education). In this relationship, the agent is considered a fiduciary

---

91 Mbaku, supra note 46, at 19.
92 Id.
93 See generally Alam, supra note 90.
and hence, must conduct himself or herself in certain legally well-defined ways. In most African countries, however, agents more often than not, breach their duty of loyalty to the principal, engage in self-dealing, and sacrifice the interests of the principal for their own. For example, it is quite common for civil servants, charged with distributing certain goods and services to the public, to illegally appropriate those resources for themselves and their families. A border patrol officer, charged with collecting import duties and remitting the monies to the national treasury for use in providing the people with public goods and services, may divert the resources to his numbered account in Switzerland or some other offshore banking venue, where he plans to retire after his “service” in the customs and excise department is ended. In the process, the agent benefits himself at the expense of the principal. Thus, the duty of loyalty and fair dealing expected of a fiduciary is totally abrogated in favor of deceit, self-dealing, depravity and other forms of opportunism, all of which are designed to maximize extra-legal income and other forms of benefits accruing to the agent.  

Virtually all of these approaches to the definition of corruption raise an important question regarding “whose norms” must be used to determine when a given behavior is corrupt. In his study of corruption, James Bryce attempted to answer this question. He argued that the criteria used to determine if behavior is corrupt should be set by the country’s legislature and judiciary. In addition, he said that an effective definition of corruption must be one that is based on the value judgments of extant national elites and not

---

94 See generally Mbaku, supra note 46; Werlin, supra note 47; Gould & Mukendi, supra note 47; J. C. Leith, GHANA (1974) & Gould, supra note 47.
on formal legality.\textsuperscript{96} Recent researchers, however, have argued that the people, through their duly elected officials, should determine and set the rules for judging the corrupt nature of behaviors.\textsuperscript{97}

\textbf{III. Classifying Corruption}

\textit{A. Alam’s Four Types of Corruption}

Given the fact that several types of activities and behaviors can qualify as corrupt within a given institutional environment, researchers have developed typologies to identify the different categories of corruption. One such typology is that developed by Professor M. S. Alam. It consists of four categories of corruption, namely, \textit{cost-reducing}, \textit{cost-enhancing}, \textit{benefit-enhancing}, and \textit{benefit-reducing} corruption.\textsuperscript{98}

1. \textit{Cost-reducing Corruption}

Cost-reducing corruption is a type of scheme utilized by bureaucrats to lower the regulation-induced costs of a business enterprise below their normal levels. Through this process, the bureaucrat can also eliminate all the taxes that the business owes the government or reduce them significantly, as well as exempt the business from complying with a variety of state regulations. By engaging in all these activities, the bureaucrat can lower the overall transaction costs that a business owner faces and help significantly improve the business’s profitability. In exchange for providing the business owner with these extra-legal services,

\textsuperscript{96} \textit{Id.}


\textsuperscript{98} This classification is discussed in greater detail in Alam, \textit{supra} note 90.
the civil servant is given a share of the cost-savings that have been generated through this process. Usually, the bureaucrat’s share of the booty is determined in advance.\textsuperscript{99}

This type of corruption is quite common in African economies. In addition to the fact that it is used by bureaucrats to illegally enrich themselves, the ruling coalition also utilizes it to place in a favorable operating condition, the enterprises of the regime’s supporters and benefactors.

2. Cost-enhancing Corruption

In this type of corruption, civil servants, whose job it is to distribute public goods and services to the population, attempt to extort payments from demanders of these goods and services. Usually, the civil servants require that consumers pay for goods and services that have already been paid for with tax revenues. Of course, the revenues collected do not go into government coffers but accrue to the bureaucrats for their private use. Additionally, bureaucrats, whose job it is to issue permits for business to operate in economic sectors closed by government regulations (e.g., production, export and import licenses) can successfully extract part of the monopoly profit that is expected to accrue to permit owners. Finally, civil servants can engage in illegal takings of private property for their own use, through, for example, unauthorized taxation of economic activity.\textsuperscript{100}

3. Benefit-enhancing Corruption

Through benefit-enhancing corruption, bureaucrats transfer to recipients of government or public benefits more resources than they are legally required to receive. In exchange for helping the government benefits-recipient receive more benefits than are legally due to him

\textsuperscript{99} Alam, \textit{supra} note 90 & Mbaku, \textit{supra} note 46, at 20-21.

\textsuperscript{100} Mbaku, \textit{supra} note 46, at 21. Also Alam, \textit{supra} note 90.
or her, the civil servant is granted a share of the additional resources. This type of corruption is also quite common in African economies and is regularly used by incumbent regimes to transfer resources to supporters of the regime, as well as to individuals and groups (e.g., military officers and urban elites) that have the potential to threaten regime security.  

4. Benefit-reducing Corruption

Civil servants who engage in benefit-reducing corruption illegally appropriate, for their own use, government benefits destined for other citizens. For example, the director of a government scholarship fund for study abroad, may delay the transmission of checks to students, pack the funds in an interest-paying account at a local bank, and subsequently transfer the accrued earnings to his personal account. In African economies, where bureaucrats have more information about government benefits programs than the general population, this type of corruption is quite common.

B. Benefit versus Harmful Corruption

Some researchers argue that a much more appropriate typology for classifying corruption is one based on whether corruption is beneficial or harmful to private economic activities. As argued by D. Osterfeld, in economies in which government regulation of private exchange is pervasive, there exist two types of corruption. The first type of corruption, which Osterfeld calls “expansive corruption,” includes those corrupt activities, which “facilitate, improve, and enhance competitive exchange.” This type of corruption is expected to make the economy more competitive and hence, is considered by its proponents as beneficial to

101 Mbaku, supra note 46, at 21.
102 Id. & Alam, supra note 90.
104 Mbaku, supra note 46, at 23 & Osterfeld, supra note 103, at 208-209.
economic growth and wealth creation. As argued by Osterfeld, government regulation adversely affects voluntary free exchange, which is a critical part of economic growth, specifically, the creation of wealth.\(^\text{105}\) However, with the help of expansive corruption, business owners are able to rid the market of the various regulation-induced impediments to voluntary free exchange that significantly raise the cost of operating in the formal sector of the economy. Through this process, proponents of expansive corruption argue, government-imposed bottlenecks, which otherwise would stunt wealth creation, are eliminated and the economy allowed to function properly and efficiently.\(^\text{106}\)

The “expansive corruption” classification is a repackaging of the “beneficial corruption” argument, which in the 1960s, promoted corruption as beneficial to economic development. Then, as now, it was argued that corruption could be used to remove bottlenecks in the bureaucracy and make it more efficient and responsive to the private sector.\(^\text{107}\)

The second type of corruption is identified by Osterfeld as “restrictive corruption.”\(^\text{108}\) As described by Osterfeld, restrictive corruption severely limits opportunities for market exchange, and hence, is considered a major constraint to wealth creation and economic growth.\(^\text{109}\) An important characteristic of this type of corruption is the redistribution of income and wealth in favor of politically dominant individuals and groups (e.g., military elites, urban elites—especially politicians and bureaucrats). Throughout Africa, this type of corruption is quite pervasive and includes activities such as extortion of bribes from private-sector operators by regulators; embezzlement of government funds; misappropriation of

\(^{105}\) Osterfeld, supra note 103, at 208-209.

\(^{106}\) Mbaku, supra note 46, at 23-24.

\(^{107}\) Bayley, supra note 66, at 719-729.

\(^{108}\) Osterfeld, supra note 103, at 212-217.

\(^{109}\) Id.
public resources; nepotism; and other forms of opportunism, designed to illegally increase the compensation packages of civil servants and politicians.110

C. Systemic versus Opportunistic Corruption

In some political systems, corruption is systemic and in others, it is individualized.111 In governments in which corruption is systemic, it is the case that existing laws do not adequately and effectively constrain civil servants and politicians, the country has degenerated into a venal society in which access to lucrative opportunities in the economy are routinely sold by bureaucrats and politicians, and government institutions (police, judiciary, legislature, electoral system) have been fully and effectively compromised.112 Given the fact that the institutions whose job it is to make certain that citizens comply to the law have been totally compromised, the rule of law no longer exists in such countries. In these types of economies, corruption has become institutionalized and well organized, so that the only way for anyone to gain access to government-provided public goods and services, and, indeed, to the economy, is to bribe the gatekeepers, who in this case are the regulators.113 In fact, public institutions, including the courts, only “function” if the person requesting service pays the appropriate bribe. For example, the adjudication of court actions is no longer based on the evidence presented at trial but on the ability of the defendant to pay bribes to the magistrate. The defendant, who has the wherewithal to pay the necessary bribes and is willing to do so, is usually guaranteed acquittal regardless of the evidence presented at trial.114

110 Id. & Mbaku, supra note 46, at 23.
112 Id. See also Mbaku, supra note 46, at 23.
113 Mbaku, supra note 46, at 24.
114 Id.
In economies in which corruption is individualized, the structures of government still function properly and the rule of law exists. Here, there does not exist organized, system-wide corruption. Instead, opportunistic civil servants and politicians, acting on their own individual behalf, seek ways to subvert the existing rules in order to enrich themselves. For example, an unscrupulous nurse at a government hospital, where patients are supposed to be treated free of charge, may, without the knowledge of his superiors, demand bribes from patients or their relatives before treatment is granted. These types of individual efforts to subvert the laws, unless they become widespread, usually would not compromise the country’s health-care system. Should the practice become widespread, immediate and swift action is needed to minimize harm to the system and avoid long-term damage to the integrity of the hospital’s ability to deliver services to the people.\textsuperscript{115}

Individualized corruption is quite common in the African economies. Behaviors associated with this type of corruption include, but are not limited to, embezzlement of public funds, moonlighting (e.g., a nurse employed at a government-owned hospital, works there only three days a week, and spends the rest of the week working for a private clinic for pay, but, nevertheless, receives full pay and benefits from her government job), smuggling, absenteeism, and regularly coming late to work or leaving work before the official “quitting time”, but receiving full pay, and several other types of white-collar crimes.\textsuperscript{116}

\textit{D. Grand Corruption and Petty Corruption}

\textsuperscript{115} Id.

Grand corruption describes the corrupt activities of high-ranking civil servants and politicians, which involve significantly large sums of money. Petty corruption, on the other hand, involves relatively small amounts of money and is usually committed by lower-level civil servants. In a review article on corruption, A. Jain describes two types of corruption: grand and bureaucratic corruption.\(^\text{117}\) Grand corruption, Jain argued, represents “acts of the political elite by which they exploit their power to make economic policies” and bureaucratic corruption, he continued, represents the “corrupt acts of appointed bureaucrats in their dealings with either their superiors (the political elite) or with the public.”\(^\text{118}\) One, however, must not be fooled into thinking that because corruption is characterized as “petty,” it means or implies that it has only minor or marginal impact on African societies and hence, is benign, not invidious. On the contrary, petty corruption is a major headache for the bulk of Africa’s poverty-stricken urban dwellers. It imposes enormous costs on the continent’s most vulnerable individuals and groups. The poor, who find themselves living on the urban periphery, must, on a daily basis, pay bribes to regulators in order to have access to welfare-enhancing and, in many instances, life-saving services, such as police protection, effluent disposal, clean water, shelter, basic health care, and food.\(^\text{119}\) John Erero and Tony Oladoyin, in a study of corruption in Nigeria, describe the daily experiences of Nigerians with the country’s corrupt police as follows:


\(^{118}\) *Id.*

At the counter of any police station in Nigeria, there is usually a boldly written notice to the effect that ‘BAIL IS FREE.’ However, no one can be released from police custody without parting with some amount of money. The policeman at the counter will demand money for writing materials with which they claim they will enter the case, whether of a complainant or an accused. At another level if a policeman effects an arrest, the first thing he or she demands is ‘chop money’ from the suspect. At the level of the inter-relationship between the commuter drivers and the police, the situation is a pathetic one. The police of all categories—anti-crime, mobile, or traffic wardens—openly demand and take bribes even in the presence of passengers. The amusing but sad dimension here is that these police officers in Nigeria even give change. For instance, where a driver does not have the required bill, say a 10 currency note and he gives out a 50, the policeman at the check point, will give back 40 in change without any sense of shame. It is that bad now in Nigeria.120

120 Id. at 280. “Chop money” is an expression used throughout West Africa to mean money given a wife by her husband to purchase household items, specifically, food, and for urban couples, to pay household bills. The word “chop” is a Pidgin English verb meaning “to eat.” However, in association with corruption, it means to appropriate someone else’s money, usually illegally, for another’s private use. Hence, a police officer “chops” the public’s money, meaning that the police officer illegally appropriates public funds for his private use. Also, a police officer can demand “chop money” from a citizen who is seeking services from the police department. This is a bribe supposedly to help the police officer feed himself and his family because, in the police officer’s opinion, his official or legal salary is not enough to meet his obligations to his family. Of course, one must note here that, high-ranking civil servants, who are granted official compensation packages that are considered exorbitant, even by Western standards, still voluntarily and willingly engage in corrupt activities, often at the grand scale. One is reminded, then, that the argument that African civil servants are forced to engage in corrupt activities in order to subsidize inadequate legal salaries, in order to meet their obligations to their families, remains tenuous at best, and at worst, is just an excuse made by policymakers who are unwilling to come to grips with the
E. State Capture versus Administrative Corruption

Quite often, private individuals or groups may, using illegal payments and other favors, pervade the judgment of state custodians (i.e., civil servants and politicians) in such a way as to have complete control over public policy. This is called “state capture.” Specifically, through state capture, special interest groups can take over control of the design and implementation of public policy, as well as the enforcement of state regulations. Those capturing the state usually intend to use its structures as instruments of plunder for their self-enrichment. One consequence of state capture is that there is a proliferation of fiscally discriminatory legislation, whose main purpose is to transfer income and wealth from the rest of society to politically dominant individuals and groups. In Africa, it is the case that fiscally discriminatory laws have been used to transfer income and wealth for the benefit of groups that have captured the state. Specifically, such legislation has been used to transfer income and wealth from (1) the relatively disorganized and politically weak rural agricultural sector to the politically dominant urban sector; (2) society as a whole, to military and police elites, who have a comparative advantage in the use of force and violence; and (3) productive sectors of the economy to politically dominant ethno-regional groups.\textsuperscript{121}

As many Africans have come to discover, where the state has been captured by a group of non-state actors, the state seizes to “be present” to deal with citizen issues. Instead, the state serves primarily, and in many instances, exclusively, to maximize the interests and values of the groups that have captured it. Hence, the duty of loyalty and fair dealing, which dysfunctional nature of institutional and judicial systems, which were never designed to confront such problems as political opportunism.

the agent (i.e., the government) owes the principal (i.e., the people) is breached and the agent no longer serves the interests of the public. All government activities are now geared toward maximizing the interests of the group that has captured the state. Public policy in general and the distribution of public goods and services in particular are now undertaken in ways designed to meet the needs of the capturers of the state, with the bulk of the people left to fend for themselves. The state is either totally absent from many communities within the country or only appears when there is a need to plunder and exploit these communities for the benefit of the new “principal”—that is, the group that has captured the state.

Groups engaged in administrative corruption do not direct their efforts toward capturing the state. Their primary objective is to influence and/or control the design and implementation of public policy so that they can maximize benefits flowing to them from such policies. The focus of those groups that are engaged in administrative corruption is much narrower and often involves the targeting of specific sectors of the economy. For example, mining and extractive industries may be targeted, with significant time and expenditure devoted to corrupting civil servants and politicians responsible for designing and implementing policy for this sector of the economy. Again, the primary objective of the groups engaged in such opportunism, is to maximize the income flowing to them from the mining and extractive industries.

F. Centralized and Decentralized Corruption

What if the central government is able to control all corrupt activities in the country such that every individual who is involved in any corrupt undertakings regularly reports those activities to the center through a formalized structure? In other words, what if corruption is centralized so that an individual entering this economy can easily and accurately predict what
their corruption-related expenditures would be should they decide to engage in any transactions within that economy? Students of corruption and its impact on economic growth and development have argued that if corruption is decentralized, it is relatively unpredictable and is much more harmful than centralized corruption. Although these scholars agree that corruption, in general, is a constraint to economic growth and development, they nevertheless argue that centralized corruption imposes less costs on investment and production than the decentralized type. According to them, where corruption is centralized, prospective and even extant entrepreneurs can more accurately and effectively determine how much money they must pay the central authority in order to engage in productive activities in the formal sector of the economy. Given the fact that under such a regime, corruption is relatively and easily predictable, enterprise owners can factor into their cost structure the corruption-related expenses and consider them simply as part of their transaction costs or part of the tax that they must pay in order to continue to carry out their business activities. Decentralized corruption, on the other hand, the argument goes, is more difficult to predict—such unpredictability seriously impedes the ability of business firms to plan, for example, future investment. Specifically, businesses intending to operate or which are already operating in countries where corruption is decentralized, usually do not know when they may be forced to pay bribes to regulators and, how much they would have to pay. Such unpredictability, it is argued, can be quite detrimental to a business operation—it can significantly (1) increase the complexity of planning, rendering the process virtually nonviable; (2) distort the firm’s cost structure, making it difficult for the firm to

---

meet, in a timely way, its expenses; and (3) impact the firm’s ability to invest in capital improvements, as well as, in new capital. If, on the other hand, corruption is centralized, the central authority will provide necessary information, on a regular basis, to transactors, making it possible for firms to know in advance, how much they must pay in order to do business in the country. The central authority desires a viable, well-functioning economy. Thus, argues proponents of centralized corruption, such an authority is unlikely to impose prohibitive “taxes” on firms. In other words, the central authority will not demand bribes from investors that are so disproportionately large that they would negatively affect firms’ long-term revenues and force them into bankruptcy.123 Such a claim, however, is based on “questionable assumptions about the central authority’s discount rate and the extent to which the failure of various businesses will have on his income stream.”124 The claim has yet to be subjected to empirical testing.

G. Corruption as a Dynamic Process

Some researchers of corruption and its impact on wealth creation and economic growth in Africa argue that part of the reason most of the region’s economies have been unable to deal effectively with this major constraint to development is that anti-corruption programs have not taken into consideration corruption’s dynamic nature.125 According to Meagher and Thomas, “the dynamics of corruption are not well understood, and relatively little [research] work has been done in this area.”126

124 Mbaku, supra note 46, at 26.
125 Meagher & Thomas, supra note 111, at 18.
126 Id.
Research has uncovered evidence that demonstrates that the balance between political and economic power, in addition to the degree of autonomy, which national elites enjoy, as well as the extent to which the governed are able to interact with the governors, determine the extent of corruption in a country. If a country’s institutional arrangements endow ruling elites with a significant level of autonomy, grant citizens relatively unconstrained access to these state custodians (i.e., civil servants and politicians), and guarantee economic freedom (i.e., the right of the people to freely engage in exchange and contracting), corruption and other forms of political opportunism (such as rent seeking) are likely to be minimized. Should national elites lose their autonomy, through, for example, a concentration of power in the national executive, or should economic freedom be abrogated, there likely would be created within the country an environment that supports, perhaps promotes, and enhances corrupt activities. The system, of course, is dynamic and goes through various cycles, some of which can and do threaten the rule of law, while at the same time, enhancing corruption, rent seeking and other forms of opportunism. The effective way to safeguard the system against encroachment by opportunistic elites is to provide it with a constitution, which adequately and fully constrains the state, but guarantees economic freedom and enhances the ability of entrepreneurs to engage in wealth-creating or productive activities. An effective constitution will make certain that whenever there is disequilibrium, through, for example, an illegal or extra-constitutional regime change that attenuates the authority of national elites and/or abrogates economic freedoms, equilibrium can easily be restored through national counter-acting institutions (e.g., the police, judiciary and the press). For

---

example, if the country’s chief executive attenuates, abrogates, or usurps the powers of the other branches of government (the judiciary and the legislature) and proceeds to downgrade or seriously violate constitutionally-guaranteed (i.e., fundamental) rights, a return to democratic governance, can be made possible by the nation’s counter-acting institutions.\(^{128}\)

In his study of the dynamics of corruption, M. Johnston recognized four scenarios, which can be sub-divided into “moderate corruption scenarios” and “high corruption scenarios.” Moderate corruption scenarios include the following: (1) *interest-group bidding*—in those countries that have well-developed economies, well-functioning institutional arrangements, specifically those which adequately constrain civil servants and politicians, and opportunities for wealth-creation and hence, personal enrichment, in the private sector, dominate those in the public sector, the country’s political elites are quite susceptible to interest-group pressure; (2) *patronage machines*—in some economies, the political sector dominates the private sector, the public sector offers more opportunities for self-enrichment than the poorly-developed private sector, and there exists a relatively autonomous elite. These factors combine to produce high levels of organized corruption. Mobutu’s Zaire, Ahidjo’s Cameroon, and Bongo’s Gabon are examples of Africa’s more prominent patronage machines.\(^{129}\)

High corruption scenarios include (3) *elite hegemony*—within such a system, there are significant economic opportunities, as well as relatively autonomous elites. However, given

---

\(^{128}\) Mbaku, *supra* note 46, at 27. Here, judicial intervention can restore equilibrium and bring about the balance between the various branches of government. *Id.*

the fact that the nation’s top-level ruling elites are not accountable to the people, corruption is pervasive; and (4) fragmented patronage—this system became quite pervasive in Africa’s economies during the immediate post-Cold War period, a time that was characterized by significantly more improved access to the governing elites by the people. The liberalization effort, however, did not succeed in creating private sectors (with robust civil societies) that dominated the public or political sectors. Throughout the continent, public sectors remained dominant while the private sectors “remained small, underdeveloped, fragile, nonviable, and incapable of creating enough jobs for a restless population.”\footnote{Mbaku, supra note 46, at 27.} Although the political liberation movements that gained momentum in many African countries in the late 1980s significantly improved opportunities for economic and political participation, especially for historically marginalized and deprived citizens, the public sector remained dominant, opportunities for self-actualization in the private sector continued to be in extremely short supply, and the new institutional arrangements were still unable to fully and effectively constrain the state’s custodians (civil servants and politicians). These factors together created an environment in which corruption continues to be pervasive.\footnote{\textit{Id.}}

**IV. Still Another Way to Look at Corruption: The Theory of Public Choice**

**A. Introduction**

In recent years, public choice theory, which can tersely be defined as an economic theory of political behavior or “the economic study of nonmarket decision making, or simply as the
application of economics to political science,"¹³² has emerged as a much more robust and policy-relevant approach to the study of corruption in Africa.¹³³ Public choice theory can provide significant insights into corruption, bureaucratic behavior, and how African societies have become totally overwhelmed by venality. First, looking at corruption through the lenses of public choice theory, one can see that the practice of corruption involves essentially an effort by individuals and groups within and without the country to subvert national rules (formal or informal) in order to extract benefits (pecuniary and non-pecuniary) and privileges for themselves. Second, public choice theory can throw light on how individuals organize for the purpose of extracting extra-legal income and other benefits from the national economy. In the process, these groups engage in behaviors that at the very least, corrupt civil servants and politicians, and, at worst, undermine political and economic systems, subvert justice, significantly increase state tyranny, abrogate fundamental rights, stunt wealth creation, and contribute significantly to economic regression. In fact, during the last fifty years, corruption has become so important an activity in the African economies that profit-maximizing entrepreneurs have shifted their efforts away from the traditional forms of seeking profits (e.g., improvements in productivity, more enhanced customer service, provision of a safer and more worker-friendly work environment, and innovation) to greater reliance on influence peddling. The latter approach to entrepreneurship has pushed many African

economies into venal societies, characterized by bloated, highly unproductive, severely inefficient, and parasitic bureaucracies.\textsuperscript{134}

Third, since it advocates a people-driven, inclusive, bottom-up, and participatory approach to constitution making, an understanding of public choice theory can enhance the ability of African policymakers, in particular, and Africans in general, to design and adopt more effective and viable laws and institutions, especially those that will help minimize corruption, promote wealth creation and economic growth and development. A viable, effective and development-oriented constitution is perhaps, the most important instrument for successful transition to democratic governance in Africa. Given the continent’s significant cultural, geographic, and human diversity, it is important that any effort to build laws and institutions to govern these societies take this diversity into consideration. Only a democratic approach to institutional reforms and state reconstruction, as advocated by public choice theory, can provide the facilities for and enhance the ability of all these diverse groups to participate fully and effectively in constitution making. It must be emphasized that it is only through such a participatory and inclusive process that Africans can hope to provide themselves with legitimate governance structures—those that are acceptable and accepted by the people because they provide them with the wherewithal to maximize their values.

\textsuperscript{134} By the late 1990s, except for, perhaps, Botswana, Seychelles, and Mauritius, it was difficult to find an African economy that did not fit this model. While Nigeria, Zaire (now Democratic Republic of Congo), Cameroon, Gabon, Kenya, and Sierra Leone, easily come to mind, it is important to realize that corruption had, by the mid-1990s, become one of the largest, most pervasive and destructive institutions in the economies of virtually all the countries on the continent. \textit{See generally} Hope \& Chikulo, \textit{supra} note 47; Gould, \textit{supra} note 47, LeVine, \textit{supra} note 47.
The constitution provides the foundation for building and sustaining the various institutions (e.g., a free press, a well-constrained police force; a representative legislature; etc.) that will minimize corruption, enhance peaceful coexistence of each country’s diverse population groups, promote the efficient and socially equitable allocation of scarce resources, and perhaps, most importantly, prevent civil servants and politicians from using their public positions as instruments of plunder for their own benefit and that of their benefactors.\(^\text{135}\)

Fourth, public choice theory can help policymakers in Africa understand and appreciate the critical role played by *economic freedom* in wealth creation and hence, economic growth and development. In order for economic agents (be they domestic or foreign owners of wealth) to invest in productive activities, they must be guaranteed the right to engage freely in mutually beneficial exchange and to execute contracts beneficial to them. Research by several economists has revealed that unless economic freedoms are constitutionally guaranteed, property rights will be insecure and, as a result, investors will be less likely to provide the investment resources needed to operate a robust and wealth-creating economy.\(^\text{136}\) In an economy in which economic freedoms have been proscribed, the only investors that one is likely to see are those who are either members of the ruling coalition or individuals who have the resources to bribe the ruling elites in order to significantly improve the security of their investments. Either process—bribery of public officials or the provision of preferential treatment to the investments of political insiders—will significantly increase

\(^{135}\) *See generally* G. BRENAN AND JAMES M. BUCHANAN, *THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY* (1985) (detailing and elaborating the importance of rules to the effective and proper functioning of any society).

inefficiency in both the public and private sectors, stunt entrepreneurial activities, encourage
capital flight (both financial and human capital), and severely limit the creation of the wealth
that the country needs to meet rising obligations. Hence, in economies, which do not
constitutionally guarantee economic freedoms, there is a constant threat to the security of
property rights, creating the types of economic and financial uncertainties that severely limit
the ability and willingness of entrepreneurs to engage in productive activities. In addition,
such economies are quite often pervaded by extremely high levels of rent seeking and other
forms of political opportunism (e.g., violent mobilization by groups that perceive themselves
as permanently denied gainful participation in political and economic markets), as
marginalized and deprived groups seek ways to minimize further marginalization and
improve their rates of participation.

Fifth, and looking ahead, public choice theory can help Africans learn from the mistakes
of the past five or so decades. Many of these so-called policy mistakes (e.g., Kwame
Nkrumah’s import substitution program in Ghana; Julius Nyerere’s villagization program in
Tanzania; and Ahmadou Ahidjo’s planned liberalism in Cameroon) distorted economic
incentives and discouraged the types of entrepreneurial activities that would have
significantly enhanced wealth creation and provided the resources that these economies
needed to meet immediate post-independence social obligations. Perhaps, more important
was the fact that post-independence economic policies encouraged and enhanced venality
and financial malfeasance in the public sector and set the stage for the extraordinary increase
in corruption and rent seeking that has characterized most African economies during the last 

\textbf{B. The Continuing Impacts of the Reluctant and Failed Decolonization Project}

Despite the significant political and economic improvements that have taken place in the 
continent since the end of the Cold War and the demise of apartheid in South Africa, many 
African countries remain plagued by (1) high levels of political instability, including 
destructive ethnic mobilization;\footnote{138}{For example, following the December 2007 disputed presidential elections in Kenya, 
there erupted, in several cities, what many observers have described as “unbelievable 
barbarity.” In the city of Nakuru, for example, by January 28, 2008, more than sixty people 
were said to have been hacked to death by marauding ethnic gangs who appeared to have 
been taking pride in this unbridled orgy of violence designed primarily to rid the city of so-
called “settlers,” Kenyans from other parts of the country, mostly Kikuyus, for whom 
Nakuru is said not to be their ancestral home. The killers of Kikuyus were members of 
ethnic groups, which claimed that incumbent President Mwai Kibaki, a Kikuyu, had stolen 
their election victory and had effectively deprived them of their turn to “chop.”} (2) unmanageable external debts; (3) extremely poor rates 
of economic growth and development; (4) severe inequalities in the distribution of income 
and wealth; (5) crumbling and rapidly decaying economic infrastructures, including health 
care systems that have failed to meet the needs of the people; (6) a continuing exodus of 
skilled manpower from these economies to more stable markets in the West, the Middle 
East and East Asia; and (7) a burgeoning population of restless, poorly educated, 
underemployed or unemployed youth living on the urban periphery.
The origins of these and other problems that now plague the economies of many African countries can be traced to the failure of the decolonization project to adequately prepare the post-independence economies for economic growth and development. Decolonization and preparations for independence were supposed to offer Africans the opportunity to design and adopt laws and institutions that would serve effectively as legitimate tools of political and economic governance. The opportunistic alliance formed between Africa’s petty-bourgeoisie and its masses helped end colonial rule but failed to fully, effectively and adequately transform the critical domains to provide the post-independence societies with the type of institutional arrangements that would have supported, enhanced, and advanced democratic governance. Instead, the institutional arrangements that ushered in independence in many of the new African countries came to be regarded by the people as legal structures, designed not to enhance growth and development, but to provide ruling elites, most of whom were members of politically-dominant ethno-regional groupings, the wherewithal to monopolize both economic and political markets. Thus, while these new laws and institutions enhanced the ability of ruling coalitions to enrich themselves, they relegated many historically marginalized and deprived groups (e.g., women, ethnic minorities, rural inhabitants, and the urban poor) to the economic and political periphery, where they continue to suffer from extremely high rates of poverty and material deprivation.  

As described by Professor Robert Fatton, Jr., what emerged from the failed attempts to properly transform the critical domains in the pre-independence period were

---

139 For a thorough review of the literature, see JOHN MUKUM MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE (1997).
varied forms of personal rule that achieved varied degrees of successes with varied degrees of coercion. Where there was success, however, it was precarious, temporary, and crippled by its class and ethnic limitations; where there was failure, it was egregious, massive, and tragic. Where there remained civil liberties, they were fragile, vulnerable, and under constant threat of sudden death; where despotism prevailed, it was cruel, murderous, and incompetent.\textsuperscript{140}

1. A Top-down, Elite-driven Constitution Making Process

But, what exactly happened during the decolonization period that had such a significant and profound negative impact on post-independence economic performance in the continent? First, the constitution making process in virtually all the European colonies in Africa was top-down, elite-driven, non-participatory, and non-inclusive. This approach to constitution making did not serve Africans well. For one thing, it effectively eliminated from participation in the rules-compacting process, each country’s relevant stakeholder groups, relegating the task of institutional reforms and constitution making to a select group of urban elites and their European benefactors (a group that included colonial officers and European entrepreneurs—the latter wanted to make sure that independence was granted only on conditions that guaranteed their continued access to the resources and markets of the new countries). As a consequence, the outcome of this opportunistic and ill-conceived effort at institution building were rules that did not reflect the values, traditions, customs, cultures, and aspirations of the majority of the people in each emerging independent country.\textsuperscript{141} While

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{140}] Robert Fatton, Jr., \textit{Liberal Democracy in Africa}, 105 \textit{Political Science Quarterly} 458 (1990).
\item[\textsuperscript{141}] For a review of constitution making and constitutionalism in West Africa, see generally LeVine, \textit{supra} note 42.
\end{itemize}
\end{footnotesize}
several attempts have been made, during the last several decades, to reform and restructure what came to be known generally as “alien institutional impositions,” these latter-day efforts, like their colonial counterparts, have succumbed to basically the same shortcomings—the unwillingness of the national elites to provide all relevant stakeholders with the facilities to participate fully and effectively in constitution making and institutional development. As was the case in the immediate post-independence period, many African countries remain saddled with laws and institutions that are incapable of fostering peaceful coexistence, promoting entrepreneurship and wealth creation, as well as engendering more effective and gainful participation in the global marketplace. Perhaps, more important is the fact that these post-independence institutional and judicial structures did not adequately or effectively constrain the state and as a consequence, civil servants and politicians were able to successfully engage in various forms of corruption to enrich themselves at the expense of the rest of their fellow citizens.

Second, the laws and institutions adopted by many African countries at independence did not incorporate appropriate time-and-place information and, as a consequence, the formal rules that emerged from the decolonization process were not locally-focused and were incapable of complementing existing informal (or traditional) economic and political governance structures. So that formal rules can function effectively and perform their jobs well, they must complement existing social systems. Where formal institutions are incompatible with informal or traditional ones, the incentives provided by the former are most likely to be incompatible with those emanating from the latter. In fact, throughout the continent, incentives provided by each country’s formal laws and institutions have been discarded or ignored as many citizens have resolved conflicts arising out of this contradiction
in favor of traditional incentive structures and have done so by engaging in the subversion of formal rules instead of complying to the rule of law. For example, many bureau managers, required by the country’s formal institutional and judicial structures to hire personnel based only on merit, have instead, resorted to nepotism in order to meet their obligations to the ethnic group to whom they belong. Granted, ethnic allegiance (or “tribalism”) remains a very difficult problem for Africans to deal with. However, it is important to note here that this and other issues were never “brought to the table” to be examined as part of the process of preparing these territories for independence. Had, for example, the issue of “tribal affiliation,” especially as it relates to such critical issues as internal exit (especially economic mobility), property rights, especially in real property, investment in different parts of the country by citizens, as well as the ability of citizens to participate freely and effectively in political and economic markets in areas of the country other than their “ancestral” place of origin, been thoroughly examined during the compacting of the national constitution, a specific scheme could have been entrenched in the constitution to provide the wherewithal for the post-constitutional society to deal effectively and fully with what is now a major constraint to national integration and peaceful coexistence. Careful, full and effective examination of the issues critical to the various ethnic groups within each country during preparations for independence could have provided for the development of governance structures capable of dealing effectively with these problems.142

142 For example, during preparations for re-unification between the U.N. Trust Territory of Southern Cameroons under British administration with the former U.N. Trust Territory of Cameroons under French administration (which had gained independence on January 1, 1960) in 1961 to found the Federal Republic of Cameroon (République Fédérale du Cameroun), little effort was devoted to the examination of the issue of Anglophone autonomy (within the federation), especially as it pertained to such Anglophone values as liberty and enterprise,
As research by many social scientists, especially public choice theorists, has determined, providing a society, even those as diverse as many African countries are today, with institutional arrangements that enhance the ability of all individuals and groups with the opportunity to maximize their values will significantly minimize such opportunistic behaviors as corruption and rent seeking, improve entrepreneurial activities and advance the creation of the wealth that many of these countries need to deal effectively and fully with rising social obligations.\footnote{See generally John Mukum Mbaku, Institutions and Reform in Africa: The Public Choice Perspective (1997) \& John Mukum Mbaku \& Joseph Takougang, The Leadership Challenge in Africa: Cameroon under Paul Biya (2003), and specifically Piet Konings \& Francis B. Nyamnjoh, President Paul Biya and the “Anglophone Problem” in Cameroon, in The Leadership Challenge in Africa: Cameroon under Paul Biya 191 (John Mukum Mbaku \& Joseph Takougang eds., 2003).}

For many young people in Africa today, the desire is to exit what have become highly dysfunctional political and economic systems and migrate to the West where opportunities for economic and social advancement would not be dependent on, for example, variables such as one’s place of origin, but on one’s skills and willingness to work hard and honestly, and within the existing set of rules. Hence, for many of these restless youth, unless their freedom of expression, a legal system based on English common law (especially given the fact that the former French-administered territory with whom the Anglophone territory was preparing to join in federation had inherited the French “civil law” system), parliamentarism (which Southern Cameroonians had practiced very successfully under British rule since the end of the great war), and economic harmonization, including when Southern Cameroon’s currency would be harmonized with that of the former French territory. Many issues critical to Southern Cameroons were left unexamined—this failure came to haunt Anglophone society and, in fact, this failure now represents the reason why many Anglophone leaders in Cameroon want the United Nations to re-examine the re-unification agreement. Some Anglophones even see the agreement as a fraud perpetuated on the Southern Cameroons by the UN and the United Kingdom (which was afraid that it might have to provide financial support, indefinitely, for what London believed was a nonviable political entity). See generally John Mukum Mbaku, Institutions and Reform in Africa: The Public Choice Perspective (1997) \& John Mukum Mbaku \& Joseph Takougang, The Leadership Challenge in Africa: Cameroon under Paul Biya (2003), and specifically Piet Konings \& Francis B. Nyamnjoh, President Paul Biya and the “Anglophone Problem” in Cameroon, in The Leadership Challenge in Africa: Cameroon under Paul Biya 191 (John Mukum Mbaku \& Joseph Takougang eds., 2003).
countries adopt laws and institutions that reward merit, hard work and fidelity to the rule of law and not ethnic allegiance or place of origin, as well as enhance peaceful coexistence, the exodus to the West will continue.  

Finally, because the relevant stakeholders in each colony were not allowed to participate fully and effectively in constitution making at independence, post-independence society, except for a few urban-based elites, came to view national laws and institutions as foreign impositions and not as legitimate tools of governance and national integration. The results were that constitutional maintenance (most importantly, compliance to the rules) became a recurring problem for governments. In fact, because many Africans today consider their governments and the institutions that define their powers as part of an illegitimate enterprise designed to oppress the people, many citizens rarely condemn civil servants and politicians who plunder national treasuries for their own benefit and that of their benefactors (mostly the ethno-regional groups that support them). For example, if the plunderer of the public treasury is from ethno-regional group X, members of group X would praise the effort because they stand to benefit from it. Nevertheless, members of ethno-regional group Y would mobilize, often violently, but not necessarily to condemn the activities that now benefit X or the existence of institutional arrangements that favor the plundering activities of group X. Y’s mobilization would not be designed to improve overall resource allocation but to situate one or more of its members in a position to participate in the plundering—that is, group Y’s main objective would be to capture a part of the state (e.g., a ministry or some public agency, from which the group can extract extra-legal income for itself and its benefits).

---

members—in Cameroon, this is called “the warehouse” where members of the successful
group can go “shopping” for “necessaries”). Thus, group Y’s interest is not necessarily to
seek the type of institutional reforms or modification of the existing rules that would
minimize the plundering of public resources by any group, but to secure for itself and its
members a government “warehouse” from which the group can, for the next several years or
so, “chop” public resources.

Once an ethnic group captures one of several government “warehouses” (e.g., the
Ministry of Agriculture, or even a public hospital or a parastatal), members of the group are
now free to go “shopping” for everything from employment for themselves or their
children, scholarships for foreign study, to anything that the “warehouse” can provide (and this
can include items that are not traditionally part of the government agency’s inventory of
equipment). In fact, the Ministry of Agriculture, for example, need not have bottles of
French cognac as part of its inventory of equipment. Yet, if it is necessary that French
cognac be supplied for the wedding of an important benefactor of the Ministry’s managers,
the cognac would be ordered and delivered. It is generally understood among politicians and
civil servants who capture these “warehouses” that the latter’s purpose is not to serve the
general public but represent a core set of resources for them to satisfy their insatiable
appetite for decadent living and safeguard their positions by making certain that their
benefactors are taken care of. See generally Nantang Jua, Cameroon: Jump-starting and Economic

“Chop” literally means “to eat.” However, as used here, “chop” is closer to
“plunder,” as to plunder someone else’s resources. Here, the resources being plundered for
the benefit of the extended family (which may include not only the village the civil servant-
cum-plunderer comes from, but also the entire ethnic group or region of which he or she is
a member) are public resources. This process represents what French political scientist,
Professor J.-F. Bayart has described as the “politics of the belly.” Several eating metaphors
have been used to describe Africa’s corrupt behaviors, as in “dividing the national cake”
(Nigeria), securing a “meal ticket” (Cameroon), or “chomp dem money” (plunder someone
BELLY (1993) (describing the emergence in post-independence Africa of a new type of
political economy characterized by opportunistic alliances between a few political and
economic elites. The primary and in many cases, the only, objective of these alliances, is to
enhance the ability of participating elites to monopolize political power so that they can use
the apparatus of state to enrich themselves and the ethno-regional groups that form their
bases of political support. Such alliances constitute an important foundation of the
corruption that continues to pervade African States today. It was this process that allowed
Nigeria’s former military dictator, Sani Abacha, to amass a fortune worth billions of U.S.
dollars. While members of his coalition benefited significantly from the corrupt enterprise
What public choice theory offers Africans, then, are ways to restructure and reconstitute what are now anachronistic institutional structures inherited from the colonial government and provide themselves with locally-focused, development-oriented, and viable institutional arrangements that enhance peaceful coexistence, adequately constrain civil servants and politicians, and provide appropriate and effective incentives for entrepreneurship and wealth creation.

C. Law, Markets and Corruption

In most economies, whenever there is market failure (e.g., the aggregate economy is characterized by high levels of instability or public goods and services require joint consumption), the government is usually called upon to eliminate or minimize these inefficiencies and restore the price system to its ideal efficiency standards. What has not been clear to many supporters of this type of government intervention in markets is how such correction is supposed to be undertaken. For one thing, no government has, waiting on the shelf, a duly constituted and effective corrective device that can simply be pulled off the shelf and applied to the price system malfunction and quickly restore stability and efficiency to the economy. What happens, in reality, is that when a market imperfection is discovered or recognized, civil servants and politicians must then design alternative institutional arrangements, which produce a new and different set of incentives that are capable of forcing a change in the behavior of market participants with the expectation of achieving more efficient outcomes—that is, with the expectation of resolving the inefficiency. Within each country, institutional arrangements are the tools for collective decision-making—these

led by the now deceased dictator and lived in wanton luxury, most of the country’s citizens were relegated to a life of intense misery, characterized by an extremely high level of material deprivation. See generally K. MAIER, THIS HOUSE HAS FALLEN: NIGERIA IN CRISIS (2000).
structures govern activities such as production and consumption and provide the framework within which individuals can engage in free and mutually beneficial exchange. Whether an economy deteriorates into a venal society or matures into an efficient wealth-creating mechanism is determined primarily by the quality of its laws and institutions. A major concern of public choice theory is to improve our understanding of how societies deal with their collective choice problems—the main emphasis is on (1) how rules are designed (that is, how to compact an effective and viable constitution); and (2) how the rules so selected function to regulate socio-political interaction in the post-constitutional society.  

The most important thing to keep in mind about constitution making in any country is that the process is affected by several actors, including (1) legislators; (2) other politicians; (3) voters; (4) civil servants; and (5) political coalitions, including special interest groups. Of course, the extent to which each of these actors participates in the rules selection process will be determined by, among other things, how competitive the negotiating environment is. Where the negotiating environment is competitive (i.e., it is not monopolized by a few ethno-regional groups, as was the case in most African colonies prior to independence, the various population groups within the country can participate effectively and fully in the process, making certain that the outcomes are rules and institutions that reflect their values. In other words, the outcome would be locally-focused laws and institutions, significantly enhancing compliance and minimizing policing costs.

As many Africans have come to realize, no matter what the politician promises to do when he gets into office, the lesson that public choice theory teaches is that once elected, politicians should not be expected to suddenly become obedient, passive, benevolent and

---

147 See generally Brennan and Buchanan, supra note 135.
attentive servants of those who elected them into office. On the contrary, the politician is expected to remain, as he was before he came into public office, a rational, egoistic, utility maximizer.¹⁴⁸ Such a politician will seek ways, including subverting existing rules or modifying them, to maximize his or her self-interest. All state custodians (civil servants and politicians) will seek ways to maximize their individual objectives as they would, if they operated in private markets. The only reason a civil servant or politician may behave differently from his or her private-sector counterpart is differences in incentive structures between the two sectors. Thus, the most effective way to minimize public-sector opportunism is to change the incentive system and force the outcomes that society desires. That can be accomplished through constitutional design.¹⁴⁹

Since the African colonies began to gain independence in the 1950s, the one question that has plagued the minds of supporters of peaceful coexistence, rapid wealth creation and economic growth, and social, political and economic development in Africa, has been: “How can African countries create the wealth that they need to deal with their multifarious social problems?” An effective answer to this question has eluded African policymakers during most of the last five or so decades.¹⁵⁰ As evidence from other regions of the world indicates,

¹⁴⁸ Mueller, supra note 132, at 2.
¹⁴⁹ See generally Brennan and Buchanan, supra note 135.
¹⁵⁰ True to the tenets of public choice theory, these policymakers are quite aware of what needs to be done in order to enhance the creation of wealth in Africa. However, they voluntarily choose to develop and implement perverse economic policies—that is, those that stunt the creation of wealth but enhance the ability of policymakers to enrich themselves, first, because existing institutional arrangements are incapable of constraining such behavior, and second, because these individuals are interested only in maximizing their private interests and not those of the public. This behavioral patterns, of course, emanate from and are made possible by the perverse incentives imposed on these economies by colonially-imposed institutional arrangements. As discussed earlier, the latter were not effectively modified in the
it is the entrepreneur, not the government, who creates wealth. So, do African countries not have entrepreneurial classes? To have a fully functioning, productive, and robust entrepreneurial class in a country, there must exist within that country a set of institutional arrangements that (1) guarantees economic freedom; (2) enhances and enables peaceful coexistence; (3) severely limits the ability of state custodians to engage in corruption and other forms of political opportunism; (4) directs entrepreneurs to the various profit opportunities that exist within and without the economy; and (5) generally enhances mutually beneficial free exchange.\(^{151}\) Thus, the failure of entrepreneurship, and hence, wealth creation, in post-independence Africa has been due primarily to poor, and in many instances, reluctant and opportunistic, constitution making practices, the results of which have been laws and institutions that have been either ill-equipped for effective political and economic governance, or which actually have enhanced the ability of ruling coalitions to engage in political exploitation and economic plundering.\(^{152}\)


152 Note, for example, that the constitutions of most former French colonies in Africa were copies of the constitution of the French Fifth Republic (1958). In fact, when the former U.N. Trust Territory of Cameroons under French administration gained independence on January 1, 1960, it did not have a constitution. It was not until February of that year that the committee charged with compacting the constitution presented what was a copy of the French constitution of 1958 for approval by the people through referendum. See generally JOHN MUKUM MBAKU, *INSTITUTIONS AND DEVELOPMENT IN AFRICA* 119 (2004). During the process of compacting what came to be the first constitution of the new Republic of Cameroon, the *Union des populations du Cameroun* (UPC), at the time the territory’s most important and largest indigenous political organization, was banned, at the behest of the French colonial authorities, from participating in political discourse. In fact, the UPC had already been proscribed by French colonial authorities in 1955, in response to allegations from European Christian groups that the UPC would lead a new independent Cameroon
Understanding how state custodians function is critical to the process of designing institutional arrangements capable of effectively moderating the conduct of public-sector employees and preventing them from subverting national laws for their own benefit. For each individual who participates in either economic or political markets, the decision-making process is informed by a personal cost-benefit calculus. According to Professors J. D. Gwartney and R. Wagner, if acquiring such things as “personal wealth, power, and prestige motivates people in the [private] market-place, there is every reason to believe that these same elements will motivate them in the political arena.” The pursuit of, or the search to maximize, self-interest, as argued by Adam Smith many years ago, should not necessarily conflict with the maximization of public goals. Given a well-structured institutional environment, especially one whose structure has been determined through a democratic (i.e., bottom-up, participatory, inclusive and people-driven) process, self-interested entrepreneurs, for example, can in the process of seeking ways to maximize their own interests or welfare, actually engage in activities or behaviors that maximize the common or social welfare. Hence, the focus of any research agenda devoted to seeking ways to minimize corruption and significantly improve economic performance in Africa should be to improve the ability of Africa’s policymakers to “differentiate between institutional arrangements that bring into socialism and hence, godliness. See also Victor T. LeVine, The Cameroons: From Mandate to Independence (1964) (describing the reluctant and opportunistic decolonization process in the former U.N. Trust Territory of Cameroons under French administration, which gained independence in 1960 and took the name République du Cameroun.)

153 Mbaku, supra note 146.
155 Id.
individual self-interest and the general welfare into harmony and institutional arrangements that leave them in conflict."

An individual, regardless of whether he or she participates in political or economic markets, is motivated by self-interest and usually seeks to maximize that self-interest. However, each set of institutions (private or public) has its own unique incentives or constraints. As a consequence, the government bureau manager, for example, will behave in ways quite different from those of the chief executive officer of a private enterprise. While both seek to maximize self-interest, they will engage in different types of conduct because they each face different constraints or incentives.

In the 1950s, Professor Anthony Downs argued that the decisions of voters, and indeed, their willingness to participate in the electoral process, are affected by what has come to be known as the “rational ignorance” effect. The voter who wants to be fully informed about the issues to be decided by an election must expend resources, including time and personal effort, to gain such knowledge. Given the fact that a single vote is not likely to be a determining factor in an election, the rational voter will most likely choose to remain relatively poorly informed on the issues to be decided by the election. Thus, based on a personal cost-benefit calculus, most voters will not devote the resources needed or required to fully inform themselves about the election and its various issues. Instead, these voters will prefer to remain rationally ignorant. Due to the constraints faced by political market

---


157 See generally *ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY* (1957) (introducing and elaborating on the “rational ignorance” effect in democratic participation, with special reference to voting).

158 *Id.*
participants, many of them will forego personal research and rely primarily on information provided to them by the candidates and the press.

Who, then, will be most likely to participate in the electoral process since many voters are likely to abstain if they believe that the costs to them of participating are greater than expected benefits? Alternatively, to whom will those competing to capture positions in the government appeal? Politicians seeking office are likely to seek votes primarily or, as is common in many African countries, from special interest groups. These groups are usually well-informed on the issues to be decided in an election and because many tend to vote as a block, there are significant scale economies to be gained from campaigning to them. In exchange for providing a politician with their collective support at the polls, the politician will promise to enact laws providing the group with a concentration of benefits, which the group would not have otherwise been able to extract from the economy—here, the marginal costs of participation will be less than the marginal benefits, resulting in a high level of participation by such groups. For example, an interest group representing automobile manufacturers would be better informed on such issues as tariffs, import quotas, outsourcing, foreign exchange rates, globalization and export subsidies, than say, the median voter. In the case of Africa, an ethnic-based interest group is most likely to have more information about the group’s values, especially as they relate to language, culture, customs, family, and other issues unique to the group, than voters in general.

While special interest groups can provide politicians with the critical support that they need to win elections, these groups have the potential to use their organizational structures to influence the political choices that individuals make. In fact, where interest groups are formed or organized along ethnic or ethno-regional lines and hence are permanent
institutions, their influence on the choices that people make is quite significant. This is due not only to the fact that these groups possess significant resources to become well-informed on the issues to be decided by each election, but also to the fact that many of them have, in the presence of a callous, inefficient or unwilling state, become the main providers of critical public goods and services (e.g., primary education, basic health care, security, water, and access to land). Hence, many voters are likely to respond favorably to pleas from ethnic associations seeking their support for given candidates than to any appeals from the government for them to keep “tribes” out of politics and avoid voting along ethnic lines.

A critical outcome of interest-group influence on politics, especially for Africa, is the concept of state capture, which as mentioned earlier, results in high levels of corruption. In Africa, the main purpose of state capture is to “chop” someone else’s money. Thus, if the ability of the state to undertake wealth redistributions is severely limited or constrained through the constitution, interest groups will not be so willing to devote the resources necessary to capture the state since such an investment will fail to earn its opportunity cost. For Africa, the more sustainable future lies in providing an institutional environment in each country that enhances the ability of all individuals and groups to engage in private wealth creation. A development-oriented constitution will guarantee economic freedom, provide the wherewithal for individuals and groups, including those organized along ethnic or ethno-regional lines, to seek profits in the private sector, and severely limit the ability of the government to engage in the types of inefficient wealth redistributions that have contributed significantly to poor economic performance in the post-independence society. Perhaps, more important, is the fact that the emergence, in the post-independence period, of enormous public markets for the redistribution of wealth, usually from the rural agricultural
sector to the politically-dominant urban sector, has distorted economic incentives and stunted entrepreneurial activities and wealth creation. The results, as we have already seen, have been extremely high levels of poverty and material deprivation, pervasive venality in the public sector, bloated, unproductive and parasitic bureaucracies, and relatively high incidence of bloody inter-ethnic confrontations as historically marginalized and deprived groups fight to improve their chances to “chop” and minimize further marginalization. Thus, in many African countries, where the state is not well-constrained by the law, political competitions are seen as a high-stakes game of ethnic survival—the ethnic group that captures the apparatus of state will get to “chop” and live relatively well for the next few years while other groups languish in poverty and squalor, die from preventable diseases, suffer higher rates of illiteracy, and essentially eek out a living on the political and economic periphery.\(^{159}\)

**V. Economic Freedom: Paving the Way to Prosperity**

*A. Introduction*

\(^{159}\) In fact, observers of Kenyan elections had expected that a certain level of ethnic mobilization would follow the December 2007 elections, especially given the fact that the Luo had been complaining that the Kikuyu, since independence from Britain in 1963 (and the subsequent departure of their leader and then Vice President, Oginga Odinga, from the ruling coalition in 1966), had spent more years “chopping” at the government treasury than they and that it was time for Mwai Kibaki (a Kikuyu) to give way to Raila Odinga (a Luo and son of Oginga, who, with Jomo Kenyatta (a Kikuyu), led Kenya to independence) and allow the Luo to exercise their “God-given” right to “chop.” Unlike former South African President Nelson Mandela, whose emphasis was on institutional reforms to bring about a more democratic and equitable system for the allocation of resources—a system that would place all South Africans on an equal footing to create their own wealth—most African leaders, including those who engineered the post-elections riots in Kenya, do not appear to have any interest in creating competitive political and economic systems, which can foster private wealth creation as a way to deal with chronic poverty and deprivation. Instead, these politicians and their ethno-regional benefactors continue to foster a type of political economy based not on wealth creation but on state-sponsored redistribution. The latter process, characterized by a “chop” mentality, has, during the last five decades, produced bloody civil wars, ethnic cleansing, starvation, and total chaos.
As I have argued throughout this paper, the quality of a country’s institutions determines the security of property rights and the extent to which individuals within and without the economy are willing to invest in productive activities. One of the most important and critical aspects of the quality of a country’s institutional arrangements is economic freedom. In those countries in which the constitution guarantees economic freedom, (1) individuals within the economy can engage, freely, in mutually beneficial exchange; (2) the right or freedom to contract is constitutionally guaranteed; (3) public sector activities complement those of the private sector and, in addition, enhance the ability of entrepreneurs to engage in productive activities; (4) the state adequately protects the person and property of the individual; (5) market incentives encourage engagement in wealth-creating activities; (6) property rights are well-specified and enforced; and (7) state custodians are properly constrained and their ability to engage in political opportunism is severely restricted by the law. The most important attribute of economic freedom is that its existence in an economy enhances and promotes the efficient and socially equitable allocation of resources, encourages entrepreneurship and maximizes the creation of wealth, and contributes, in a significant way, to sustainable poverty alleviation and perhaps, eradication, efforts. Of course, for individuals to exercise their economic freedom, capital, including human capital, must have the freedom to move to where it is needed the most—that is, where it can earn its opportunity cost. Thus, government regulations must enhance mobility (e.g., through the provision of effective and adequate transportation systems, such as highways and bridges) and minimize constraints to free internal exit (e.g., government, especially in the case of Africa, must get rid of laws that mandate that citizens can only participate in the economic and political

activities of a political jurisdiction if they are indigenes of that location—such laws impede the mobility of resources and stunt wealth-creating entrepreneurial activities).\textsuperscript{161}

But what exactly is economic freedom? Economic freedom’s central elements are “personal choice, freedom of exchange, and protection of private property.”\textsuperscript{162} Where economic freedom is guaranteed by the constitution and protected by the law, “individuals are more able to make private choices regarding which goods and services to consume, which economic activities to engage in, and how to use their resources, including their time.”\textsuperscript{163} In such an economy, entrepreneurs and other market participants come to realize that cooperation with others can significantly improve their welfare by increasing the benefits that accrue to them from the various transactions they engage in. Hence, they would be more willing to cooperate with other market participants. In an economy characterized by well-protected economic freedoms, individuals are able to freely engage in trade, “with market prices serving to coordinate voluntary and mutually beneficial exchange.”\textsuperscript{164}

But, how does one determine the extent to which economic freedom is guaranteed in a country? Without undertaking a thorough examination of the country’s constitution, one can look at the relationship between the public and private sectors and determine which sector dominates resource allocation. In those economies in which economic freedom is constitutionally guaranteed and protected, there is more reliance on markets for the

\begin{footnotesize}
\textsuperscript{161} See, for example, J. D. Gwartney & R. G. Holcombe, Economic Freedom, Constitutional Structure, and Growth in Developing Countries, in INSTITUTIONS AND COLLECTIVE CHOICE IN DEVELOPING COUNTRIES: APPLICATIONS OF THE THEORY OF PUBLIC CHOICE 33 (Mwangi S. Kimenyi and John Mukum Mbaku eds., 1999).
\textsuperscript{163} Mbaku, supra note 160, at 223.
\textsuperscript{164} Id.
\end{footnotesize}
allocation of resources. In addition, national institutions effectively protect the person of individuals and their property, society is provided with sound money and all the other institutions that facilitate free exchange.\textsuperscript{165}

The constitution places certain constraints on the state in order to make certain that in performing its duties, the state “does not (1) become the source of violence and brutality directed at citizens; (2) seize private property without [due process] and without adequate, full and fair compensation; (3) pass laws that interfere with or restrict voluntary and mutually beneficial exchange; and (4) engage in regulatory activities that place certain individuals, groups, and communities at a competitive disadvantage (e.g., usury laws that force banks to lend money to certain traders at artificially low interest rates).”\textsuperscript{166} So it can perform its constitutional duties effectively, the State must not abrogate or attenuate the economic freedoms of its citizens.\textsuperscript{167}

As discussed earlier, during the last five decades, many African countries have engaged in various forms of intervention in their economies that have negatively affected economic freedom and severely constrained entrepreneurial activities. While many of these regulatory programs (e.g., price controls) have benefited a few politically-dominant individuals and groups (e.g., urban-based elites, including especially, military officers and other purveyors of “legitimate” violence), they have generally impoverished the mass of the people. In order for African countries to significantly improve economic performance and generate the wealth that they need to deal with rising obligations, these countries must constitutionally guarantee economic freedom.

\textsuperscript{165} Id.

\textsuperscript{166} Id. at 224.

\textsuperscript{167} See generally Gwartney and Lawson, supra note 162.
What is critical for Africans to recognize at this time in their socio-political development is that, as with other societies, political opportunism (e.g., rent seeking and corruption) is going to remain a challenge that they must find ways to deal with. In other words, the general tendency within any society is for people to want to behave opportunistically. That is, there will always be people in any society who want to subvert national laws and institutions in order to extract extra-legal income for themselves, whether they are private- or public-sector operators. Research by economists and public choice theorists has determined that opportunism is part and parcel of all human societies. The question to ask then is: What is the most effective way for Africans to deal with political opportunism? The answer is that the most effective way to deal with corruption and other forms of opportunism is to equip each country with a development-oriented, locally-focused, set of institutional arrangements.

Africans, through democratic constitution making, can provide themselves with development-oriented constitutions, which guarantee economic freedom, promote and enhance entrepreneurial activities (especially among heretofore marginalized and deprived groups), promote sustainable economic growth, effectively constrain the power of civil servants and politicians to engage in opportunistic behaviors, minimize destructive ethnic mobilization, and provide the wherewithal for each country’s diverse population groups to live together peacefully. So such constitutions can adequately protect private property rights, they must provide for (1) monetary stability (in order to safeguard the value of money and hence, enhance free exchange), (2) freedom of capital movement (to allow citizens to own bank

---

accounts in foreign currencies), (3) responsible fiscal policies (so as to limit and constrain the borrowing, spending, and taxing powers of the government—at all levels), and (4) freedom to contract to allow both citizens and non-citizens to have the right to engage freely in mutually beneficial exchanges, provided that such transactions are conducted within the law. Under this regime, many of the government regulatory activities (e.g., price controls and licensing programs) that have restricted entry to some individuals and groups or confer privilege on others, would be eliminated. One of the most important advantages of a development-oriented constitution is that it creates a competitive political and economic environment within which individuals, regardless of their ethnic affiliation or area of origin, can compete effectively for the benefits of economic growth.

VI. THE CHALLENGE OF STATE RECONSTRUCTION AND CORRUPTION CLEANUPS IN AFRICA

A. Introduction

Throughout this paper, I have argued that the most effective way for Africans to deal with corruption and other forms of political opportunism is for each African country to provide itself with constitutional government. The latter is especially effective for governance in countries such as those in Africa, which are characterized by extreme population and cultural diversity. Constitutional government, as implied here, is characterized by separation of powers among the executive, legislative, and judicial branches of government. The powers of those who serve in the public sector (i.e., civil servants and politicians) are defined in, and constrained by, the constitution. Thus, the exercise of government agency by state custodians is well-constrained by the constitution. In addition, the rights of citizens are as defined and elaborated in the constitution and protected and enforced by an independent
judiciary. As stated by Brennan and Buchanan, fundamental rights are not defined by the state. Rather, citizens establish governments and grant them the power to guarantee and protect the people’s rights, which the people have defined, agreed upon and elaborated in the constitutional compact. Given that the African States have already been established, these States can be reconstructed and reconstituted through a negotiated change of rules—as explained in this paper, the process to do so must be bottom-up, inclusive, participatory and people-driven.

B. When Will the Rule of Law Prevail?

In the case of the developed market economies of the West, constitutional theorists (e.g., Professor C. H. McIlwain) have argued that certain conditions must be met in order for the rule of law to prevail in a country. These are (1) political accountability—the governors (that is, those in positions of leadership in the political and judicial systems) must be accountable to the governed; and (2) judicial independence—the country’s judges, at all levels, must be free to exercise independent judgment without any interference from anyone.

Professor McIlwain’s approach to constitutionalism is called juristic. Professor Francis D. Wormuth, on the hand, adopts what is referred to as a structural approach and argues that it would not be possible to maintain liberty in a country if doing so is dependent on the

---

169 Brennan and Buchanan, supra note 135.
170 Id.
popular-democratic control of the government.\textsuperscript{173} In Professor Wormuth’s view, as a form of government, constitutionalism must protect individual liberty in particular and the principles of liberty in general, even if doing so is not supported by public opinion.\textsuperscript{174}

Professor Richard L. Sklar examined both Professor McIlwain’s juristic and Professor Wormuth’s structural approaches to constitutionalism and concluded that caution must be exercised if these concepts are to be transferred to non-Western societies.\textsuperscript{175} According to Professor Sklar, Professor McIlwain’s juristic concept of constitutionalism, including especially the rule of law concept, is “closely associated with specifically Western intellectual, judicial, and political traditions” and as a result, “there are cultural limitations to the moral authority of this idea” that must not be ignored by any person interested in transferring the concept of constitutionalism, as elaborated by Professor McIlwain, to non-Western societies, such as those in Africa.\textsuperscript{176} Professor Sklar then goes on to argue that Professor Wormuth’s structural conception of constitutionalism, on the other hand, is morally neutral and more appropriate for transmission to societies with cultures and traditions that are different from those of the West.\textsuperscript{177}

The debate over the structural principles that define and shape constitutionalism and the various forms of constitutional government (e.g., federalism; parliamentary government; judicial review; separation of powers) continues. Writing about constitutionalism in modern Africa, Professor Sklar warns that “it would be a mistake to minimize the problems that may

\textsuperscript{173} Francis D. Wormuth, The Origins of Modern Constitutionalism (1949).
\textsuperscript{174} See also Francis D. Wormuth, On Bills of Attainder: A Non-Communist Manifesto, 3 The Western Political Quarterly 52 (1950).
\textsuperscript{175} Sklar, supra note 172, at 43-51.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
arise from imported technologies. If borrowed constitutional devices turn out to be incompatible with the principles and traditions of government in post-colonial African countries, they are unlikely to endure or to be maintained effectively.”\textsuperscript{178} It is critical, Professor Sklar continues, that “the question of cultural resistance to structural, as well as juristic, conceptions of constitutionalism should not be overlooked or underestimated by constitutional scholars.”\textsuperscript{179} Thus, for African societies, then, a cultural perspective on constitutionalism, or in other words, a locally-focused conception of constitution making and practice, which can more effectively deal with the challenges that emanate from “conflicts of law and value” in the diverse societies that exist within the continent, is quite critical. Throughout this paper, I have made similar arguments, stressing the importance of a bottom-up, participatory, inclusive, and people-driven constitution making process. This “democratic” approach to constitution making should ensure that all relevant stakeholders are enfranchised and provided the facilities to participate fully and effectively in the process of compacting the national constitution. But, why such an emphasis on participation? The full and effective participation of each country’s relevant stakeholder groups is critical because such a process would significantly increase the chances that the outcome would be laws and institutions that are capable of dealing with the challenges that arise from conflicts of law and value in African societies. For Africa, the most important part of the process of state reconstruction is to distinguish between those aspects of constitutionalism that are universal and those that are culture-specific and then design a constitution that benefits from

\textsuperscript{178} Id. at 45.
\textsuperscript{179} Id. at 46.
universal concepts but is locally-focused and hence, reflects the values of the people and societies to be governed by the constitutional rules so selected.  

C. What About “Bounded Rationality”?  

But, are the traits that are considered absolutely necessary for the effective implementation of the reforms described in this paper currently present in Africa? One can argue that effective corruption cleanups in Africa is presently not a viable objective because African societies do not currently have those traits needed to create effective laws and constitutions and that one has to wait until the African countries can acquire the conditions necessary for democratic constitution making. As argued by proponents of this “wait-and-see” approach, the ability of individuals within the African economies to make decisions is constrained by many factors, including political and economic monopolies (e.g., tyrannical dictatorships; exploitative and domineering transnational companies; entrenched civil servants; just to name a few), limited information, poorly-developed and nonviable economic infrastructures (e.g., non-functioning or nonexistent communication infrastructure), multiplicity of languages (which makes communication at a national level very difficult), and the failure, since independence, for the people to trust their leaders and national laws and institutions. As Professor E. A. Brett has described it, Africans are subjected to a form of “bounded rationality” and that at this time, Africans are not able to

---

180 See generally Mbaku, supra note 152.
engage in the types of institutional reforms that would help them deepen and institutionalize democracy, guarantee economic freedom, and minimize corruption.182

D. The Management Requirements for a Modern Institution

The management of a modern institution, whether in the public or private sector, requires a significant amount of highly complex information. Managers of institutions, whether these are public bureau chiefs or managers of private enterprises, must develop the highly technical skills that would allow them to understand and appreciate the complexities of their institutions and manage them effectively and efficiently. In Western countries, managers of modern institutions are constrained by stakeholders who know their rights, which have been defined and elaborated in national constitutions. Not only are these individuals willing to enforce their rights but they have the wherewithal to do so.

First, in these societies, there exist a well-funded and fully accessible educational system that provides prospective managers with the opportunity to acquire the necessary skills. Such an educational system also offers citizens the opportunity to educate themselves about their fundamental rights and how to organize to defend them against encroachment by opportunistic civil servants and politicians—that is, the constitution provides avenues for the people to defend themselves against state tyranny. Second, these societies have independent media that can investigate and expose incidents of bureaucratic corruption and other types of public malfeasance, making it very difficult for bureau managers to abuse their public positions for private gain. Finally, each society is provided with the structures or tools that managers need to access all the information that they need to perform their jobs efficiently and effectively.

182 Id. See also Mbaku, supra note 152 & Mbaku, supra note 46.
E. The Situation in Africa Today

In Africa today, the majority of countries continue to be governed by laws and institutions based on those brought to the colonies by the Europeans. The colonial-era institutions were managed by individuals who were all members of an alien economic and political class that had values that conflicted with those of Africans. The institutions that the Europeans brought to Africa were exploitative, oppressive, despotic and designed exclusively to enhance the ability of the Europeans to exploit Africans and their resources for the benefit of the metropolitan economies. It was never the intent of colonialism to help Africans develop the capacity to govern themselves and engage in productive activities for their own benefit. Hence, European managers in the colonies had no interest or desire to provide institutions within which Africans could acquire skills needed to manage modern complex institutions. In fact, in many colonies, the Europeans actually introduced laws that frustrated efforts by Africans to acquire various critical skills needed to manage modern political and economic systems.183

Second, during colonialism, the Europeans deliberately prevented the development and emergence of an African entrepreneurial class in each of their colonies. Thus, after independence, many of these countries found that they did not have a robust indigenous managerial and entrepreneurial class that could effectively manage the institutions that they

183 French colonial officers are well-known for favoring education only for Africans who supported the colonial concept of economic, social and political development. Hence, Africans who advocated an end to colonialism and independent existence for their territory were suppressed and prevented from acquiring any skills that could further improve their ability to articulate their ideas and organize for independence. See, e.g., JOHN MUKUM MBAKU, CULTURE AND CUSTOMS OF CAMEROON (2005) (examining, among other things, efforts by the French colonial officers to stop the development of indigenous knowledge centers in Cameroon in favor of an educational system based on a French colonial model and run exclusively by Paris-based Christian churches).
were inheriting from the departing Europeans. Third, many of the new African countries did not have independent media, which could inform the people about the management of their institutions. Where there were media houses, they were either owned and controlled by corrupt and authoritarian governments and, were never instruments for mass education about governance. Instead, the press, as it emerged after independence, was actually an appendage of the ruling government and was used to feed the people with the misinformation that was necessary to enhance the ability of the opportunistic governors to continue to monopolize political and economic power.

Fourth, at independence, the new countries had very high rates of illiteracy, especially among women. In the former U.N. Trust Territory of Cameroons under French administration, which gained independence on January 1, 1960 and took the name, République du Cameroun, for example, communication with the country’s more than 200 ethnic groups (each with its own language) posed significant problems since most of the people were not literate in French, which had been chosen as the national language. Thus, carrying out a national debate on institutional management was virtually impossible.

Fifth, most African countries at independence lacked the massive resources needed to undertake an aggressive campaign to help indigenous peoples acquire the skills to manage complex institutions. According to critics of democracy in Africa, “[n]either effective management nor democratic control is possible in such circumstances.”

The management of complex modern institutions requires that managers acquire the specialized skills, expertise, and knowledge that are necessary to allow them to understand these institutions and manage them well. Unfortunately, critics of Africa’s continuing

---

184 Brett, supra note 181, at 204.
struggle to deepen and institutionalize democracy argue, the current conditions in the
continent make it virtually impossible for there to emerge a set of viable institutions or
people with the skills needed to manage them effectively and efficiently.

F. Taking A Second Look at the Situation in Africa

Granted, during the last five decades in Africa, few African countries have had a truly free
and independent press, which could have kept a check on the exercise of government agency
and provided the people with information about the functioning of their institutions.
However, one needs to caution that the absence of modern communications structures (e.g.,
television and newspapers) in many African countries does not necessarily imply that citizens
have been totally unable to have access to information about the functioning of their
institutions. For example, in Cameroon, during the authoritarian rule of Ahmadou Ahidjo
(1961-1982), the absence of independent and free modern media structures did not prevent
Cameroonian from learning about corruption and malfeasance in the Ahidjo government.
The people developed elaborate informal structures and reformulated traditional
communications structures to gather and disseminate information about government
operations.185 Throughout the country, underground newspapers and “rumor mills” emerged
to provide the people, especially the nascent political opposition, with information about
government operations. In the early 1990s, when a viable pro-democracy movement
emerged to challenge the tyrannical rule of Paul Biya, “side-walk” radio, a powerful informal
communication infrastructure, was transformed into a critical source of information for the
people. The government threatened to imprison anyone caught using the “side-walk” radio
to spread information about government activities. Despite these threats, “side-walk” radio

185 Mbaku, supra note 46, at 356-357.
and other informal structures remained viable communications schemes and served the people fairly well.

Even after more than fifty years of independence, illiteracy remains a major constraint to economic, political and social development, as well as national integration, in many African countries. It must be noted, however, that statistics on illiteracy in Africa usually refer almost exclusively to how well Africans are literate in one of several European languages (e.g., French, English, Portuguese, and Spanish). After reunification in 1961, Cameroon adopted the languages of its former colonizers, English and French, as its official languages—these are the languages supposed to be used in government, commerce and industry, and the schools. Unfortunately, most Cameroonians, especially those who reside in the rural areas of the country (which is a majority of the people), do not speak or write either French or English. Nevertheless, there is still significant interaction between the more than 250 ethnic groups that make up the modern nation. While English and French are the national languages as required by law, the real national language is *pidgin* English.

Pidgin English, a language that is spoken throughout West Africa, has been around for a long time. However, it took root in Cameroon during the colonial period when the Europeans developed plantation agriculture in the southern coastal regions of the country and brought labor from all parts of the country to work in these agricultural concerns. Pidgin evolved as the *lingua franca* among these disparate peoples and has since become the language of record for many commercial transactions in the urban areas of the country.

In fact, Cameroon politicians have taken advantage of the popularity and accessibility of pidgin English and now rely on it as a tool to reach millions of the country’s populations that are illiterate in the European languages. In fact, during the presidential elections of the
early 1990s, one of the candidates conducted his entire campaign in pidgin English. Ni John Fru Ndi, who is fluent in English but not French and leader of the opposition Social Democratic Front (SDF), spoke to millions of Cameroonians in pidgin and was able to get his message across to the people quite effectively. Yet, virtually all of these people would be considered illiterate and incapable of participating effectively in robust democratic discourse.

Today, developments in information technologies, especially the spread of the Internet and cell phones, are making it very difficult or logistically quite expensive, for African governments to control the media and the free flow of information across their borders and internally. For example, many Cameroonian journalists, and indeed, journalists in other African countries, who have been forced by their governments to cease distributing their publications domestically, have actually turned to the Internet as a way to continue with their publications. Many of them now maintain websites from which they can publish their papers without censorship from their governments. Many of the websites on which these papers can be found are maintained by country-men (or country-women) living in the Diaspora. Although these governments continue to block access to the Internet, changes in information technology continue to frustrate state efforts to prevent citizens from having access to information. In fact, the Blackberry technology is revolutionarizing information technology and making it more and more difficult for national governments to maintain effective censorship regimes, especially with respect to information transmitted from abroad.

Since the end of the Cold War and the demise of apartheid in South Africa, private radio stations have emerged as important tools of communication throughout most countries in Africa. An important and critical development in this area are radio stations that carry programs in African languages, a process that has significantly improved the participation of
many groups in national dialogue about politics, economy and society. In some countries, such as Ghana and Liberia, American-style “talk radio” has become an important tool for young people to participate in politics. In recent democratic elections in Ghana, candidates running for public office appeared on radio to answer questions from voters who called in from all parts of the country.

It is true that when the African colonies gained independence, few of them had the skilled manpower to effectively manage their private and public sectors. This sad situation was due to colonial policies, which deliberately stunted the development of human capital among indigenous groups. Nevertheless, the availability of highly skilled and well-trained managers is not a necessary precondition for the effective management of political and economic institutions. African countries can secure these resources in the process of development. Even if African countries are able to garner for themselves those skilled and competent individuals, they will still fail to achieve the necessary economic growth and development in the absence of accountable, transparent and participatory governance structures.

G. Revisiting the Issue of Special Interest Groups

As argued in this paper, self-interest is a very important motivator for how individuals within a society behave. Given the opportunity (e.g., as a result of weak laws and institutions),

---

186 In those colonies, such as the South African colonies, Southern Rhodesia, and Algeria, where there was a significant population of settlers or colonists, the effort to stunt the development of an African entrepreneurial class was usually more intense. The European settlers opposed the emergence of an African entrepreneurial class for two main reasons—first, in order to ensure that the colonists’ continued monopolization of economic activities, even in a post-independence society, could be effectively maintained, and second, to enhance the colonists’ ability to secure the cheap labor needed to enhance the profitability of their operations.
individuals will most likely engage in opportunistic behaviors to maximize their private interests even if undertaking such activities imposes significant net costs (e.g., severe reductions in welfare, through, for example, denial of opportunities to engage in productive, wealth-creating activities) on the rest of society. The purpose of democratic constitution making, as examined in this paper, is to provide each African country with the types of institutional arrangements that can adequately constrain the state and prevent its custodians from maximizing their self-interest through the various forms of opportunism. In other words, to restructure and reconstitute the state and provide civil servants and politicians an incentive structure that minimizes their ability to engage in corruption and other forms of malfeasance. But, will self-interested Africans, notably those who have been able, through the last several years, to secure privileged positions in the public sector, be willing to engage the people in state reconstruction to provide more competitive political and economic markets?

Existing institutional arrangements in many African countries, all of which trace their origins to the governance structures imposed by colonialism, have enhanced, and continue to do so, the ability of a few individuals and groups (usually ethno-regional coalitions) to monopolize both political and economic markets and, in the process, use state structures to plunder national resources for their own benefit. Any attempt to undertake genuine institutional reforms will most likely be strenuously opposed by these entrenched groups. Nevertheless, the successful overthrow of the predatory, violent, and racist apartheid regime in South Africa, as well as the collapse of several of Africa’s post-independence dictatorships in the mid-1990s, in addition to the recent and significant improvements in the deepening

\[187\] Mbaku, supra note 46, at 358-59.
and institutionalization of democracy in a few countries (notably Ghana), indicates that opposition from entrenched groups can be overcome and the necessary reforms undertaken. Noteworthy is the emergence of robust civil societies in South Africa and Ghana, all of which have contributed significantly to the further deepening of democracy in these countries. The key to a successful campaign for state reconstruction is sustained pressure from grassroots organizations, coupled with support from abroad, primarily from citizens or nationals living in the Diaspora. One must not underestimate the critical part that can be played by the many Africans that now live and work outside the continent: in addition to financial support, these individuals, many of whom are highly educated and possess skills in many areas of human endeavor, can provide the moral and intellectual leadership needed to create, within each African country, an environment conducive to democratic institutional reforms.

Professor Brett and others have argued that “rational self-interest must transcend the short-term calculations of market theory, and recognize the collective obligations and self-sacrifice required to create the social movements which will campaign for institutions based on freedom and competition.” 188 The professor argues further that citizens must be willing to set aside “self-interest and demonstrate high levels of altruism where they can be made to recognize the need for and possibilities of collective solutions to problems of social breakdown through institutional reform.” 189 While altruism is a desirable and important trait for society, one cannot depend on it as a way to effectively govern socio-political interaction in a polity. In fact, one does not have to, because, as argued in this paper, it is to the benefit

188 Brett, supra note 181, at 205.
189 Id. at 213.
of self-interest maximizing folk to operate in markets governed by *predictable* and efficient rules than in those characterized by significant levels of uncertainty. The self-interested operator wants to minimize transaction costs and maximize benefits. Market uncertainty, which can arise from poorly-specified rules, significantly increases the costs associated with transactions (i.e., identification, negotiation, and enforcement (policing) costs) and reduces the profitability of those transactions.\(^{190}\) These transaction costs can be minimized by providing the market with a set of predictable and efficient rules.\(^{191}\) Thus, it would actually be beneficial to the self-interested individual to operate in an environment that is characterized by well-specified and efficient rules, for such an institutional environment reduces transaction costs and enhances the maximization of one’s self-interest.\(^{192}\)

Since the events of September 11, 2001 in the United States, many countries have become quite interested in fighting transnational terrorism. Part of that effort is devoted to helping developing countries, including those in Africa, deal in a more effective and sustainable way, with some of the structural factors (e.g., corruption) that enhance the ability of terrorists to practice their trade. For example, corrupt and malevolent or mischievous regimes are susceptible to capture by transnational criminal gangs, including terrorists, who are interested in using the country’s financial system to transfer funds to their agents around the world. Cleaning up corruption and significantly reducing its contribution to global terrorism is an important goal of the global fight against transnational terrorism. Thus, it is to the advantage of Western economies, the target of most (but not all of) today’s global

\(^{192}\) Mbaku, *supra* note 46, at 359-61.
terrorism, to assist grassroots organizations in Africa (and other parts of the world) that are currently engaged in efforts to reconstruct their anachronistic state structures and provide themselves with more effective, efficient, and locally-focused institutional arrangements. For, unless and until institutional and judicial systems in these countries are fully restructured and reconstituted, they will remain susceptible to capture by terrorists and other groups seeking ways to enhance their ability to carry out various international criminal activities.

VI. CONCLUSION: WHICH WAY FORWARD?

In this paper, I have shown that corruption in Africa is a concept that has a lot to do with the nature of a country’s institutional arrangements. A country’s laws and institutions determine the types of incentives faced by traders in both political and economic markets. The most important reason why corruption remains endemic in many African countries today is the fact that the institutional arrangements in these countries produce incentives, which make corruption the most viable outcome from market interactions. Throughout many countries in the continent, the traditional determinants of profitability in business (e.g., managerial expertise, efficient customer-oriented service, innovation) have given way to rent seeking and corruption as the most important ways to seek profits. Where, as in many of these countries, opportunism has emerged as the most lucrative conduct for market participants, the only effective way to rid society of these behaviors and hence, minimize corruption, rent seeking and other forms of political opportunism, is to change the institutional arrangements and by implication, market incentives. An effective corruption
cleanup program must begin with a negotiated change of each country’s existing laws and institutions. 193

Since independence, constitution making in Africa has been monopolized and dominated by urban-based elites with most citizens not provided any opportunities to participate. In order to undertake the type of comprehensive institutional reforms that I have recommended in this paper, African countries must make certain that the process is people-driven, bottom-up, inclusive and participatory. It is only through such a democratic process that Africans can secure laws and institutions that enhance peaceful coexistence, provide market incentive structures that promote wealth creation but, at the same time, adequately constrain state custodians (civil servants and politicians) and prevent them from engaging in opportunistic behaviors, and generally advance sustainable economic growth and development.

---

193 See generally Mbaku, supra note 190.