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DEMOCRATIC BACKSLIDING IN AFRICA?

*Autocratization, Resilience,
and Contention*

Edited by Leonardo R. Arriola, Lise Rakner, and Nicolas van de Walle

OXFORD STUDIES IN AFRICAN POLITICS & INTERNATIONAL RELATIONS

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Edited by

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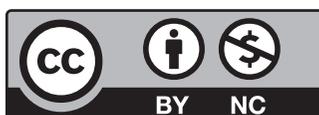
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Democratic Backsliding in Africa?

Autocratization, Resilience, and Contention

Leonardo R. Arriola, Lise Rakner, and Nicolas van de Walle

Introduction

A broad consensus has emerged that a global democratic decline has been ongoing for over a decade. Such a view is held not only among scholars (Carothers, 2006; Diamond, 2008; Bermeo, 2016; Brechenmacher and Carothers, 2014; Diamond, 2015) but also among public policy think tanks such as Freedom House, which track democratic trends around the world (Schenkkan and Repucci, 2019; Freedom House, 2019). Motivated by cases in which leaders have visibly succeeded in rolling back core democratic norms, as has occurred in Hungary, Poland, Turkey, and Venezuela, the consensus on democracy's decline suggests that leaders in several countries have been able to undertake a range of actions aimed at bringing about the piecemeal erosion of democratic institutions and civil liberties (Waldner and Lust, 2018; Huq and Ginsberg, 2018; Levitsky and Ziblatt, 2018). Indeed, by 2022, democracy appeared to be in retreat worldwide.

The democratic backsliding consensus has been extended by scholars and commentators to the countries of sub-Saharan Africa. Gyimah-Boadi (2015: 101) suggests that the democratic gains in African countries are being slowed, if not reversed, due to “the waning commitment to the democratic project on the part of political elites.” It is not simply that democratic rights have been under attack in countries such as Uganda and Zimbabwe, where entrenched incumbents have long limited participation and contestation, but that even among the region's cases of democratic progress, such as Ghana and South Africa, basic freedoms have been curtailed by the illiberal impulses of those in power. Given such apparent trends, we are forced to seriously consider the question posed by Lewis (2019: 77), namely, “Has democratization run its course in Africa?”

Our analytical point of departure is that there is no general trend in democratic backsliding among African countries. Democratization remains a contentious process across the continent as individual citizens, civil society groups, and political parties continue to mobilize for the expansion of basic rights. Yet, it is precisely due to such mobilization that incumbent leaders have had to adapt their efforts to contain the pressure for further political liberalization. Their standard tools of manipulation—corruption, fraud, and violence—are no longer enough to undercut the growing demand for representative and accountable governance. In this respect, incumbents have had to work harder and more creatively to keep democratization from continuing to unfold in their countries. Indeed, as [Carothers \(2020\)](#) reminds us, autocratic incumbents in Sudan, Algeria, and Ethiopia have also had to address increasing grievances among their citizenry. When democratization appears to have stalled in some African countries, it is because incumbents have successfully honed new tools to hinder, though not necessarily completely derail, pro-democracy actors.

In this book, we delineate two distinct processes that incumbent African leaders have engaged to contain democratization pressures. We first document how some incumbent leaders have sought to employ the law to limit the scope of action by domestic actors attempting to expand democratic liberties. This entails the strategic use of constitutional provisions, criminal law, and the courts with the aim of holding onto office or strengthening powers in ways that undermine democratic institutions or subordinate them to the executive. Additionally, we demonstrate how incumbent leaders attempt to manipulate their positions as national interlocutors in international relations to neutralize the democratizing influence of external actors. This entails the strategic use of sovereigntist claims against foreign intervention in domestic politics as well as the selective implementation of social policies promoted by foreign donors. While pro-democracy actors also seek to use these strategies (e.g. parties going to courts to challenge election results or NGOs lobbying foreign donors to pressure their governments), arguably, incumbents enjoy special institutional advantages in manipulating these mechanisms. Backsliding often emerges because incumbents have pushed this advantage over a divided or weak opposition. Nevertheless, in other cases, pro-democracy activists, politicians, and citizens can mobilize to overcome an incumbent's institutional advantages in order to prevent their countries from backsliding into authoritarianism. Understanding authoritarian resilience requires understanding the resources, both organizational and normative, that both sides bring to this political conflict.

In this introductory chapter, we proceed by describing democratizing trends in Africa going back to the 1990s. We discuss key factors that have created greater demand for democracy across the continent, particularly over the past decade. We then summarize conventional explanations from the literature for the region's apparent democratic backsliding before discussing the legal and international processes we claim are increasingly employed by incumbents. We conclude with an overview of the book's chapters.

Africa's waning democratization?

The wave of democratization that swept Africa in the early 1990s appeared very promising at the time. Significant popular political protests broke out in twenty-eight of the region's forty-eight countries and political reforms were hastily undertaken to preempt protest in another twelve countries (Bratton and van de Walle, 1997: 116–117). Within a half-decade, virtually all countries in the region had legalized political opposition and committed to multiparty electoral regimes. Most had even adopted executive term limits—a notable reform, since unconstrained executive power had been one of the most fundamental challenges to democracy in the region (Mckie, 2017; Posner and Young, 2018). A new era then seemed to be underway. As Figure 1.1 illustrates, after Latin America and Eastern Europe, sub-Saharan Africa experienced one of the most significant expansions in democracy in the early 1990s. Employing data from V-Dem's liberal democracy index, Figure 1.1 plots the extent to which, on average, countries in different regions constitutionally provided for electoral competition while limiting executive power and protecting civil liberties, including freedom of expression and assembly (Coppedge et al., 2020).

Figure 1.1 also suggests that Africa's democratic experimentation soon stalled. Most African countries simply never attained the degree of political liberalization that emerged in Latin America or Eastern Europe. Instead, many of the continent's autocratic leaders, who had been forced by domestic and international pressures to countenance multiparty elections, demonstrated their ability to survive politically with few other concessions. Before the end of the 1990s, it was clear that real democratization had been circumscribed to less than a dozen countries. The process of democratization seemingly came to a standstill in most African countries, which instead became electoral autocracies or authoritarian countries with regular multiparty elections and only a very imperfect respect for political and civil rights.

While we examine Africa's democratizing trajectory in this chapter through V-Dem's liberal democracy index, the overall trends we highlight can be

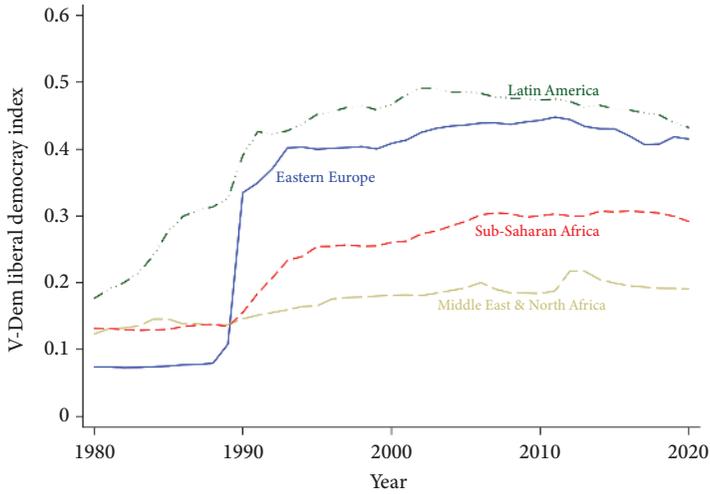


Figure 1.1 Africa’s democratization in cross-regional perspective

Note: The figure plots the average regional scores according to V-Dem’s liberal democracy index ($v2x_libdem$). Higher scores on the 0–1 index reflect greater electoral democracy.

Source: V-Dem.

found using any of the standard indices, including Freedom House and Polity IV.¹ Notably, while these aggregate measures reflect distinct theoretical and methodological foundations (Elff and Ziaja, 2018; Teorell et al., 2018), any one of them could be employed to describe the relative stagnation of democratization across African countries. All of them generally reveal that Africa’s average level of democratization has remained largely unchanged over a long stretch of time.

Thus, a striking characteristic of the region that needs further explanation is how little negative or positive regime change has actually taken place since the conclusion of initial democratic transitions in the 1990s (Bleck and van de Walle, 2019; Mechkova et al., 2017; Levitsky and Way, 2015). Once African countries started holding regular multiparty elections, they largely continued to do so. Regular elections have become the default option of politics, while the military coups that used to lead to lengthy periods of non-electoral politics get overturned quickly due to both local and international pressures. This status quo is reflected in Figure 1.1, indicating that Africa’s average liberal democracy scores have effectively remained a flat line from the mid-2000s onwards.

¹ The appendix to this chapter replicates all of the figures and tables from this chapter using V-Dem’s electoral democracy index, Freedom House’s measures of political rights and civil liberties, and Polity IV’s combined regime index.

Verde, Ghana, Mauritius, Namibia, and South Africa. The same is true at the other end of the spectrum, with cases like Angola, Chad, Eritrea, Equatorial Guinea, Rwanda, and Sudan remaining among the most authoritarian over time. Notably, as illustrated in Figure 1.2, there are relatively few countries that have an unambiguous backsliding trajectory in the two-decade period between 1995 and 2015: Central African Republic, Congo Republic, and Madagascar. Of course, in this span of time, some countries have experienced large swings in the extent of their democratization due to the onset or conclusion of civil wars or other forms of large-scale political instability. Most impressive are the members of the set of countries that considerably expanded the scope of democracy beyond their initial levels. In Figure 1.2, Côte d’Ivoire, Liberia, Kenya, Nigeria, and Sierra Leone are among those that experienced some of the largest increases in democracy between 1995 and 2015. While each of these countries had been below the regional democracy average in 1995, they were all above the average twenty years later.²

Proponents of the backsliding narrative might argue that the very lack of continued liberalization among African countries makes their case. But we stress that, first, there is considerable variation across the African cases in the degree of democratic progress or decline, belying a general negative regional trend. Second, as shown by Table 1.1, over time the V-Dem liberal democracy index has posted as many, if not more, net positive changes to African democracy ratings than negative ones. Table 1.1 does also suggest that the relative number of years with negative changes has been rising since 2000. However, this is partly a function of the sensitivity of the V-Dem index, in which even miniscule annual changes on the 0–1 index (e.g. -0.002) would count as a net decline. More relevant is the fact that, according to the V-Dem

Table 1.1 Annual changes in V-Dem liberal democracy scores for African countries

Annual change	1980–1989	1990–1999	2000–2009	2010–2020
Positive	34.67	55.09	42.91	42.08
None	50.22	22.67	26.67	11.55
Negative	15.11	22.24	30.42	46.37
Country-years	450	472	480	537

Note: Cells show percentage of country-years with positive, no, or negative change in the V-Dem liberal democracy index.

² Each of these countries achieved more than one standard deviation increase in the liberal democracy index between 1995 and 2015.

liberal democracy index, African countries tend to experience about as many annual increases in democracy (or no change at all) as they do decreases.

Rather than fixate on fine-grained annual changes, we argue that students of African politics should aim to understand why the overall picture of democratization in the region remains one of stagnation. With few exceptions, the political trajectories that most countries set upon in the early 1990s have not been shifted in any significant direction, positively or negatively. It must be emphasized that the modest gains made during the 1990s have generally not been overturned. What needs to be explained, then, is why this equilibrium has endured despite conflicting tendencies, namely, the growing demand by citizens for further liberalization and the incentive of leaders to try to close down political space in order to secure their hold on power.

Africa's democratic potential

Africa's stalled democratic progress is all the more puzzling because the region has simultaneously continued to experience other developments, often at an accelerated pace, that are associated with greater political liberalization. We highlight in particular socio-economic, demographic, international, and attitudinal factors.

First, substantial socio-economic changes over the course of the past three decades have been favorable to political pluralism in most African countries. Since the late 1990s, remarkably steady increases in gross domestic product (GDP) have begun to change the economic landscape. In real terms, Africa's GDP increased by more than 5% annually from 1995 to 2013, making it the fastest-growing region of the world. Even with the economic slowdown since 2013, per capita growth rates have remained positive, in sharp contrast to the two decades that immediately followed independence in the 1960s. This growth has resulted in the first sustained declines in the region's rate of poverty since independence, though it remains high, as well as the progressive emergence of a small, but significant middle class (Radelet, 2010; Ncube and Shimeles, 2012). The impact of these gains should not be exaggerated since economic growth has surely helped to stabilize political regimes and thus the old autocrats who seek to survive through electoral politics. Nevertheless, this level of economic growth has also begun to change the structural factors that can shape the prospects for democratic politics.

Second, rapid urbanization may pose problems for African governments. The number of Africans living in urban areas has grown from 28% of the

population in 1990 to over 40% in 2019 (World Bank world development indicators, WDIs). In Africa, as elsewhere, cities have proven to be a thorn in the side of autocrats and often fertile ground for oppositions spreading (Wallace, 2013). Urban populations have been more literate, more cosmopolitan, and less likely to be manipulated by traditional authorities and local big men. An independent press and civic associations are more likely to thrive in cities, where the natural counterweights to an oppressive state are more likely to exist. As a result, African capital cities have consistently elected opposition politicians (Wahman and Boone, 2018) and more generally been on the forefront of popular struggles to ensure the accountability of the state (Bratton and van de Walle, 1997).

Third, Africa's linkages with the rest of the world have dramatically increased over the past three decades (Vastapuu et al., 2019) and almost certainly have had a net positive ideational effect on democratization. The rise of the internet and the expansion of social media may not only have positive effects (Tucker et al., 2017; Dwyer and Molony, 2019; Zhuravskaya et al., 2020) but also provide citizens with new resources to enhance the accountability of governments, in addition to providing online mechanisms for disseminating ideas (Nyabola, 2018; Orjii, 2019). In this context, the propagation of democratic ideas has been enhanced by Africa's growing worldwide diaspora. Some 9 million Africans were estimated to be living in Europe in 2016 (Smith, 2019: 13), while over 2 million first- or second-generation Africans are estimated to be living in the United States (Lorenzi and Batalova, 2022). This African diaspora accounts for substantial and rapidly increasing remittances back to Africa, which the World Bank estimated at some \$35 billion in 2015. In addition, and perhaps more significantly, this diaspora can play a positive role in support of democratic ideas and organizations (Burgess, 2014; Doyle and Fidrmuc, 2004).

Finally, the resilience of democracy in Africa may be linked to the support it continues to enjoy from its citizens. Countering the oft-asserted cliché that "you can't eat democracy" and that citizens in Africa's poor countries are likely to view civil and political rights as less important than economic growth and law and order (Chabal and Daloz, 1999; Monga, 1997), the Afrobarometer data suggests continuing support among Africans for political freedoms and electoral competition. In its seventh round of surveys across thirty-four countries between 2016 and 2018, 68% of the Africans surveyed agree that "democracy is the best form of government," while an even higher 75% say they prefer open elections to choose their country's leaders to other

selection mechanisms.³ Even if these totals have slightly declined over the past two decades, they remain high.

Digging deeper into the Afrobarometer survey results leads to a more mixed picture and one that is revealing in terms of the themes of this book. The support for democracy seems to weaken when citizens' answers are put through more stringent conditions; thus, only 42% of respondents support democracy as the best system and reject all three alternatives that are presented to them (i.e. one-party state, military rule, and presidential dictatorship); support drops to under one-quarter of respondents in seven countries. The Afrobarometer surveys distinguish between this popular demand for democracy and its supply, which reflects the extent to which respondents believe their current government is democratic. Only 51% of respondents believe their own country to be democratic, while 43% of respondents are satisfied with the level of democracy in their country. In over twenty countries surveyed in Afrobarometer's latest round, the supply is lower than the demand, suggesting that Africans are not satisfied with the level of democracy they have been given and want more of it. Nonetheless, in some eleven countries, respondent answers suggest that they want less democracy than what they are getting (Mattes, 2019).

Popular support for democracy is largely focused on elections and there is less support for some of the actors and institutions without which elections are too often manipulated. However, these actors and institutions are often viewed with suspicion because they are divisive or controversial. Afrobarometer's seventh round suggests a sharp decline of the legitimacy of the national legislature over the past decade, as a minority of respondents now say they trust the institution. Logan and Penar (2019) argue that support for freedom of association, religion, and movement have all declined over the past decade across the region, largely because all three are viewed as undermining public security. The concern for public security makes sense in a region in which crime and violence have been on the rise and governmental responses have been largely inadequate. There has similarly been a decline in the support for an independent press, political parties, and non-governmental organizations (NGOs). These actors are often viewed as untrustworthy and self-dealing rather than central actors for a healthy participatory pluralism.

Taken altogether, these socio-economic, demographic, international, and attitudinal factors may help to explain the rise of contentiousness across

³ These totals reflect an average across the thirty-four countries, which varied from 88% in Gambia to 48% in Lesotho. See a summary of findings in Bratton and Bhoojdhur (2019), Logan and Penar (2019), and Mattes (2019).

Africa over the past decade. There is much evidence that Africans are increasingly willing to engage in strikes over economic conditions, student protests, social movements, and public demonstrations over various causes (Branch and Mampilly, 2015; Mueller, 2018; Philipps, 2016). Mueller (2018) views this increase as being largely driven by dissatisfaction over living conditions and the rise in social inequality.⁴ Nonetheless, the general rise in contentiousness cannot be circumscribed to social protest concerning social deprivation, whether it is objective or subjective. Instead, it should be understood as being caused by broad socio-economic and political trends in the region due to the changes discussed above such as urbanization, an increasingly active civil society, and expanding international linkages.

Africa's democratic constraints

Given the numerous factors that should encourage greater democratization across the region, what explains the lack of continued progress toward the ideals of liberal democracy, namely, stronger checks and balances between branches of government and greater protection for individual freedoms? The existing research links the disappointing legacy of Third Wave democratization in Africa to a number of factors (see, e.g. Joseph, 1999; Cheeseman, 2015; Lynch and Crawford, 2011). From among the various factors commonly cited in the literature, we selectively highlight here authoritarian political legacies, civil society weakness, low state capacity, and donor fatigue.

Democratizers in Europe or Latin America could often rely on the legacies of previous democratic experiments that provided precedents, norms, and practical experience in conducting elections, registering voters, and mobilizing voters. In Africa, however, other than the short period around independence in the 1960s and subsequent occasional democratic interludes, few countries had any extensive experience with democratic politics. More typically, African countries suffered through years of military emergency rule or presidents for life. Moving away from authoritarian politics has thus proved difficult in most of the region's countries, despite popular support for democracy.

The historical weakness of civil society across the continent has also undermined democratic consolidation (Bratton, 1989; Monga, 1995; Obadare, 2013;

⁴ African inequality levels have historically been comparatively high. Overall, nonetheless, at the country level, the best recent estimates suggest relatively stable levels of inequality in Africa with many of the poorer countries in West Africa actually recording declining inequality as a result of improved social services and agricultural growth (Chancel et al., 2019; see also Bhorat et al., 2017). Notably, the highest levels of inequality in the region occur in Southern African countries such as Botswana, Namibia, and South Africa, which are rated among the continent's most democratic.

VonDoepp, 2019). This weakness was, in part, a consequence of the absence of a democratic tradition as well as the legacy of Africa's relatively low level of economic development, including limited historical urbanization and a small middle class. The civic associations, free press, and interest groups that might have served as intermediary between citizen and state, helping to enhance mechanisms of vertical accountability, remain poorly institutionalized. Under the one-party rule that dominated for decades after independence, these associations were more likely to have been coopted by the state. Today, even when the regime allows them to operate freely, they lack the means to self-finance domestically and are often reliant on a small number of foreign donors. Some civic groups have been at the forefront of mobilizing popular support for greater democratization, acting sometimes with great courage in the face of repression, but much of associational life has had little or no effect on political liberalization. To the contrary, there is often active collaboration among NGOs focused on economic development and governments (Brass, 2016). A degree of sociological symbiosis thus exists between civil society and the state, in which personnel, networks, and roles in policy formulation overlap considerably between the two, making civil society a partner of rather than a challenger to the status quo (Obadare, 2011; VonDoepp, 2019).

Low state capacity also undermines democratic consolidation in Africa. The region's countries tend to offer few social services to their citizens because they lack the capacity to collect taxes to finance these services and, in part, because they lack the civil servants and physical infrastructure to deliver services outside of the capital and bigger towns. Admittedly, state capacity varies substantially across the region, and this dynamic was more pronounced in the poorer states of central and west Africa. Nevertheless, the reliance on foreign aid to carry out development policy has further undermined already weak citizen–government linkages as governments found they could shift the blame for developmental failures onto the donors and thus further escape accountability (Moss et al., 2008; Prichard, 2015).

At the international level, donor support for democratization has receded, creating conditions in which autocrats can push back. Donor motivations to promote political change probably peaked at the apex of the economic crisis in the late 1980s and early 1990s, when the patent failure of Africa's authoritarian regimes to promote economic growth prompted donors to believe that regime change might be a prerequisite of structural economic reform. Once commodity prices started to bounce back later in that decade and the debt crisis abated, regime change came to seem less urgent. Even in such poorly performing

economies as Cameroon or Togo, and certainly in the more successful cases of Ethiopia, Rwanda, and Uganda, the West no longer strenuously enforced political conditionality beyond the organization of regular elections (Brown, 2011; van de Walle, 2016). The emergence of alternate trading partners for Africa, such as China, lessened the ability and willingness of Western donors to impose political conditionality on their aid (Woods, 2008; Devermont, 2018). At the same time, the reemergence of security concerns after 2001 further undermined democracy promotion as anti-terrorism foreign policy following the 9/11 attacks, including the rise of radical Islam in the Sahel and Horn of Africa, began to dominate donor interests (Devermont, 2019; Hackenesch, 2019). Ultimately, donors may have come to the conclusion that they had already done enough to support African democratization. Most African countries, in their view, had benefited from good governance support in the period following the end of the Cold War to appreciably increase the number of civil society organizations and ensure basic protection for human rights (Resnick and van de Walle, 2013; Bush, 2015; VonDoepp, 2019).

The persistence of the status quo

As we have seen, a democratic backsliding narrative does not accurately capture the predominant pattern of democratization across Africa. Despite several factors that create strong pressures for greater liberalization, the level of democracy has remained remarkably stable in most countries; it has neither appreciably improved nor worsened. The stability that needs to be explained is illustrated in Figure 1.3, which shows the year-to-year changes in average levels of liberal democracy across African countries.

To account for Africa's anemic democratization since the late 1990s (the largely flat line seen in Figure 1.3 that hovers around zero), we depart from the existing literature in two ways. We stipulate that there are structural and systemic factors that make it difficult to build democracy in the region. But we contend that such factors cannot adequately explain why or how the positive democratizing factors we outlined earlier have been neutralized. Additionally, we acknowledge that incumbents often deploy repression and coercion to subdue their opposition. But it is unlikely that incumbents can rely on violence alone. Most incumbents simply lack the capacity to control large-scale violence, especially over a prolonged period of time.

The apparent democratic stagnation seen in African countries belies the actual political struggles that play out between an incumbent executive bent

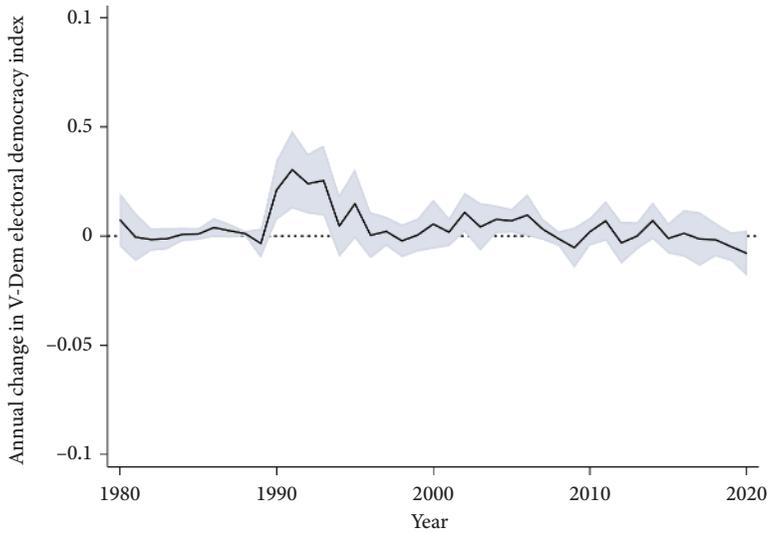


Figure 1.3 Average annual change in African democracy

Note: The figure plots average year-to-year changes across African countries on V-Dem's liberal democracy index (v2x_libdem). The black line represents the average annual change, while the gray area shows the 95% confidence interval.

Source: V-Dem.

on staying in power and an opposing array of parties, civil society groups, and citizens increasingly contesting control of the state. The impact of these struggles is not uniform in all countries because the resources that political actors can bring to bear on behalf of their interests and aspirations vary across countries. Nevertheless, we argue that incumbents have generally been able to stymie further democratization, limit contestation, and managing participation by relying on two processes in which they enjoy institutional advantages. First, we point to the executive's ability to use the law to enhance its discretion and avoid accountability. Second, we claim that the executive's position as a country's national interlocutor with the international community allows it to curry favor with donors and deflect criticism of authoritarian actions.

In this volume, we show how controlling legal instruments and acting as national interlocutors in international relations helps to account for the piecemeal, subtle ways in which incumbents are able to forestall greater democratization despite the increasing popular pressures they often face. Indeed, these two processes share distinct properties that give incumbents considerable advantages when undercutting their pro-democracy challengers. These processes are institutional; that is, they enable an incumbent to implement their political prerogatives through their control of government

institutions such as a Ministry of Justice or a Ministry of Foreign Affairs. Given the totality of government actions taken on a daily basis, this can make it more difficult to discern the anti-democratic intent of any individual act or policy. And precisely because these processes are institutional, they offer the incumbent a veneer of legitimacy: an incumbent can claim to be taking action as head of state in order to protect the country from instability or to ensure the country's autonomy.

Examining the employment of legal institutions and international relations also allow us to highlight the power asymmetry between the incumbent and pro-democracy challengers. Whereas incumbent and opposition face each other in elections as equals, at least theoretically, there is no such pretense when it activates the mechanisms we emphasize here: as head of government, the incumbent is a country's enforcer of law as well as its national spokesperson in international relations. On the one hand, it can use the law to advance partisan goals; on the other, it sits as a gatekeeper between the domestic and the international arenas, providing it with a *de facto* advantage in each.

Incumbents use the law to preserve the political status quo

Africa's stalled democratization can be traced back, in part, to the lack of comprehensive constitutional reform in the 1990s. While constitutions in most countries were amended or completely revised to allow for multiparty elections, freedom of association, and freedom of speech, the core powers of the executive were mostly left intact—even when citizens were consulted during the constitutional redrafting process (Parlett, 2012; Prempeh, 2008). Despite political liberalization, most African leaders have retained considerable authority over lower-level actors in government (e.g. through powers of appointment). African leaders benefit from constitutional provisions which weaken or subordinate the other branches of governments in favor of the executive. Presidents have the constitutional capacity to overawe the legislative and judicial branches of government. These broad constitutional powers allow leaders to effectively coordinate the legal apparatus of the state against perceived threats (Prempeh, 2008; Ginsburg and Simpser, 2018).

Here, we draw on Gloppen's (2018) analytical construction of "state lawfare" to emphasize how, under constitutions biased in favor of the executive, incumbents can readily deploy the legal instruments of the state to shore up their political regimes. Gloppen (2018) explains how an incumbent can strategically use the law to target specific groups (e.g. registration criteria for civil

society organizations) or individuals (e.g. eligibility criteria for elected officials).⁵ Moreover, she points out that incumbents can pursue these legal tactics through a variety of institutional venues. They can use their power over legislation to draw up new regulatory measures, they can lean on courts and bureaucrats to act as enforcers of illiberal laws or to offer favorable interpretations of vague constitutional provisions (see also [Shen-Bayh, 2018](#)), or they can ask judicial authorities to criminally prosecute particularly troublesome rivals.

Civil and political actors can also resort to the law to fight back against abuses by the incumbent by, for example, turning to the courts to demand accountability of a government's constitutional or legislated commitments or to ask for the rerun of flawed elections ([Gloppen, 2008a](#); [Gloppen 2008b](#)). Although such efforts are occasionally successful, the force of the law tends to favor those who hold power ([Comaroff and Comaroff, 2007](#)). In countries where the judiciary and legislature are cowed by the executive, the law can become an effective tool for incumbents to prevent pro-democracy actors from coordinating or mobilizing in order to assert mechanisms of accountability.

Empirically, the application of this legal mechanism can be seen in countries where governments have increasingly used the law to selectively target organizations with the potential to mobilize in favor of greater democratization, such as human rights organizations ([Christensen and Weinstein, 2013](#); [Dupuy et al., 2016](#)), while benignly ignoring other interest groups such as churches. In Tanzania, at least fifteen new laws have been enacted since 2015 with the aim of impeding the democratization efforts of local organizations. In July 2019, the Tanzanian parliament dominated by the ruling party adopted eight laws that gave government the authority to suspend civil society organizations and private companies. These legal actions severely restrict the ability of organizations to perform functions of accountability either through the free press or through free association. Similar legal tactics were employed in Zambia under President Edgar Lungu, whose government used the law to close critical news outlets as well as to harass his opponents. After a close presidential election in 2016, Lungu's government went as far as to arrest opposition leader Hakainde Hichilema on treason charges, a non-bailable offense that carries the death penalty.

⁵ See also [Gloppen et al. \(2019\)](#) and Chapter 3 of this volume.

Incumbents use their international position to preserve the political status quo

African incumbents have increasingly been able to leverage their position as national representatives of their respective countries in global affairs. In particular, they have managed to instrumentalize the West's own ideals and norms in ways that simultaneously strengthen their position at home and provide them with insulation from critics abroad.

Levitsky and Way (2005, 2006) have most clearly drawn attention to the role of the West in accounting for cross-national variation in authoritarianism. They point to the strength of ties between democratizing countries and the established democracies of the West, finding that regimes are more likely to further democratize when both linkage (i.e. the density of cross-border flows of capital, trade, and ideas) and leverage (i.e. the exposure to external pressure) are greater. When applied to African countries, international linkage and leverage primarily concern foreign aid and political conditionality, respectively. Following the end of the Cold War, almost all Western donors began to nominally condition their aid on governance reforms, namely, liberalization. The aid system officially rewarded countries taking steps to improve their governance, and bilateral donors channeled substantial amounts of support as a way of encouraging democratization and fostering development (Barnett, 2011; Dietrich and Wright, 2015; Resnick and van de Walle, 2013). Nevertheless, even in cases in which donors explicitly sought to leverage greater aid funds in exchange for democratic reforms, the evidence suggests that they could not ensure follow-through from recipient countries. As Swedlund (2017) and others have argued, neither donors nor recipient governments have been able or willing to sanction one another for breaking deals. Enforcing this “aid bargain” has been complicated, in part, by the lack of donor coordination over conditionality, enabling recipient governments to play donors off one another.

But rather than focus on the manipulation of tangible resources within the international arena, we claim that African incumbents have been especially effective in instrumentalizing Western ideals—namely, national sovereignty and liberal norms—to forestall greater democratization. What we have in mind is a version of the older “extraversion” argument (Bayart and Ellis, 2000), in which African elites can manipulate their weakness within international relations in order to achieve self-interested aims, namely, maximizing their access to power and resources. To be sure, as a head of state, an incumbent is uniquely situated in that their status as national executive provides them with

the authority to negotiate with the rest of the world. They can, in turn, harness their international ties to better dominate the domestic political game.

A central element of international relations concerns the notion of sovereignty. African incumbents have been able to activate the notion of sovereignty to neutralize criticism from external actors in ways that often increase their domestic legitimacy. Longstanding public resentment over Western interference in domestic politics enables incumbents to turn international criticism to their advantage. For example, a particular feature of the politicization of LGBT debates in Africa is that they are framed as a threat to African values as well as to national sovereignty.⁶ Several African leaders have been able to rally a coalition of social conservatives in support of their governments by vocally labeling as “un-African” the emerging international consensus on the promotion of LGBT rights, particularly by Western countries. Scapegoating thus allow incumbents to channel criticism away from more serious governance matters that might threaten their hold on power (Grossman, 2015). This is why public denouncements of LGBT rights are often accompanied by increasing enforcement of once-dormant anti-sodomy laws, including highly publicized arrests of alleged gays and lesbians. And these denouncements are politicized for electoral effect. In Zambia, the ruling party from 1991 to 2011, the Movement for Multiparty Democracy (MMD), sought to hold onto their electoral support by activating the issue in painting their main opposition, the Patriotic Front (PF), as a pro-gay party that would seek to legalize homosexuality.

Beyond using national sovereignty to shield themselves from external criticism, African incumbents are adept at selectively implementing policies that signal their compliance with emerging global norms that Western donors are known to especially value. Engaging their international partners through policies targeting gender equality, for example, allows incumbents to provide proof of their commitment to progressive democratic values. Examples of such compliance include ratification of international treaties such as the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the adoption of gender-related legislation linked to social reforms (e.g. child marriage, female genital mutilation, and domestic violence), and the institutionalization of women’s political representation in the legislature through quotas for elected office. The advantage to incumbents is that all such

⁶ We use the term LGBT to refer to the rights of lesbian, gay, bisexual, trans*, intersex, and queer people with a focus on rights related to same-sex intimacy. We recognize that the acronym LGBTIQ+ encompasses a wider spectrum, but LGBT is the term most frequently recognized in political debates across the continent.

measures allow them to claim to be advancing democratic norms, while knowing that they will pose no threat to their hold on power. In Uganda, President Museveni could partly resist international demands for greater liberalization because he could point to the dramatic expansion in women parliamentarians under his party.

The design and plan of the book

To understand Africa's seemingly stalled democratization, we need to undertake empirical analyses that go beyond merely describing continent-wide dynamics or identifying regional particularities of broader global trends. Our goal is to explain how democratizing actors have remained surprisingly resilient at the same time that incumbents have managed to parry their liberalizing efforts and explain the instances when this equilibrium has in fact been undermined. While an increasingly influential and cosmopolitan urbanizing society demands more rights and better governance, incumbent leaders have relied on domestic legal institutions and international relationships to avoid having their own powers curtailed. This is, ostensibly, why we observe the nearly flat line in Figure 1.3 starting in the late 1990s. Neither side is strong enough to completely overpower the other.

But the flat lines we highlight in our own narrative disguise a great deal of cross-country variation. Some African cases are moving in a direction consistent with the global story of democratic backsliding, just as others continue to make progressive liberalizing gains, all while the modal tendency among countries remains to instigate no change at all. But even among this latter set of countries with minimal to no change, the struggle over democracy is not uniform; it takes on its own character in each country. Thus, even in the absence of a generalized backsliding trend, we need to explain the occurrence of countervailing moves toward and away from democracy within countries.

To explain the democratic trajectories in more detail, we focus on six African countries: Ghana, Kenya, Malawi, Zambia, Uganda, and Zimbabwe. These countries exhibit considerable variation in the levels of democracy attained by the mid-1990s, despite having in common a set of institutions inherited through their shared British colonial background. Ghana has made steady, though incremental progress toward democratic consolidation. Kenya, Malawi, and Zambia have experienced both dramatic advances and reversals, resulting in a more muddled process of political liberalization in which the future of democracy remains uncertain. Uganda and Zimbabwe are the

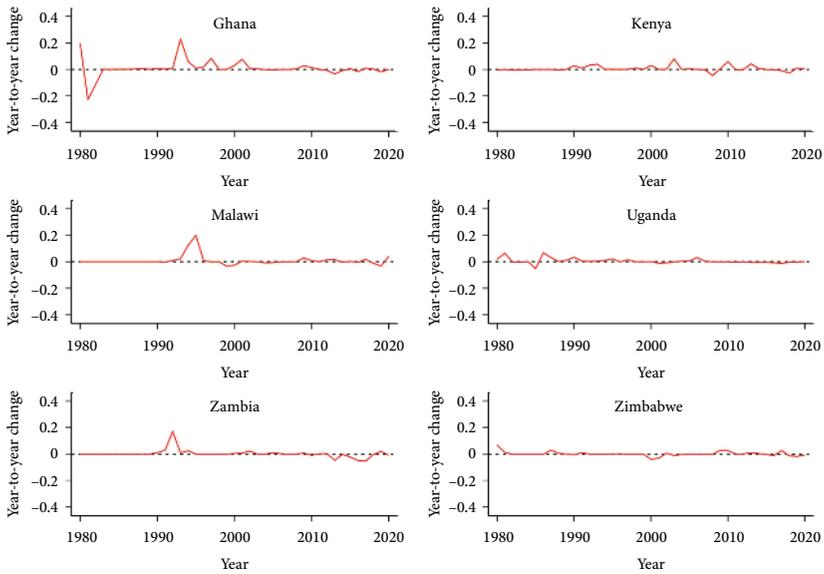


Figure 1.4 Democratic trends in country cases

Note: The figure plots year-to-year changes in V-Dem's liberal democracy index (v2x_libdem).
Source: V-Dem.

clearest cases of authoritarian retrenchment in which long-serving incumbents managed to personally hold onto power. Yet, as Figure 1.4 illustrates, once these countries reached a given equilibrium, they have experienced relatively few changes in terms of the continued expansion of democracy.

Through individual country case studies, we trace discrete democratizing and autocratizing changes back to the actions taken by political actors, namely, incumbents, opposition parties, civil society organizations, and citizens. The country chapters explain how incumbents and pro-democracy forces (opposition parties, civil society, and citizens) have used legal and international mechanisms in attempts to contain the liberalizing efforts of pro-democracy actors. While the time dimension for the case studies is the post-transition period, the main emphasis in empirical discussion concerns the period after 2000. The six country cases display distinct variance in terms of their democratic trajectories. Yet, a striking commonality is the limited overall change that has occurred past the initial transitional equilibrium. The country chapters show how incumbents and pro-democracy forces have strategically employed the law and international relationships to shore up their own positions. This does not suggest that incumbent leaders in electoral autocracies have completely abandoned other items in the menu of manipulation,

particularly repression and extra-legal measures. The case studies analyze the lawfare and international strategies in the context of other more traditional strategies. Toward that end, the process tracing for each case follows a common template.

Following a short description of the democratic transition, the country chapters document how incumbents have employed legal institutions to forestall democratization and the effects of these actions. This entails tracing the effects of initial constitutional reforms and subsequent legal changes on both contestation and participation. Second, the country chapters document when and how incumbents have employed the international relationships at their disposal to forestall democratization. This process tracing focuses on whether the incumbent's use of sovereignty claims and demonstrations of adherence to democratic ideals affect their ability to subsequently curtail contestation and participation. Reflecting on *asymmetries* in access to both legal and international procedures, the country chapters discuss the relative institutional capacity of incumbents in comparison to pro-democracy forces.

The outline of the book

Following this introductory chapter, Chapter 2 focuses on political participation and regime responses (1990–2020). The chapter confronts a key paradox of political participation in Africa's multiparty era: increased popular mobilization among African citizens has not led to greater democratization. We explain this paradox by showing how incumbent leaders, in responding to increased political mobilization, have sought to protect their regimes by strategically clamping down on key arenas of citizen participation in politics such as rights-promoting civil society organizations and digital information.

In Chapter 3, we provide a typology of the legal strategies that African autocrats exploit to stay in power and the legal strategies used by the opposition and civil society to resist autocratization. We first describe how African incumbents have used the law to legitimize their rule as a consistent strategy since independence. We then discuss how the lack of comprehensive constitutional reform in the early 1990s allowed incumbents to retain most of their authoritarian powers, thereby enabling them to deploy legal institutions to hold onto office or further strengthen their powers. This includes legislative strategies, where the law is changed to bolster their consolidation

of power, socio-discursive strategies such as rule-of-law rhetoric to mobilize public opinion, and court-centered strategies.

Chapter 4 turns to international relationships as key processes influencing the balance between democratizing and autocratizing forces across Africa. The chapter discusses the complex interplay between international actors and incumbent African governments as well as civic associations and opposition forces. The chapter demonstrates how sovereignty claims made by incumbents toward the international community are used to shield episodes of autocratization. The chapter also describes how African incumbents use the symbolic value of selected policies, such as women's empowerment, to signal their compliance with global norms.

The following chapters analyze the interactions between legal and international processes in the democratic trajectories of Ghana, Kenya, Malawi, Zambia, Uganda, and Zimbabwe. As noted earlier, each case study follows a common template for tracing the effects of legal and international processes. Each case study explicitly discusses the relative weight of each in influencing the country's recent democratic trajectory, noting whether one or the other has been more (or less) likely to be employed by the incumbent and to what effect.

The book's concluding chapter draws out generalizable lessons from the case studies and presents a framework for further empirical analysis regarding the impact of legal and international processes on democratization.

Alternate democracy indices

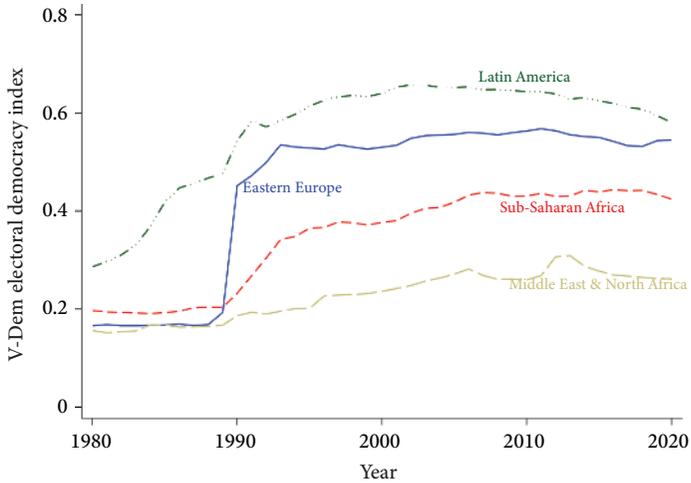


Figure 1.1A Africa's democratization in cross-regional perspective (V-Dem electoral democracy)

Note: The figure plots the average regional scores according to V-Dem's electoral democracy index (v2x_polyarchy). Higher scores on the 0–1 index reflect greater electoral democracy.

Source: V-Dem.

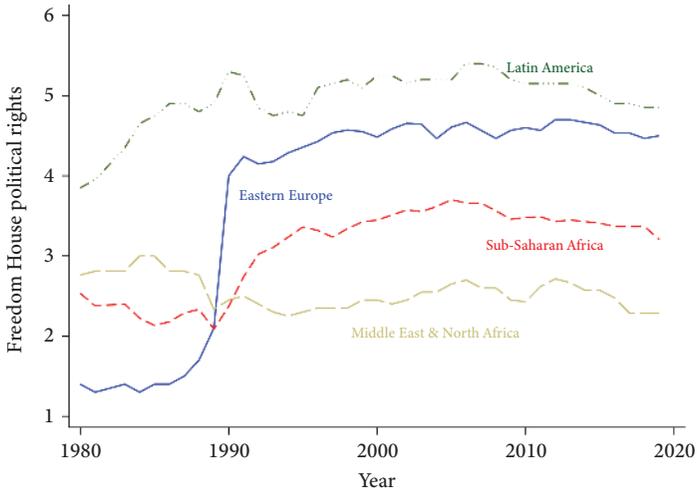


Figure 1.1B Africa’s democratization in cross-regional perspective (Freedom House political rights)

Note: The figure plots the average regional scores according to Freedom House’s political rights index. Scores are inverted so that higher values reflect greater rights.

Source: Freedom House.

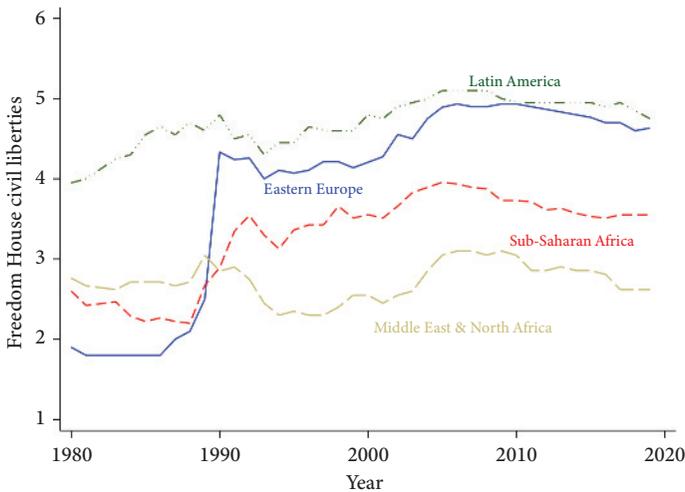


Figure 1.1C Africa’s democratization in cross-regional perspective (Freedom House civil liberties)

Note: The figure plots the average regional scores according to Freedom House’s civil liberties index. Scores are inverted so that higher values reflect greater liberties.

Source: Freedom House.

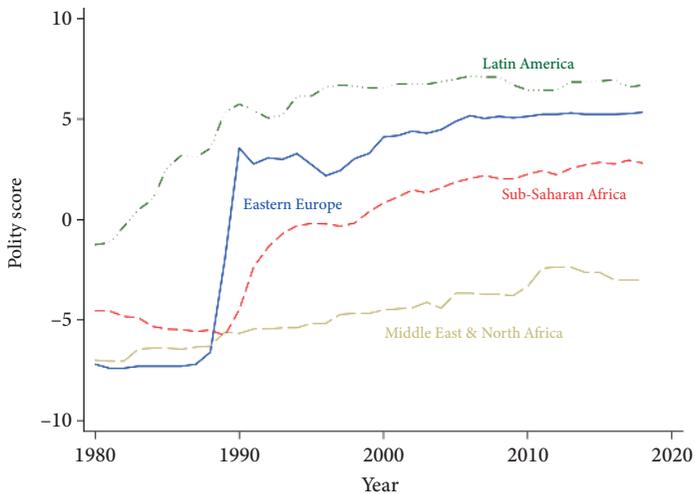


Figure 1.1D Africa's democratization in cross-regional perspective (Polity IV)

Note: The figure plots the average regional scores according to the Polity IV combined regime index. Higher values indicate greater democracy.
Source: Polity IV.

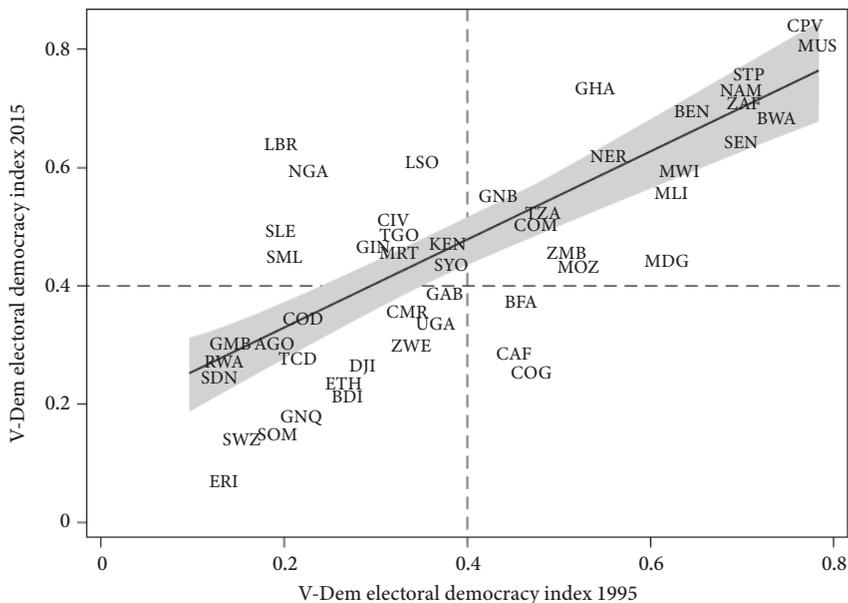


Figure 1.2A The persistence of the political status quo (V-Dem electoral democracy)

Note: Dotted reference lines indicate the average score (0.4) among African countries on V-Dem's electoral democracy index (v2x_polyarchy) from 1990 onwards. Higher scores reflect greater electoral democracy.
Source: V-Dem.

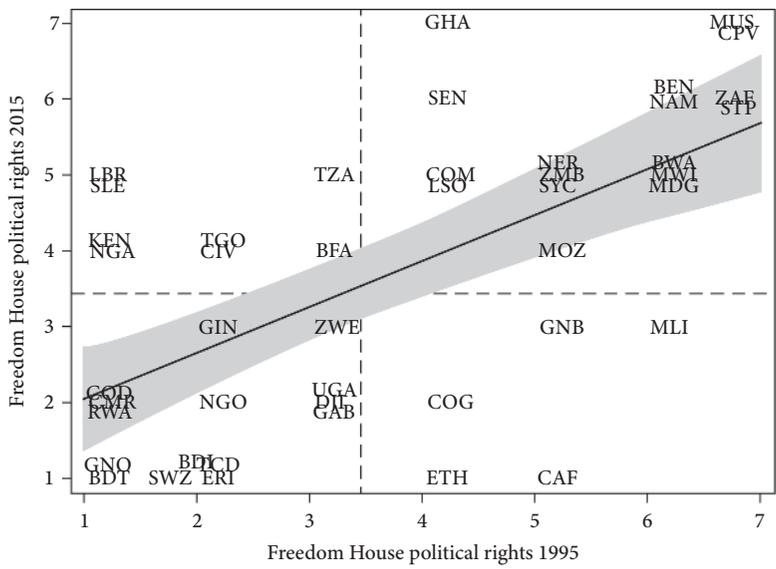


Figure 1.2B The persistence of the political status quo (Freedom House political rights)
Note: Dotted reference lines indicate the average score (3.44) among African countries on Freedom House's political rights index from 1990 onwards. Scores are inverted so that higher values reflect greater rights.
Source: Freedom House.

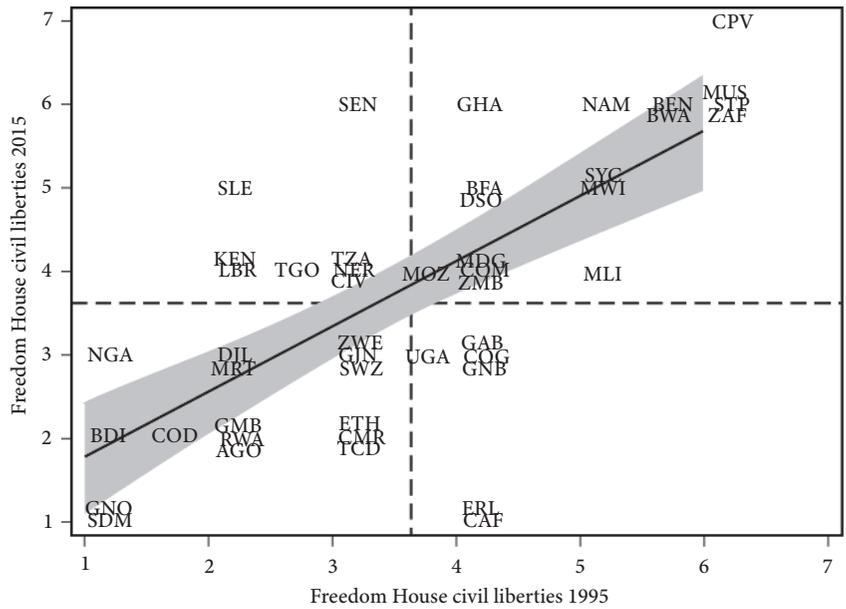


Figure 1.2C The persistence of the political status quo (Freedom House civil liberties)
Note: Dotted reference lines indicate the average score (3.64) among African countries on Freedom House's civil liberties index from 1990 onwards. Scores are inverted so that higher values reflect greater liberties.
Source: Freedom House.

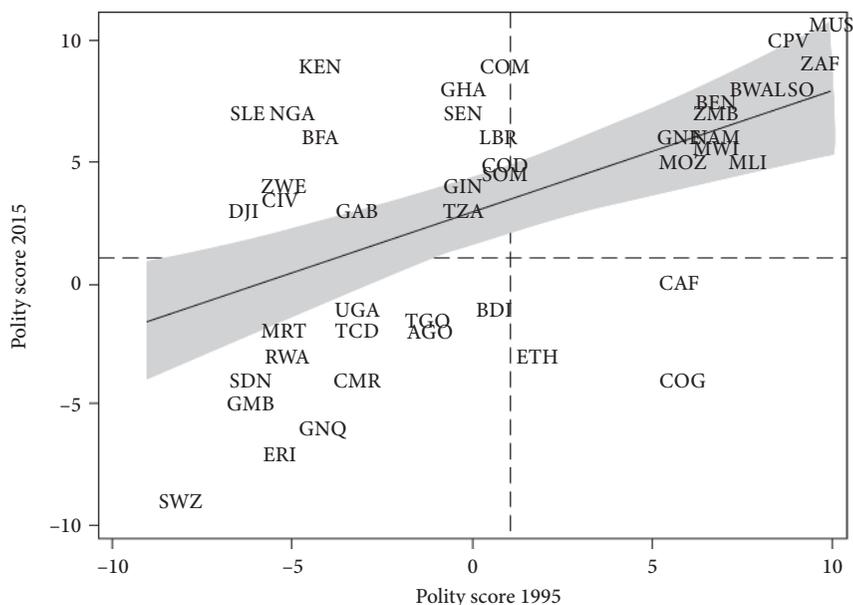


Figure 1.2D The persistence of the political status quo (Polity IV)

Note: Dotted reference lines indicate the average score (1.05) among African countries on the Polity IV combined regime index from 1990 onwards. Higher values indicate greater democracy.

Source: Polity IV.

Table 1.1A Annual changes in V-Dem electoral democracy

Annual change	1980–1989	1990–1999	2000–2009	2010–2018
Positive	33.78	51.69	42.50	40.41
None	49.33	28.18	28.33	14.71
Negative	16.89	20.13	29.17	44.88
Country-years	450	472	480	537

Note: Cells show percentage of country-years with positive, no, or negative change in the V-Dem electoral democracy index.

Table 1.1B Annual changes in Freedom House political rights

Annual change	1980–1989	1990–1999	2000–2009	2010–2018
Positive	7.22	14.38	10.00	5.44
None	81.94	78.33	80.64	87.24
Negative	10.83	7.29	9.36	7.32
Country Years	360	466	470	478

Note: Cells show percentage of country-years with positive, no, or negative change in the Freedom House political rights score.

Table 1.1C Annual changes in Freedom House civil liberties

Annual change	1980–1989	1990–1999	2000–2009	2010–2018
Positive	9.72	17.17	7.66	3.97
None	81.39	72.96	87.02	90.80
Negative	8.89	9.87	5.32	5.23
Country-years	360	466	470	478

Note: Cells show percentage of country-years with positive, no, or negative change in the Freedom House civil liberties score.

Table 1.1D Annual changes in Polity IV

Annual change	1980–1989	1990–1999	2000–2009	2010–2018
Positive	3.65	19.34	11.74	5.73
None	92.01	76.26	85.00	92.12
Negative	4.34	4.40	3.26	2.15
Country Years	439	455	460	419

Note: Cells show percentage of country-years with positive, no, or negative change in the Polity IV combined regime index.

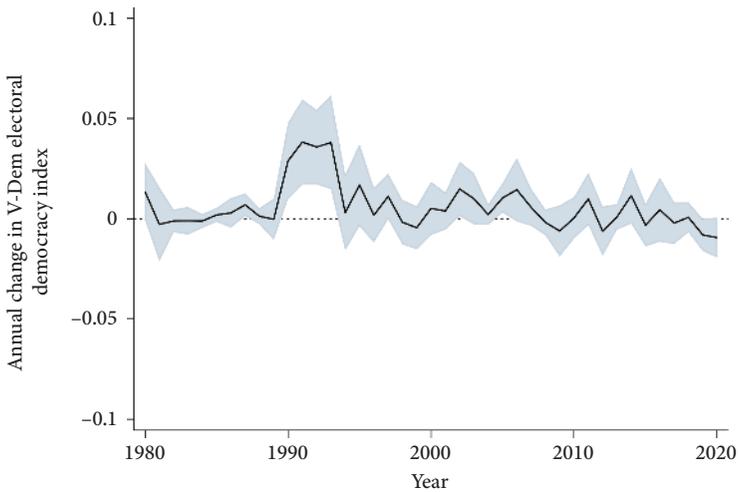


Figure 1.3A Average annual change in African democracy (V-Dem electoral democracy)

Note: The figure plots average year-to-year changes across African countries on V-Dem’s electoral democracy index (v2x_polyarchy).

Source: V-Dem.

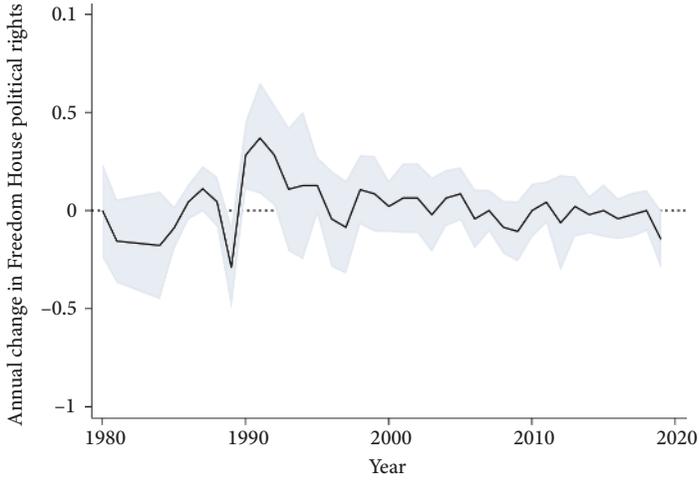


Figure 1.3B Average annual change in African democracy (Freedom House political rights)

Note: The figure plots average year-to-year changes across African countries on Freedom House’s political rights index. Scores are inverted so that higher values reflect greater rights.

Source: Freedom House.

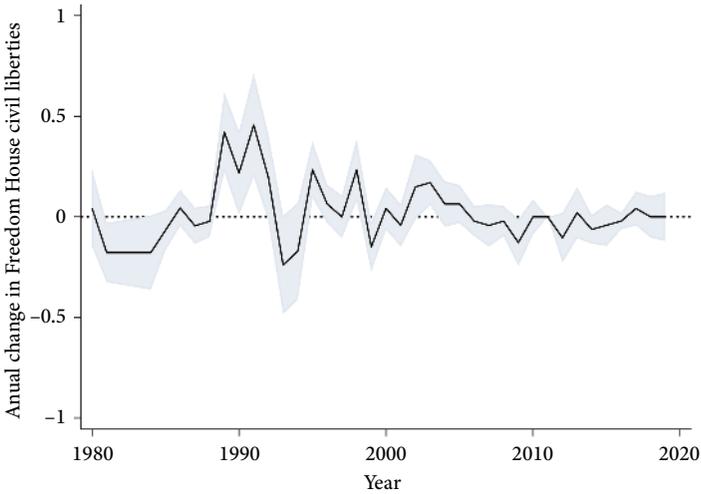


Figure 1.3C Average annual change in African democracy (Freedom House civil liberties)

Note: The figure plots average year-to-year changes across African countries on Freedom House’s civil liberties index. Scores are inverted so that higher values reflect greater liberties.

Source: Freedom House.

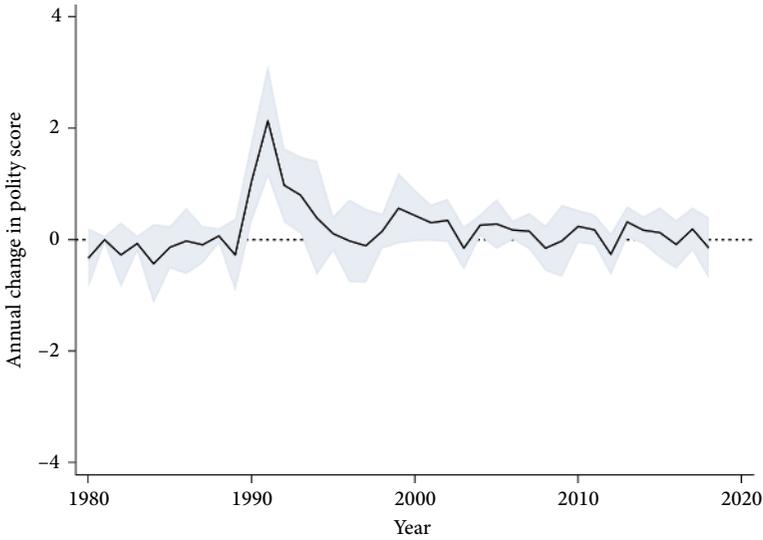


Figure 1.3D Average annual change in African democracy (Polity IV)
Note: The figure plots average year-to-year changes across African countries on the Polity IV combined regime index. Higher values indicate greater democracy.
Source: Polity IV.

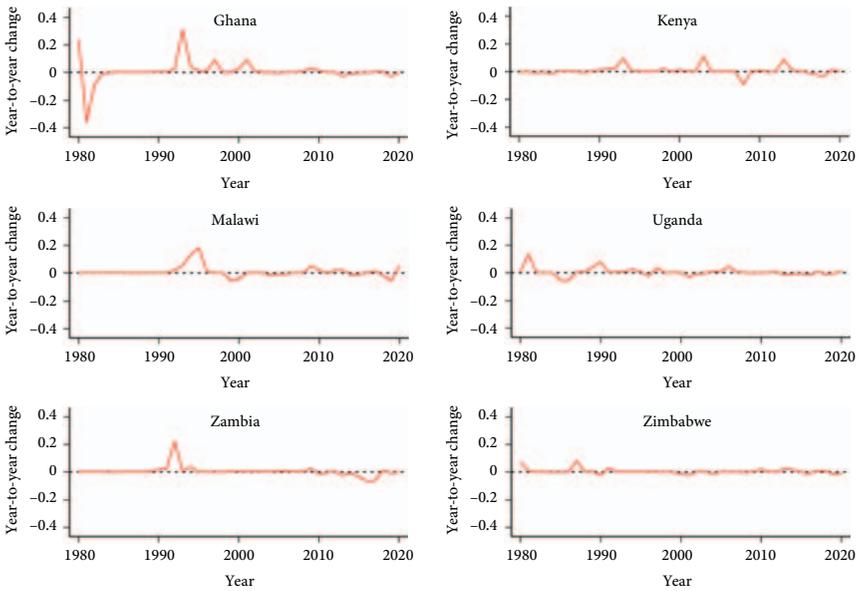


Figure 1.4A Democratic trends in country cases (V-Dem electoral democracy)
Note: The figure plots year-to-year changes in V-Dem’s electoral democracy index (v2x_polyarchy).
Source: V-Dem.

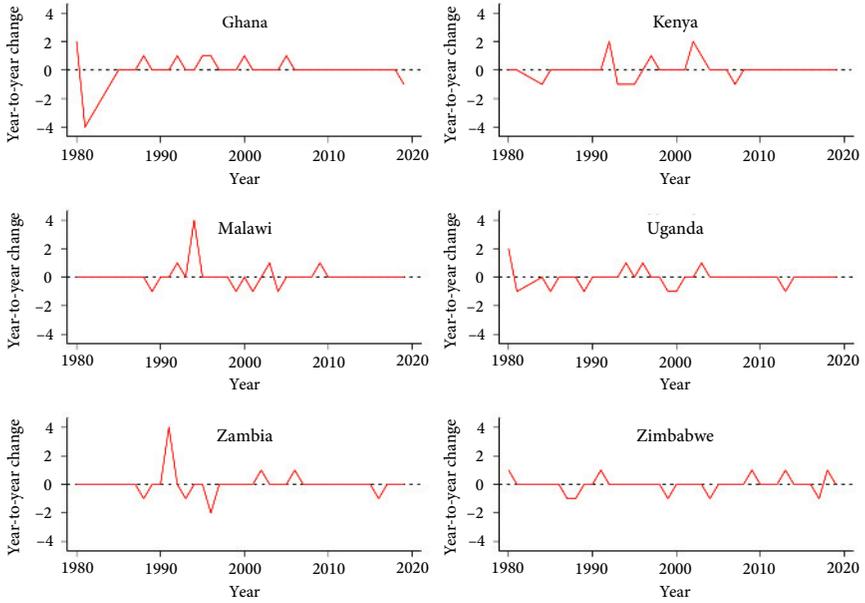


Figure 1.4B Democratic trends in country cases (Freedom House political rights)

Note: The figure plots year-to-year changes in Freedom House’s political rights index.

Source: Freedom House.

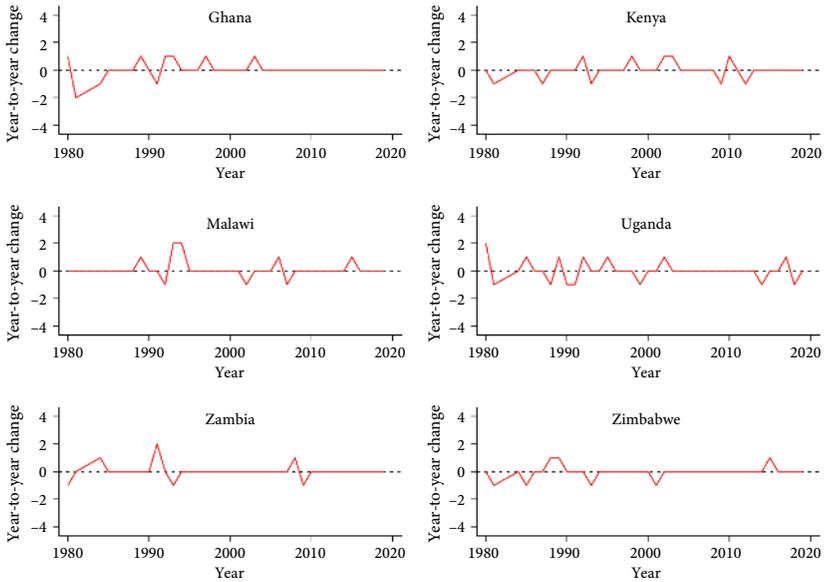


Figure 1.4C Democratic trends in country cases (Freedom House civil liberties)

Note: The figure plots year-to-year changes in Freedom House’s civil liberties index.

Source: Freedom House.

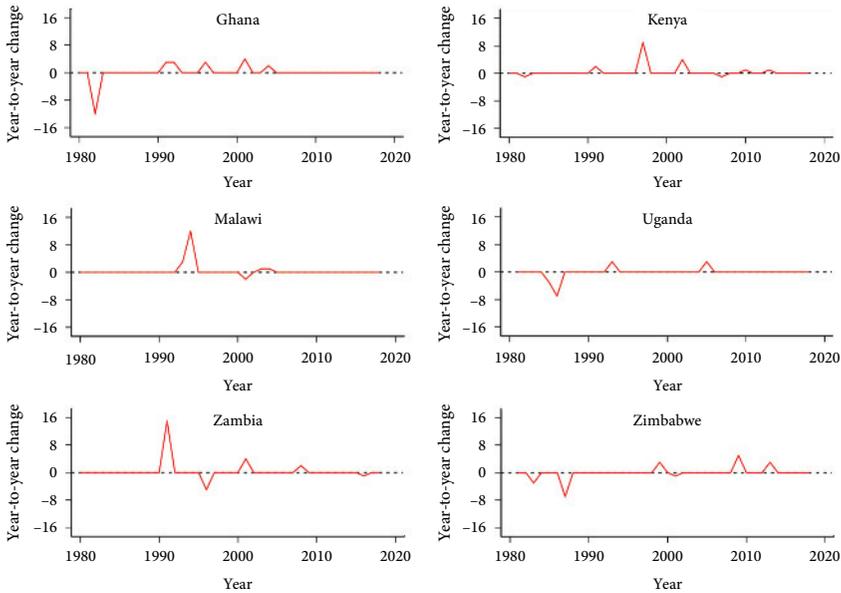


Figure 1.4D Democratic trends in country cases (Polity IV)

Note: The figure plots year-to-year changes in the Polity IV combined regime index.

Source: Polity IV.

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2

Political Participation and Regime Responses

Kendra Dupuy, Leonardo R. Arriola, and Lise Rakner

Introduction

After months of protest, Malawians went to the poll in June 2020 for a do-over election. Gross electoral malpractices in elections held a year earlier, in May 2019, had led opposition parties and civil society groups to reject the results as illegitimate. Mass protests demanding new elections were then held for months across the country's major cities. The protesters won their first legal victory in December 2019, when the Malawi High Court annulled the elections (see Chapter 7 for more details). The new elections subsequently held in June 2020 resulted in a victory for the opposition coalition over the incumbent candidate, one of the few alternations in a continent where presidents usually win re-election.

The events in Malawi underscore how political mobilization via elections can successfully challenge executive power. Elections pose a political threat to incumbents because they provide citizens with the opportunity to organize and coordinate openly in support of their preferred candidates and parties, thus potentially resulting in the replacement of incumbents who fail to perform in office. This is exactly what transpired in Malawi in 2019–2020.

But since the reintroduction of multiparty elections, the reality is that incumbents in most African countries have learned to successfully manipulate electoral processes to preserve the political status quo and avoid a Malawi-like outcome (Morse, 2018; Gandhi and Lust-Okar, 2009). Nearly three decades of multiparty elections have resulted in only limited democratic consolidation, leading Bleck and Van de Walle (2018: 6) to conclude, “The striking characteristic of the region that needs to be explained is how little negative or positive regime change has actually taken place since the conclusion of the democratic transitions of the mid 1990s.” Indeed, as noted in Chapter 1, African countries

have plateaued at whatever level of democracy they initially achieved after the transitions of the 1990s.

African incumbents have been able to protect their hold on power by using a range of political tools to undermine elections as moments of collective decision-making. According to Schedler (2010: 78), the leaders of electoral autocracies have simply shifted the energy previously used to repress the emergence of democratic institutions to manipulating them.¹ In learning to live with the threat posed by citizen mobilization, incumbents have turned elections into occasions to target and control various constituencies, namely, by channeling resources to them (Gandhi and Lust-Okar, 2009) and collecting information about them (Brownlee, 2007; Schedler, 2013). Where such efforts fail, incumbents resort to violence to contain the threat of mass mobilization. Violence can serve as a form of electoral manipulation because its mere threat may be sufficient to affect the behavior of voters (Burton et al., 2014; Höglund, 2009; Schedler, 2002). Such violence is a useful de-mobilization strategy for regimes that seek to deter the supporters of opposition parties (Laakso, 2007; Collier and Vicente, 2012; Wahman and Goldring, 2020).²

Manipulating elections, however, may be insufficient to neutralize the threat posed by citizen mobilization. The mass protests that preceded Malawi's do-over election represent the type of mass action that many incumbent leaders increasingly fear. Across a range of countries in the region, leaders have been challenged by citizens demanding respect for basic democratic principles as well as their right to participate in political processes. In Senegal, youth rallying around the *Y'en a marre* ("Enough is enough") social movement effectively used street protests in 2011 to challenge President Abdoulaye Wade's efforts to pass legislation that would have allowed him to reinterpret the constitution and compete for a third term in office. In Burkina Faso, protesters mobilized under the *Balai Citoyen* ("Citizens' broom") movement to force President Blaise Compaoré to resign from office in 2014, that is, after he sought a constitutional amendment to extend his time in office after already being in power for twenty-seven years. Similarly, in Sudan, the street protests that citizens sustained for months in 2018–2019 eventually led to the ouster of President Omar al-Bashir after nearly three decades in power.

¹ Incumbents continue holding multiparty elections because they understand that the international community treats them as a benchmark by which their regimes are considered eligible for continued financial support (Cheeseman, 2010; Resnick and van de Walle, 2013).

² African countries vary considerably in the incidence of electoral violence. Whereas such violence appears to be a regular feature of elections in countries such as Côte d'Ivoire, Kenya, and Zimbabwe (Straus and Taylor, 2013), countries like Zambia have mostly experienced isolated incidents of violence (Goldring and Wahman, 2018).

The protest movements seen from Senegal to Sudan illustrate the potential for Africa's civil society to challenge incumbents who manipulate the rules of political contestation. Outside the military, the ability of citizens to coordinate through the ballot box—or on the street—poses the most powerful threat to a leader's tenure in office. Precisely for this reason, the efforts of incumbent leaders to limit the ability of citizens to participate in the political process is both systematic and purposeful.

In this chapter, we interrogate a key paradox of political participation in Africa's multiparty era. On the one hand, economic and demographic trends have facilitated the surge in political participation described above. As described in Chapter 1, increased urbanization, education, and digital communication have made it easier for citizens to mobilize politically. Youth, in particular, have become increasingly important actors in making democratic claims on political space. Yet, on the other hand, despite the surge in political participation seen in many African countries, their democratic progress appears to have stalled. The indicators used to track democracy worldwide show that the average African country's level of democracy plateaued a decade ago and has not changed much since then. Why has increased popular mobilization among African citizens not led to greater democratization in their countries?

We explain this paradox by showing how incumbent leaders, in responding to increased political mobilization, have sought to protect their regimes by strategically clamping down on key arenas of citizen participation in politics. Across the continent, incumbents have found ways to suppress participation through legal and extra-legal circumventing of democratic norms, ultimately seeking to prevent citizens from influencing the political processes that determine access to and the exercise of power. From competitive democratic systems like Senegal to one party dominant regimes such as Tanzania, incumbent leaders have taken discrete actions to undermine the ability of their opponents to openly and freely engage in criticism and activism. In the process, incumbents have managed to reinforce, if not extend, their hold on power.³

Many African incumbents have responded to increased political activism with a range of legal measures aimed at containing the challenges posed by

³ Much of the mobilization seen in recent years has been stimulated, in part, by incumbent presidents seeking to extend their time in office. For example, in 2005, President Idriss Deby followed legal procedures to remove the two-term limit in Chad's constitution, allowing him to remain in office until his recent death. President Yoweri Museveni did the same in Uganda in 2005, as did President Paul Biya in Cameroon in 2008. Since then, Rwanda, Togo, Guinea, Burundi, and the Republic of Congo have all followed suit in removing term limits.

societal forces to their continued hold on power. In particular, we find that incumbents and their regimes seek to constrain activities in two distinct arenas through which citizen participation has been increasingly mobilized in recent years: the realm of rights-promoting digital civil society and the realm of information technology and social media. These arenas constitute key building blocks of democratic participation. While civil society enables citizens to coordinate in limiting the discretionary authority of government, social media has helped to make the behavior of those leaders transparent to citizens. Documenting how African regimes have sought to restrict participation in these arenas, we focus in this chapter on the restrictions imposed on civil society organizations and the limits placed on the right to information and use of social media platforms.

Africa's participation surge

Citizens in democracies engage in a broad range of participatory political acts that bring them into contact with government through both formal and informal processes (Barnes and Kaase, 1979; Marsh, 1977; Verba and Nie, 1987). Across African countries, movements made up of citizens, workers, the poor, and other marginalized groups have been important actors in shaping the continent's political history since independence (Resnick and Casale, 2011; Branch and Mampilly, 2015; Mueller, 2018; Dwyer and Zeilig, 2012). Labor unions, churches, and other civil society groups were certainly critical protagonists in the democratic transitions that swept across the continent in the early 1990s (Le Bas, 2011; Bratton and van de Walle, 1997).⁴

Political participation has evolved and expanded in the three decades since African countries began regularly holding multiparty elections. Despite the challenges associated with institutionalizing democratic rights and norms in many countries, African citizens continue to engage with elections as meaningful political processes that require their active participation. Voters in African countries reflect many of the institutional and individual dynamics found in other parts of the world. African voters are more likely to turn out to vote in elections involving presidential races—reflecting the importance of the executive in African politics—and legislative elections conducted using proportional representation (Kuenzi and Lambright, 2007). At the individual level, voters

⁴ A broad range of civil society groups have been important actors in facilitating democratic mass mobilization in African countries, ranging from the professionalized organizations that have emerged with the support of international donors (Eckert, 2017) to other local groups, such as Muslim organizations, often excluded from the analysis of democratic civil society (Villalón, 2010).

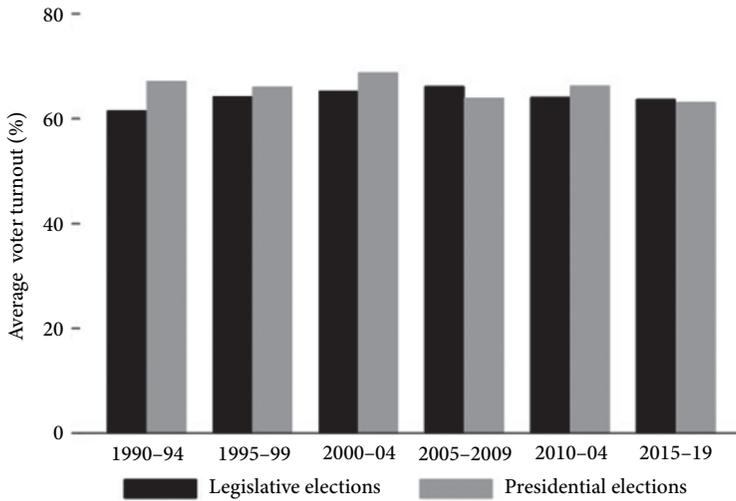


Figure 2.1 Africa's engaged voters

Source: Institute for Democracy and Electoral Assistance (IDEA) Voter Turnout Database.

are more likely to participate in African elections if they feel close to a political party and are members of voluntary associations. But, in contrast to many other regions, voters who are relatively poorer are also more likely to be mobilized to turn out on election day (Kuenzi and Lambright, 2010).

The persistent engagement of African voters with elections is illustrated in Figure 2.1. While continued progress toward greater political liberalization slowed across the continent in the mid-2000s, Figure 2.1 shows no corresponding decline in average voter turnout in presidential and legislative elections, according to data compiled by the Institute for Democracy and Electoral Assistance (IDEA).⁵ Since 1990, average turnout across 199 African presidential elections has been 65.7%, which is not much lower than the average turnout for presidential elections worldwide (67.8%) in the same time period. Average turnout in 221 African legislative elections since 1990 has been somewhat lower at 64.2%; the worldwide average was 68.3%. However, the gap between turnout in African elections and those in other parts of the world has narrowed. Since 2010, voter turnout in African presidential elections has averaged 64.7% versus 65.4% worldwide. Average turnout in African legislative elections has also remained relatively steady since 2010 at 63.9% versus 66.4% worldwide.

⁵ Voter turnout data are based on the number of registered voters.

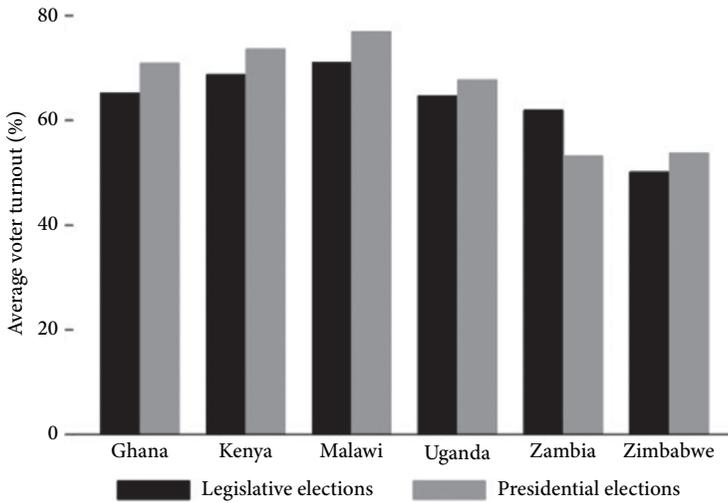


Figure 2.2 Voter turnout in country cases

Source: Institute for Democracy and Electoral Assistance (IDEA) Voter Turnout Database.

A closer look at the country cases examined in this book indicate that voter engagement with elections can vary in important ways, as reflected in Figure 2.2. The countries in our sample that have experienced electoral alternation tend to have higher average turnout (i.e. Ghana, Kenya, Malawi). The one exception is Zambia. Despite having elections leading to alternation, Zambia has also had more presidential elections than the other countries in this sample due to the deaths of incumbents, leading to off-cycle presidential elections. The countries where democracy has made the least progress, Uganda and Zimbabwe, have appreciably lower rates of average turnout. For example, while Zimbabwe has had an average voter turnout of 53.8% across five presidential elections between 1990 and 2019, in Ghana, the country with the highest democracy scores in our sample, has averaged 71% across seven presidential elections in the same time period.

But political participation includes more than the individual act of voting. Instances of mass action, often led by youth leaders, have emerged in nearly every African country to demand improved policies for addressing social inequalities and to protest against government abuses of basic freedoms (Urdal, 2006; Nordas and Davenport, 2013). When the V-Dem state of Democracy report characterized 2019 as the “year of global protests” (Maerz et al., 2020: 920), it was notable that African countries (e.g. Angola, Burkina Faso, Cameroon, Djibouti, Gabon, Malawi, Mozambique, Nigeria, Senegal, Sudan,

Swaziland) formed a large proportion of cases in which citizens took to the streets to protest the status quo.

Many of these citizen activists have learned from prior episodes, taken inspiration from each other, and forged solidarity networks to support ongoing political mobilization (Eckert, 2017). As a result, some of these movements have effectively managed to force governments to reverse unpopular decisions and even remove dictators, despite the threat of state repression (Engels and Muller, 2019). For example, members of *Le Balai Citoyen* in Burkina Faso, which led to the removal of that country's long-serving president, discussed ideas for effective organizing and mobilizing with members of *Y'en a marre* in Senegal (Wienkoop, 2020: 3).

Figure 2.3 shows the significant increase in protests in Africa, particularly after 2010. Using media reports from a variety of sources, the Armed Conflict Location & Event Data Project (ACLED) recorded 5,123 protest events across the continent between 2000 and 2010. The number of protests grew six-fold after that year. Between 2011 and 2020, ACLED recorded 34,513 protest events. But it is not simply the number of protests that shifted over time. Surprisingly, at a time when progress toward democracy has plateaued in most countries, the proportion of protests that turned violent actually declined. Whereas 39% of the protests in 2000–2010 turned into violent demonstrations, this rate declined to 31% in 2011–2020. It remains unknown whether this shift

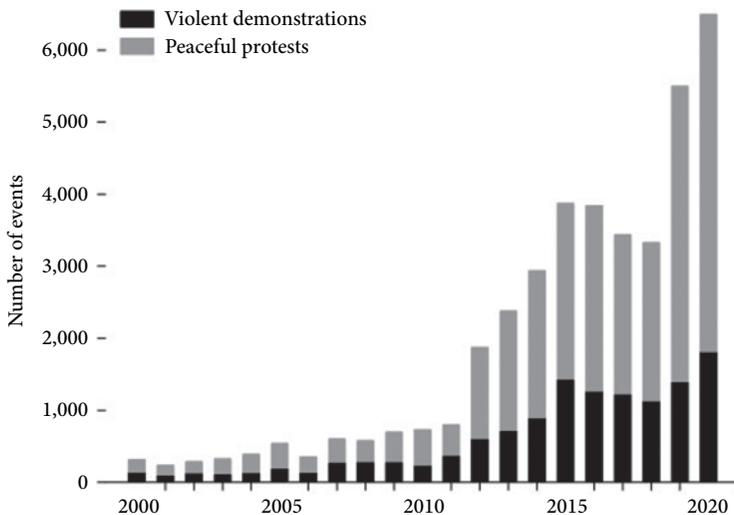


Figure 2.3 Africa's growing protests

Source: Armed Conflict Location & Event Data Project (ACLED).

toward relatively less violence is due to the actions of protesters, governments, or some combination of the two.

As with voting, there are important differences in our sample of countries in terms of protest, as shown in Figure 2.4. The countries with greater political liberties once again appear to be distinct in that they have relatively fewer protest events, though the relationship is not necessarily linear. Among the more democratic countries, Ghana had 533 protest events and Malawi had 366 between 2000 and 2020, according to ACLED data. Among the more authoritarian countries, Uganda had 949 protest events and Zimbabwe had 779. But the outlier here is Kenya, which falls in the middle range in terms of democratization among our set of countries; it had 2,419 protest events recorded in the same time period. But it is not only the number of protests that matters here. Notably, their violence appears to be less correlated with a country's democratization. Whereas Zimbabwe has had more protest events than Ghana, the proportion that turned violent is almost the same between the two: 29% in the former and 28% in the latter. And while 55% of protests in Uganda turned violent, more than in any of the other countries, the rate among other less authoritarian countries was also high: 47% in Zambia, 44% in Kenya, and 39% in Malawi.

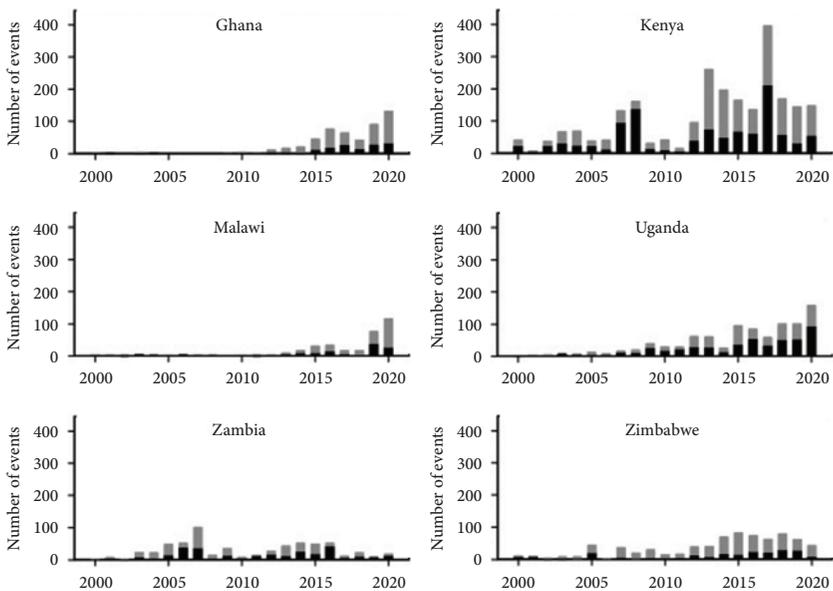


Figure 2.4 Protests in country cases

Note: Gray bars indicate peaceful demonstrations; black bars indicate violent demonstrations.

Source: Armed Conflict Location & Event Data Project (ACLED).

One of the hallmarks of protest mobilization in African countries has been the active involvement of youth. Young people have not only been at the forefront of many recent movements, but they have also taken advantage of new forms of organization and communication to mobilize citizens in challenging the policies and actions of governments. In analyzing the increase in social movements and protests across Africa, Honwana (2012, 2015) notes that youth, who have been historically excluded from national political processes, have tended to reject formal organizations such as political parties as vehicles for their engagement in politics (Honwana, 2015). While rejecting mainstream forms of political engagement, African youth have created alternative spaces for participatory citizenship and have become drivers of change in their countries (Honwana, 2012). Nevertheless, the informal nature of organizing among youth can make it more difficult for them to enter the formal political arena, sustain their organizational coherence, and offer a clear leadership alternative to the incumbent regime. As a result, rather than operating in isolation from more established civil society groups and political parties, youth movements can often be seen allying with these formal organizations to bring about political change (Wienkoop, 2020).

Clamping down on civil society

Civil society organizations (CSOs) have played a central role in mobilizing African citizens, whether as voters or as protesters. Although a range of local groups in African societies have historically organized people around common interests (e.g. self-help, religious, ethnic, self-defense, and other types of pro-social community groups), formal, professionally managed non-governmental organizations (NGOs) championing internationally sanctioned universal causes like human rights and democratic freedoms emerged in African countries largely in the post-independence period (Reimann, 2006; Fowler, 1991; Holmén, 2010; Hearn, 2007; Bratton, 1989; Ibrahim, 2015; Moyo, 2010).⁶ CSOs and NGOs have subsequently helped to bring about

⁶ NGOs are private, not-for-profit, non-state formal organizations that are not controlled or operated by governments, but which may receive funding and other resources from governments and businesses. NGOs are organized around a common purpose, such as poverty alleviation at a national, local, or international level, in order to provide services and/or address community problems through advocacy (see Tarrow, 2001; Vakil, 1997; Dibie, 2008).

democratic transitions by connecting citizens to the political leaders who ultimately have to decide whether to abide by multiparty elections.

In the post-colonial and especially the post-Cold War eras, Western powers promoted CSOs and NGOs as a force for positive change in Africa, a region conventionally depicted by outsiders as being afflicted by extreme poverty, bad government, and humanitarian crises. From such a perspective, CSOs and NGOs represented an institutional alternative to the failed state provision of public services and a catalyst for democratic consolidation. In the vision of civil society-driven democratization, CSOs and NGOs were expected to ignite mass participation, training African citizens how to demand their basic rights from government and to help them hold public officials accountable.

Foreign aid was vital to the spread of CSOs and NGOs in Africa in service provision and rights advocacy (see Chapter 4). Figure 2.5 specifically shows the growth of both international NGOs with branch offices in African

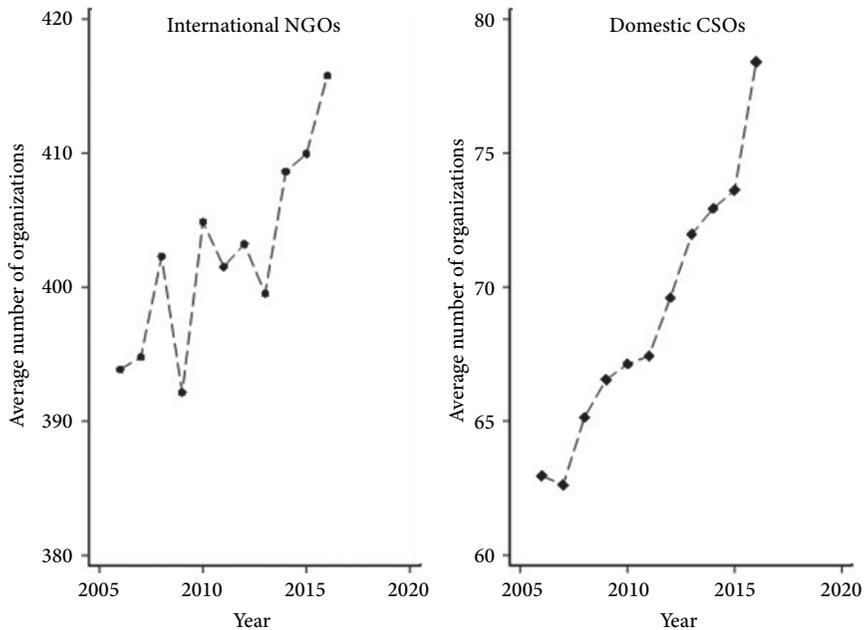


Figure 2.5 Africa's expanding civil society

Note: The left-hand panel shows the average number of international NGOs operating in African countries; the right-hand panel shows the average number of national civil society organizations in African countries.

Source: *Yearbook of International Organizations*.

countries and national CSOs operating in African countries. In a reversal of foreign aid trends during the Cold War, foreign aid donors in the 1990s began to lean toward strengthening civil society organizations vis-à-vis the state (Griffin, 1996).⁷ Many African governments tolerated and even welcomed foreign-funded NGOs, whether national CSOs receiving international support or international NGOs operating in a given African state (Brass, 2016). These organizations provide employment, fill service gaps, and bring much-needed international attention and resources to otherwise neglected places and causes. Without intervention and attention by foreign-funded NGOs, major regional crises such as the Ebola pandemic in Western Africa may well have gone largely unnoticed—and unassisted—by the international community. At the same time, many of these groups also advocate for advancement in democratic rights, mobilize citizens to participate in key political events such as elections, and hold governments accountable.

While African governments have, to some extent, always regulated civil society (Moyo, 2010), CSOs and NGOs were able to operate relatively freely in most countries, including in those governed by less liberal regimes. This was because African governments either needed CSO assistance to deliver services, lacked the capacity or will to implement CSO and related regulations, or tolerated the presence of CSOs as part of aid conditionality or out of fear of international naming and shaming (Brass, 2016). This picture began to change by the early-to-mid 2000s, when the global trend in closing civil society space started spreading across the African continent.

But African governments have been moving toward ever greater restrictions on CSOs, particularly those engaged in what might be perceived as “political” activities, because they could result in the mobilization of citizens through greater awareness of or training in democratic rights. Many of the new legal restrictions enacted over the past decade have been aimed squarely at constraining the right of citizens to form and participate in CSOs, thereby undermining their ability to collectively mobilize *en masse*. These legal restrictions affect how CSOs and NGOs can operate, what types of issue areas and activities they can engage in, and whether and how they can receive and use foreign-sourced resources, including funding. As of 2018, a total of

⁷ For instance, Fowler (1991) reports that in Kenya, the number of non-church foreign NGOs grew from 37 to 134 between 1978 and 1987, and the number of local NGOs grew from 57 to 133 during the same time period. The number of foreign and local NGOs active in Kenya is estimated to number over 350,000 (USAID, 2010). There have been similar growth trends in the NGO sectors of some other African countries, while the NGO sectors of other African states remain relatively small.

twenty-one African countries had adopted more restrictive regulations on CSOs,⁸ including four of the countries analyzed in detail in this book.⁹

New regulations are often specifically targeted against groups that have strong international linkages, namely, through restrictions on access to foreign-sourced funds and the ability of internationally linked groups to work on politically sensitive issues such as human rights and good governance (Musila, 2019). The imposition of such restrictions is meant to allow governments to limit, if not to sever altogether, the external sources of support or legitimacy that domestic civil society groups might seek to leverage in challenging the state. This regulatory clampdown is rooted in regimes perceiving internationally linked CSOs as being organizational auxiliaries of their political opponents. Such presumed links between the political opposition and civil society are not completely unfounded, given that CSOs do often advocate causes that challenge the behavior of regimes. Moreover, the fact is that a revolving door exists between civil society, opposition parties, and government as socially powerful individuals move fluidly between these various realms. In this respect, CSOs, by their nature, are perceived as a threat that regimes need to contain.

CSOs engaged in rights-related activities are ultimately targeted because they are involved in carrying out fundamental tasks critical to the quality and functioning of democracy, such as election monitoring and voter education. CSOs are vocal advocates for governance reform and, crucially, for increased recognition and fulfillment of basic human rights and democratic freedoms such as expression, association, and information. In this respect, governments clearly intend to use the legal restrictions on CSOs to impede their ability to mobilize citizens politically before it happens, which is arguably less costly than restricting mass protests once they are underway.

A few examples are illustrative. Ethiopia held competitive national elections in 2005 in which opposition parties made significant electoral gains that threatened the ruling party. These opposition parties were strongly linked

⁸ The twenty-one countries are: Angola, Benin, Burundi, Cameroon, DR Congo, Equatorial Guinea, Eritrea, Ethiopia, Kenya, Liberia, Malawi, Mozambique, Rwanda, Senegal, Sierra Leone, Somalia, South Sudan, Sudan, Tanzania, Uganda, and Zimbabwe. Countries in North Africa have also adopted restrictive NGO regulations.

⁹ The United States Agency for International Development (USAID), the International Center for Non-Profit Law (ICNL), and CIVICUS have also examined state regulation of NGOs across a number of states in the developing world, including in Africa. See USAID's *NGO Sustainability Index* (published for several world regions, including Africa), the ICNL's various publications on the legal environment for civil society in different countries (<http://www.icnl.org>), and the country reports in CIVICUS's Monitor (<https://monitor.civicus.org>). See also Moyo (2010) and Bratton (1989).

to and funded by diaspora groups, while internationally funded groups carried out election monitoring, voter education, and human rights reporting (Dupuy et al., 2015). In 2009, the Ethiopian government enacted the Charities and Societies Proclamation prohibiting organizations receiving more than 10% of foreign-sourced funds from working on politically sensitive issues such as human rights, democratization, conflict resolution, and elections. The proclamation placed further constraints on how internationally sourced funds could be spent and how internationally linked organizations could partner with each other and increased government oversight over all NGOs. In 2019, the 2009 Charities and Societies Proclamation (CSP) and many of its draconian restrictions were replaced by a new Civil Society Organizations Agency Proclamation No. 1113/2019, put in place after a leadership transition within the ruling party. But critically, the revised proclamation did not remove the prohibition on foreign CSOs from lobbying and influencing political parties, carrying out voter education, and observing elections.

Governments in several other countries have similarly clamped down on civil society. Sierra Leone enhanced its NGO regulations in 2017, requiring NGOs to provide detailed information about their funding sources, surrender assets for completed projects to government, align their activities and programs with government development objectives, and be subject to heavy oversight and monitoring by government. In 2013, the Kenyan government attempted to adopt new CSO regulations that would have capped the amount of foreign funding that nationally operating CSOs could receive. The proposed regulations came in the direct aftermath of the launch of charges by the International Criminal Court against President Uhuru Kenyatta and Vice President William Ruto for their role in the violence that erupted after the 2007 elections. Kenyan CSOs banded together to successfully pressure the government to table the proposed legislation. South Sudan, Africa's newest state, heavily restricts employment of international staff in NGOs and calls for strict registration and reporting requirements in its CSO legislation from 2016. And Tanzania's 2018 NGO Act requires NGOs to publicly disclose detailed financial information, submit donor funding agreements to government for approval, limit administrative expense, and not to undermine the sovereignty of the state. The end result of all such regulatory restrictions is to force CSOs to shut or size down, switch away from working on issue areas perceived as political, and silence their opposition to and criticism of governments. In some cases, such as Ethiopia after the 2009 CSP was adopted, the presence of independent, rights-focused CSOs decreased dramatically.

Stifling digital communication

African regimes aim to strictly control political communication because the right to free expression can be used to openly challenge official views presented by government, potentially exposing malfeasance, undermining claims of good governance, or simply revealing their unpopularity. Journalists, opinion leaders, and even average citizens have long been censored legally or through the threat of violence in many African countries. However, over the past decade, it has been the rise of digital political mobilization that has profoundly accelerated and intensified how governments and citizens communicate about the prevailing political order. While the scholarship on whether or how African governments can stifle information flows is still developing (Nyabola, 2018; Dwyer and Molony, 2019), what is already clear is that digital communication via mobile phones and social media have effectively democratized political participation across the continent, constituting a new form of political mobilization that regimes need to contain.

Digital communication serves as a powerful tool for pro-democracy forces, whether opposition parties or civil society organizations, seeking to spread their agenda or organize anti-regime demonstrations. Where the opportunity to publicly gather to criticize government remains limited and perhaps dangerous, access to mobile phones and the internet provides a critical space for political organization and activism. For the average citizen, digital media lowers the costs of acquiring information, whether about a regime's behavior or the actions taken by those in opposition. Access to social media, in particular, can allow citizens to learn whether others share their grievances and what might be done about them. As a result, digital communication has the potential to undermine entrenched regimes by offering citizens communication channels that are "fundamentally resistant to state regulation, reducing a state's capacity for repression by hindering its ability to control the flow of information and political communication" (Garrett, 2006: 220).

The political potential of digital communication is magnified by its broad reach in African countries. As Figure 2.6 illustrates, citizens in African countries are increasingly connected via their mobile phones and the internet. Access to mobile phones, in particular, has exploded over the past two decades. There was an average of only 2.6 subscriptions per 100 people in 2000; that figure jumped to 51.5 by 2010 and then to 99 per 100 people by 2020. In most African countries today, there are nearly as many mobile phone subscriptions as there are people; the median African country has 97 subscriptions per 100 people. Similarly, the growth of the internet has made it possible for

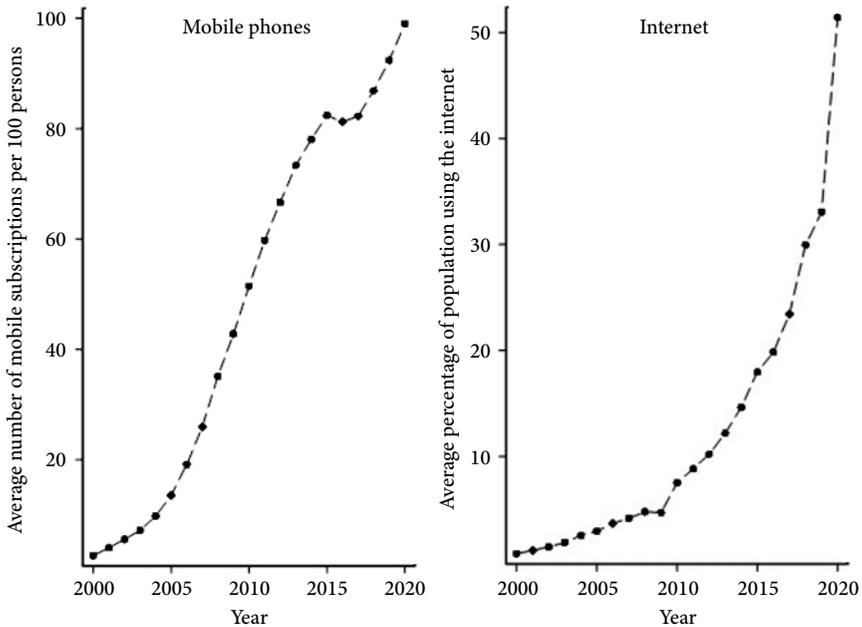


Figure 2.6 The growth of digital communication in Africa

Note: The left-hand panel shows the average number of mobile phone subscriptions per 100 people in African countries; the right-hand panel shows the average percentage of the population using the internet in African countries.

Source: World Bank World Development Indicators.

more African citizens to access information. In 2010, only an average of 7.5% of African citizens were using the internet; by 2020, the average had risen to 51.4% of the population. Today, nearly two-thirds of people are using the internet in the median African country.

African regimes are, of course, pushing back on online discourse by using internet shutdowns, content blocking, and reduced internet speeds in order to limit political coordination among their critics and opponents. As part of this trend, governments are progressively introducing more restrictive media laws. One of the most extreme forms of securing control over digital communication involves internet shutdowns (Howard et al., 2011). Although the internet is often considered a communication channel that is resistant to state censorship due to its decentralization, the internet ultimately relies on physical infrastructure that the state can control. Freyburg and Garbeu (2019) note that ownership of internet infrastructure, namely, internet service providers (ISPs), is critical to understanding how the state can compel ISPs to comply with their requests. Internet shutdowns, as Freyburg and Garbeu (2019) document, are

relatively easier to achieve when the state owns a controlling share of ISPs. Their study underlines the importance of how digital ownership structures can limit the impact of digital mobilization in challenging authoritarian rule.

Shutdown orders consistently come from central authorities in the highest echelons of power. By 2019, nearly half of African countries (twenty-six of fifty-four countries) had deliberately disrupted digital communication services or the internet to prevent citizens from accessing information (Rød and Weidmann, 2015). Governments that disrupt access to communication services are overwhelmingly authoritarian or hybrid regimes (Rød and Weidmann, 2015). *Collaboration on International ICT Policy in East and Southern Africa (2019)* found that all of the African countries where such disruptions occurred between 2014 and early 2019 were classified under those two regime categories (authoritarian or hybrid) with no shutdowns in regimes classified as flawed or full democracies.

Temporary internet blackouts have direct and severe consequences for opposition groups' capabilities to effectively use digital communication and information channels. For instance, they prevent ordinary internet users from accessing websites, including online news portals or social media platforms. Protesters are then unable to use coordination tools, such as online mapping services, to navigate through urban spaces to avoid zones occupied by security forces or to reach pre-planned protest sites (Rapoport and Weinberg, 2007; Rød and Weidmann, 2015).

African regimes have been learning from one another how to use the tools of digital repression to contain the threat of political mobilization. While the shutdown strategy has been increasingly employed across the region, as its use has spread to a growing number of countries (Access Now, 2021; Collaborations on International ICT Policy in East and Southern Africa, 2019), regimes are also adapting new tactics to effectively shut down political communication in other ways. Bergère (2020), for example, documents how governments in Benin and Guinea have used taxes on social media to prevent everyday citizens from engaging in or disseminating political speech. Using the case of Tanzania, Parks and Thompson (2020) note that a variety of state regulations can be used to make it too costly or difficult for citizens to communicate online. Since 2015, the government of Tanzania has adopted a series of laws, including the Statistics Act of 2015, the Cybercrime Act of 2015, and the Media Services Act of 2016, to regulate online content. The net effect of these regulations has been to progressively limit the scope of online communication among Tanzanians (Parks and Thompson, 2020). Such regulations have enabled the government to acquire greater power over political speech in general as well as

the ability to target individual producers of websites and blogs with censorship and repression.

Internet shutdowns and slowdowns may give governments an upper hand as they seek to control political communication, but citizens should also be expected to adapt. Drawing on examples from African countries that have executed shutdowns between 2017 and mid-2019, Rydzak et al. (2020) show that deliberate network shutdowns do not simply stop protest mobilization. Instead, the authors find that such disruptions are often followed by escalations in the momentum of pre-existing protest or a continuation of previous dynamics. Further technological developments, coupled with economic development, will continue to reshape the parameters of political mobilization across the African continent.

Conclusion

This chapter has described the high rates of political participation that persist across the continent despite stagnating democratization processes since the transitions of the early 1990s. Young people have become increasingly important actors in making democratic claims on political space. Why, then, has increased popular mobilization among African citizens not led to greater democratization in their countries? We have explained this paradox by showing how African incumbents have responded to increased political activism from below with a range of legal measures aimed at containing the challenges posed by societal forces to their hold on power. In particular, we have argued that incumbents have sought to constrain arenas where mass participation is most often mobilized: the realm of rights-promoting civil society organizations and the realm of information technology. These arenas constitute key building blocks of democratic participation. While having learned to accommodate themselves to electoral contestation, incumbents are attempting to shore up their regimes by clamping down on civil society and stifling digital communication with the aim of suppressing citizen mobilization.

The interactions between incumbents and civil society suggest a “reiterative process” wherein incumbent regimes seek to close space for contestation and, in turn, new spaces are created by citizens, which incumbents then again seek to control. Now, turning to how this reiterative process plays out, in the next chapters we present two central strategies employed by African governments to undermine these growing pressures for political participation and political competition: the weaponization of the law for political ends and the manipulation of international relations to shield incumbents.

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3

Legal Strategies

Constitutional, Administrative, Judicial, and Discursive Lawfare

Siri Gloppen, Thalia Gerzso, and Nicolas van de Walle

Introduction

Coups and violent non-constitutional transitions of power have decreased significantly in sub-Saharan Africa since the wave of democratization in the 1990s (Posner and Young, 2018). Alongside the introduction of multi-party elections, regimes were liberalized and democratic constitutions enacted (Bleck and van de Walle, 2018; Meng, 2020). This trend, however, does not mean that African leaders abide by the letter or spirit of the constitution and laws they find when they come to power. Instead of relying on force or violence, African incumbents have increasingly manipulated legal mechanisms to maintain or enhance their power (Cassani, 2020). This includes using their parliamentary majority to amend the constitution and bypass presidential term limits in order to remain in office, passing laws to limit political freedoms or constrain opposition parties, and, more generally, seeking to use the legal system and legal loopholes to buttress their own positions and weaken democratic institutions (Akech, 2011).

This chapter explores the legal strategies and forms of rule manipulation that have been favored by incumbent presidents in the African countries that are the focus of this book and their effects on autocratization and regime change. Many African incumbents have relied on legal strategies to legitimize their rule since independence, arguably rendering such autocratic lawfare strategies more entrenched than in other parts of the world and with a wide repertoire on display. The literature remains vague about the specificity of these legal strategies. We address this gap by providing a typology of the different legal strategies that autocrats exploit to stay in power as well as the legal strategies used by the opposition and civil society to resist autocratization.

The chapter starts by providing a brief discussion of existing claims regarding backsliding and autocratic legalism and notes how and where our approach is different before providing a theoretical description of the different types of autocratic lawfare. We distinguish between strategies aimed at changing the law in formal terms (*constitutional* and *legislative* lawfare), strategies that rely on the discretionary space of the law (*administrative* lawfare), strategies using courts and quasi-judicial bodies to either alter the meaning of the law or unleash the force of criminal law against opponents (*judicial* lawfare), and strategies mobilizing support and public legitimacy invoking rights or law (*socio-discursive* strategies). Illustrative examples from the country cases in this volume are provided for each of these core strategies. It should be noted that the strategies are often combined and that socio-discursive tactics, in particular, are often used to bolster other types of lawfare strategies.

We go on to explore how regime variation within the region affects the use of these legal manipulation strategies, which we see in some but far from all African regimes. Though we treat the region as largely comprised of electoral autocracies, highly imperfect electoral regimes which combine a degree of pluralism and regular elections with various autocratic features, we recognize that there is significant variation. In some regimes, such as Ghana (Chapter 5), Kenya (Chapter 6), and Malawi (Chapter 7), the balance tilts toward democracy; these are countries in which the judiciary and/or the legislature do impose significant accountability on the executive and where elections can lead to the defeat of the incumbent. Zambia has experienced a period of distinct democratic backsliding, despite its third turn-over elections in 2021 (see Chapter 8). At the other end of the spectrum are regimes where elections are further away from being free and fair, and weak judiciaries and legislatures are unable to counter the predations of the executive. Among the cases discussed in this volume, Zimbabwe (Chapter 10) and Uganda (Chapter 9) would fall closer to this end of the spectrum.

Finally, what is often absent from the literature on autocratic legalism is the importance of similar strategies for the pro-liberal democracy side. The law is not only a powerful tool for an incumbent seeking to remain in power, but also other political actors can also use it to challenge the ruling regime and improve the state of liberal democracy. The last part of the chapter discusses how the opposition and civil society—to varying degrees—have been able to use legal mechanisms to challenge incumbents and, in some cases, prevent democratic backsliding or even claw back lost terrain. While it is important to remember the asymmetrical nature of the law (as the country's main law enforcer, the incumbent can manipulate it with the greatest impact), in many

of these countries, law and courts have arguably been the “friendliest” space for the opposition throughout the post-independence period.

The debate on democratic backsliding and autocratic legalism

Attention to the role of law and constitutions in authoritarian regimes is not new and has often focused on the puzzle of why autocrats find such legal constraints to be in their interest (Gandhi and Przeworski, 2006; Boix and Svolik, 2013). In recent years, there has been a surge in literature analyzing what Sheppele (2018) has termed “autocratic legalism,” that is, the use of law and legal strategies for anti-democratic purposes. This describes an increasingly widespread global trend in which autocratization processes more rarely involve military takeover but rather proceed through a process that is *en face* legal and gradual (although sometimes rapid). Others have referred to this phenomenon as “authoritarian constitutionalism” (García and Frankenberg, 2019) or “weaponization of the law” (Popova, 2019).

A variant of this literature has focused on issues of democratic backsliding in the United States and Eastern Europe. Perhaps the most influential has been Levitsky and Ziblatt’s *How Democracies Die* (2018), which notes how this process tends to proceed through the erosion of informal norms—chipping away at the *guardrails* of the constitution, the norms supporting and ensuring its intended function—by playing what Mark Tushnet (2003) has described as *constitutional hardball*. Recently, scholars have extended the argument to other continents, where arguably the democratic legacy is weaker. Brinks et al. (2020) use a similar approach to analyze institutional weakening in Latin America. A special issue of *Democratization* edited by Croissant and Haynes (2021) highlights comparable processes of democratic regression in Asia, while as early as 2008, Silverstein, using the case of Singapore, showed that the rule of law is not necessarily the ally of liberal democracy. Although the Africanist literature has often dismissed the role of formal institutions (Jackson and Rosberg, 1982), the more recent scholarship on African politics has brought institutions back in (Cheeseman, 2018). Scholars have explored the relationship between authoritarianism and formal institutions, such as legislatures (Opalo, 2020), the judiciary (Gloppen and Kanyongolo, 2006; Shen-Bayh, 2018), or presidential term limits and presidential control over formal appointments (Posner and Young, 2007; Meng, 2020).

The literature on democratic backsliding and electoral autocracies may have brought institutions back in, but many questions still remain. First, it is

important to distinguish the erosion of democratic rights in well-established democracies through the undermining of the norms that undergird these rights from the use of lawfare by executives in hybrid regimes to alter the formal rules themselves in ways that advantage the incumbent. The former does take place in the more democratic regimes in the Africa region, in which incumbents are trying to undo the formal democratic progress made in recent years. Still, the latter is more common across Africa because one of the institutional legacies of several decades of non-democratic rule before the 1990s is a body of statutory laws, regulations, and norms that already mean that the rules of the game are tilted in the favor of the incumbents. Legal autocratization often undermines the pluralism and accountability mechanisms of what are already not fully democratic regimes.

Second, what type of legal mechanisms do autocratizing incumbents use? On this point, the literature remains abstract and, to the extent that concrete mechanisms are identified, the focus has been limited to a few constitutional provisions, in particular presidential term limits. We argue that incumbents have a broader set of legal tools to consolidate their power, undermine the opposition, and provide a comprehensive typology of legal strategies used to weaken democratic institutions.

Third, because this book focuses on former British colonies, we take this opportunity to explore the legal–political dynamics in common law Africa. While their legal systems are generally plural, with influences both from customary law and from the more strictly codified civil law tradition, the legal systems in these countries are all influenced by the British common law system in significant ways. This includes more emphasis on judicial precedent as a source of law, which means that judges’ interpretations of the facts and the law as expressed in judgments, in principle, have a strong and durable influence. In the civil law tradition, the judge in principle interprets the statute afresh for each new case without evaluating relevant precedents. Additionally, while judges in the civil law tradition typically join the judiciary as career judges straight out of legal training, making them more similar to bureaucrats, common law judges, particularly in the higher courts, are usually appointed by the political branches later in their careers, making their appointments more political. And while civil law systems typically depend on written procedures, often with judges investigating the cases (in the place of public prosecutors), the common law tradition relies more on oral presentation of evidence by the parties in court, which makes court cases more of a theatre and focus of public attention. Because political actors have weaponized these characteristics to their advantage, the specificities of legal traditions should be taken into

account in the study of legalized democratic backsliding. The literature has generally found that common law countries tend to outperform civil law countries in terms of human rights and various governance and economic freedom indicators (Mitchell et al., 2013), but we do not assume common law Africa to be more or less prone to democratic backsliding than civil law countries in the region. Rather, we argue that incumbents use lawfare strategies tailored to their specific legal systems.

Legal strategies: A typology of autocratic lawfare

Our typology of autocratic lawfare is based on a description of legalist strategies employed by autocratic-minded incumbents in common law Africa. It is important to keep in mind the many regime differences across the forty-nine countries of sub-Saharan Africa. The strength and commitment to democratic institutions vary significantly, both between countries and over time, and what is possible for an incumbent in one country or at one time may not be possible in another. Given that not all incumbents adopt each of these strategies, or even could if they wanted to, we link our examples of autocratic lawfare to specific countries. We distinguish between strategies aiming to formally change the law or the constitution, strategies administratively relying on the discretionary space within the law to change its meaning and force, strategies using courts to reinterpret or selectively enforce the law, and strategies relying on legalist rhetoric.

Constitutional and legislative lawfare

Winning elections by more or less democratic means and, once in office, using this power to change the rules of the game to prevent the opposition from gaining power through an election is a tried-and-tested strategy for autocrats in many parts of the world, including sub-Saharan Africa. The least subtle strategy in the repertoire of autocratic lawfare is to formally change the constitution. This requires a public and elaborate process that typically involves a range of actors, draws international attention, and entails significant risk for incumbents.

Almost all the democratic constitutions adopted or adapted in the 1990s and early 2000s restricted presidents to serving two terms (Mangala, 2020; Posner and Young, 2018), and the most common attempt at constitutional lawfare has

Table 3.1 Presidential term limits amendment (1990–2020)

Cases where bids to extend or remove presidential term limits succeeded	Cases where bids to change presidential term limits failed
Burkina Faso (1997, 2005)	Benin (2014)
Burundi (2015)	Burkina Faso (2014)
Cameroon (2011)	Malawi (2002, 2003, 2009)
Chad (2006)	Nigeria (2006)
The Democratic Republic of the Congo (2015)	Niger (2007)
Djibouti (2010)	Zambia (2001)
Gabon (2003)	
Guinea (2003)	
Namibia (1998)	
Niger (2009)	
Rwanda (2015)	
Senegal (1998, 2012)	
Sudan (2005)	
Togo (2003)	
Uganda (2005, 2020)	
Zambia (2018)	

been to change or remove presidential term limits. In many cases, incumbents have succeeded in extending or removing term limits. In other cases, such bids have failed after sparking widespread public resistance (see Table 3.1). Another overt constitutional lawfare strategy is the introduction of constitutional provisions tightening eligibility requirements for political office in order to exclude particular candidates from running. Another, more subtle, but consequential focus of constitutional lawfare has been directed at provisions regulating party defections that typically benefit ruling parties, allowing them to increase their parliamentary base between elections.

Besides overt attempts to change the constitutional text, incumbents commonly bolster their position and undermine institutional checks by stretching their constitutional competencies and mandate, not least their powers of appointment. Constitutions typically grant the executive branch extensive powers to appoint members of the judiciary, the administration and statutory bodies, formally independent bodies such as electoral commissions, judicial service commissions, and human rights commissions, as well as *ad hoc* investigative commissions. Powers of appointment may be actively used and abused to shift the balance of power in favor of the executive branch. An example of blatant abuse is from Kenya after the 2007 elections (see Chapter 6 for a more detailed discussion). The re-election of President Kibaki led to a series of violent protests. To guarantee that his victory would stand, Kibaki packed the court at the last minute with new appointees who ensured that the opposition

would not get a fair ruling. As a result, this time, despite allegations of electoral fraud, the opposition opted not to challenge the results before the Supreme Court. This abuse of the constitutional powers of appointment, which was later established by the Waki commission, seriously undermined the electoral process and the independence of the judiciary.

Manipulation of appointment powers may, however, be more subtle and harder to detect. For instance, appointments often require the involvement of formally independent bodies, in theory limiting executive involvement. In Zimbabwe, where the 2013 Constitution states that members of the new electoral commission shall be appointed by the President “after consultation with the Judicial Service Commission and the Committee on Standing Rules and Orders,” which, one might assume, provides a strong check to ensure the electoral commission’s independence. In reality, since both of these commissions are themselves appointed by the executive, they are unlikely to act as effective checks against abuse (see Chapter 10 for further discussion).

Autocratic lawfare strategies aim to enact or change statutes in a manner that bolsters the sitting regime. This is a diverse category that includes laws regulating the electoral process, political parties, non-governmental organizations (NGOs), the media, and other spaces of democratic debate such as universities. For instance, in Zimbabwe, the Official Secrets Act and the Public Order and Security Act, have regularly undermined freedom of expression. During the 2013 election, the Zimbabwe African National Union–Patriotic Front (ZANU–PF) weaponized these laws to target journalists covering the general election (see Chapter 10). Legislative lawfare strategies that require a formal legislative process provide an institutional space for criticism and resistance. However, particularly where the regime enjoys a clear legislative majority, new legislation may pass swiftly, without significant opposition.

Another strategy is to issue executive orders in place of legislation. Executive orders are meant to complement existing legislation, but governments often use them to legislate in lieu of parliaments, thus undermining the balance of power. Defined as a delegation of power from the legislature to the executive branch, this is particularly attractive for incumbents who lack stable legislative backing. In the case of Kenya, [Opalo \(2017\)](#) finds evidence that executive rule-making weakens the legislature’s independence and strength, outstripping the legal scope defined in the constitution. In electoral years, Kenyan presidents have weaponized executive orders (see Chapter 6). The COVID-19 pandemic has further opened the way for the use of emergency powers, including more extensive use of executive orders and budget reallocations to

serve executive interests. Uganda's President Museveni is among those criticized for taking advantage of the pandemic to strengthen his position ahead of the January 2021 elections, in which he emerged as the winner (Biryabarema, 2020; Titeca and Reuss, 2021 (see Chapter 9 for further discussion of Uganda). Similarly, Ghanaian President Nana Akufo-Addo was criticized for issuing a directive to adopt emergency measures instead of relying on the Constitution and the Emergency Power Act (Addadzi-Koom, 2020; Appiagyei-Atua, 2020, see Chapter 5). In all these examples, the executive bypassed the constitutional safeguards to adopt a new act under which the government does not have to consult the Council of State to declare a state of emergency. The act also deprived Parliament of its power to revoke the state of emergency and transferred it to the executive branch.

Administrative lawfare

A more subtle and arguably the most widespread autocratic lawfare strategy is to rely on the discretionary space inherent in the law to change the operation and nature of administrative structures, including formally independent or semi-independent bodies such as media boards and public prosecutors. In these processes, the bureaucracy can become a precious ally for an incumbent seeking to remain in power (Hassan, 2020). Administrative lawfare strategies take many forms: Government officials can issue directives changing the interpretation of legal provisions, and they can hollow out or refocus cumbersome agencies. Common to these administrative lawfare strategies is that they can radically change the law "from within" without changing the formal law on the books.

Governments can weaken a watchdog institution or regulatory agency, taking away its capacity to work effectively. This can be done by failing to appoint key personnel, minimizing funding (often legitimated by the need for austerity), and by disregarding the agencies' advice or directions. An example from Malawi is the role of the Human Rights Commission (HRC). After its creation in 1994, it took four years for the HRC to start operating due to lack of funding and no clear mandate and it remains hampered in its work by fears of reprisal and a persistent lack of resources (see Chapter 7 for further discussion of Malawi). In Uganda, Museveni has delayed the appointment of a new HRC chair, thus "handicapping" the monitoring body (*The Independent*, 2020). In Ghana, the HRC commissioner expressed concerns over the lack of financial independence of administrative bodies (Hatchard, 1999). Ghana's

system of parliamentary vetting and approval of the HRC budget is, however, widely regarded as preferable to executive allocation, which is not uncommon.

The refocusing of administrative bodies can be achieved through appointments by changing the mandate or, more subtly and most commonly, by issuing regulations and guidelines defining how relevant laws and regulations should be interpreted and implemented. For instance, [Hassan \(2020\)](#) shows how Kenya's President Moi controlled the bureaucracy to protect his authority. Instead of performing administrative duties, the executive branch urged the provincial administration officials to allocate their resources and time to harassing opposition members.

To delegitimize and weaken administrative bodies, judicial and socio-discursive strategies are often used, typically relying on corruption allegations or other legalized criticism or performative strategies such as instituting investigations and bringing charges. In those cases, incumbents rely on the attorney general prosecuting opposition members. In Uganda, Museveni and his administration strongly relied on such a tactic to circumvent the work of the main opposition leader, Kizza Besigye, and, more recently, Bobi Wine. After announcing his candidacy for the next Ugandan presidential election, Besigye was charged with rape. The judge, however, ordered Besigye's release after finding that the allegations and evidence provided by the prosecutor were "crude and amateurish, betraying the motives behind the case."

Bureaucratic and legislative lawfare interacts. Legislative strategies commonly broaden the scope of bureaucratic manipulations, thus enabling the executive to better control the administration. One common example, as discussed in [Chapter 2](#), is the imposition of administrative hurdles to control NGOs. To conduct their activities and avoid deregistration, these organizations must disclose their funding sources and intended activities, leaving them at the mercy of capricious and arbitrary decisions of state agencies. To illustrate, in Uganda in December 2020, the Media Council announced an obligation for all journalists to register within seven days. If they did not comply, the journalists would be prevented from covering the 2021 presidential election and risk charges (see [Chapter 9](#) for further discussions).

Executives generally rely on appointments not only to ensure bureaucrats' competence but also to gain their loyalty and compliance, and more so in sensitive and critical areas ([Hassan, 2020](#)). This strategy is not as such autocratic legalism but becomes so when instrumentalized to undermine constitutional and legal mandates by weakening or refocusing institutions. Since elections are a moment of vulnerability for incumbents ([Bleck and van de Walle, 2018](#)),

appointments for electoral commissions have become critical. One example (among many) is from Zambia, where the opposition has repeatedly deplored the Zambian electoral commission's lack of independence. The executive branch appoints all commissioners, and the electoral commission was repeatedly accused of working "hand in hand" with the Patriotic Front to create constituencies that benefit the ruling regime before the August 2021 elections. It is nonetheless important to emphasize the variation in the independence of electoral commissions across the region as well as across time.

Judicial lawfare

Some African incumbents also attempt to strengthen their grip on power by resorting to strategies using courts and quasi-judicial bodies. Common law systems lend themselves to such strategies because judicial decisions are to a larger extent binding on later court decisions and thus have a clearer and broader normative function. Furthermore, the self-perception of judges is also different. Because of these characteristics, judicial lawfare strategies used in common law Africa differ from the ones used in civil law states. While civil law judges commonly see—or at least portray—themselves merely as "the mouth that pronounces the words of the law," in the common law tradition, judges are more typically viewed as "oracles of the law," as Gladstone wrote in his *Commentaries of the Law* (1765). Common law judges thus have a greater capacity to shape the law (Osiel, 1995), with fewer—or at least different—constraints on the political use of courts than judges in civil law systems.

Furthermore, the court system is usually more monolithic in common law countries, with the ordinary courts ruling on all issues, including constitutional, administrative, and electoral matters. Civilist countries, on the other hand, often have separate administrative courts and electoral tribunals and a constitutional court with sole competence on constitutional questions. Here, constitutional courts are often more of a political entity,¹ which may make them easier for executives to lean on but provide decisions with less judicial legitimacy. The broader jurisdiction of the common law courts, including the competence to review the constitutionality of a law and provide their interpretation of the constitutions, must be taken into account when studying courts and democratic backsliding. This, combined with other features of the legal

¹ For instance, Côte d'Ivoire's *Conseil Constitutionnel* is composed of former presidents and "advisers" appointed by the National Assembly and the president for "their legal and administrative skills."

system discussed here, has important political implications, arguably making common law judges both more important allies for incumbents and, potentially, more problematic opponents when they do not support government initiatives.

Rulings on constitutionality can set important precedents and alter the meaning of the law through reinterpretation of constitutional provisions. There are multiple examples of both successful and unsuccessful attempts from incumbents to pursue constitutional change through judicial strategies: After establishing his new Democratic Progressive Party (DPP) while in office, Malawian President Bingu wa Mutharika asked the Supreme Court to reinterpret the constitutional prohibitions on floor-crossing by Members of Parliament to retain his parliamentary majority. The attempt was unsuccessful, but he subsequently played constitutional hardball with Parliament to effectively undermine the court ruling. In 2019, the Ugandan Supreme Court found the age limit amendment unconstitutional, thus allowing President Museveni to compete in the 2021 presidential election. In 2020, the Zambian Constitutional Court had to determine whether President Lungu could run in the 2021 presidential election. Although the Zambian Constitution establishes a presidential term limit of two terms, the court granted Lungu's petition as he had not served his first term fully, only replacing former President Sata after his death. For some Zambian lawyers, this decision set a dangerous precedent that could undermine term limits itself (see Chapter 8 for further discussion of Zambia). In these cases, the courts become arenas in constitutional warfare strategies. Similarly, courts are used by executives to "clarify" the meaning of other legal provisions, particularly when they lack parliamentary majorities to change the legal text or want to draw less attention.

Courts are also used to unleash the force of criminal law against opponents (including rivals within their own party) to get them out of the way—or, even if the chances of getting a conviction is slim, occupy and discredit them while election campaigns are going on. This includes serious charges of treason, murder, and rape that rarely result in convictions. In 2016, the police arrested Uganda's main opposition leader after a wave of protests against Yoweri Museveni. Once again, Besigye was not indicted for his political views but for the death of two protesters. This strategy is also used to silence civil society critics by keeping them in detention for extended periods of time and sending a warning to other opposition voices. By weaponizing courts against dissenting voices, the Ugandan regime has repeatedly sought to legitimize and legalize arbitrary decisions and show that the system will favor the government, thus

raising the prize for criticism. Similar recent examples of harassment of media and civil society critics can be found by the Mnangagwa regime in Zimbabwe (Burke, 2020).

While dissidents frequently find themselves slapped with serious criminal charges such as treason, murder, or rape, convictions in such cases are rare. Other type of cases, where convictions are more common, are corruption and tax-related cases, frequently levied against critics, including opposition-friendly newspapers. A typical example of the latter is the shutdown of *The Post* newspaper in Zambia ahead of the 2016 elections. These are often complex charges to assess. They may or may not be bona fide—in some cases, charges are clearly trumped up; in other cases there seems to be some reason for suspicion but the “triviality” of the transgression (in the sense that it is a common behavior that “everyone” is guilty of but that qualifies as corruption, tax evasion, etc. under the law) and the timing of the charge clearly indicate a political motive. The latter, what we can call “for-my-enemies-the-law” cases, are particularly interesting as it seems difficult for independent-minded judges to avoid running the executive’s errand, even when the political motive is clear.²

A related type of case falling within the grey zone between legitimate law enforcement and “rule of lawfare” relies on vague and broad public order and nuisance legislation and often jeopardizes the right to peacefully protest. To guarantee public order, most democratic regimes require the registration of protests and their itinerary. Autocrats have often weaponized these requirements to prevent the opposition from exercising its right. Because public order is subject to bureaucrats’ and judges’ interpretation, these authorizations are often difficult to obtain in time, thus pushing the opposition to gather illegally.

Judicial lawfare can be a useful strategy for incumbents when they cannot dictate court rulings. Reasonably independent courts, which should be expected to rule against the government in unfounded and politically motivated cases, can still serve important purposes for incumbents, keeping the opposition busy, on the defensive, having to deal with legal expenses, and, in some cases, disadvantageous public relations. But autocrats frequently also try to influence the courts themselves to enable preferred outcomes. This is done through various means, some clearly illegal, others not. A common—and not illegal—way for the executive to influence the judiciary is through appointments. Across the cases discussed in this volume, the common constitutional

² Globally, the most famous case in point is the conviction of former President Lula da Silva in Brazil for corruption, preventing him from contesting the 2018 elections. The conviction was later annulled.

arrangement is that the Judicial Service Commission (JSC) is tasked with vetting and nominating judicial candidates while Parliament confirms judicial appointments. However, legislative confirmation carries little weight if the president controls the legislature. And JSCs, often consisting predominantly of presidential appointees, are themselves vulnerable to executive influence, as are the criteria for judgeship. In some cases, JSC nominations are secret or not binding, allowing executives to ignore them at will. Presidents usually have an even more direct and decisive say in the appointment of the Chief Justice, who, in turn, can influence other judicial appointments and the running of the judiciary more generally in very significant ways. Even where parliament has a role in ratifying the Chief Justice, this rarely poses a significant barrier in practice.³ Appointments of acting judges, where there is no need for confirmation and where tenure depends on the will of the president, in some cases make up a substantial part of the judiciary.

According to the International Commission of Jurists, Uganda's Judicial Officers Association (2007) deplored the prominence of partisanship in the appointment process, claiming that 98% of judicial appointments were politically motivated. In Kenya, President Kenyatta declined to appoint forty-one judges recommended by the JSC, questioning the nominees' integrity, while members of the opposition accused the President of weaponizing these appointments and weakening the courts' capacity in his fight against the judiciary (Otieno, 2020).

Another common and, to varying degrees, legal strategy is to "starve" the judiciary of resources, including running costs, salary increases, new positions, and leaving vacant positions unfilled. This mirrors the "hollowing out" administrative lawfare strategies discussed above. For example, the Ugandan government subjected the judiciary to severe budget cuts in 2007, forcing the judiciary to scale down its activities. As a result, the number of criminal trials decreased by 60%, and 26,000 prisoners waited for their hearings. An inverse—and sometimes complementary—strategy is to *increase* budgets, salaries, and benefits at strategic times, when important cases are before the courts. Threats and bribes—or a combination of the two—enable the government to deal quietly with courts and magistrates (Ellett, 2014). Only rarely does this strategy make headlines, but in Zambia, Judge Simusamba denounced the repeated attempts of bribery by the political establishment. Simusamba revealed how

³ But it happens. In Malawi in 2007, President Mutharka did not get his candidate, Lovemore Munlo through with the required 2/3 majority, and only managed to do so in 2008 by transgressing quorum requirements.

Chishimba Kambwili, a PF deputy, and his lawyer tried to bribe him to obtain his acquittal (Chabusha, 2020).

It is also common that cumbersome judges are reposted to less influential positions—or are elevated to higher courts, where they will be sitting as a bench and will be in the minority, or to international positions. In some cases, there are more blatant attempts at impeaching judges or retiring them by introducing new rules that disqualify them based on age (Ndungu, 2020). Such tactics are, however, obvious and more likely to be challenged. For example, in the case of the impeachments in Malawi in 2001, members of the opposition and civil society—and even prisoners—mobilized to protect the judiciary's independence, engaging foreign donors and the International Court of Justice (ICJ) in the process (Gloppen and Kanyongolo, 2006).

Another insidious strategy is to claw back courts' jurisdiction and devolve their authority to more manipulable bodies—such as martial courts. In 2005, the Chairperson of the Military General Court Martial in Uganda ordered the arrest of six journalists and sentenced them (and their defense attorney) for publishing an article on the martial court (Naluwairo, 2012), indicating how the expansion of Ugandan military courts' jurisdiction has undermined the right to a fair trial. With strong ties to the executive branch, these courts can never act fully independently. The judges are also financially vulnerable and can be removed at will.

Socio-discursive lawfare

Socio-discursive lawfare seeks to weaponize the symbolism of the law. Incumbents can also instrumentalize the law to mobilize support and public legitimacy—or use rhetoric to undermine the legitimacy of the law, court rulings, or the courts themselves. Socio-discursive lawfare can be used as a stand-alone tactic, but incumbents often use it to bolster the other lawfare strategies discussed above. For instance, autocrats often rely on socio-discursive tactics to complement and/or legitimize legislative and constitutional strategies. When courts are unlikely to support the executive branch, governments can build narratives to either pressure the judiciary or delegitimize their rulings. Thus, this section outlines different ways in which incumbents have constructed narratives and symbols around other types of autocratic lawfare to reinforce their own power.

To legitimize legislative lawfare, one strategy is to portray legal reforms as improving the state of democracy in the country, even when their effect

is to strengthen the executive branch and the ruling elite's hold on power. A common example of the use of discursive lawfare strategies is around gender quotas. Many African states have modified electoral rules to promote gender equality, enhance democratic representation, and satisfy international donors. In countries such as Tanzania, multiple constitutional amendments throughout the 1990s and early 2000s increased the proportion of special seats reserved for women. The goal, according to government officials, was to improve women's political representation and to uphold international commitments (Yoon, 2008). Although such initiatives are laudable, these measures often bolster the ruling party. Because such reforms are usually well perceived by domestic and international audiences, opposition groups have difficulty denouncing their authoritarian effects (Yoon, 2008; Gerzso and van de Walle, 2022).

To facilitate constitutional lawfare, incumbents have similarly often claimed that the constitutional reforms will actually enhance the state of democracy and the rule of law. An example is how the PF government in Zambia in 2016 attempted to reform the constitution to "address the identified lacunae and inconsistencies in the Constitution" (see Chapter 8). To legitimize Bill 10, the government built a narrative around constitutional principles and the reform's legality. For example, the Ministry of Justice argued that this reform would improve the separation of power, clarify conflicts of jurisdiction within the judiciary, and extend the timeframe to challenge electoral results. After its defeat in parliament, the government used the same rhetoric to delegitimize the opposition's actions. Through the media, the PF accused its opponents of hurting women and minorities' representation in parliament. Lungu declared that the opposition committed a *crime* by killing Bill 10: "it's not about me; it's about the law" (Mwebantu, 2020).

Lungu's quote illustrates another recurring socio-discursive strategy used by incumbents: creating a narrative that criminalizes the opposition. This tactic has two main effects. First, it may trigger the judicial lawfare strategies described earlier in this chapter. Because these accusations are without merit and fail to provide compelling evidence, prosecutions often fail. This criminalization rhetoric has other insidious and pervasive effects, however, aiming to delegitimize and weaken opponents and shift public opinion. In the run-up to the 2017 Kenyan election, Kenyatta systematically accused his opponent, Raila Odinga, of fanning violence (NTV Nation, 2021). These allegations were not random: they sought to trigger memories of the 2007 election, where members of the opposition launched a wave of violence all across the

country. With these memories still vivid in Kenyan's mind, Kenyatta's narrative exploited this trauma to shape people's attitudes toward the opposition, depicting Odinga as a violent politician who would not hesitate to unleash violent forces all across the country. Odinga would, thus, become an enemy of democratic institutions and the rule of law. Socio-discursive strategies delegitimizing administrative bodies and officials through corruption allegations or other legalized criticism commonly play an important role in the weakening of cumbersome institutions, as do performative strategies such as instituting investigations and bringing charges.

Pro-democratic lawfare

The law does not only benefit autocrats, however. What is often absent from the literature on autocratic legalism is the importance of similar lawfare strategies on the pro-liberal democracy side. Both the opposition and civil society have been able to use aspects of these same legal mechanisms to challenge incumbents and, in some cases, prevent democratic backsliding or to claw back lost terrain. In most cases, these strategies are reactive, motivated to prevent autocratization strategies from succeeding, but, in some cases, they are also pro-active by seeking, for example, to expand or enhance the political domain (such as voter-education drives, human rights education, and court strategies to have LGBT organizations registered) or to bolster the independence of courts and watchdog institutions and administrative bodies (e.g. through sensitivity training and domestic and transnational network-building).

Pro-democracy constitutional lawfare

In the context of constitutional reform processes, we almost always find lawfare by pro-democracy actors—both pro-active and reactive. As discussed above, executives may initiate constitutional changes for autocratic reasons, but constitutional reform can also result from civil society or opposition pressure. And even when they are set in motion by the executive for autocratic purposes, they often create unique opportunities for pro-democratic actors. Since constitutional change typically requires enhanced majorities and special procedures, thus empowering multiple veto-players, it creates opportunities and incentives for alliance-building. The processes surrounding constitution-making and reform open possibilities for broader public debate on democratic

principles and values, and, compared to other processes of legal contestation, constitutional processes are more likely to capture the attention of potentially supportive international actors. Broad alliances between civil society and the political opposition, also engaging international actors, have played a significant role in numerous constitutional amendments. This includes what [Keck and Sikkink \(1998\)](#) term *boomerang* strategies, whereby domestic activists mobilize their international allies, who then, in turn, lobby their respective governments to put pressure on the errant rulers. Hence, in Zambia, domestic actors secured support for their protests from the South African and Botswanan governments who contributed to the pressure on Chiluba to abandon his bid to modify the constitution. This illustrates how domestic legal mechanisms and international mechanisms may work in tandem.

Pro-democracy legislative lawfare

As discussed above, legal reform is often used by autocrats to strengthen control on power and reduce space for civil society, including through adopting more restrictive NGO laws, media and libel laws, public order laws, targeted citizenship laws, etc. However, pro-democratic actors (often in alliance with international actors) also commonly form alliances to initiate legal reforms, including the right to information laws. For example, in 2016, the Malawian parliament passed the Access to Information Act to improve transparency and enable the media and organizations to obtain governmental information, thus improving the state of democracy ([Masina, 2020](#)).

In other cases, pro-democracy legislative lawfare is reactive, often combining legislative resistance with street protests and other socio-discursive strategies and or judicial strategies, taking the laws to court for constitutional review. In Zambia, the legislature, scholars, and civil society united to block Bill 10 and denounce its unconstitutionality ([Ndulo, 2020](#)). Although adopting new legislation generally take less time and faces fewer procedural hurdles than constitutional reform, it also has to follow formalized procedures that allow opposition voices inside (and sometimes outside) the legislature at least discursive input through drafting processes, in some cases, public hearings, legislative committees and (uni- or bicameral) plenary adoption and executive assent. The process takes time, which also creates opportunities for resistance and alliance-building, including with international actors.

Finally, in the region's more democratic countries, the legislature can be powerful or independent enough to act effectively in stopping presidential

attacks on democratic institutions by using procedural checks or issuing warnings. From obstruction to censure, all legislatures have a set of tools available to block executives' initiatives if they so choose. For instance, South Africa's parliament forced former President Jacob Zuma to step down by threatening to use a vote of no confidence. This feature of parliamentary regimes can even lead to the resignation of an entire government. However, incumbents typically enjoy a parliamentary majority, so effective action to counter the executive usually requires at least the support of some of the president's own backbenchers. This is more likely to take place in countries with relatively strongly institutionalized parties that have not been cowed by the president.

Pro-democracy administrative lawfare

As we have argued, the executive is particularly well positioned to use the discretionary space within the law to bolster his or her hold on power in ways that make society less democratic by shaping policies and bureaucratic processes. Nevertheless, bureaucrats do not necessarily follow the executive branch's orders blindly. In trying to understand under which conditions presidents can use the bureaucracy to reinforce social control, [Hassan \(2020\)](#) shows variations in Kenyan bureaucrats' compliance. For instance, some Kenyan bureaucrats refused to repress local dissidents and worked to undermine Moi's regime. Hassan's findings suggest that pro-democratic administrative lawfare is more likely to occur when bureaucrats belong to a different ethnic group or are patronage-free.

Other factors can enable bureaucrats to act independently from the executive branch. Pro-democracy actors in civil society, including among NGOs, academia, and professional associations such as law societies and academia also commonly seek to influence the ways in which actors in different parts of the civil service interpret their mandates and relevant legislation (including the police and different line ministries). This is typically accomplished through various forms of training and by working with allies in the bureaucracy (and sometimes international actors) on guidelines, etc. Administrative lawfare can also include discursive and judicial tactics. In Malawi, for instance, members of civil society mobilized to ensure the implementation of the Access to Information Act. In 2018, two years after its enactment, the law had still not been applied and the Media Institute of Southern Africa threatened to take legal action against the government for its failure to execute a law

passed in Parliament. Aware of the potential consequences of this lawsuit, the government finally agreed to enforce it.

If successful, pro-democracy administrative lawfare can improve vertical and horizontal accountability and enhance human rights enforcement. For example, human rights organizations have often criticized the Ugandan government and its administration for repeated human rights violations against LGBT persons (see Chapter 9). In 2016, the police arrested and beat participants of a Pride pageant, causing the hospitalization of several contestants. In the aftermath, civil society actors conducted training on minority rights for police officers, through which officers learned about minorities' rights and how to uphold them.

Pro-democracy judicial lawfare

Court-centered strategies are also commonly used by pro-democratic actors, in some cases with considerable success. The most spectacular cases were the presidential election petitions after the 2017 election in Kenya and the 2019 election in Malawi, which were upheld by the courts and resulted in fresh presidential elections. In Kenya, a new election was held in October 2017, but with opposition discontent with the process, massive voter boycott, and without unseating the incumbent. In Malawi, the pro-democratic victory was more decisive (see Chapter 7). But although the court's decisions that annulled the 2019 electoral results demonstrated the judiciary's independence, the final outcome could not have been achieved without civil society's actions. After the Constitutional Court ruled the 2019 election result to be invalid and ordered a new presidential election, political and civil society actors gathered their forces. The two opposition leaders, Lazarus Chakwera (Malawi Congress Party) and Saulos Chilima (United Transformation Movement) allied to defeat President Peter Mutharika in the new election, while members of civil society worked relentlessly to denounce, expose, and document electoral malpractice.

The Malawi case illustrates the interaction between different forms of pro-democracy lawfare: judicial, legislative, administrative, and discursive. Malawi's political institutions, the legislature, the military, and the judiciary, combined with civil society actors—and pressure from international allies—to improve the Malawian Electoral Commission's (MEC) practices and secure the integrity of the 2020 elections. Sustained mobilization by civil society, international backing, and the military's protection forced the

executive branch to backtrack and implement the MEC's reforms ahead of the June 2020 elections. This collaborative work between societal and constitutional actors enabled the MEC to engage in substantial reforms, which could result in sustained improvement of the country's electoral process.

Less spectacular election petitions for parliamentary and councilor seats are common across the continent when results are challenged by either the opposition or incumbent. In some cases, courts have been a precious ally for the opposition during electoral campaigns, for instance, through granting bail applications when members of the opposition are jailed during electoral campaigns. In the run up to the 2020 elections, Ugandan opposition leader and presidential candidate Bobi Wine was arrested for violating COVID-19 guidelines by holding a rally but regained his freedom after a judge ordered his release on bail. That this followed widespread condemnation by domestic and international actors of the arrest and of the growing repression against the opposition ahead of the 2021 presidential election again shows the interaction between various forms of lawfare and between legal mechanisms and other forms of mobilization.

Pro-democracy actors commonly bring cases asking for judicial review in response to what is seen as undemocratic legislation or executive actions. But pro-democracy litigation may also be more pro-active. In 2015, the High Court of Kenya overturned a decision from the NGO Coordination Board, which had refused to register LGBT organizations on the ground that the Kenyan Penal Code criminalizes gay and lesbian relationships. The court held that this violated the Kenyan constitution, which protects the right to freedom of association, and that morality could not be weaponized to violate fundamental rights ([Human Rights Watch, 2015](#)).⁴ The High Court of Botswana made a similar ruling the year before ([UNAIDS, 2016](#)).⁵ As discussed in the previous sections, the Ugandan courts have often helped Museveni to hold on to power, but the democratic opposition, including the LGBT community, has also scored significant victories, securing democratic space, particularly in cases that do not directly challenge the core interest of the executive branch ([Jjuuko, 2020](#)).

Pro-democracy actors, both domestic and international, engage in building and reinforcing a democratic professional culture among judges (through training, professional forums, etc.) as well as safeguarding the judiciary when it is under attack, as happens during elections. In Ghana, the judiciary underwent training on electoral adjudication ahead of the 2020

⁴ The appeal was decided by the Supreme Court of Kenya in 2019, upholding the High Court order.

⁵ The ruling was confirmed by Botswana's highest court in 2016.

presidential election (*Modern Ghana, 2020*). The judiciary also circulated a manual on electoral disputes, providing judges resources to turn to in case of conflict. In addition to improving judges' skills and the justice system's efficiency, this aimed to increase people's trust in the judiciary by demonstrating professionalism and independence. Similar training of judges on electoral cases was also conducted in Kenya and Tanzania (*Dodoma, 2020; Reuters, 2012*).

Pro-democracy socio-discursive lawfare

Pro-democratic actors commonly engage in socio-discursive lawfare either as ancillary strategies to accompany constitutional, legislative, or judicial processes or as stand-alone strategies. This involves a diverse toolbox, including, as illustrated earlier, different forms of advocacy and training. This ranges from advanced and targeted legal training, human rights education, and sensitivity training for professional actors (judges, bureaucrats, police, teachers, health workers, politicians) to curriculum development for students and civic education for the general public. As noted above, training of judges to handle electoral disputes aims to improve judges' skills—but it is also intended as a discursive pro-democracy strategy, attempting to shape the symbols, and rhetoric used by political actors and civil society members in a pro-democracy direction. After the 2007 electoral crisis in Kenya, many domestic and international observers argued that the opposition resorted to violence because of a lack of trust in the judiciary (*Reuters, 2012*). By training judges, Kenya has sought to reaffirm its commitment to democratic principles undertaken with the 2010 constitutional reform and to show its preparedness to deal with electoral disputes.

Discursive pro-democracy strategies include diverse forms of rights-based advocacy, often working with actors within the bureaucracy on law and policy development and implementation guidelines as well as with political actors. An example from Zambia is the petitioning of the Speaker of Parliament by pressure groups, including Authentic Advocates for Justice and Democracy and the Women Movement for Development, to defeat Bill 10 (the constitutional amendment) in the parliament. The goal was to encourage members of Parliament to participate in the debate to enhance democratic dialogue and avoid procedural blockages.

Monitoring and reporting on rights violations and legal transgressions is another socio-discursive lawfare tool, sometimes taking the form of the

naming and shaming of particular political actors and often combined with media campaigns with a distinctively pro-democracy narrative. Both this chapter and the country chapter on Uganda demonstrate how, while President Museveni uses a range of lawfare strategies to remain in power, his autocratic efforts have not prevented activists and opposition members from challenging his authority. In order to circumvent Museveni's control of mainstream media, political actors have relied heavily on social media. Posts and videos challenge the narratives built by Museveni and his government and expose his repeated attacks against democracy and human rights. For example, opposition members live-streamed the riots of November 2020. Since the government did not allow journalists to cover these violent confrontations, these videos were the only source of information available and successfully questioned the official accounting of these events (Ssenoga, 2021).

Pro-democracy lawfare is evidence of the resilience of liberal-democratic regimes. In countries with regular elections, however flawed, public opinion matters, and where there is a functioning court system, it is likely to also lend itself to use by the opposition. The chances of democratic lawfare to advance political and civil rights or to resist attempts by incumbents to undermine them is, however, uneven across the region, depending on the extent of formal presidential prerogatives and discretionary powers, as well as the willingness of the government to flout public opinion and the laws themselves. For every country like Ghana, South Africa, and Malawi, where pro-democracy lawfare is viable, there are countries like Cameroon, Equatorial Guinea, and Zimbabwe, in which democratic lawfare currently has to content itself with meager victories, if any.

Conclusion

While law and courts have arguably been the “friendliest” space for civil society and opposition voices throughout the post-independence period, it is important to remember the asymmetrical nature of the law. As Meng writes in her book *Constraining Dictatorship*, the Third Wave of democratization was actually a wave of institutionalization (Meng, 2020). Since the 1990s, leaders have designed institutions that advantage them, allowing incumbents to engage in a new form of rule-bending that weakens democratic institutions. From legislative to administrative lawfare, the instrumentalization of the law enables incumbents to undermine horizontal and vertical accountability. For the opposition and civil society, the manipulations are often

difficult to detect and challenge since these laws and procedures are ostensibly democratic.

Studying how the various forms of lawfare affects democracy and regime stability raises theoretical and empirical issues that need to be addressed. What should count as autocratic lawfare and how do we capture and assess the grey zones? When are ostensibly democratic constitutional, legislative, and judicial reforms that are protested by the opposition, nevertheless legitimate and justified in a democratic society, as in, for example, the context of the COVID-19 pandemic or election-related civil unrest? How do we determine if *en face* credible criminal charges against regime critics or corruption allegations against judges nevertheless are undemocratic? Even though the law often advantages the incumbent, it may still be legitimate—and can sometimes also help civil society and the opposition.

A related question is how we can estimate the effect of each lawfare strategy on regime change. Our typology shows that the different dimensions overlap and often reinforce each other. For instance, socio-discursive strategies often complement legislative or judicial lawfare. This raises methodological questions about identifying the effect of each dimension as well as combined effects. More careful empirical work is required to expose and understand the conditions under which particular provisions (e.g. in media or NGO laws, or anti-corruption legislation) benefit autocrats and what enables the democratic opposition to effectively make use of them. The six country chapters aim to provide more nuanced empirical analyses to better understand the dynamics of the mechanism at play.

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4

International Strategies

Sovereignty Claims and Selective Compliance

Lise Rakner and Nicolas van de Walle

Introduction

In this chapter, we examine the manipulation of sovereignty claims by incumbent leaders to neutralize criticism and sanctions or to forestall greater international pressure and interference. By sovereignty claims, we mean the leveraging of international norms of state sovereignty to weaken the power and influence of external actors, particularly with regard to internal or domestic affairs. This increasingly common strategy remains underexamined in the literature on electoral autocracy. Since independence, African incumbents have signaled their compliance with global norms by selectively adhering to various policies. At the same time, at critical periods, civil society actors have been able to utilize international funding and support mechanisms to challenge incumbents. As a result, international strategies are key processes forging the balance between democratizing and autocratizing forces on the continent.

Thanks to the rise of donor political conditionality, by the mid-to-late 1990s, incumbent regimes in highly indebted low-income countries found it harder to neutralize various governance demands from international partners. They were increasingly challenged concerning their adherence to democratic norms, human rights, and good governance, all of which were introduced as conditions for financial support. Donor support to enhance political contestation, participation, and the rule of law were also extended to non-governmental entities, whereas previously governments had been the main recipients of aid. This provided civil society and opposition actors more political space in which to operate, as they were able to utilize international funding and support mechanisms to challenge incumbents at critical periods. As a result, the continent's international linkages came to be a key resource in processes of political liberalization and, in some cases, democratization.

More recently, external pressures on African incumbents have been significantly altered and three decades of comparatively strong international support for democracy and human rights on the continent has been increasingly challenged. Economic growth and the emergence of international remittances and foreign direct investment to the region have decreased the macro-economic dependence on donor aid, and, with it, donor leverage. In addition, two changes in Africa's external relations have reinforced the position of incumbent governments in negotiations with international actors and the leverage gained by sovereignty claims in recent years: the War on Terror and the emergence of China as a significant regional actor. Since the attacks of September 11, 2001, the West has sought African allies in the struggle against regional Islamist extremist organizations such as Boko Haram, Al Shabaad, and al-Qaeda in the Islamic Mahgreb (AQIM). African states that have found themselves on the front lines of the war-on-terror have become the highest recipients of military aid and financing, often despite poor democracy and human rights records. Similarly, while Western donors in the 1990s faced little opposition to its rhetorical support for democratic governance, today, China's growing economic presence on the continent is increasingly accompanied by its explicit ideological support for an alternative autocratic regime model that is attractive to many incumbents as a counterweight to Western influence.

These factors are altering the equilibrium between incumbents, opposition, and civil society that had been achieved by the early 2000s and had resulted in some real democratic gains in a majority of countries. The declining influence of international donors, as well as their waning commitment to democracy assistance, have again opened the door for incumbent elites to employ sovereigntist claims as a shield against domestic challenges and contestation for power.

In this chapter, we discuss the complex and evolving interplay between international actors and incumbent African governments, as well as other domestic actors such as civic associations and opposition forces. We demonstrate how some backsliding episodes are advanced by sovereignty claims that incumbents make vis-à-vis the international community. As we will show, the relative leverage of the international community varies considerably across policy areas. In terms of gender equality, African leaders have been willing to accommodate global gender norms because it often does not affect the domestic balance of power between themselves and their opposition. However, when gender rights are broadened to include sexual and reproductive rights, incumbent governments have increasingly applied arguments of state sovereignty and "African values" to oppose Western interference. LGBT rights,

in particular, are politically manipulated by governments to depict the opposition and Western-funded civil society as being out of touch with domestic attitudes.

We begin our discussion by clarifying the concept and application of sovereignty claims as a defining characteristic of post-colonial politics. We then turn to analyze the post-Cold War era politics of political conditionality and democracy support, a period when adherence to rule of law, democracy, and human rights was often made a condition for financial aid transfers from Western donors. Contrary to other aid forms, democracy assistance is provided to non-governmental actors and the chapter discusses how new aid modalities affect policies and debates around national sovereignty. A concluding section discusses how global challenges to international aid affects the relationship between opposition forces and incumbents.

Sovereignty and extraversion: Converting international weakness into a domestic resource

The international legal norm of national sovereignty constitutes a resource for African state elites as it guarantees their authority and has shielded them to a considerable degree from domestic accountability. The notion that African judicial statehood could compensate for comparatively weak Westphalian empirical statehood was first posited by [Jackson and Rosberg \(1982\)](#). Comparing rule in Africa's post-colonies to Westphalian notions of statehood, they noted that, historically, independence had been linked to the capacity to project power and govern a territory. By the late 1950s, under increasing international moral and political pressure, the judicial right to self-determination became separated from the empirical capacity to self-government following decolonialization. As [Jackson and Rosberg \(1982\)](#) noted at the time, despite the African states' empirical weaknesses, their independence or survival was not in jeopardy because their sovereignty was not contingent on their credibility as capable political structures. Instead, sovereignty was buttressed by the world community of states and the corpus of international law which provided African states with legitimacy that at least partly compensated for its manifest weaknesses ([Englebert, 2009](#)). After independence, African state leaders reinforced sovereignty claims, emphasizing the principles of non-interference and sovereign state borders as the main priorities in processes of state-building. The Organization of African Unity (OAU)'s Constituent Charter (1963) affirmed in its preamble the determination "to safeguard and

consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states, and to fight against neocolonialism in all its forms.”¹

Analyzing the swift move from independence to one-party or military rule across the continent, increasingly scholars of African post-colonial politics noted a pattern where border security guarantees and the norm of sovereignty and international non-interference granted almost total discretion to African rulers to repress their domestic opponents or co-opt them, often thanks to resources granted by foreign aid. Bayart (2000) coined the term “extraversion” to refer to the ability of governments to convert their dependent relations with the external world into domestic resources and authority, noting that the juridical international guarantees of statehood were sustained by the financial potency afforded rulers through financial aid. African elites, Bayart claimed, were able to manipulate their own weakness and international marginality in self-interested ways by instrumentalizing Western values and norms, notably around principles of citizenship, diversity, and representation. With its origins in Cold War logics and designed to check the spread of communism, from the start, financial aid to Africa was heavily influenced by geopolitical interests and the foreign policy preferences of donors. Highly politicized countries that enjoyed the support of patrons such as France or the United States enjoyed substantial bargaining advantages vis-à-vis the international financial institutions (Stone, 2004). However, at the end of the Cold War, when several countries lost their Soviet patron and the United States and some European countries departed from their support of allies and began making demands for democratization, diversifying the extraversion portfolio became necessary (Bayart, 2000; Peiffer and Englebert, 2012).

Underscoring the links between these international dynamics and the legal strategies discussed in Chapter 3, the political economy analyses of post-colonial rule in Africa up until the late 1980s emphasized that the legal command of African states persisted thanks to the resources that came with international recognition, even as the state’s capacity to provide security, order, and public services weakened as a result of economic collapse. State offices can be understood as “prebends” (Joseph, 1987), meant for extracting resources from others that were secured by sovereignty-supported legal command. The sovereign monopoly of the state, conferred rather than earned, trumped

¹ In addition, Articles II and III of the Charter stated that one of the key purposes of the organization is to defend their sovereignty, their territorial integrity, and their independence (Article II, c). Article III(3) reaffirmed the respect for the sovereignty and territorial integrity of each state and its inalienable right to independent existence as key principles.

other forms of political legitimacy and crowded out alternative arrangements (Englebert, 2009). Surprisingly few studies have attempted to theorize these evolving dynamics in African governments' complex interactions with their international funders and domestic audiences.² In what can be identified as a two-level game (Putnam, 1988; Milner, 1997), African incumbents leverage domestic resources to bargain with the international community, on the one hand, and simultaneously harness diplomatic and international aid resources to bargain in the domestic political game, on the other. Engaging with international institutions and actors is central to gaining financial support and avoiding international criticism. At the same time, international support may be used to enhance domestic support. Cooper (2002) describes the two-level game as having created and then sustained a "gatekeeper state" in post-colonial Africa, where the ruling powers maintain power not through internal support but through access to external resources—or their control of the gate between the international and the domestic arenas. External resources, according to Cooper, entrench regimes by enriching them. Connecting the ruling elites' international legal sovereignty to Krasner's (1999: 10–20) concept of "domestic sovereignty," or effective control of state authorities over their population, Englebert (2019) emphasizes that the elites' monopoly power over law and rule-making is the main source of their domestic command: "Recognition does not only allow states to endure, it allows those in state positions, from the state house down to the lowest clerks, to keep the capacity to control, dominate, extract, or dictate through the law." Democratization in the region since the early 1990s alters but does not weaken the position of governments in this two-level game. Even in the region's electoral autocracies with unfair political competition, incumbents have been able to point to their electoral victories to claim domestic support for their sovereignty claims, as we discuss below.

Aid for reform: Emerging tension in the post-colonial international system

In idealized terms, the post-colonial state was founded on international law that granted the former colonies judicial statehood and sovereignty. The model was sustained by economic transfers as development assistance provided the new independent states with capital and transfer of knowledge in the form of development aid. African economies collapsed in the late 1970s

² Key recent exceptions include Resnick and van de Walle, 2013; Bush, 2015; Hagmann and Reyntjens, 2016.

due to the combined effects of external shocks of oil price increases, plummeting commodity prices, and lack of productive investments. Having failed to diversify their export bases during the first post-colonial decade, African economies were vulnerable to external shocks. The international finance institutions responded to the collapse of Africa's narrow, commodity-based economies with increases in aid transfers and bilateral and multilateral loans. As a result, from the 1970s onwards, the African continent received more aid per capita than any other region of the world. van de Walle estimates that in the early 1990s Africa's relationship with the international economy was almost entirely mediated by public aid flows, given the small amount of international remittances and foreign direct investment (van de Walle, 2001: 189; see also Easterly, 2009). The new aid modalities developed as a response to the collapse of African economies challenged the post-colonial sovereign state model supported by legal recognition and financial support. Unable to address the economic crisis without international donor finance, African governments had little choice but to acquiesce to numerous economic reforms as part of International Monetary Fund (IMF) or World Bank reform packages (Collier and Gunning, 1999; Mkandawire and Olukoshi, 1995). Between one-third and one-half of all aid going to Africa in the 1980s explicitly sought to bring about policy reform (van de Walle, 2001: 7). Because economic reform has winners and losers, donor-promoted adjustment programs had the potential to destabilize the existing status quo and undermine incumbent regimes (Arriola, 2013). Not surprisingly, perhaps, the response of African political elites in their dialogue with the international finance institutions was to emphasize principles of nationhood and sovereignty in their attempts to minimize the reforms' intended effect of "rolling back the state" (Mkandawire and Soludo, 2003).

The economic crisis, and the subsequent structural adjustment reforms to address the economic crisis, represented the first considerable threat to the post-colonial state sovereignty model. An illustration is provided by Arriola's (2013) analysis of multiethnic coalition formation that showed how the relative autonomy of business from state-controlled capital provided the opposition with new avenues from which to solicit funding and to create coalitions based on "competing" patronage. The reform measures were deeply unpopular with the African ruling elites (Mkandawire, 2015; van de Walle, 2001; Herbst, 1990). The economic reforms, largely imposed from the international finance institutions, highlighted a tension in the post-colonial international system between the right to independence and the principal of self-determination, on the one hand, and the obligations that sovereign states have to development as well as the reliance of most African governments on substantial international

aid transfers, on the other (Werner and De Wilde, 2001: 105). Not least because the demands of the donors threatened domestic political support for African governments, the language of sovereignty proved a powerful rhetorical tool and resource with which to contest restrictions on national autonomy and loosen the conditionality the donors were attempting to impose. Vis-à-vis their domestic audience, it also allowed incumbents to blame the donors for budget cuts that would have been even more substantial in the absence of donor support. The statement by the president of Tanzania Julius Nyerere when the IMF announced the breakdown of support to Tanzania in 1980 is illustrative: “Who elected the IMF to be the ministry of finance for every country of the world?” (Fraser and Whitfield, 2008: 7). The question no doubt put IMF officials on the defensive and bought Nyerere some policy space; the hegemony of the sovereignty regime at the time is suggested by the fact that it was inconceivable for the IMF to retort that most African finance ministers were not themselves actually members of a democratically elected government. This perspective also found support in the academic community. Most development economists supported the reforms as necessary (Rodrik, 1996; Collier and Gunning, 1999), but increasingly, other scholars began questioning the legitimacy of the liberal economic reforms being undertaken or the role of the international finance institutions in their implementation (for instance, Mkandawire and Soludo, 1999; Mkandawire and Olokushi, 1995).³

Despite the persistent economic stagnation that lingered in most of the countries undertaking structural adjustment reforms (SAPs), structural adjustment reforms rarely directly challenged incumbents’ hold on power, at least until the wave of democratization in the early 1990s did lead to the electoral defeat of a handful of them. Underlining the incumbent leaders’ asymmetrical control over international collaborations, van de Walle notes that expenditures linked to state sovereignty, such as international diplomacy and government offices, were remarkably unaffected by the economic reform measures (2001: 62).

The rise of economic policy conditionality in the middle 1980s signaled the weakening of the sovereignty regime, and two moments, in particular, threatened the post-colonial extraversion model. First, as part of structural adjustment conditionality, the early “Washington Consensus” called for

³ The initial academic writing on structural adjustment reforms had few African economists perspectives. Mkandawire and Soludo (2003) argue that years of economic crisis led to a surrender of national policymaking to international experts and that the failure of the reforms is linked to a consensus-driven policymaking between the international finance institutions and northern-based academics.

resources to be channeled to non-state actors as part of the state's withdrawal from the economy (see Chapter 2). Second, when good governance conditionality was added in the early 1990s, the sovereignty regime was further eroded by the rise of political conditionality and a new-found willingness on the part of the donors to direct their resources to non-governmental actors. Adherence to the rule of law, democracy, and human rights increasingly were now made conditions for financial aid transfers, in addition to measures promoting economic policy liberalization. Moreover, the donors increasingly devoted resources and capacity support to non-governmental actors, viewed as an attractive alternative to government (Dunning, 2004; Finkel et al., 2007).

Aid for democracy? Development aid as democratic leverage

The turn of the century brought a qualitative shift in Western actors' support to Africa. Following the end of the Cold War era and the Third Wave of democratization, human rights now became a legitimate international framework (Sikkink, 2017). Linked to this, support for democracy, human rights, and good governance became mainstreamed in development policy as donors increasingly viewed "good governance" as a precondition for the effectiveness of development aid and conducive to long-term sustainable development (Bush, 2015; Dietrich and Wright, 2013; Burnell, 2000).⁴ Western governments and multilateral donors channeled support to countries in the global South and former communist countries to spread liberal norms, encourage democratization, and foster development (Barnett, 2011; Dietrich and Wright, 2013). Going beyond the conditionalities installed through the structural adjustment programs, the 1990s democracy clauses also included international agreements to sanction regimes that assumed power through non-democratic means.

In the late 1990s, Africa's relationship to the international world was still primarily mediated by financial aid transfers, and the new aid modalities provided external actors with greater opportunities to influence governance structures. For the first time, democracy support presented a distinct threat to the African post-colonial model, sustained by a legal right to sovereignty and financial support that largely upheld the status quo. First, international democracy support aimed to strengthen the basic institutions of democratic

⁴ To illustrate, the United States implemented an array of new regulations to promote democracy, and, by 1998, the United States had set up democracy promotion programs in more than 100 countries (Hackenesh, 2019).

accountability through enhancing the capacity of civil society organizations, media, an independent judiciary, and legislatures (Bush, 2015). Second, donors provided more of their (democracy) assistance to non-governmental actors and civil society actors, some openly opposing government. For the first time, opposition forces and civil society now enjoyed a form of international recognition and legitimacy to support their challenge of incumbent power and the status quo.

This model of balancing external democracy support with state sovereignty informs the expectation in Levitsky and Way's (2010) analysis of the effect of the end of the Cold War on authoritarian regimes across the world. Analyzing variations in the patterns of democratic transitions primarily as a result of international relations, they argue that levels of international linkage and Western leverage largely structure the relationship between emerging democracies and the international community, with implications for their regime trajectories. Levitsky and Way postulate that when linkage and leverage between a country and the West are high, democratic change is a likely outcome. Conversely, when linkage and or leverage is low, regime outcomes are more likely to be determined by organizational power or the incumbent's capacity to resist opposition challenges (Carothers and de Gramont, 2013; Swedlund, 2017; Resnick and van de Walle, 2013).⁵

Some caveats are, however, in order. While international democracy promotion represented the first sustained attempt to transform the domestic political practices and institutions of other countries, the attempt was at best partial: some donors chose not to provide democracy assistance, and funding to non-government actors was always dwarfed by the flows continuing to go to government (Bush, 2015: 211). Furthermore, evidence on the effects of democracy support has not provided conclusive findings. Supporting the expectations underlying the leverage model, Dietrich and Wright (2013) find that democracy aid has a stabilizing effect for multiparty regimes and that it reduces the likelihood of electoral misconduct. Some studies detect a positive effect of the United States' aid on the level of democracy (Finkel et al., 2007). Heinrich and Loftis (2019) establish that democracy aid is associated with more electoral accountability, while Jones and Tarp (2016) and Bermeo (2016) concur that democracy aid has a positive effect on political institutions.

⁵ Linkage refers to the density of ties and cross-border flows of capital, goods, services, people, and information between particular countries and the United States and the European Union, measured across six categories. The second dimension, leverage, is meant to capture the vulnerability of regimes to external democratizing pressure, encompassing the regimes' bargaining power vis-à-vis the West and potential impact of the West's punitive actions.

Overall, country studies demonstrate that democracy aid has a positive effect in aid-dependent countries that are already relatively democratic. Examples from Mozambique (Manning and Malbrough, 2012), Tanzania (Tripp, 2013), and Malawi (Resnick, 2013) suggest, for instance, that donors can contribute to countering reversals in democratic gains. As the case studies in this volume reveal, the governance aid from multilateral, bilateral, and transnational donors have provided African civil society and other pro-democracy forces with political and financial resources, enhancing their ability to challenge incumbents. At the same time, democracy aid has not completely altered the balance between the opposition and incumbent, and its impact on the consolidation and deepening of democratic practices, while hard to measure, seems slight at best. Second, democracy assistance has always constituted a small proportion of overall foreign aid to the region, with estimates varying between 3 and 8%. Whatever pro-democracy effect democracy aid has, it is probably counterbalanced by the strong pro-incumbent effects of other forms of aid (Devereaux Evans and van de Walle, 2019). Thus, at the national level, aid resources have continued to be allocated in a strong pro-incumbency manner.⁶ In this sense, despite the significance of democracy assistance, overall aid is still remarkably faithful to the post-colonial sovereignty regime. Even in cases in which donors explicitly sought to leverage democratic reforms for increased aid, much evidence suggests that they could not ensure credible commitments from recipient countries. As Swedlund (2017) and others have argued, both donors and incumbent governments appear unable to sanction one another for breaking deals.

Political pluralism challenged

As the only form of development assistance aimed toward promoting pluralism and with a substantial part of the funding channeled to non-state actors, it is perhaps not surprising that democracy support came under attack from African incumbents and their supporters. African political elites regarded political conditionality as neocolonial and intrusive, and, as we shall see, have been able to shore up nationalist sentiments in response to specific donor activities, especially those linked to civil society and to issues around sexual and reproductive rights.

⁶ For instance, Briggs (2012) shows that World Bank support for rural electrification in Ghana tended to be directed toward core constituencies of the incumbent party. A similar paper (Briggs, 2014) found that all aid provided to Kenya favored regions dominated by the president's core supporters.

By 2005, donor enthusiasm for democracy support appeared to be diminishing and major donors started to backslide on their commitment to aid for democracy. The 2005 Paris Declaration emphasizing government ownership of development represented a direct challenge to political conditionality; the ideal of local ownership weakened the resolve of donors to pressure governments about human rights and governance failures (Devereaux Evans and van de Walle, 2019: 70). While democratizing states were initially awarded more aid (Bermeo, 2011), overall governance concerns soon took a back seat to the strategic interests of the donor country or the geopolitical position of recipient country (Dietrich, 2013; Bush, 2015). Based on AidData, Devereaux Evans and van de Walle note a decline of democracy assistance after 2008 (2019: 70).⁷

Two external factors are particularly central to the international donor community's backsliding on democracy support. First, the introduction of the War on Terror after 9/11 and the greater prioritization of Africa on Western states' security agenda served to strengthen the hands of African incumbents because of a new emphasis on political stability (Fleck and Kilby, 2010). The prioritization of security concerns by the West provided the political space for regimes in various transition and developing countries to clamp down on the activities of civil society organizations (CSOs), often employing the logic and discourses of the War on Terror to justify their actions. Authoritarian states such as Ethiopia and Uganda enjoyed plaudits for their economic records and substantial aid increases from donors after 2001, at least in part to reward them for their robust support of the War on Terror and by providing troops to the peace-keeping force in Somalia. In West Africa, the same could be said of the Western relationship with the authoritarian regime in Chad and its willingness to provide troops to fight against such regional groups such as AQIM and Boko Haram, while the worry that Islamist insurgencies in the Sahel might destabilize the region's fragile states almost certainly led the West to loosen conditionality in Cote D'Ivoire, Niger and Burkina Faso. Various African governments have also used anti-terror measures as a pretext for clamping down on civil society activism. Crack-downs on CSOs have increasingly been justified with reference to concerns about national sovereignty and foreign interference (Bakke et al., 2020; see Chapter 2). To illustrate, the governments of Ethiopia, Kenya, and Uganda have accused CSOs of pursuing

⁷ Note, however that Niño-Zarazúa et al. (2020) find increases in democracy aid through 2018 for a global set of recipient countries, using Organisation for Economic Co-operation and Development–Development Assistance Committee (OECD–DAC) data and classifications. Their data situates the proportion of total development aid devoted to democracy at over one-tenth of total aid.

foreign goals and not being accountable to their own people (Dupuy and Prakash, 2018).

Second, the rise of China, both as a powerful economic actor and as an alternative political model, has undermined the political influence of the West in the region and reduced its willingness to promote political reform as well as the effectiveness of efforts to do so. Increasingly, China is competing with Western actors for political influence in Africa (Hackenesch, 2018; Hess and Aido, 2019). Even as Western aid has stagnated, China has emerged as a significant economic actor in the region, with substantial investments, aid, and trade deals.

Based on positive economic results and progress on some key Sustainable Development Goals (SDGs) by some of Africa's authoritarian, dominant party states like Ethiopia and Rwanda, more observers have questioned the effectiveness and legitimacy of governance and democracy conditions in development assistance (Kelsall, 2013; Booth and Golooba-Mutebi, 2012), and China has openly endorsed the notion of an authoritarian advantage for promoting development.

Whereas in the early 1990s, Western donors faced little pushback to their democracy support, they now face an increased risk that their activities will trigger retaliation by authoritarian rulers (Dodsworth and Cheeseman, 2018). According to Hess and Aido (2019), having experienced Western pre-conditions attached to democratic and economic reform projects such as the structural adjustment programs (SAPs) of the 1980s and 1990s, most African governments found China's less conditioned economic arrangements and brand of non-interference in the internal political affairs less intrusive.⁸ African leaders frequently invoke South–South solidarities when they address what China can contribute to their development.

While China has been at pains to argue that it does not condition its aid and investments in the region, a natural affinity to authoritarian governments appears unmistakable; there are numerous examples in which China has provided direct technical and financial assistance to the state in ways that reinforce the powers of incumbency.⁹ Journalistic reports have pointed to the willingness of Chinese companies to link their help with internet and phone

⁸ In the past couple of years, African voices have been heard that are more critical of the Chinese role in the region (see Soto and Hill, 2020).

⁹ Fusion of Chinese communist ideology with contemporary African politics has found a receptive audience within several of the continent's largest and most powerful ruling parties from Ethiopia, Malawi, Kenya, Kongo, and South Africa (Sun, 2016).

connectivity with support for state internal security agencies (Prasso, 2019; Gagliardone, 2019).

In hindsight, revisiting Levitsky and Way's linkage and leverage model as an explanatory model of democratization, neither extensive linkage to the West, nor the leverage of financial support appear to have strengthened Africa's democratic trajectories. Indeed, one lesson from the extensive levels of international linkage and leverage in the Eastern European cases is that the policies can be effectively exploited by populist forces in domestic politics in a manner that can undermine support for democratic institutions. Criticizing the West and its norms can provide populist leaders with domestic political capital, even as the West fails to act upon the resources which leverage is supposed to provide to respond to the episodes of democratic backsliding. In sub-Saharan Africa, authoritarian countries like Ethiopia, Uganda, or Rwanda, which pursued effective economic policies and promoted growth and poverty alleviation, were soon rewarded with among the very highest levels of donor support. As evidenced in the country chapter on Uganda (see Chapter 9), Museveni's power has been strengthened by the support, or at least benign neglect, of the international community motivated by strategic interests.

Thus, the notion of a causal relationship between the role of aid and Africa's democratic trajectory is increasingly challenged. Global human rights and democracy norms are still articulated through transnational global networks (Keck and Sikkink, 2014). Yet, democracy promotion has also provided incentives to authoritarians to develop more subtle mechanisms of control and motivated authoritarian learning (Varol, 2015; Bush, 2015). Suggesting the continued relevance of the African post-colonial state model, engaging with international institutions has enabled incumbent elites to gain financial support and to avoid both domestic and international criticism. While analyses of democracy assistance have tended to lump democracy assistance as a single type of foreign aid, from the perspective of fostering democratic change, comparing aid to dissidents with aid to women's groups may not be helpful. Support to opposition parties and civil society associations engaged with contestation, rule of law, and accountability poses a key challenge to an incumbent government intent on staying in power. Other aspects of the international human rights agenda appear less conflictual, allowing contemporary African autocratic leaders to fine-tune their tools of power maintenance. And, whereas African leaders have selectively complied with international human rights norms of gender equality, demands for the inclusion of sexual and reproductive rights (SRR) have invoked more conflictual responses.

Selective compliance: Accommodating international support to gender equality

Gender equality is central to most donors' democracy assistance agendas, and policies targeting gender equality have been adopted as part of larger governance-related reforms and support programs (Ottaway, 2005). Examples of compliance with international gender-equality norms include ratification of gender-related international treaties, such as the UN Committee of the Elimination against Discrimination of Women (CEDAW), or the passing of gender-related legislation that is central to donor concerns, such as child marriage reform, female genital mutilation, and domestic violence.

By adhering to global norms of gender equality by adopting gender quotas, African political elites may improve their countries' democratic reputations (Towns, 2010; Bush and Zetterberg, 2021). Incumbent elites may have strategic reasons to support gender quotas, even in non-democracies. Dictatorships perform worse than democracies in respect for most human rights, yet a large number of autocracies have prioritized the advancement of women's rights (Donno and Kreft, 2019; Tripp, 2010). Supporting gender equality may help an incumbent party to broaden its political support by winning women's votes. Thus, for autocrats, different forms of rights provision may serve different ends and women's rights may be seen as a tool of pre-emptive coalition-building. Tripp's research on the adoption of gender quotas in Africa (2010) suggests that gender-equality norms may serve broader nationalist projects. Rwanda is often praised for its achievements in the area of gender equality. Lorentzen (2018) argues that the Government of Rwanda's national gender policies appropriate gender-equality norms in the construction of a "new" Rwandan identity. The Rwandan government has implemented a robust gender quota (2003), reformed the property rights and inheritance regime (1999), and stiffened criminal penalties for sexual/domestic violence (2009–2011), among other measures.

Similarly, prioritization of women's rights in Uganda and Tanzania occurred prior to the introduction of multiparty elections, connected with ruling party institutions that emphasized mass mobilization and support. Other African authoritarian regimes have adopted legislation that challenges oppressive customary practices, including efforts to outlaw forced marriage (Chad in 2004), increasing the age of marriage (Chad in 2015, Mozambique in 2003), and providing stronger land and property rights to women (Mozambique in 1997, Tanzania in 2004). Bjarnegård and Zetterberg (2016: 466) argue that compared to democracies, gender quota adoption in dominant-party authoritarian

states has an “even stronger strategic component” related to maintaining the party’s electoral strength.

Autocracies also embrace gender quotas to enhance their countries’ international reputations for democracy and deflect external pressure to democratize in the post-Cold War environment (Bush, 2011). Whether autocratic regimes will seek to enhance their international reputations by putting women in more positions of power may depend on the nature of the regime. Analyzing a comprehensive sample of authoritarian regimes from 1963 to 2009, Donno and Kreft (2019) find that 25% of present-day autocracies perform as well or better in respect for women’s rights than the average developing democracy. Their findings underline the incentives for authoritarian leaders to secure women’s loyalty. Incumbents have been able to use the enhancing of women’s representation in the legislature (primarily through quotas for elected office) as proof of their commitment to democratic values. In a context of evolving global gender norms, advancing women’s equality signals modernity and wins praise from the international community, which can translate into a variety of tangible and intangible benefits, including increases in foreign aid (Hicks and Maldonado, 2020).

President Museveni of Uganda illustrates how to effectively resist the international demand for multiparty democracy by instead signaling an openness toward international gender initiatives and initiatives. The ruling National Resistance Movement’s (NRM) support for women’s political, educational, and economic equality has meant that “women as a group have for a long time been among the staunchest supporters of the NRM” (Tripp, 2010: 106). Similarly, in Zimbabwe, gender and gender norms have been employed by the ZANU–PF regime to maintain power, divert attention from other issues, and depict the opposition as foreign agents, linked to Western colonial forces (see Chapter 10). Thus, authoritarian governments can make important political gains at the international and domestic level by espousing gender equality, without much of a domestic political cost.

Yet, an incumbent’s selective use of gender to signal compliance with international norms is not without risk. Certain opposition forces may also try to use this tool to restrain the incumbent through a domestic boomerang effect. Keck and Sikkink’s (1988) influential work on the impact of transnational advocacy networks in domestic and international politics found that social movements, the media, churches, unions, and intergovernmental organizations often succeeded in addressing gross inequality of legal opportunity. And, as Villalon (2010: 378) reminds us, democratic openings have also empowered religious social movements that are difficult to reconcile with secular, global

concepts of democracy. In the Sahel countries, for instance, religious movements have challenged the donor and secular democracy promoters' policies on gender and family law.

The international donor community has adopted significant measures to integrate the right to sexual and reproductive health into their human rights policies. Contrary to the external push for gender representation, sexual and reproductive rights (SRR) are lightning rods of controversy in most societies, pitting donor concerns against governments.¹⁰ Political polarization has been particularly pronounced with regard to abortion rights and the rights of sexual minorities.

The adoption of the Protocol to the African Charter on Human and People's Rights on the rights of women in Africa (Maputo Protocol) in 2003 recognized the rights of women in Africa and explicitly endorsed access to comprehensive sexual and reproductive health (SRH) care in Article 14, including access to safe abortion "in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus." Currently, thirty-seven of fifty-four African Union member states have ratified the protocol, making it binding, while another fourteen countries have signed but not yet ratified it ([African Union, 2003](#)).

On balance, however, incumbents are the most likely to benefit from the invocation of national sovereignty because its control of the state apparatus and its symbolic power is associated more with office holders than with the opposition. And while civil society and the opposition relies on international human rights norms, incumbent elites may opt to weaponize sovereignty claims against the international community on the domestic political front.

Sovereignty claims: Politicizing global human rights norms

While African incumbents have been able to accommodate gender rights as part of the international aid agendas, increasingly the rights of sexual and gender minorities have become salient electoral campaign issues. Incumbent governments have increasingly applied arguments of state sovereignty and "African values" to oppose Western interference and create a link between

¹⁰ SSR rights is also a controversial issue within the donor community, and the US conservative Christian movement has particularly contributed toward outlawing abortions. Activists on the Christian right are actively involved in writing policy and getting lawmakers elected in African countries. While the report focuses significantly on these groups' attempts to maintain the criminalization of homosexuality, stifling reproductive freedom in countries like Zambia, Uganda, and Kenya is also high on the agenda.

external forces and opposition forces. To win elections and maintain power, incumbents can invoke national interest and xenophobic appeals to explicitly link international donors to the opposition. In a sample of eight countries, [Bleck and van de Walle \(2018: 208–211\)](#) estimate that appeals to national interest and sovereignty were the sixth most common issue addressed in recent presidential campaign and were significantly more likely to be advanced by the incumbent candidate. Sovereignty claims have been invoked related to electoral conflicts and issues of term limits, in particular in circumstances where domestic pro-democracy has been able to mobilize domestically, in part based on the support of international actors.

A common trend witnessed on the African continent is the revival and increasing enforcement of sodomy laws, including the often highly publicized arrests of alleged gays and lesbians ([Gloppen and Rakner, 2020](#)). Today, some thirty-one African countries have laws on the books that criminalize non-heterosexual relationships ([Ushie et al., 2020](#)). Increasingly, incumbent governments rely on deep-seated nationalism and resentment about Western interference in domestic politics to turn international criticism into a domestic advantage. In numerous recent electoral campaigns across the continent, incumbent governments have sought to create social coalitions of religious conservative domestic interests by contesting as “un-African” the international consensus on the promotion of LGBT rights. The attacks on the gay community can be tied to a popular critique of liberal international and non-African values. President Mugabe in Zimbabwe, Jonathan Goodluck in Nigeria, and Museveni in Uganda have all employed homophobia as arsenals in their fight to maintain power ([Gloppen and Rakner, 2020](#)).

Zimbabwe under Mugabe’s reign illustrates how incumbent rulers have actively utilized international partners in their struggle for power and dominance. Discourses of sovereignty have often served as justifications for the ZANU–PF to close political space. Across a wide range of issues, from human rights to LGBT issues, Mugabe has relied on sovereigntist arguments, which are popular, notably with elite populations. In his speech at the opening of the Harare book fair in 1995, he attacked homosexuals as behaving “worse than dogs and pigs,” drawing widespread international criticism—which he, in turn, used in his emerging anti-Western, anti-colonial rhetoric. Similarly, [Oloka-Onyango \(2015\)](#) describes how latent anti-gay sentiments are utilized opportunistically by Ugandan authorities. The government frequently portrays the West (the donors) as decadent and depraved in contrast to the Ugandan morally pure national self. The “Kill the Gays Bill” saga received enormous international attention from the moment David Bahati tabled the

Anti-Homosexuality Act in Parliament in 2009, proposing the death penalty for homosexuality.¹¹ Resisting donor pressure to drop the bill was framed as taking a stance for “traditional” Ugandan values and against the threat that homosexuality poses to the family as the fundamental societal unit. Primarily focusing on West Africa, [Corey-Boulet \(2019\)](#) describes how LGBT rights become lightning rods in African electoral campaigns. The campaign kick-off speech of presidential candidate Prince Johnson in August 2016 in Monrovia is illustrative: “The government, under our watch will never, ever, accept gay rights—Liberia is not Sodom and Gomorrah ... we will not accept it here. I want the West to take note of that and get me clearly” (Johnson’s speech, cited in [Corey-Boulet, 2019](#): 267).

The politicization of LGBT issues illustrates how African incumbents manipulate the international mechanism by employing sovereignty claims to neutralize criticism or sanctions from external actors. Anti-gay sentiments are typically mobilized to divert attention from a looming economic or governance crisis or to secure support in elections. Allegations and formal charges of homosexuality are also used against political opponents or allies fallen out of favor. The high-profile arrest of Zimbabwe’s first independent President Canaan Banana on sodomy charges, and later his trial and conviction in 1999, is illustrative. While the charges and evidence in the case were credible, the prosecution is widely believed to have been politically motivated and strategically used to get rid of potential competition. Similarly, allegations of homosexuality have been made against key opposition candidates in Zambia (Sata in 2011 and Hichilema in 2016).

Within the discourses of nationalism, modernity, and “cultural authenticity”—queer rights (and universal human rights) are frequently described as a “dangerous western import” that must be resisted. Framing the politicization of LGBT debates as a threat to African values, national integrity, and sovereignty serves a dual purpose: Governments simultaneously aim to weaken and isolate domestic civil society actors, often led by cosmopolitan urban elites, whose non-governmental organizations (NGOs) are reliant on foreign support, and lament foreign governments and organizations attacking African values and sovereignty ([Grossman, 2015](#)). The incumbents’ willingness to politicize LGBT rights in Africa is in no small part spurred by

¹¹ The bill repeatedly resurfaced on the parliamentary agenda until its adoption (in modified form) in December 2013 and signing into law by President Museveni in February 2014. The bill was nullified by the Constitutional Court on August 1, 2014.

the fact that their hostility to LGBT rights is genuinely popular domestically,¹² independently of the assertion of sovereignty. Moreover, it is useful politically to tap into religious communities—notably, the increasingly powerful Pentecostal churches—and traditional authority, which are useful allies for incumbents.

Another area where the employment of sovereignty is especially marked is seen in relation to the role of the International Criminal Court (ICC), which has been subject to accusations of inequality, racism, and selectivity against African countries by African heads of state, lawmakers, and regional constituencies. Articulations of critique and dissent, even by African warlords, have gained strength and legitimacy due to the perception of an underlying hypocrisy of the court's judgments. In response to the perceived bias of the ICC in emphasizing African indictments, African leaders such as Rwandan President Paul Kagame have labeled the ICC a neocolonial instrument to continue the history of external exploitation, racism, and control (Mbaraga, 2016, quoted in [Clarke, 2019](#): 257). The use of sovereignty claims is illustrated in the 2009 arrest warrant for Sudanese President Omar al-Bashir by the ICC. The referral was predicated on the United Nations Security Council's determination that Sudan constituted a threat to international peace and security under Article 39 of the United Nations Charter and that the prosecution of the perpetrators of the human rights violations in Darfur would help to restore stability in the region. The government of Sudan objected to the exercise of this jurisdiction, arguing that both the United Nations Security Council (UNSC) and the ICC violated the country's sovereignty, given that Sudan had not ratified the Rome Statute ([PDu Plessis et al., 2011](#): 8).

Sovereignist claims were invoked in relation to the ICC's decision to indict several prominent Kenyan politicians for their role in the violence that marred the 2007 elections, most notably then candidates Uhuru Kenyatta and William Ruto ([Lynch, 2014](#)).¹³ Kenyatta and Ruto jointly contested and won Kenya's 2013 elections under the "Jubilee Alliance." The ICC indictment affected the electoral outcome by first creating an otherwise inconceivable alliance and, second, by providing it with a majority share of support ([Wolf and Pope, 2015](#): 235). Kenyatta, Ruto, and much of the Kenyan political class castigated the court and the international community for its imperialistic attempt to

¹² For instance, [Dionne and Dulani \(2014\)](#) report on various surveys from the Afrobarometer and the Pew Research Center involving a total of fourteen countries, suggesting that the overwhelming majority of Africans have negative attitudes toward homosexuality.

¹³ The ICC was established on July 17, 1998 through a treaty signed in Rome by 120 states. It became operational after sixty countries ratified the court's statute (hereinafter "the Rome Statute") on July 1, 2002.

shape political outcomes. The Jubilee Alliance between the two former foes managed to reframe the ICC narrative—in the eyes of a significant number of Kenyans—into one of neocolonialism and threats to the country’s sovereignty and stability (Lynch, 2014). In addition, their claims vis-à-vis the international community were strengthened by the electoral mandate that they received in the 2013 elections, a clear indication that electoral politics could meaningfully strengthen sovereignty claims, even in countries with a less than stellar democratic record.

Conclusion

A central premise of the argument set out in Chapter 1 is that Africa’s democratic trajectories have been remarkably stable since the multiparty transitions in the early 1990s. In this chapter, we have argued that the stability of Africa’s democratic trajectories is linked to the scale and form of financial assistance provided to the continent over this period. Incumbents, opposition forces, and civil society have utilized aspects of international linkages to enhance their positions. But the chapter has emphasized the asymmetrical nature of international linkages as the official position of incumbents (as national representatives in international affairs) allow them to manipulate this mechanism with greater impact than the opposition or civil society.

The African sovereign state model, sustained thanks to the combination of international judicial recognition and aid transfers, was challenged around the turn of the twenty-first century. Democracy support, while a fraction of overall aid transfers, meant that aid for the first time was channeled to institutions of horizontal accountability and civil society forces, often in direct opposition to the state. As such, democracy support represented the first substantial challenge to the African post-colonial state model. By explicitly promoting pluralism by funding civil society and political parties and horizontal accountability through supporting institutions such as independent courts and legislatures, arguably the donors helped to sustain the democratic gains from the 1990s. International linkages are effectual where donors stay the course and support democracy efforts. But, democracy aid has challenged only some parts of the sovereignty model. Autocratic leaders have been able to accommodate global gender rights norms into their state models. However, international support to civil society, and in particular NGOs, have been met with restrictions and claims of threats to state security and sovereignty. Similarly, we see that African incumbents, long before populist regimes in Europe,

has used nationalist and sovereignty claim to link donors and opposition forces to global human rights claims to SRRs.

As part of a more general global democratic rollback the notion of a causal relationship between the role of aid and Africa's democratic trajectory has been attenuated. African governments are imposing restrictions on foreign funding to NGOs and CSOs, leaving international donors with fewer options as support for human rights, and democracy traditionally has been channeled through NGOs. With this door gradually closing, the only other door open to international support is through governments; the international community is increasingly finding itself in a situation where their remaining tools for promoting democracy appear to support the increasingly more autocratic tendencies of African executives. For their part, African incumbents have proven skillful at leveraging the region's participatory politics to claim a broader democratic mandate for their sovereignty claims against the international community when deemed beneficial for their political ambitions.

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5

Ghana

A Stagnated Democratic Trajectory

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Introduction

Since Ghana's return to democratic governance in 1992, after thirty years of one-party and military rule, the country has made incremental but steady progress toward democratic consolidation. Today, Ghana is considered to be one of Africa's most robust democracies and the country ranks high on most global measures of democracy. There is strong popular support for democratic rule: In the most recent Afrobarometer survey in 2022, 76% of Ghanaians expressed support for a democratic form of government as opposed to other forms of governance and 67% rejected military rule.

Ghana's current period of democratic rule—its longest in history—had a rocky start when military incumbent Jerry Rawlings returned to power as a democratically elected president in 1992 and again in 1996. However, since 2000, executive power has consistently alternated between the country's two main political parties and democratic rule has been upheld, despite the challenges of the most recent (2020) presidential election. The two main parties, the National Democratic Congress (NDC) and the New Patriotic Party (NPP), have rotated occupancy of the executive three times: in 2000, 2008, and 2016. A multiparty, representative system of governance has emerged as the only legitimate means of governing Ghana, with competitive selection of government via the ballot box viewed by political elites and citizens alike as the sole acceptable institutional arrangement for accessing national political power. The relative success of Ghana's democratic experiment rests on the foundations laid by the 1992 Constitution, in the integrity and independence of the Electoral Commission, and in the courts. Each of these institutions has at critical junctures engaged in what can be termed pro-democratic lawfare (see Chapter 3) to protect key democratic norms and institutions and has functioned as a vanguard for defending contestation rights through protecting, defending, and

expanding the rights of citizens and candidates to participate in the selection for political office.

And yet, even in one of Africa's most robust democracies, political elites have sought to limit further democratization and to constrain actors promoting enhanced democratization. Underlining the central role of legal mechanisms and lawfare, they have done so primarily through the strategic use of law, including a strategic unwillingness to adopt progressive legal measures. As a result, Ghana's democratic trajectory has stagnated, as reflected in the democratic indicators discussed in Chapter 1. While the actions of the political elites to hamper democratic development have not succeeded to the extent witnessed in other cases discussed in this volume, we find evidence of democratic constraining in the machinations of the political parties. Specifically, we argue that Ghanaian political elites (controlled by and in cooperation with their respective political parties) have consciously blocked and/or not acted on the legal reforms that are both popularly supported and required to bring about the kind of substantive, inclusive democratic practices and governance that would strengthen participation rights and increase checks and balances on executive power. By "political elites," we refer primarily to those individuals holding elected office at national and local levels, as well as to representatives of political parties (including party representatives not holding elected office). It is these individuals who negotiate over the distribution of power and resources in the Ghanaian polity. These elites have repeatedly resisted restricting executive power in particular, as manifested in their continued failure to implement much-needed constitutional reforms, their delays in adopting and implementing key civil liberties legislation to improve minority rights, and to an extent introducing legislation to further restrict minority rights, and in their active attacks on media pluralism and freedoms. Political elites have primarily resorted to legal mechanisms to halt and constrain democratizing forces and have only to a limited extent appealed to international relationships via claims of sovereignty and non-interference.

The chapter proceeds as follows. In the next section, we present the institutions contributing to upholding Ghana's democratic gains before turning to discuss how political elites, as influenced by their political party structures, use legal strategies—or various forms of lawfare as described in Chapter 3—to constrain further democratization. This is followed by a brief discussion of the limited ways in which Ghanaian political elites further resort to international relations to constrain democratization, while simultaneously leveraging Ghana's reputation as a successful and stable African democracy. We conclude with a brief discussion on the relative strength of the legal and international strategies and reflect on challenges for Ghana's further democratic development.

Legal strategies: Pro-democratic, administrative, and judicial lawfare

The institutions contributing to upholding Ghana's democratic gains are primarily the Constitution, the Election Management Body (EMB), and the judiciary, and in particular the Supreme Court. The 1992 Constitution, a hybrid of Westminster and US systems of governance, established the key institutions of contestation and participation. This includes an independent judiciary; freedoms of association, assembly, and expression; the foundations for competitive political contest (including an independent election commission and the ability of political parties to operate freely); and a commitment to political decentralization (Abdul-Gafaru and Crawford, 2010; Arthur, 2010; Debrah, 2016). Since independence in 1957, and in particular since 1992, contestation rights and institutions have been strengthened through a series of constitutional reforms, a relatively strong EMB (labeled the Electoral Commission), an institutionalized political party system, enforcement and affirmation of the rules of contestation by the courts, and decentralized political authority. Participation rights have also been strengthened, with gradual improvements achieved over time in rights of association, assembly, expression, and information. Ghana's democratization process represents a case where the liberal 1992 Constitution that propelled the transition to democracy in 1992 has not been deliberately tinkered with to weaken contestation and participation rights, to strangle the opposition, or to curtail civil and political freedoms.

The conduct of elections has continued to improve since 1992, and elections have progressively become more credible and peaceful since then. Political parties' acceptance of results when the opposition wins, even in times of narrow defeat (as happened with the 2008 elections) is testament to the fact that political elites recognize elections as the only legitimate means for selection into governing authority. Election-related disputes are resolved peacefully through institutions, as political elites allow the rule of law and the courts to litigate and resolve election-related disputes. This was seen most recently in January 2021, when the opposition (NDC) challenged the 2020 election results. And even when one party is not completely satisfied with the process or outcomes of the judicial proceedings, outcomes are still ultimately accepted and disagreement expressed in a way that allows the democratic process to continue.¹

¹ An example of this is the dispute that arose from the 2012 presidential election results and outcomes, the first time in the country's post-independence political history where the opposition NPP challenged in the Supreme Court the declaration by Ghana's Electoral Commission of the NDC candidate as the election winner. The judicial proceedings took almost eight months to adjudicate, with the Supreme Court of Ghana ultimately confirming the declaration made by the Electoral Commission.

Pro-democratic lawfare

Several scholars have pointed to Ghana's independent Electoral Commission—one of the key institutions established in the 1992 Constitution and whose autonomy is guaranteed in the Constitution—as a critical factor explaining the country's democratic consolidation over time. Although Ghana's elections are often praised for their transparency and fairness, the 2008 election raised concerns over potential electoral violence and malpractices similar to that observed in Kenya (Chapter 6), Uganda (Chapter 9), and Zimbabwe (Chapter 10). To prevent Ghana from following the same fate, the Ghanaian Electoral Commission engaged in what can be termed pro-democratic administrative lawfare as described in Chapter 3. It coordinated with other bureaucratic bodies and think tanks, such as the Institute of Economic Affairs (IEA) and the Center for Democratic Development (CDD), to facilitate electoral monitoring/observation; revised and widely shared the *Political Parties Code of Conduct* to combat harmful socio-discursive lawfare; worked with bureaucratic bodies such as the National Commission for Civic Education to educate voters on the electoral process; and collaborated with the National Election Security Task Force to train police forces and prevent the escalation of violent incidents. Another important step the Commission took to increase trust in the electoral process and bolster its independence was the creation of the Inter-Party Advisory Committee (IPAC) in 1994, a forum wherein political parties can voice concerns about the electoral process (Abdul-Gafaru and Crawford, 2010; Cheeseman et al., 2017). The IPAC helped to build trust between parties and created consensus on the Commission's rules (Hamberg, 2015). Further investments by the Commission to improve quality and transparency in voter registration, as well as in election monitoring and observation, enhanced its image as a trustworthy institution (Arthur, 2010; Gasu, 2017; Gyimah-Boadi, 2009, 2018).

These initiatives by the Electoral Commission greatly facilitated the electoral process. Notwithstanding claims by losing opposition parties (alternately, the NPP and the NDC) about the Commission's pronouncement of the 2012 and 2020 election outcomes, respectively, such a guarantee has been critical to alleviating the fears of political elites of being permanently excluded from access to power. Thus, since the 1992 transitions, electoral losers have bought

While the NPP candidate publicly expressed disagreement with the ruling of the court, he accepted the verdict and urged his party and supporters to respect the court's ruling and the rule of law.

into the legitimacy of the electoral result because they know that they could win the next election. Historically, the Commission has been perceived as being independent and as having high integrity, principles facilitated by its operational, financial, and institutional autonomy and insulation from executive control. Members of the Commission enjoy security of tenure and have the same conditions of service as justices of the superior courts. Furthermore, the Commission retains firm control over recruitment of both the permanent and temporary election staff and over drafting of important legislative and constitutional instruments that regulate the conduct of elections. The Commission also has the mandate to set election dates and to determine the modalities for declaring election results.

Finally, the judiciary is one of the key governance institutions to have remained intact since independence, its functions not suspended during the periods of military and one-party rule. Chapter 11 of the 1992 Constitution provides for the structure and independence of the courts from all other branches of government. The courts in Ghana, in particular the Supreme Court, have been called upon several times during the Fourth Republic to make rulings on the contestation and participation rights of citizens. While there were accusations in the past that the courts overly deferred to the executive, particularly during the first decade of the current Fourth Republic (Asante, 2002), more recently, the courts have become the vanguards of contestation rights. The courts have provided judgments that have contributed to protecting, defending, and expanding boundaries on the electoral rights of citizens and candidates. Landmark cases that the Supreme Court of Ghana has been called upon to adjudicate include ordering the state-owned media to provide equal access and fair opportunities to opposition political parties to express their ideas and views to the public; compelling the Electoral Commission to provide information, such as the voter registry, to all political parties within given timelines; and requiring the Electoral Commission to establish rules to allow for an expansion in the pool of presidential candidates, to set nomination fees for candidates and contestants, and to regulate the registration and identification of voters both at home and abroad.

In spite of these successes, Ghana's democratic trajectory has remained an electoral democracy and appears to have stagnated at this level. Political elites, from both the dominant parties (the NPP and NDC) have resisted popular demands for constitutional reforms that would limit the powers of the executive; promote more accountability of elected leaders; extend the boundaries of popular participation of citizens in electoral politics, especially in local-level governance; expand the frontiers of media freedoms and access

to information; and promote and enhance inclusion of minority rights. We argue that this is due to the collusion of political elites who share a common interest in maintaining the political status quo, most notably the scope of executive power. Because ministers are appointed by the executive, and because the majority party in the legislature and the executive have traditionally come from the same party, the loyalty of ruling political elites is primarily to the executive (president) and the party. Increased levels of partisanship have strengthened party cohesion and an unwillingness by ruling parties to weaken the executive (Dramman, 2017). As a result, there is little interest by ruling parties to negotiate with minority parties to change the existing political status quo. Once new parties achieve power peacefully through the ballot box, electoral promises to enhance participation and accountability quickly disappear in the interest of maintaining a strong executive.

Democratic stagnation through administrative lawfare

Ghana's legal system has its roots in the post-independence period, which started in 1957 under Kwame Nkrumah and his Convention Peoples Party (CPP). A liberal constitution established a Westminster-style parliamentary government and guaranteed a full suite of democratic rights for citizens, including the right to contest elections as well as an independent judiciary (Botchway, 2018). A new constitution in 1960 created an executive president as head of state and government. Nkrumah assumed the position of president and transformed the country into a one-party state under his civilian autocratic rule in 1964, which was ultimately overthrown in the country's first military coup in 1966, ending the post-colonial liberal political period.

Up until the 1992 democratic transition, the military consistently posed the biggest threat to democratic stability, overthrowing democratically elected civilian governments three times between 1966 and 1981. The political equilibrium between 1957 and 1992 was characterized by continuous ideological conflict between Nkrumah's populist, left-wing, socialist-oriented and one-party regime, which sought to be broadly inclusive both ethnically and socially, and a powerful coalition of conservative political and economic forces. The military alternated in its support of these factions and had its longest period of rule from 1981 to 1992 under Flight Lieutenant Jerry Rawlings.

Democratic stagnation in Ghana has been driven by the two main political parties, the NPP and the NDC. Since Ghana's return to democracy in 1992, political parties have become the vehicle through which political elites

and voters pursue their objectives and thus actualize representative democracy (Oduro et al., 2014; Bob-Milliar, 2019). The two parties are well institutionalized and power rotates between them rather than between personalities. Yet, while the parties are critical for mobilizing mass political participation, at the same time they are also fundamental factors blocking key democratic reforms, including constitutional reform, reform of local governance elections, and expanded media freedoms and minority rights. These legal and governance reforms would contribute to improving the accountability of the executive and to decentralizing political power, enhancing citizen popular participation in political processes and deepening respect for individual civil and political rights. Below, we discuss some specific examples of reforms demanded by citizens but successfully resisted by the dominant political parties.

Judicial lawfare: Resisting constitutional reforms

Each new republic in Ghana has introduced constitutional reforms aiming to amend the rules and dynamics of contestation politics, bringing the country closer to full democratic governance. Changes enacted by the constitutions of 1957, 1960, 1969, 1979, and 1992 revolved largely around the role and power of the chief executive (Buah, 1998). The 1992 Constitution is the longest surviving constitution since Ghana attained independence in 1957, and it is generally viewed as one of the most progressive and liberal constitutions in Africa (Abdul-Gafaru and Crawford, 2010). The Constitution has provided the framework for developing and sustaining contestation and participation rights and has produced eight successive and largely credible and peaceful elections that have promoted democratic stability.

The current 1992 Constitution maintained the previous constitution's provisions for the chief executive's role and power and retained the power of the president to appoint ministers (Arhin, 1995). The 1992 Constitution went further than previous versions by granting extensive civil and political rights and freedoms (such as freedom of speech), reinstating an independent judiciary, and integrating the political decentralization process that had begun in 1987 (Abdul-Gafaru and Crawford, 2010; Asamoah et al., 2014; Doorenspleet and Nijzink, 2014). All of these elements were expected to constrain the power of the executive through accountability mechanisms, the dilution of centralized power, and the freedom for alternative views to be voiced and ultimately to govern. The 1992 Constitution further protects Ghanaians' right to be

represented by legitimately elected public officials through partisan national elections and non-partisan local government elections.

Above all, the right to form political parties and contest elections is guaranteed by the Political Parties Act 2000 (Act 574) and the passage of several Public Elections (Registration of Voters) Regulations, all which have served to further guarantee the rights to contest elections and to vote. Arguably, the 1992 Constitution reflected lessons from the previously abrogated constitutions of 1957, 1960, 1969, and 1979, intentionally setting up mechanisms to try to prevent future coups and the return of an autocratic government and a one-party state. The 1992 Constitution further envisaged the institutionalization of power-sharing among the president, a parliament, a cabinet, a Council of State, and an independent judiciary. The president is elected by universal adult suffrage for a four-year term and can only serve for two terms. Members of Parliament are popularly elected by universal adult suffrage for terms of four years with no term limits. The parliament has emerged over the years as a key institution of democratic governance, and its relevance in terms of government oversight and public accountability is growing (Gyimah-Boadi and Yakah, 2013: 265).

While there have been no attempts to change the 1992 Constitution in ways that would undermine contestation rights, over the years there have been calls by civil society and political actors to review, fine-tune, and reform provisions in order to advance, deepen, and consolidate democratic gains. In particular, concerns have been raised about excessive executive power and dominance vis-à-vis parliament. Increasingly, parliament is considered subordinate to the executive and its oversight functions have largely been perfunctory (Doorenspleet and Nijzink, 2014; Gyimah and Prempeh, 2012). Parliament is challenged by a strong dependency on the executive, most notably for its budget. Moreover, there are aspects of fusion of the executive and legislature through cabinet appointments,² which undermine the legislature's independent oversight of the executive branch of government (Center for Democratic Development–Ghana, 2008). Dramman (2017) argues that parliament has become weaker since around 2009 in its oversight of the executive due to increased partisanship, which has created high levels of party cohesion and an unwillingness to censure either serving ministers or the executive. This

² The 1992 Constitution requires the executive to appoint majority of cabinet members and ministers of state from among members of the parliament. This has, invariably, weakened the parliament's ability to exercise its oversight control of the executive, as this guarantees significant numbers of pre-determined votes in the legislature.

problem is exacerbated by the fact that over the years the executive and the legislature are controlled by the same party and, with high levels of party cohesion, there is little desire by the ruling party to negotiate democratic reforms with the political opposition.

Furthermore, many stakeholders recognize that the constitutional governance arrangements enable “winner-takes-all” politics and that changing this is critical to enabling more inclusive and accountable governance by diluting single-party control over decision-making and over political assets such as jobs—the spoils of electoral office (Fobih, 2011; Oduro et al., 2014). Public-sector jobs are a vital source of patronage for the party in power as the ability to appoint people to serve in Ghana’s public sector is vested in the president of the governing party (Bob-Milliar, 2019). Finally, the promise of representation, inclusion, and participation of women and minority groups—as expected in the application of the constitution—has not been realized, limiting the inclusiveness and representativeness of the country’s democracy (Abdul-Garafu and Crawford, 2010). We address this further in our discussion of international mechanisms below.

Ahead of the 2008 general elections, the issue of constitutional reform took center stage in debates and campaign promises. The two major political parties (the NDC and NPP) committed to initiate the first major review of the 1992 Constitution if they were victorious during the elections. As a result of a strong advocacy campaign for enhanced democratization and a 2005 report by the African Peer Review Mechanism that revealed a number of deficits in governance procedures and democratic development, the NDC, which won the 2008 elections, established a Constitutional Review Commission (CRC) in 2010 to undertake a comprehensive review of the Constitution with the broad objective of making recommendations for constitutional amendments (Barker-Vormavor and Atuguba, 2014). These recommendations were seen as improvements on the margin, not as a major overhaul of democratic governance (Vormavor and Atuguba, 2014).

Following nearly two years of nationwide and multifaceted consultations, extensive media coverage, and citizen participation in public hearings (with nearly 83,000 formal submissions made from across the country), the CRC concluded its work and submitted its report to the NDC government in December 2011. The CRC made several recommendations and proposals for constitutional changes as well as for legislative and administrative reforms covering twelve thematic areas. These proposals included regulating executive powers of appointment, strengthening the legislature powers of lawmaking and oversight, reinforcing the independence of the judiciary, expanding the list of independent constitutional bodies as originally provided for in the

1992 Constitution, and strengthening the Electoral Commission to better regulate the electoral process (such as through the creation and redrawing of constituencies and districts for electoral purposes, making transfers of power from one administration to another smoother, faster disposition of electoral disputes, provision of adequate measures to actualize the voting rights of prisoners and Ghanaians living abroad, strengthening of the IPAC, and improving regulation of political parties).

In September 2012, in response to civil society demands, the NDC government established a five-member Constitution Review Implementation Committee (CRIC) to take forward the CRC recommendations. The government issued a white paper on the CRC report, wherein it accepted and rejected some of the recommendations in the report ([Government of Ghana, 2012](#)). The CRIC was mandated to prepare proposals for constitutional amendments that were to be discussed in parliament as well as a national referendum for both non-entrenched and entrenched clauses respectively. The CRIC proposed a total of ninety-seven amendments to the constitution, forty-one of which required a national referendum because they were entrenched provisions and fifty-six that simply needed parliamentary procedure process. Among the proposed amendments that would have significantly contributed to improving democratic and accountable governance, if enacted, included the constitutional requirement for the executive to appoint the majority of ministers of state from among members of parliament. The proposed amendment aimed at freeing the president from this requirement and thus allowing the president to appoint from inside or outside of parliament. The objective was to reduce the influence of the executive on the legislature, thereby strengthening the separation of powers.

While the NDC retained power for another four years, no efforts were made to translate these outcomes from the CRC and CRIC works into outputs following the December 2012 general elections. As of today, the suggested reforms have still not been adopted and the NPP, after winning the 2016 elections, has made little effort to complete the reform process ([Star Ghana Foundation, 2019](#)).³ Thus, the first comprehensive constitutional reform exercise aimed at transforming and consolidating the country's electoral democracy gains failed because political elites abandoned the process. Observers of Ghanaian political and democratic development argue that neither the NDC nor the NPP are sincere about making any meaningful constitutional reforms and that they prefer the status quo over reforms because of the patronage

³ The NPP won the recent 2020 elections and has still not initiated any reform process at the time of writing.

politics that the current system generates.⁴ The political commitments made by the parties in their 2008 election campaign manifestos were made in response to demands by civil society. The delays associated with executing the CRC-recommended reforms should have taken place under the NDC, which had two terms (eight years) in power. The fact that these reforms did not occur is testament to this lack of sincerity. Indeed, the NDC, which set up the CRC, was against one of the major recommendations from the CRC regarding the transformation of local government elections from non-partisan to partisan elections.⁵ This was reflected in a white paper that the government issued in response to the work of the CRC and which totally rejected that particular recommendation as well as others ([Government of Ghana, 2012](#)).

The NDC's formal position in rejecting the proposed amendment to make local governance elections partisan was the fear of further political polarization of Ghanaian politics in local governance. A senior party official of the NDC stated that "the consequence of exporting this polarization into the district assemblies [local government] is that very soon in our villages, there will be 'NDC Communal Labor day' and 'NPP Communal Labour day.' There will be also 'NDC market' and NPP market" (The Ghana Report, 2019). While there have been legitimate worries of "winner-takes-all politics" polarizing the multiparty democratic setting, the current period of Ghana's democracy is its longest since independence. Moreover, the political parties have consistently violated the local government election laws by sponsoring and backing candidates and party members. What was at stake for both parties on the issue of local elections was and remains the weakening of political party control of patronage through executive appointments of heads of local government administrations. In the Ghanaian context, non-partisan local elections enable centralized control over local, decentralized governance and the continuation of what is in reality a top-down political administrative system ([Anaifo, 2018](#)).

For its part, the NPP, while promising constitutional reform in its 2008 campaign, was against the mode and format that the NDC set up for the CRC in 2010. After gaining power in the 2016 elections, the NPP did not pursue fulfilling the recommendations of the CRC and the CRIC, resulting in the collapse of the most comprehensive attempt at constitutional reform since 1992. The

⁴ Interviews with key informants between 2019 and 2020, including civil society leaders, governance experts, academics, and constitutional lawyer/experts. One of the authors is also privy (participant) to a meeting between civil society organizations (CSOs) and the president, where this issue was raised and discussed.

⁵ The NDC prides itself as the architect of the current local government and decentralization reforms dating back to 1988, which was first introduced by the Provisional National Defence Council (PNDC). The NDC is the offshoot of the PNDC.

NPP was not interested in following through the work of CRIC and was against some of the recommendations made in the CRC. In particular, the NPP leader, also the country's president, is reported to have expressed disinterest in a proposed recommendation to tinker with the constitutional provision calling for appointment of the majority of ministers from the legislature. Instead, the president (and by extension, the party) preferred the status quo of the fusion of the executive and the legislative branches of government,⁶ which has long been observed as the main factor undermining parliamentary oversight functions (Gyimah-Boadi and Yakah, 2013). It must be noted, however, that the NPP leader was a strong proponent of a reform in the decentralization structure with respect to popular and partisan elections in local government leadership, although, as we discuss next, the party (NPP) did not fully support its leader on this reform. Significantly, the decision not to reform local government elections is an instance where the two parties appear to have found a unity of purpose.

Resisting legislative measures: Failed decentralization reforms

One of the recommendations made by the CRC was to install direct and popular election of local political leadership, popularly known in Ghanaian law as metropolitan, municipal, and district chief executives (MMDCEs). The CRC also recommended further devolution at the district level and increased fiscal transfers from the center to decentralized political units. The NPP and NDC parties agreed to and incorporated these suggested reforms into their campaign manifestos ahead of the December 2016 elections. Proposed measures included parliamentary amendments of relevant provisions in the 1992 Constitution that would allow Ghanaians to popularly elect political leaders (mayors) in the decentralized political authority, replacing the current practice where the president appoints these authorities. Indeed, Ghanaians had expressed support, nearly 70%, for directly electing local government officials (Armah-Attoh and Norviewu, 2018). An additional proposed measure was to organize a national referendum for Ghanaians to decide on whether to introduce multiparty politics in local-level elections.

While regular local elections have been held every four years since 1988 to select local assembly representatives and members of unit committees, the

⁶ Interviews by authors with key informants (civil society leaders, governance experts, academics, and constitutional lawyer/experts), 2020.

non-partisan, popular nature of local elections has been identified as a factor undermining effective political authority at decentralized levels of governance. Voter turnout is much lower for local as opposed to national (partisan) elections, and observers of Ghanaian democratic politics have attributed the low public interest in local government elections to their non-partisan nature, given that political parties in Ghana have been key mobilizers of voters during elections ([Yeboah-Assiamah, Asamoah, and Osei-Kojo, 2014](#)).

Once in power in 2017, the NPP government made plans to honor its promise and took steps to initiate parliamentary amendments to Articles 243(1) and 55(3) of the 1992 Constitution. It was envisaged that these amendments, if successful, could have allowed for democratic entry of political parties into local government, opening up the executive arm of governance to participation of all political parties for the first time in the Fourth Republic. This would have replaced the current situation wherein the president has sole authority to appoint local-level administration executives to one wherein multiparty elections would be held for these positions. Such a move would contribute to enhancing inclusive governance by empowering the electorate to redistribute elected positions at local government levels, reducing the tensions associated with a “winner-takes-all” approach once a party is successful in national elections (Institute for Democratic Governance, 2018).

With strong popular support and broad consensus among the political parties, especially the two dominant parties, as well as voter mobilization by all political parties, the success of these reforms would most certainly have raised the bar of Ghana’s elite consensus beyond electoral democracy. It would have demonstrated the potential of Ghanaian ruling and opposition parties to overcome their political differences and seek efforts to deepen democratic and participatory governance beyond elections, something both parties have usually campaigned on during elections. Furthermore, these reforms would have enhanced greater governmental accountability. However, the amendment process in parliament and a national referendum planned for 17 December 2019 were both withdrawn by the NPP government on the eve of scheduled events. In a nationwide address two weeks before the national referendum, the NPP government cited as one of the main reasons a reversal of the broad consensus and support from the NDC, which had been earlier assured for the proposed reforms (see [CNR Citi Newsroom, 2019](#)).

While the NPP government cited the NDC U-turn in support, as the president described it, it was clear that neither party genuinely supported these reforms and that they preferred the status quo because of the patronage advantages that accrue when a party is in power. In his statement addressing the

withdrawing of the proposed referendum, the president noted that it was critical for a broad consensus from both parties (not driven by one party) in amending an entrenched provision in the Constitution. In the absence of such clear national consensus and the support of the NDC, (which withdrew its support in the days leading up to the referendum), he did not believe that such an atmosphere provided the appropriate time for the referendum to take place ([CNR Citi Newsroom 2019](#)).

On the issues of constitutional reforms and decentralization reforms, both parties have demonstrated a preference for preserving the current legal and institutional arrangements. The preference for the status quo may be linked to the control of appointments of MMDCs as decentralization provides the party structures at the regional and local levels with influence over who gets nominated, appointed, and also, ultimately, who manages the flow of resources from the center to the periphery. Tellingly, the president withdrew the call for the referendum despite the fact that the reform had support and the vote was likely to be successful (see the Afrobarometer survey report, 2018). Ultimately, the lack of support appears rooted in the parties and party elites, not in the people.

Legislative measures: Challenges to media freedoms and information rights

Ghana's democratic success is often attributed to its robust and vibrant media engagement as well as to citizens exercising free speech ([Arthur, 2010](#); [Gyimah-Boadi and Yakah, 2013](#)). The "culture of silence" that characterized Ghana's political and media space prior to the 1992 democratic transition was addressed with the enabling constitutional provisions in the 1992 Constitution, which guaranteed media freedom and the right to information.

Yet, despite the freedom of information guaranteed by the 1992 Constitution, criminal libel and sedition laws remained in place at the time and were used to harass and intimidate the nascent private media and restrict free expression of ordinary citizens. These laws were finally repealed by parliament in 2001 under the auspices of the first NPP government, led by President Kufuor ([Arthur, 2010](#)). Decriminalization and the relaxation of state control led to a burgeoning and pluralistic media scene. To further guarantee citizen rights to information (as guaranteed by the Constitution), the Akufo-Addo NPP government passed a Right to Information (RTI) law in March 2019. This law took nearly two decades to adopt ([Commonwealth Human Rights](#)

[Initiative, 2019](#)). Though first proposed in the mid-1990s under the first NDC government, it took sustained civil society advocacy and international pressure to finally get the law adopted in 2019. Interestingly, both parties, in similar fashion to the issue of reforming local governance elections, publicly acknowledged the need for the passage of the RTI law and consistently included its passage in their respective election campaigns.

Though the RTI was finally passed into law, implementation has been slow, and there are also indications that political elites are deliberately seeking to impede implementation ([Ghana News Agency, 2020](#); [GhanaWeb, 2021](#)). It took more than a year for the executive to put in place systems to operationalize the law and, as of February 2021, the parliament has yet to pass the required implementing regulations to accompany the law ([Modern Ghana, 2021](#)). These regulations would require administrative procedures, including fees to be charged by public institutions when one invokes the law to demand public information. In the absence of these regulations, public agencies are setting their own arbitrary fees, which are often prohibitively expensive. The failure to put in place required regulations and structures for the efficient operation of the law signals that the RTI law, which in itself took two decades to be adopted, may be tactically delayed and as such may not significantly expand the boundary of citizen's right and access to public information.

Despite the repeal of restrictive media laws and the adoption of the RTI law, a number of developments in the media space in Ghana directly threaten media freedoms and undermine free speech. The decriminalization of the criminal and seditious laws were met with professionalism and integrity challenges and increased partisan ownership of media outlets ([Hasty, 2005](#); [Whitfield, 2009](#)). According to the Media Ownership Monitor (2017), media independence is lacking in Ghana: one-third of media outlets are either state-owned or are owned by shareholders with political affiliations, among them high-level politicians ([Endert, 2018](#)). In addition, the media's ability to conduct investigative journalism and to scrutinize government actions and transactions is challenged by the lack of recourses and access to official and credible information. Furthermore, media organizations, such as the Media Foundation for West Africa (MFWA) and Ghana Journalists Association (GJA) have recently sounded the alarm about declining press freedom and free speech in Ghana. Several reports have documented violations of press freedom and an increase in harassment and attacks on journalists ([Freedom House, 2019](#)). These attacks are being carried out by police officers as well as citizens who are suspected of being vigilante groups for political parties

(IFEX, 2017). These attacks must be considered in the context of growing popular anger over fake news and sensationalism (Endert, 2018) and significant support for the government to restrict and limit the sharing of fake news, as reported by Afrobarometer survey data (Sanny and Selormey, 2020).⁷ Indeed, ahead of the 2016 general elections, the fear of misinformation and fake news led the Inspector General of Police to declare his intentions to ban social media on the day before elections. However, this move was quickly squashed as a result of opposition from media freedom advocates in civil society.

While there is an overall understanding in both the civil society and media sectors about the need for improved regulation and control of the media sector, due to the large increase in media outlets after the repeal of the libel laws in 2001, this has also been subject to criticism. In the lead-up to the 2020 general elections, the opposition parties argued that the NPP government was deliberately using the law to stifle opposition voices and replace them with its own media content. This claim was vehemently refuted by the governing party (NPP), eager to uphold the image of its president and party as the champions of liberal rights and media freedom (Joy Online, 2021).

Similarly to other competitive electoral regimes on the continent, as in Kenya (Chapter 6) and Zambia (Chapter 8), the constitutional reform failure, the stalling of decentralization reforms, and the limits on the expansion of media freedom illustrate how Ghanaian political elites across the party divide have refrained from advancing democratic governance through legal and institutional reforms, even when popular opinion supports such reform. The political elites comprising both the main political parties have preferred the status quo because of the patronage advantages that accrue when a party is in power. Turning to discuss the role of international actors and international mechanisms, we shall see that Ghana's reputation as one of the few liberal democracies in Africa has provided the various regimes with little international pressure to deepen democracy. Its international reputation has allowed the political elites to push back against international pressure for deepened democratic reform in the arena of civil rights.

International strategies

Ghana's international economic and political relationships have played a significant role in assisting its democracy over the years. International economic

⁷ Findings from the Afrobarometer survey conducted in 2019 shows that "large majorities of Ghanaians 'agree' or 'strongly agree' that the government should be able to limit or prohibit the sharing of false news (77%), hate speech (69%), and news and opinions that criticize or insult the president (57%)" (Sanny and Selormey, 2020: 2).

pressures played an important role in Ghana's transition to democratic rule in 1992. The International Monetary Fund (IMF) and the World Bank, as well as the main bilateral donors, made it clear that aid and loans would be reduced unless the Rawlings regime moved toward democracy (Haynes, 2001; Whitfield, 2010). At the same time, the negative impacts of the structural adjustment policies implemented by the Rawlings regime during the 1980s began to threaten the domestic legitimacy of his government, further prompting the move toward democratic governance (Awal, 2012; Debrah, 2016; Jeong, 1998).

The international community often lauds Ghana's political stability, something that Ghanaians themselves are proud of and seek to maintain. And while newfound petroleum resources allowed the government to postpone much-needed economic reforms (such as removing energy subsidies and ensuring fiscal discipline), at the same time the country has continued to participate in the international global economy to export its mining and oil resources (Arditti, 2017). The government adopted a number of positive political measures for good governance of its oil resources, including mechanisms for civil society participation and oversight (Kopinski et al., 2013), and it has not linked calls for more resource nationalism in the mining sector to an unwillingness to pursue democratic reforms. In contrast to other countries, such as Tanzania, Ghana has not bargained the access of international oil and mining companies to the country's resources as a way to thwart criticism and pressure for further democratic reforms.

Selective compliance with minority rights

At the same time, Ghana has pushed back against international pressure for deepened democratic reform in the arena of civil rights. Recognition and respect of minority rights is an area in which Ghanaian political elites have resorted to both sovereignty claims and selective compliance as strategies to resist international pressures for further democratization (see Chapter 4). In particular, there has been pushback against women's political participation and other recognized gender-based rights such as LGBT rights. This laggard performance is at odds with the fact that the 1992 Constitution's bill of rights (located in Chapter Five) guarantees fundamental human rights and freedoms that are enforceable by the courts. These rights include cultural rights, women's rights, children's rights, the rights of disabled persons, and the rights of the ill, among others. Furthermore, Chapter Six of the Constitution requires the state to promote inclusion in governance and development. Specifically, Article 35(5) of Chapter Six charges the state to actively "promote the integration

of the peoples of Ghana and prohibit discrimination and prejudice on the grounds of place of origin, circumstances of birth, ethnic origin, gender or religion, creed or other beliefs.” Ghana is also a signatory to several regional and international human rights agreements on gender and minority rights, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Selective compliance with minority rights can be seen in the realm of upholding women’s rights. In recognition of the urgent need to halt and reverse the effects of the marginalization of and discrimination against women and to promote the sustainable development of the country, the Ministry of Women and Children (now the Ministry of Gender, Children, and Social Protection) was established in 2001 (Appiah, 2015). This Ministry began work to provide further impetus for increased political participation of women⁸ and of persons with disabilities, among other minority groups. Furthermore, the CRC recommended the adoption of an affirmative action law that would guarantee at least 30% representation of gender in all public offices, in addition to requiring that one-third of local government assemblies be composed of women, youth, and persons with disabilities. The purpose of the draft Affirmative Action Bill is to effectively redress social, cultural, economic, and educational gender imbalances in Ghana, based on historical discrimination against women that impedes sustainable national development (Appiah, 2015). In essence, it seeks to promote the full and active participation of women in public life by providing for a more equitable system of representation in electoral politics and governance. The current draft bill seeks equal (50–50) representation and participation of both women and men in governance, public positions of power, and all decision-making spaces.

While each of the two dominant political parties has drafted its own affirmative action law whenever it has been in power, these draft laws have yet to be adopted into law and implemented. Appiah (2015) notes that while it is common for political parties to consider ethnic, regional, and religious background when selecting nominees for ministerial appointments, gender rarely serves as a criterion for selection. The current NPP government promised to ensure the passage of the affirmative action law when it took office in early 2017 but, at the time of writing, no action has been taken to do so.

In contrast, LGBT rights are a clear example of the use of sovereignty claims to push back against international pressure toward improved civil liberties.

⁸ Female representation in the national legislature has constituted just 8–13% since 1992. In the local-level assemblies, elected female representatives have consistently been under 10% since 1994.

The Ghanaian criminal code of 1960, section 104, criminalizes consensual same-sex sexual activities between adults, and the political elite from both sides of the political divide, as well as influential religious and traditional authorities, seem to be in no hurry to amend these provisions or to promote new rights to these groups (*Ghana News*, 2020b; *Joy Online*, 2019; *Ghana News*, 2020a; *Joy Online*, 2018). In mid-2021, the government went so far as to propose a new bill prohibiting membership in LGBT groups and advocacy for LGBT rights and punishing public displays of same-sex affection. Indeed, this subject is yet another one on which the NDC and the NPP are united in resisting pressures, mostly international, to respect and recognize the rights of LGBT communities in the country. Furthermore, social stigma regarding sexuality remains strong. Since 1993, each time the subject of legalizing and/or respecting and protecting the rights of same-sex relationships has come up for discussion in domestic and international circles, the leaders of both parties have rejected such demands by resorting to discourses around sovereignty, citing the protection of traditional, cultural, and religious values as reasons for not enhancing legal protections. For example, the former President of Ghana, Attah Mills, stated that the UK government could not use threat of cutting foreign aid to impose its values on Ghana and that he would never legalize homosexuality (*Africanews*, 2017; *GBC Ghana Online*, 2020). As recently as 2018, a bi-partisan parliament (composed of NPP and NDC) declared that it would not entertain any bill legalizing same-sex marriage. Both the speaker of the legislature (who is a member of the NPP) and the second deputy speaker (who represents the NDC) forcefully declared that under no circumstance would they endorse any attempt to legalize homosexuality (*Ghana Business News*, 2018).

If there is any lesson to be drawn from how Ghanaian political elites have resisted the promotion of minority rights and failed to fully facilitate the inclusion and participation of marginalized groups, the passage of a “persons with disability law” in 2006 is one such an example (Oduro, 2009). It took almost fifteen years for such a law to be enacted following the adoption of the 1992 Constitution (similar to the long time to adoption for the freedom of information law).

Conclusion

Ghana is considered one of Africa’s most stable democracies and the country ranks high on all global measures of democracy. However, Ghanaian political

elites have consistently stalled constitutional and legal reforms that would have allowed a deepening of democracy. Political elites—including the party leadership of the two major political parties—have thwarted reforms to key political institutions, such as the Constitution and the failed decentralization reform, and they have restricted and hampered media and information freedoms as well as gender and minority rights. Despite the successful attempts of political elites to constrain democratization in order to maintain a powerful executive, Ghana's democratic trajectory is likely to remain steady. This pattern of stability is due to the high levels of political elite consensus on political, electoral, and democratic arrangements, as promoted and protected by the 1992 Constitution. This can be attributed to three broad factors. The first relates to lessons drawn from the checkered economic and political post-independence history that nearly led to the collapse of the Ghanaian state by the 1980s and the collective determination not to return to the political past of autocratic and military rule. The second relates to the delegitimization of the military due to its poor performance over many years in office.⁹ The third factor relates to the relative success of competitive politics, which has created a peaceful power-sharing arrangement wherein the dominant political parties have an equal chance of governing, thwarting a desire to use legal mechanisms to stifle and weaken opposition parties.

Notwithstanding the above, there are threats on the horizon to Ghana's democracy. The outcomes of the 2020 elections, which led to the opposition party NDC rejecting the outcomes and contesting the results in the highest court of the land, is a sign of the gradual erosion of trust in and credibility of the Electoral Commission. Throughout the election season, the NDC expressed its distrust and accused the Electoral Commission of being non-transparent, biased, and as being an appendage of the ruling NPP party. It is thus not surprising the party rejected the results and contested it following the polls. Ironically, the NPP, prior to winning the 2016 elections, also launched similar accusations against the then leadership of the Electoral Commission. In both instances, perceptions of bias flowed from the fact that, ahead of the 2016 and 2020 elections, the respective leaderships of the Electoral Commission were appointed by the NDC and NPP, respectively, and the party in opposition expressed misgivings. The trust and credibility of the Commission have increasingly been questioned, undermining its independence and popular trustworthiness, since the post-2012 election petition and litigation

⁹ Rejection of the military in Ghanaian politics has been consistent since 1999, as demonstrated by Afrobarometer surveys overtime: 89% (1999), 86% (2002), 85% (2005), 81% (2008), 87% (2012), 74% (2014), 73% (2017), 69% (2019), 67% (2022).

of the presidential results. Incidentally, reforming the appointment powers of the executive and enhancing the independence of the Electoral Commission were among the many recommendations made by the CRC that have not been followed through by the two main parties.

If Ghana's democratic trajectory is to backslide, it may be as a result of the erosion of the trust, autonomy, and independence of the Electoral Commission, which is, in turn, likely to undermine contestation and participation rights. In addition to restoring trust and strengthening the autonomy and independence of the Electoral Commission, taking bold steps to reform key areas of the 1992 Constitution, with particular reference to separation of powers and checks and balances; limiting the excessive powers of the executive; reforming local governance elections to assure popular participation and greater responsive and accountable local governance; expanding the boundaries of media rights and freedom; and, above all, promoting the rights of minority and underrepresented population in public life are measures that will advance and deepen Ghana's democratic trajectory beyond the present political settlement of electoral democracy.

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6

Kenya

Executive Dominance through Constitutional Bargaining

Matthew K. Gichohi and Leonardo R. Arriola

Introduction

Kenya's uneven progress toward democracy has been defined, to a great extent, by the political manipulation of institutions. The analysis presented in this chapter shows how, after the initial transition from one-party to multiparty politics, Kenyan incumbents have been able to exploit legal mechanisms—constitutional, legislative, and judicial—to limit democratic reforms that might threaten their hold on power. In the process, incumbents and their political allies have managed to stymie the efforts of civil society groups to mobilize Kenyans in support of greater liberalization.

The constitutional reform process, for much of the first two decades, was defined by incumbent efforts to limit changes to the prevailing constitutional order. By controlling constitutional reform directly, successive incumbents have followed an authoritarian template focused on protecting executive authority, while maintaining some semblance of political liberties (Tushnet, 2015). Incumbents achieved this outcome by using the reform process to coordinate with other Kenyan politicians who similarly favored a constitutional order dominated by the executive—either because it would be one that they themselves might one day control (Ginsburg and Simpson, 2013) or because such executive dominance provided irresistible clientelistic benefits (Hale, 2013).

Greater political liberalization in Kenya began to accelerate in earnest only after a faction of politicians, both regime insiders and those in opposition, defected from an incumbent-driven process of constitutional reform. Perceiving their route to executive power blocked, various political factions regrouped and allied with civil society groups in the mid-2000s to push for

greater political liberalization through constitutional reform (Mutua, 2008). The incumbent regime was ultimately forced to concede to more ambitious reform once the post-election violence of 2007–2008 signaled the ability of regime opponents to threaten the country's stability. The resulting 2010 referendum produced a new constitution that ostensibly dissipated executive power both horizontally (through greater checks and balances) and vertically (through devolution to local governments). Yet, while the changes brought about by the 2010 Constitution have marked the single most important advance in Kenyan democratization since the initial return of multiparty rule, the executive remains able to manipulate legal mechanisms to control if not undermine further reform.

The Kenyan executive's ability to slow down reform has been facilitated, in part, by their dominance in international affairs. Successive presidents have invoked national sovereignty to shield themselves from criticisms made by international institutions or foreign governments. However, the international mechanism has been a relatively weaker and inconsistent instrument for Kenyan presidents. Not only have their governments remained dependent on international finance and aid, but they have also been unable to prevent civil society groups from using their own international linkages to lobby for even more international pressure for democratic reform. As a result, while Kenyan presidents regularly depict themselves as defenders of the national interest, they have only been able to use sovereignty claims to buy themselves time in delaying reforms.

Legal strategies

Meaningful democratic reform with the potential to limit executive power has been achieved in Kenya only when opposition parties have been willing to join civil society groups in challenging the incumbent regime at critical moments (Mati, 2013; Mutua, 2008). But such moments have been relatively rare, occurring only twice in three decades of democratization: in 1990–1991, when multipartism was relegalized, and again in 2008–2010, when an entirely new constitution was finally put in place. More frequently, successive incumbents, such as Daniel arap Moi, Mwai Kibaki, and Uhuru Kenyatta, have been able to stymie liberalizing reforms through lawfare (constitutional, legislative, and administrative) by using their political and institutional influence to induce opposition defections from broad-based reformist coalitions.

Kenyan democratization via legal strategies has been limited, in part, because the country's political class has largely chosen to limit citizen

participation. In this respect, Kenya's constitutional reform experience is consistent with prior research showing that citizen participation in the constitution-making process affects subsequent levels of democracy (Elkins et al., 2009; Eisenstadt et al., 2015). Despite emerging international norms encouraging public participation in constitutional drafting (Franck and Thiruvengadam, 2010; Moehler, 2008), Kenyan politicians, both in government and opposition, have consistently opted to limit public deliberation in constitutional reform, possibly with the aim of minimizing institutional changes that might threaten their electoral fortunes in the near term (Jung and Deering, 2015)—or their ability to access executive power in the longer term.

Protecting executive power through constitutional reform

Kenyan presidents have relied on constitutional lawfare to shield their extensive powers over time. In this respect, the template for Kenyan constitutional reform first took form when a pro-democracy movement coalesced under the umbrella of the Forum for the Restoration of Democracy (FORD) in 1990–1991, bringing together activists, lawyers, intellectuals, clergy, and politicians willing to openly defy Moi's one-party regime (Khadiagala, 2010). FORD's leaders managed to overcome deep ideological differences and longstanding rivalries to unite in mobilizing Kenyans to protest the authoritarian control of Moi's ruling party, the Kenya African National Union (KANU). A series of rallies, protests, and strikes ultimately forced Moi to authorize the repeal of Section 2A of the Constitution, the clause establishing a one-party state, in December 1991, marking the country's first major move toward re-democratization (Rudbeck et al., 2016).

But, in foreshadowing the trajectory of future constitutional reform, the coalition represented by FORD began to break apart almost as soon as opposition parties were legalized (Kadima and Oduor, 2014). While many in civil society sought to continue mobilizing to pressure Moi for greater reform, several long-time regime critics opted to join KANU defectors in pursuing an electoral route to political engagement with the regime. A pattern was thus set for the next two decades: opposition politicians largely preferred to be elected under a constitutional order that favored the incumbent rather than holding out for the uncertain pay-off associated with continued anti-regime mobilization, namely, the possibility of a more democratic constitution.

Despite the fragmentation of the original pro-democracy coalition, civil society continued to seek additional liberalizing reforms. Civic groups like the

Citizens Coalition for Constitutional Change (4Cs) and the National Convention Executive Council (NCEC) demanded a comprehensive constitutional review before the holding of any further elections (Kanyinga, 2003; Mati, 2012). A faction of the opposition joined civil society in staging mass protests and civil disobedience in the run-up to an election boycott, with the potential to undermine the legitimacy of the country's second multiparty elections in 1997 (Steeves, 1999).

Anticipating that a constitutional reform process open to civil society might diminish his power, if not lead to his ouster altogether, Moi sought to split the reformist coalition. He successfully did so by offering to negotiate a reform package—but only if the process were handled exclusively among parties within the National Assembly (Barkan, 1998; Barkan and Ng'ethe, 1998). Most of the opposition represented in parliament agreed to Moi's offer and worked with KANU to form the Inter-Parliamentary Parties Group (IPPG), thereby excluding civil society from constitutional reform (Ndegwa, 1998). These parliamentary negotiations led to the repeal of sedition laws, created an electoral commission that included opposition members, and resulted in the enactment of the 1997 Constitution of Kenya Review Act (Lynch, 2006). Other reforms included the replacement of laws requiring permits for public rallies, legalization of political parties that had previously been denied registration, and media time to parties through the state broadcaster.

But it was another reform resulting from the IPPG process that perhaps best encapsulates what Moi hoped to achieve, namely, using the inducements of office to drive a wedge between opposition parties and civil society. Notably, along with the other constitutional and legislative changes brought about through the IPPG process, Moi also agreed to repeal the requirement that government ministers could only be appointed from members of parliament (MPs) of the ruling party. Such a reform effectively meant that Kenya could now have a coalition government between KANU and the opposition (Barkan, 1998). Raila Odinga, leader of the opposition National Development Party (NDP), provides a case in point. He had previously chosen to stake out an aggressive reformist position by allying with civil society to demand greater constitutional reform before further elections could be held, and he chose not to participate in the IPPG process. Nevertheless, once the IPPG reforms were enacted, Odinga led his NDP into a political alliance with KANU that eventually resulted in cabinet positions as well as other government appointments (Oloo, 2000).

When it became apparent that comprehensive constitutional reform was being politically derailed by the late 1990s, civil society groups, including

religious and professional organizations and parts of the opposition, took up their own review process, the Ufungamano Initiative (Mati, 2012; Nasong'ò, 2014). The Ufungamano Initiative sought to reintroduce direct citizen participation in the reform process, resulting in the People's Commission of Kenya (PCK). Such moves by civil society alarmed Moi's regime and caused it to promote a new Review Act (2001) to restart the "official" process. This regime-led process would include an independent review commission to consult the public and draft a constitution based on their views as well as the goals established under the initial review act (Cottrell and Ghai, 2007: 5–9). The commission's draft, however, was never taken up because Moi eventually derailed the reform process by dissolving parliament ahead of the 2002 elections that resulted in KANU's ultimate defeat.

The winning opposition coalition, the National Rainbow Coalition (NARC), which brought about Kenya's first electoral alternation in 2002, managed to secure their electoral victory, in part, by promising to deliver constitutional reform in their first 100 days in office (Kanyinga and Long, 2012). And here is where the Kenyan experience with constitutional reform underscores how access to executive power can shape constitutional preferences. The opposition coalition that formed around Kibaki had agreed to pursue such reform in the run-up to the 2002 elections, including the creation of a prime minister position which would effectively share executive authority (Arriola, 2012). Nevertheless, like Moi before him, Kibaki's post-transition government used both institutional and political means to delay if not prevent fundamental changes to a constitutional order dominated by the executive.

The Constitution of Kenya Review Commission did convene a National Constitutional Conference, popularly called the Bomas Conference for its location on the outskirts of Nairobi, in 2003. But during those constitutional negotiations, Kibaki's representatives sought to block proposals intended to dilute presidential powers, particularly through the creation of a ceremonial president and strong prime minister who would exercise executive authority (Kramon and Posner, 2011; Hassan, 2015). Once the Bomas draft constitution was completed, Kibaki's allies amended the draft to minimize its power-sharing provisions, namely, ensuring that any prime minister would be appointed by and report to the president. Kibaki's efforts to reaffirm executive dominance were opposed by his own coalition allies in the Liberal Democratic Party (LDP), which had regrouped defectors from KANU under the leadership of Odinga (Wanyande, 2003).

Kibaki's attorney general, Amos Wako, produced a final draft constitution that diluted the powers of the prime minister and retained the power of the

executive presidency. The Wako draft, as it became known, was eventually rejected by 58% of Kenyans, who voted against it in a constitutional referendum held in 2005 (Whitaker and Giersch, 2009; Kersting, 2011).¹ The campaign for the constitutional referendum effectively split Kibaki's ruling coalition. While Kibaki and his close allies urged Kenyans to vote for a constitutional draft that preserved executive dominance, many of his former coalition partners, including Odinga, campaigned in opposition to the referendum as the Orange Democratic Movement (ODM), so named because the orange represented a "No" vote on the referendum ballot. Votes for or against the draft constitution then largely reflected the ethno-regional bases of the two camps, setting the stage for the contentious national elections to follow.

Constitutional reform was revived in the wake of the 2007–2008 post-election violence that killed thousands and displaced hundreds of thousands across the country (Amadi, 2009). The political settlement negotiated to resolve the post-election crisis required the drafting of a new constitution—which would be the country's first wholly new constitution since 1969. As part of the broader power-sharing settlement that would allow him to stay on as president, Kibaki agreed to establish the posts of prime minister and deputy prime minister, thereby offering his opposition a temporary concession on executive power while a new constitution was drafted (Kajwang and Southall, 2009). The Constitution of Kenya Review Act (2008) adopted by parliament established a Committee of Experts (COE), including legal scholars, to produce a "Harmonized Draft Constitution" based on the earlier Constitution of Kenya Review Commission, Bomas, and Wako drafts.

The draft constitution produced through negotiations in 2008–2010 ultimately reflected a compromise that preserved considerable executive power. Such an outcome was possible because, while Kibaki's allies remained steadfast in advocating for a strong executive, some ODM members who had previously demanded the creation of a prime minister position were now willing to forgo the dual executive that would have weakened the presidency (Kramon and Posner, 2011). These ODM members may have been willing to soften their position on executive power to extract greater devolution of authority for county governments, another possible mechanism for counterbalancing the centralization of power in the presidency. Such a shift in their demands may have also been motivated by an electoral calculus. As Kramon and Posner (2011: 93) note, "several prominent ODM members harbored presidential

¹ The High Court ruled during constitutional negotiations that ratification of a new constitution required a referendum.

ambitions and may have had mixed feelings about constraining the powers of a post that they hoped one day to fill ... Moreover, Odinga had learned in 2007 that he could win an honest presidential election, so he was likely disinclined to dilute presidential power.”

The final draft constitution imposed new constraints on the executive by articulating its powers and inducing greater cooperation with and oversight from other branches of government. Nevertheless, executive dominance was preserved in the draft because all functions that were not explicitly allocated to another governmental branch remained under the president’s control (Hassan, 2015). This ambiguity in law gave the executive considerable discretion over key government sectors and policy areas. Although some politicians opposed the new draft constitution, the political bargain it represented—the continuation of a strong presidency in exchange for greater devolution to local governments—was sufficient for most of the political class to support it. Consequently, the new constitution was approved by 68% of Kenyan voters in the 2010 referendum (Kramon and Posner, 2011).

The 2010 Constitution did not resolve the debate over executive power in Kenya. Uhuru Kenyatta, as Kibaki’s presidential successor, has proven that his office can work around constitutional constraints on executive power. He has issued executive orders reorganizing the national government and placing independent institutions under the control of the Attorney General and other cabinet secretaries, including the Judicial Service Commission (JSC), the Parliamentary Service Commission (PSC), and the Commission of Administrative Justice (Kakah, 2020; Owino and Ogemba, 2021).² In addition, he has infringed on the devolved authority of county government. For example, he issued an executive order taking over the Nairobi Metropolitan Services (NMS), whose functions include providing health care, transportation, and public works in Nairobi County. By executive fiat, it was decided that the NMS would become part of the president’s office rather than an independent office in the county government system (*The Star*, 2020).

More recently, in response to ongoing political crises, Kenyan politicians have initiated a new round of political bargaining over constitutional reform. The new round of constitutional negotiations repeats the dynamics previously seen in the aftermath of the 2007–2008 post-election crisis. In this instance, following the disputed 2017 election through which Kenyatta won a second term as president, he has sought to stabilize the country by offering to negotiate over the nature of executive power. In March 2018, Kenyatta and Odinga,

² In 2021, the courts ruled that the issued executive orders were unconstitutional.

as opposition leader, shook hands in a symbolic gesture that ended months of tensions (Jared, 2018; Omondi, 2019).³ The outcome of their negotiations, the Building Bridges Initiative (BBI), aims to amend the Constitution by creating a prime minister position, among other provisions. The BBI's proposed reforms would allow the president to control policymaking as commander-in-chief and chair of the cabinet. The prime minister's role, under the BBI reforms, would be limited to coordinating policy implementation through the ministries. The president would have the power to dismiss the prime minister or they could be removed through a vote of no confidence by parliament (Cottrell, 2020). However, in August 2021, Kenya's Court of Appeal declared the BBI initiative unconstitutional, noting that the presidency lacked authority to initiate constitutional amendments (Gavin, 2021). Kenya's current round of constitutional bargaining remains incomplete.

Insulating executive power through the legislature

Kenya's parliament has historically facilitated the executive's dominance by failing to act as an effective check—under multiparty politics just as in the previous one-party regime. Since the reintroduction of multiparty politics, successive Kenyan presidents have been able to rely on legislative lawfare by creating and manipulating parliamentary majorities. Moi, for instance, maintained his party's majority by coopting political rivals, encouraging MPs to join or stay with the ruling party by creating new districts and extending patronage to electoral swing regions (Hassan and Sheely, 2017). Or, in some cases, Moi used violence to intimidate his opponents, arresting opposition MPs for holding "illegal" meetings and using the state to harass their supporters (Mueller, 2020), all with the intent of minimizing their vote base. Electoral alternation did not fundamentally change such dynamics. After opposition parties coalesced to put an end to KANU rule in 2002—Kibaki, and later Kenyatta, have used many of the same tactics as Moi—patronage and violence—to ensure that they can control legislative action.⁴ The Kenyan president, as a partisan and coalition leader, exerts significant control over the legislature's leadership and agenda. For example, when a faction allied to Deputy President William

³ After the Building Bridges Initiative (BBI) handshake, Odinga was appointed as the African Union's (AU's) High Representative for Infrastructure Development, and his running mate, Kalonzo Musyoka, was appointed as South Sudan's special envoy. Odinga's allies in the National Assembly and the Senate then began to support government policies.

⁴ Given party fragmentation, Kenyan legislative action has often required coalition-building (Cheeseman and Tendi, 2010; Arriola, 2012).

Ruto emerged to oppose the BBI proposals endorsed by Kenyatta and Odinga, Kenyatta purged from office those individuals who had the power to derail the process within parliament, including the National Assembly majority leader (Aden Duale), the National Assembly majority whip (Benjamin Washiali), the Senate majority leader (Kipchumba Murkomen), the Deputy Speaker (Kithure Kindiki), and Senate majority whip (Susan Kihika) (*The Standard Insider*, 2020; *The Standard*, 2020).

Legislative lawfare has facilitated executive dominance in Kenya by constraining the ability of constitutional commissions and other independent offices from holding the government accountable. These legislative actions are often intended to protect members of the executive and their allies from legal action. In 2015, Kenyatta suspended the chairman and deputy chairwoman of the Ethics and Anti-Corruption Commission (EACC) following a parliamentary vote to sanction them. The EACC commissioners were sanctioned soon after releasing a report accusing 175 people of corruption, including cabinet ministers, county governors, MPs, and civil servants (Arseneault, 2015). Two years later, the EACC's recommendation that the Independent Electoral Boundaries Commission (IEBC) bar 106 candidates from running for office because of integrity issues were ignored (Ayega, 2017).

Kenya's legislature further contributes to executive impunity by failing to meaningfully reckon with previous large-scale political violence. The Kenyan government has yet to prosecute a single high-ranking official, despite findings being issued by various official committees and commissions. Consider the fate of the Waki Commission set up to investigate human rights abuses in the aftermath of the 2007 elections. To avoid previous commissions' mistakes, the Waki Commission recommended the formation of a local special criminal tribunal to prosecute the main perpetrators of electoral violence. Otherwise, the names of those responsible would be forwarded to the International Criminal Court (ICC). Kenya's parliament, however, failed to establish the local tribunal due to the combined opposition of two interest groups: one group of MPs feared that the tribunal would be vulnerable to political manipulation, thus making it ineffective; another group of MPs opposed the tribunal because they were implicated in the violence and believed ICC proceedings would take a long time to begin (Cheeseman and Tendi, 2010).

Legislators have also proven adept at cooperating with the executive in restricting the media and civil society's ability to act as government watchdogs. When parliament passed the Kenya Information and Communication Bill (2013), it gave the executive substantial control over the media sector by allowing a government-controlled board to regulate all forms of journalism,

including the imposition of fines on media houses and deregistration of individual journalists who violate a code of conduct ([Committee to Protect Journalists, 2013](#)).⁵ Legislators later extended the reach of government's control over media through the Computer and Cybercrimes Act (2018). The law ostensibly protects the confidentiality and integrity of data to facilitate the prosecution of cybercrimes. However, under the law, journalists convicted of defamation also face up to ten years imprisonment and a fine equivalent to \$45,000, while those convicted of intentionally publishing false information that either constitutes hate speech or negatively affects others' reputation face two years in prison ([Acharya, 2020](#)).⁶ Beyond passing restrictive laws to muzzle the media, MPs have used the floor of parliament to criticize and threaten journalists. During a July 2018 parliamentary session, ruling party MPs called for the Powers and Privileges Committee to investigate two journalists and their paper for having published a story about legislators taking bribes, arguing that the article was an attack on the National Assembly as a whole ([Committee to Protect Journalists, 2018](#)).

Kenya's legislature has also purposely acted against measures designed to liberalize the space for civil society. Parliament has, for example, failed to implement the Public Benefits Organizations Act (PBO) (2013). The PBO Act would translate into more transparent and efficient regulation of civil society organizations, and it would require government to involve these organizations in policy decision-making on issues that affect them, especially at the local level. Moreover, the PBO Act would repeal the Non-governmental Organizations (NGOs) Co-ordination Act (NGO) (1990), which gives the government-controlled NGO Coordination Board broad authority to monitor and register NGOs. The NGO Coordination Board is neither required to justify its refusal to (de)register an organization nor to decide within a particular time frame ([Musila, 2019](#)). Thus, by avoiding the implementation of the PBO Act, Kenyan legislators allow the executive to maintain its discretion in setting the terms and conditions for NGO operations in the country.

And the NGO Coordination Board does appear to act politically. After the African Center for Open Governance (AFRICOG) sued the IEBC in 2017 to have the voter register published for public inspection ahead of the elections, the NGO Board deregistered the organization and called for the Central Bank

⁵ Journalists convicted for sharing "false" or "fictitious" information and propagating hate speech would be fined Ksh. 500,000 (\$49,776.01) or sentenced to two years in jail, if not both.

⁶ The High Court initially suspended the Act after the Bloggers Association of Kenya (BAK) challenging its constitutionality. The suspension, however, was lifted in February 2020 and the law went into effect.

of Kenya to freeze its assets (Mukami, 2017). That same year, the NGO Board also deregistered the Kenyan Human Rights Commission (KHRC) for tax evasion and hiring foreign workers without valid visas (*The Standard*, 2017). The KHRC's Executive Director, however, believed that the deregistration was part of the government's strategy to prevent them from filing a petition challenging Kenyatta's re-election (*Civicus*, 2017).

Pushing back on legislative submission to the executive

Kenyan civil society has at times successfully derailed legislative efforts designed to increase the executive's dominance. The Civil Society Reference Group, for example, mobilized the public through petitions, public meetings, and peaceful protests to oppose amendments to the PBO Act that would cap foreign funding for NGOs at 15% of the organization's total budget as well as grant the Minister of Finance discretionary control over any increases in foreign funding (Dodsworth and Cheeseman, 2018). The move would have had a negative impact on communities that rely heavily on NGOs for basic services. The Civil Society Reference Group was successful in blocking the amendments as they failed to pass on their second reading in parliament (Musila, 2019).

Identity-based constituencies are also able to successfully lobby parliament to prevent the enactment of legislation that might impact them disproportionately. For example, Muslim groups challenged Section IV of the Suppression of Terrorism Bill in 2012, which would have given the police the power to intercept communications and use them as evidence without a warrant (Ndzovu, 2014). To address Muslim mobilization and key concerns against the bill, the government amended the proposed legislation. Similarly, the government backed away from implementing the Religious Societies Compliance Rules in 2016 following strong opposition from religious leaders. Those rules were designed to prevent religious groups from commercializing churches and mosques and to stop them from becoming grounds for terrorist recruitment. The rules would also have required religious leaders to submit certificates of good conduct and theological training (*The Standard*, 2016).

Preventing judicial independence

Prior to the 2010 Constitution's adoption, the executive was able to magnify its power through control of the judiciary (Shen-Bayh, 2018). The president

had unilateral power to appoint members of the Judicial Service Commission (JSC), which appointed, disciplined, and removed judicial officers. Given that the appointment of judges was a power ultimately vested in the president, the JSC acted as an extension of the executive. Consequently, individuals or groups openly opposed to either the president or the ruling party were unlikely to receive any relief from the courts (Adar, 2000). In 1999 the High Court dismissed Kibaki's election against Moi for rigging the 1997 presidential elections. The case was dismissed on a technicality that Kibaki failed to submit a copy of the petition to Moi personally (*The Standard*, 2000).

Kenyan presidents have regularly employed judicial lawfare since the country's return to multiparty politics. Judges who made rulings in favor of human rights victims exposed themselves to punitive transfers. In 1994, for example, a chief magistrate was transferred after refusing to accept confessions he believed were coerced from suspects accused of raiding a chief's camp (Marango, 2010: 106). In 1996, Moi explicitly warned the judiciary against hearing cases related to the ruling party's internal matters. According to Moi, the ruling party's Constitution was sufficient to guide decisions and any encroachment by the courts would only serve to erode the document's power (Rishmawi et al., 1997: 220–221).

It was with KANU's electoral defeat in 2002 that the judiciary started to assert itself against the executive and legislative branches. As the constitution review process entered its final stages in 2004, human rights activist Timothy Njoya and six others filed a case with the High Court challenging the Constitution of Kenya Review Act, which had given the National Constitutional Conference (NCC) the power to amend the Constitution. This power, they argued, rested with the people, so any amendments could only be approved through popular referendum. They further argued that parliament did not have the power to repeal or replace the Constitution because it was, itself, a creature of the Constitution; the only power it had was to make minor changes through amendments. The High Court ruled in Njoya's favor and blocked both the executive and parliament from enacting any constitution without holding a referendum (Stacey, 2011). Yet, despite the Njoya decision, parliament used the Consensus Act to alter the draft constitution adopted by the NCC at Bomas in March 2004. The amendments to the Constitution of the Kenya Review Act of 2004 had given parliament the power to alter and enact the new constitution. But another group of civil society activists went to court to challenge the changes, arguing that parliament acted contrary to the Njoya decision. Again, the court issued a unanimous ruling that only the people had the power to enact a new constitution (Mukuna and Mbao, 2014).

The Kenyan judiciary's actions during the immediate post-transition years were notable, given the executive's continued control over judicial appointments. But, in 2005, Justice Minister Kiraitu Murungi made the government's response clear: "The executive has the direct mandate of the people ... and will expect to be backed by the judiciary. [T]he executive desires a judiciary that shares its philosophy." Kibaki subsequently suspended the High Court's chief justice following allegations of corruption and the torture of prisoners. The government also set up the Integrity and Anti-Corruption Sub-Committee (the Ringera Committee) to implement its policy known as "radical surgery" against widespread corruption in the judiciary (Onsongo, 2016). The Committee's findings led to twenty-three senior judges (six Court of Appeal judges and seventeen High Court judges)—more than half of the senior bench—being suspended (Otieno, 2005). Continued executive control over the judiciary has thus limited the extent to which the courts act as an arbiter in political conflicts. Following the 2007 elections and their associated violence, for example, Odinga rejected the idea of having courts resolve the political crisis because "everybody knows that the courts in Kenya are part of the Executive and we do not want to subject ourselves to a kangaroo court" (Ongiri et al., 2008).⁷

The 2010 Constitution completely overhauled the judiciary by creating the Supreme Court, expanding and empowering the JSC, and establishing the judiciary fund. The courts now had the autonomy to check the executive's dominance. Most significantly, in 2017, the Supreme Court annulled the presidential election results after Odinga, as the opposition's candidate challenged the incumbent's victory, arguing that the elections were rigged due to the IEBC's complicity. The court's ruling held that the government illegally used state resources to promote the incumbent Jubilee Party and that the IEBC had failed to enforce the rules against such practices (Cheeseman et al., 2019).

The independence displayed by the courts, especially in annulling the 2017 elections, made them a target for political pushback. Parliament effectively moved to ensure the incumbent's electoral advantage by limiting the court's oversight in election matters. The National Assembly specifically amended the country's election law to make it more difficult for the Supreme Court to annul elections. The new law forbids any court from invalidating election results for non-compliance with the law if it "did not substantially affect the result of the

⁷ Odinga's hesitation was also informed by Kibaki's appointment of six judges to the Court of Appeal (two) and the High Court (four).

election” (*BBC News*, 2017). Though Kenyatta publicly stated his opposition to the amendment, he nevertheless signed it into law.

Kenyatta moved to reassert presidential influence over the courts. Following the 2017 election annulment, he refused to confirm the appointment of forty-one judges proposed by the JSC in violation of the 2010 Constitution and the Judicial Service Act. Kenyatta argued that he had the right and the duty to decide for himself whether the JSC nominations are appropriate after questions were raised about some of the candidates by the country’s intelligence services (*Gachuri*, 2021). Kenyatta’s government also slashed the judiciary’s budget, claiming that the reduction was necessary to offset costs entailed by the repeat presidential elections in 2017 and to enhance free secondary education. As a result, the judiciary lost 11.1% of its budget immediately after demonstrating their independence in a controversial election matter. The judiciary also saw its budget slashed by more than half in the following year’s budget. These reductions meant that the operations of more than fifty mobile courts across the country had to stop, and the court’s plans to clear its backlog were suspended (*The Platform*, 2020).

Kenyatta’s public rhetoric also increasingly called into question the judiciary’s legitimacy. Kenyatta accused the courts of ignoring the people’s will and dismissed judges as unelected *Wakora* (Kiswahili for thugs) (*Ndanyi*, 2017). His communication team created the #WakoraNetwork hashtag on Twitter to depict judges as corrupt and acting on behalf of a civil society cartel that had illegitimately taken control of the judiciary. Members of Kenyatta’s Jubilee Party lodged petitions with the JSC to have three of the judges who were part of the Supreme Court majority decision removed from office for alleged gross misconduct (*The Saturday Standard*, 2017).

This section has shown how successive Kenyan presidents have effectively employed various forms of lawfare (constitutional, legislative, and judicial) to preserve their power. They have ensured that there is sufficient discretion and ambiguity in the law to maintain a strong executive despite the devolution of power to local governments and increased oversight from other government branches. Kenyan presidents have also used patronage to build and maintain coalitions; this strategy has been most effective at weakening the opposition’s resolve to rein in the executive. The executive has relied on legislative majorities to create laws that weaken oversight mechanisms. This collusion between the executive and legislature, however, should not overshadow the judiciary’s role in resisting executive overreach and in pushing for greater accountability. Civil society’s efforts to mobilize and lobby for more transparency and accountability, however, have often failed because their interests do not align

with those of relevant politicians at key moments. These dynamics produce an equilibrium state of executive dominance.

International strategies

Beyond manipulating democratic institutions to stave off internal challenges to executive authority, presidents from Moi to Kenyatta have strategically employed sovereignty claims in an effort to neutralize external criticisms of their government actions. When international institutions and foreign governments have announced positions that appear critical or threatening, Kenyan presidents have routinely sought to shore up their legitimacy as national defenders of the country's independence by invoking the specter of outside interference in domestic affairs. The success of presidents in using such sovereigntist claims to shield themselves politically has varied, depending on their ability to rally domestic support, including civil society, as well as the international community's own coordination in pressuring the government. At other times, Kenyan presidents have sought to pre-empt external criticism by visibly demonstrating their selective compliance with international norms, showing that they are taking steps toward democracy. All such measures—whether decrying external interference or showcasing compliance—are ultimately intended to provide presidents with the time and space to delay enacting reforms that would limit executive powers.

Obstructing reform

Kenya's political—and economic—liberalization was partly initiated through external pressure. After Kenya faced a series of economic shocks through the 1980s, Moi's government had grown to depend on international financing from the World Bank, the International Monetary Fund (IMF), and bilateral donors. By the early 1990s, Moi came under significant pressure to implement policies that the international community demanded in exchange for continued financial support. But when Moi resisted further governance reforms that would diminish his direct control over the economy as well as politics, Kenya's donors chose to suspend additional aid for the first time in 1991—just as his regime was being pressured domestically by mass mobilization in support of multiparty democracy. Moi was eventually forced to capitulate, initiating a dynamic that would endure throughout his tenure: trading reforms

for international financing, using sovereigntist claims to delay and obstruct those reforms, and then facing the suspension of further aid until additional reforms were implemented (Arriola, 2012).

Moi repeatedly sought to insulate himself by arguing that the international community was unjustly interfering in Kenya's domestic affairs. His government publicly accused international institutions and foreign donors of shifting targets and requiring "dictatorial and suicidal" reforms that would lead to food shortages and mass unemployment (Dowden, 1993). After the IMF and World Bank suspended aid to Kenya in 1997, particularly for having failed to address the large-scale corruption revealed through the Goldenberg scandal,⁸ Moi called the suspension of aid "purely political" (*African Business*, 1997). Despite his attempts, however, Moi was unable to consistently rally Kenyans around his sovereigntist claims in the 1990s. His efforts were partly undermined by the public revelation that several KANU politicians and government officials were implicated in the Goldenberg scandal at a time of extended economic hardship for most Kenyans. Moreover, civil society mobilization may have undermined Moi's efforts by actually advocating for more international pressure on Moi's government. In 2000, as the donor community considered resuming further aid on the implementation of several conditionalities, civil society representatives formed the Stakeholders Support Group to lobby against the resumption of aid; they wanted aid to be tied to constitutional reform (Achieng, 2000).

Downplaying corruption

Kibaki's coalition was elected in 2002, partly on the basis of a reform agenda that, beyond adopting a new constitution, promised to fight corruption (Bachelard, 2010). Kibaki's government signaled its commitment to fighting corruption in several ways: instructing the Ministry of Justice and Constitutional Affairs to coordinate the anti-corruption campaign; appointing Transparency International's John Githongo as Permanent Secretary for Governance and Ethics; establishing the Kenya Anti-Corruption Commission (KACC); and passing a law requiring public officers to declare their assets (Bachelard, 2010). These moves were not only intended to promote public confidence in the new government but were also designed to

⁸ Originally uncovered in 1993, the Goldenberg scandal involved payments amounting to \$600 million from the Ministry of Finance and the Central Bank of Kenya for fraudulent gold exports.

increase international support for Kenya's post-transition government, including through funding from the multilateral institutions.

Kibaki's government, however, was not immune from corruption. Several cabinet members and senior officials were implicated in a series of scandals, including the Anglo Leasing scandal in which a wide range of government contracts were awarded to a fictitious company for nearly Ksh 7 billion (US\$93.3 million) and the construction of a CID forensic laboratory for which the government paid Ksh241 million (US\$3.2 million) without any work being done.⁹ When Githongo revealed the extent of the corruption, Kibaki's government did little to prosecute those implicated. Consequently, the IMF postponed further loans, the World Bank suspended projects, and bilateral donors like the United States suspended aid (*NewsWire Newsletter*, 2006).

When foreign governments issued statements about Kenya's lack of anti-corruption progress, Minister of Justice and Constitutional Affairs Kiraitu Murungi responded by stating that diplomats had no right to dictate to the Kenyan government how and when to eradicate corruption, describing the fight against corruption as "a Kenyan affair." Murungi further noted that Kibaki's government "not expect [diplomatic missions] to play the role of local, partisan, political activists—this should be left to Kenyans" (*VOA News*, 2009).

Kibaki's government also enjoyed a special advantage that Moi had lacked, namely, a closer relationship with civil society leaders. Many of those in civil society who had fought for greater democracy throughout the 1990s had gone on to join Kibaki's NARC coalition in government after the 2002 elections. When Kibaki's government used sovereigntist claims to shield itself against international criticism, civil society organizations were then largely unable to hold it accountable. Consider the case of Transparency International Kenya. When its director, Gladwell Otieno, criticized the Kibaki government's inaction on corruption, she was fired by the board of trustees, which included many close Kibaki allies. More generally, civil society failed to generate public pressure on the government to address corruption.

Shaping crisis

When the international community became heavily involved in brokering a political solution to the crisis that erupted after the 2007 elections, Kibaki's government specifically sought to disqualify proposals from international

⁹ Although some of the contracts had been signed under the Moi regime, six contracts worth \$300 million involved the Kibaki government (*IMF*, 2008).

mediators that might dilute its control over the executive. Kibaki's Minister of Justice, Martha Karua, accused mediators of neocolonial interference:

It is unfortunate to note that some diplomats are abusing Kenya's hospitality by giving their unsolicited views on the mediation talks ... I would like to remind them we are not a colony ... I urge them to refrain from such behavior and adhere to the diplomatic convention of not interfering with sovereign states.

(The Daily Nation, 2008)

Karua specifically accused Kofi Annan, the former UN General Secretary who acted as chief mediator on behalf of the international community, of trying to engineer a "civilian coup" by proposing that Odinga be made prime minister, thereby allocating a share of executive power to the opposition leader (Cohen, 2008).

This episode is particularly instructive because it highlights how becoming part of the executive can reshape political responses to international criticism (*Capital FM, 2018*).¹⁰ After a government of national unity was formed, all members of the Kenyan government used the language of sovereignty to distract from the international pressure for ongoing reform. In 2009, when the US ambassador publicly urged the Kenyan government to implement its promised reform agenda, it was Odinga, as prime minister, who demanded that the donor community stop "lecturing" Africans on governance, describing such actions as being in bad taste (Opiyo, 2009).

Sovereignty claims have also played a major role in how Kenyan politicians—across the political spectrum—have responded to international efforts to hold accountable those implicated in the 2007–2008 post-election violence. When Uhuru Kenyatta and William Ruto were called before the ICC for their role in fomenting post-election violence, they described the ICC as a Western institution that was being used to interfere with Kenya's domestic affairs (Lynch, 2014). As presidential and vice-presidential candidates, Kenyatta and Ruto were then able to leverage their ICC cases to present themselves to Kenyan voters as champions of the country's autonomy. At a campaign rally, Kenyatta claimed that the ICC was threatening peace in Kenya, undermining efforts to resolve their own problems and live together in harmony (Odiambo and Amadala, 2015).

¹⁰ The opposition can also use sovereignty claims to ward off international criticism. In 2017, after Odinga boycotted run-off elections and intended to declare himself president at a swearing-in ceremony, the United States asked him to call off the event. Odinga responded by demanding that Western countries stop interfering in Kenya's internal affairs.

Selective compliance: Promoting women

Kenya's successive leaders have selectively promoted certain rights issues to curry favor with international donors. For example, while the Kenyan government has been unwilling to comply with donor demands over LGBT rights over the past decade (Coly, 2015; Mosoku, 2015),¹¹ it has been increasingly willing to promote women's representation as a hallmark of Kenyan democracy. The reality, of course, is that the push for women's inclusion in politics has been driven by activists who have advocated for far-reaching reforms over decades. Organizations like the League of Kenya Women Voters (LKWV), the Federation of Women Lawyers—Kenya (FIDA—K), and the National Council of the Women of Kenya (NCWK) lobbied political parties to meaningfully integrate gender issues within their platforms. Only as donors began to demand greater progress on women's representation did Kenyan governments take steps to demonstrate their willingness to comply with evolving global norms. Moi's government developed a gender mainstreaming policy in 2000 with donor support. And after taking office in 2003, Kibaki's government established a Gender Commission and a Ministry of Gender. By 2007, his government had expanded gender mainstreaming to include gender desks in all ministries and parastatals (Kombo, 2012).¹² In 2019, Kenyatta stated that he was committed to women's empowerment, pointing to a range of programs as evidence of measures taken by his government to advance gender equality (Citizen Digital, 2019).

At the same time, however, Kenyan politicians have slow-walked implementing gender-based reforms. The 2010 Constitution sought to remedy women's political underrepresentation by requiring no more than two-thirds representation of one gender in elected or appointed posts. The Constitution provides a mechanism for the actualization of the two-thirds principle at the county level, but there is no mechanism provided to realize this principle in the National Assembly and the Senate. As a result, Parliament has failed to implement the principle, leading to several lawsuits. The resistance to pursuing gender equality reflects an underlying lack of political will in male-dominated politics, some of whom suspect that the promotion of gender equality is another way for the West to seek control of African political life (Segueda, 2015).

¹¹ In 2015, during US Secretary of State John Kerry's visit to Kenya, Deputy President Ruto stated, "the Republic of Kenya is a republic that worships God [and that there was] no room for gays and those others." These sentiments were repeated by Kenyatta during President Barack Obama's state visit, when Kenyatta described the question of gay rights as "really a non-issue" in Kenya.

¹² These desks received neither the manpower nor financial resources required to be effective (Makau, 2018).

Conclusion

Kenyan presidents, regardless of party or background, have consistently employed their institutional powers to limit greater political liberalization. They have been adept at employing legal mechanisms—constitutional, legislative, and judicial—to protect executive power. Despite decades of debating democratic reform, Kenyan incumbents and their allies have managed to maintain the core (expansive) powers of the presidency. For their part, Kenyan civil society and opposition parties have often failed to rein in the executive through legal mechanisms because their interests have diverged at critical moments of reform. Part of the opposition has proven incapable of resisting periodic offers from the incumbent to participate in government in exchange for abandoning greater reform. Indeed, many Kenyan politicians have refused to pare down the very executive that they intend to either take over or participate in one day.

Kenyan presidents have similarly been able to exploit their role as national leaders, institutionally and symbolically, to downplay international criticism as neocolonial or unwarranted interventions. However, their rhetorical tactics have only been able to buy themselves time. Given the Kenyan economy's continued dependence on international finance and aid, presidents from Moi to Kenyatta have not been able to simply ignore demands from their international partners; they have usually been forced to relent by demonstrating some progress, however minimal, on a reform agenda. In this respect, the rise of China as an economic and diplomatic partner may provide Kenyan presidents with greater time and space to delay further reform in the future. In the meantime, civil society groups and opposition parties are able to exercise leverage by using evidence of government abuse or inaction to lobby for continued international pressure on Kenyan presidents. But the impact of such a strategy has depended on the ties between civil society representatives and opposition politicians; the former sometimes have proven unwilling to criticize the latter once in the executive office. That fact alone—the continued cooptation of opposition and civil society—remains a constraint on Kenyan democratization.

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7

Malawi

Democratic Fits and Starts

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Introduction

Despite setbacks and flaws, Malawi has maintained a resilient democratic system since the return to multiparty rule in 1992. Three rounds of peaceful transfer of power after electoral losses by the incumbent and continued judicial independence indicate resilient democratic norms. Yet, a series of pendulum swings with recurring authoritarian themes has led observers of Malawian politics to question whether democracy is in fact maturing (Rakner and Svåsand, 2013; Patel and Wahman, 2015; Svåsand, 2011). This chapter asks why, at critical junctures, constitutional democracy has nevertheless prevailed. We explore how actors and institutions have maneuvered through this precarious democratic trajectory in ways that have not only upheld political liberalization but also threatened its survival. Using the theoretical framework outlined at the outset of this book, we identify legal and international strategies by which democrats and autocrats contest power. We find that while a rotating cast of ruling elites has deployed authoritarian strategies to entrench control, a variety of state actors, non-governmental agencies, and civil society groups have developed effective repertoires of resistance to contain or reverse autocratization attempts.

Malawi's political liberalization followed a longstanding history of one-party personalist dictatorship under Kamuzu Banda and the Malawi Congress Party (1961–1994). In the early 1990s, mounting pressure for change was propelled by growing economic differences and worsening economic conditions among Malawi's predominantly rural population (Posner, 1995; Meinhardt and Patel, 2003). Sharp criticism of the regime by the Catholic bishops in their 1992 Lenten Pastoral Letter has been considered a trigger in the democratic transition process (Magolowondo, 2007; Meinhardt and Patel, 2003).

The international community began applying pressure and aid conditionality on Malawi to reform its political institutions and human rights record and oppositional forces organized under the Public Affairs Committee (Meinhardt and Patel, 2003). On 14 June 1993, a referendum was held on the introduction of a multiparty system which the pro-democracy forces won. Elections held in May 1994 led to a regime turnover when the opposition candidate Bakili Muluzi won the presidency, and the United Democratic Front became the largest party in parliament.

As in Zambia, Kenya, and Ghana, the other electoral democracies covered in this book, Malawian elections are highly competitive. For the most part, the party system is regionally based and has been in flux with parties disappearing and emerging—even while in office. Numerous independent candidates stand and are elected for office at different levels of government—often subsequently (re)joining the ruling party. While the fragmentation of the party system is a source of weakness and concern, it has also prevented the consolidation of a long-term dominant ruling party, which has reduced the risk of autocratization. The turbulence in the party system is also somewhat deceptive as the same elite tends to rotate between different parties and government positions.

Malawi's civil society is relatively cohesive and has repeatedly mobilized—sometimes quite successfully—to protest the narrowing of democratic space and disregard for democratic rules and principles. Civil society, including church leaders, have mobilized through diplomatic channels, on the streets, and in court. Throughout Africa, churches and faith communities are the most strongly institutionalized and rooted part of civil society, and in Malawian politics they have been a significant pro-democratic force.

The president—elected by direct universal suffrage for a five-year term with a two-term time limit—wields strong powers as both head of state and head of government. Boundaries between the state and the incumbent party are blurred. State resources are extensively used in electoral campaigns and the electoral playing field is tilted toward the incumbent (Dionne and Dulani, 2013; Patel, 2016). Yet, incumbency advantage is not always enough, as is evidenced by the losses of presidents Joyce Banda in 2014 and Peter Mutharika in 2020. Parliament is directly elected every five years using a first-past-the-post electoral system. As an institution, it is subordinate, easily co-opted, and with weak oversight powers (Patel, 2016). Personalized and weakly institutionalized political parties have paved the way for frequent cross-party defections of members of parliament (MPs), mostly benefitting the incumbent (Rakner et al., 2007).

By contrast, the courts have played a significant, although uneven role in upholding and defending the constitution, significantly shaping Malawi's democratic trajectory (VonDoepp, 2005;2020; Ellett, 2013; Kanyongolo, 2016). The judiciary has remained largely independent, despite recurring attempts by the executive to exert undue influence through threats, bribes, irregular appointments, and the removal of judges (Nkhata, 2018). We argue that this is explained by a *virtuous circle of legalism*. Court judgments, although unevenly implemented, are generally respected, and the courts have enjoyed a substantial supportive constituency both among politicians and in civil society.

The role of international actors remains comparatively strong. Donor support and leverage seems to contribute to both the mobilizing potential of civil society and the relative restraint of the government. Although the trust between Malawi's ruling elites and international pro-democracy organizations and donors has fluctuated, Malawi, as one of the poorest and most aid-dependent countries in Africa, has somewhat uniquely maintained the governance aid relationship to Western donors since the democratic transition in the early 1990s (Chasukwa and Banik, 2019; Resnick, 2013). The influence of aid actors is perhaps most notable in the field of gender politics, where Malawi's political elite has been much more accommodating toward international pushback against anti-gay actions than elites in other African countries, even in the face of adverse public opinion (Gloppen and Rakner, 2020; Wahman and Drury, 2018).

Legal strategies: Judicial, administrative, and pro-democratic lawfare

There is a peculiar legalism in Malawi's political culture. Despite efforts to circumvent the Constitution, rules still matter and have repeatedly provided the institutional basis for a variety of political actors to hold power to account. In part, this stems from the formal powers of the judiciary and a tradition of judicial independence with roots in the one-party era. Kamuzu Banda marginalized the courts rather than exercising blatant control, which provided a certain basis for judicial independence and legitimacy during the one-party era and in the transition to multiparty rule (Gloppen and Kanyongolo, 2007, 2012; Shen-Bayh, 2018).

Malawi's Constitution—proclaimed supreme to any other law—sets down a broad Bill of Rights, vests the judiciary with exclusive powers to interpret

the Constitution and all other laws, and grants the High Court wide powers to review any law and decision or action of the government. This effectively renders the judiciary as the supreme guardian and interpreter of the Constitution. That the formal legal system belongs to the common law legal tradition, where the doctrine of judicial precedent prohibits lower courts from departing from past rulings of higher courts, adds to the importance of their judgments (see Chapter 3). From the perspective of democratic constitutionalism and horizontal accountability, this is a strength—but also a vulnerability as it makes the judiciary an attractive target of executive capture. To prevent this, the 1994 Constitution establishes a formal system to protect the judges from political interference. Numerous checks and balances are designed to check executive dominance, safeguard the separation of powers, protect judicial independence, and facilitate judicial review to secure the enforcement of human rights. The Judicial Service Commission is tasked with ensuring the independence and integrity of the courts. But the ability of *de jure* institutions to corral *de facto* behaviors has proven uneven. The president has wide powers over appointments and budgetary allocations to the institutions tasked with upholding constitutional democracy, and a neo-patrimonial political culture adds extensive informal influence that is difficult to rein in. The result is a powerful executive threatening to undermine the ability and will of counteracting forces—including the judiciary, despite its robust formal protections.

The Constitution as focal point for contest over political control

The 1994 Constitution has repeatedly been a focal point for contests over power. Concerted attempts have been made to amend it to entrench executive authority, particularly Section 83, which limits presidents to two terms of office and Section 65, which prevents MPs from crossing the floor. In the volatile Malawian political system, the provision that the president is elected jointly with his or her vice-president, who cannot be replaced, has been a major source of political conflict, but has also served as a check on power.

A landmark constitutional test came toward the end of President Bakili Muluzi's second term in office (1999–2004) when he sought to instigate parliament to amend the Constitution to allow presidents to stay in office for more than two terms. The judiciary proved instrumental in blocking the third-term bid through a stringent interpretation of the Constitution. This battle also shows the centrality of the floor-crossing clause. In 2001, Section 65 of the Constitution was amended so that a member of parliament would be deemed

to have crossed the floor by joining not only another political party represented in parliament but also any organization with political objectives.¹ The intent was to deter parliamentarians from working with civil society groups in advocacy campaigns. At the time, a number of MPs collaborated with civil society organizations to campaign against the attempt to remove the presidential two-term limit (Chigawa, 2008; Young, 2012). The expulsion of at least seven of these MPs would have secured Muluzi the two-thirds parliamentary majority required to amend the Constitution to allow a third term. In the end, the High Court issued an order barring the expulsion on the basis that the affected MPs had not been given an adequate opportunity to defend themselves before the decision was made. Hence, the parliamentary vote to extend Muluzi's term failed by a narrow margin (Gloppen and Kanyongolo, 2006).

Previously, a presidential ban imposed on demonstrations related to the proposed presidential third term had been found unconstitutional by the High Court.² This kept the space for contestation open and added to the political momentum that eventually saw Muluzi abandon his efforts to extend his term of office as president (VonDoepp, 2019; Shen-Bayh, 2018). In this case, democratic processes—as defined by the Constitution and upheld by the courts—prevented an executive-led seizure of power. The political battles around the third term bid also illustrate the capacity of civil society actors, including religious groups and professional associations, to mobilize domestic and international support in defense of the Constitution (Ross, 2004; Morrow, 2006; Dulani, 2011).

Constitutional contests recurred in subsequent years as Bingu wa Mutharika proved to be prolific in the use of legislative measures to safeguard his hold on power, especially during his second term in office (2009–2012) when his Democratic Progressive Party (DPP) enjoyed a comfortable parliamentary majority. Among such measures was a series of constitutional amendments, including the addition of a new underlying principle, Section 12(2), which required individual rights and freedoms to be exercised subject to “collective security, morality and the common interest,” thus essentially counteracting the Constitution's liberal democratic principles. The amendment provided the executive with a basis for broad and vague restrictions of human rights which could otherwise have been challenged in court.

A dramatic turn of events arose during “the presidential succession crisis” of 2012, which began on April 5, when President Bingu wa Mutharika suffered a heart attack and died. According to the Constitution, when there is a vacancy

¹ Constitution (Amendment) Act No. 8 of 2001.

² *Malawi Law Society v The State*, Civil Cause No. 78 of 2002. High Court, unreported.

in the presidency, the vice-president assumes office for the remainder of the president's term. However, senior members of the DPP-led cabinet initially concealed the death from the public, seeking a way to ensure that the deceased president would be succeeded by his brother, Peter Mutharika, then Minister of Foreign Affairs and International Cooperation, instead of the then Vice-President Joyce Banda. The next day, senior cabinet members announced that the President was unwell and had been flown to South Africa for treatment (Malawi Government, 2013). Given that the government only announced Mutharika's death several days later created a dramatic situation that, again, put the Constitution to the test. As rumors spread, the prolonged silence raised fears of an attempt to subvert the Constitution. Critics urged the government to obey the Constitution and transfer power to the vice-president, pointing out that failure to do so would amount to staging a coup. On April 7, 2012, the Chief Justice swore Joyce Banda into office.

A Commission of Inquiry set up to investigate the circumstances surrounding Mutharika's death revealed that members of his cabinet had sought to mount a legal challenge to Joyce Banda's eligibility for the presidency. The commission also found that Peter Mutharika and the DPP vice-president had unsuccessfully attempted to invite the military to take over the government (Malawi Government, 2013). Constitutional law experts characterized the concealment of the president's death as illegal and the subsequent attempts to set up a transitional leadership as tantamount to treason (Kasalika, 2013). Two days after the release of the report, on March 13, 2013, Peter Mutharika was arrested, with eleven government officials and former cabinet ministers, on charges of treason. However, little progress was made in the case, and, in 2014, Mutharika contested and won the presidential elections as the DPP candidate. Shortly after his presidential inauguration, the treason charges against him and his alleged coup plotters were withdrawn on the grounds that the president has constitutional immunity from prosecution and civil litigation while in office.

The ascension of Joyce Banda to the office of president demonstrates significant effectiveness of the Constitution in facilitating the lawful transfer of executive power. However, the Constitution's effectiveness may be undermined by other parts of the legal system, as illustrated most vividly in the withdrawal of the charges against Peter Mutharika and his alleged accomplices (who were not entitled to immunity from prosecution). While their attempted coup was prevented and the Constitution upheld, the people who had conspired to subvert the democratic constitutional order were not held accountable.

The legislature: The use of legal instruments restricts democratic mobilization

Malawian presidents have repeatedly sought to contain threats to their continued hold on power by using the law. This is part of a larger picture where, throughout the democratic period, a variety of legal instruments have been put in place to regulate and restrict democratic mobilization. This process has been neither linear nor direct. Laws designed to restrict democratic behaviors have often followed efforts to create more open democratic spaces.

Non-Governmental Organizations (NGO) Acts passed in 2000 and 2002, during Muluzi's tenure, enhanced government's control of civil society activities and membership. The most far-reaching, the 2002 NGO Act, establishes a ten-member board, appointed by the government in consultation with the NGO Council, and empowered to register all NGOs in Malawi and regulate their operations. The board became operational in 2015 and called on all civil society organizations to register and comply with the NGO Act, publicly threatening "noisy" organizations with court action (USAID, 2016: 122).

Civil society came under increasing pressure toward the end of Bingu wa Mutharika's term of office as the government initiated several legislative measures to forestall electoral challenges. An ongoing economic downturn resulting from fuel and foreign currency shortages led to popular protests, to which the government responded with force, culminating in the killing of almost a dozen anti-government protesters in the capital city on July 20, 2011. Repressive legislation, passed in the wake of growing public dissent, granted the government wide discretionary power to ban publications deemed contrary to the public interest,³ empowered the police to conduct searches without warrant;⁴ restricted the right of citizens to use court injunctions to challenge government decisions,⁵ and prohibited public demonstrations unless the demonstrators first paid to the government a deposit of approximately \$13,000.

Sedition laws have also been invoked to silence government critics, often drawing upon colonial-era legislation such as the Protected Flag, Emblems and Names Act of 1967. In 2012, for example, the chairperson of the Malawi Human Rights Commission was arrested for "printing and distributing seditious materials," including t-shirts purportedly insulting President Bingu wa Mutharika. The arrest took place as he was about to depart the country for

³ Penal Code (Amendment) Act (2011).

⁴ Police (Amendment) Act (2012).

⁵ Civil Procedure (Suits by or against the Government or Public Officers) (Amendment) Act (2011).

Geneva, where he was scheduled to testify before the UN Human Rights Council on the country's human rights situation.

The relatively lax laws governing political parties became stricter under Peter Mutharika, providing the executive with the authority to more closely exercise control over the party-political landscape. Until 2018, the registration and regulation of political parties was governed by the 1993 Political (Parties Registration and Regulation) Act, which set relatively low barriers to entry for new parties. This created an open and competitive party landscape. The minimalist approach of the 1993 Act changed with the adoption of the 2018 Political Parties Act, which raised entry barriers for new parties, requiring a minimum of 100 members in each district. Registration could now be refused if the party name denoted a regional or ethnic identity or provoked or offended public morals; its objectives were based on a religious faith; or it advocated secession. More interventionist provisions were added regarding how the parties conduct their internal financial matters.

The courts: The ambiguous role of litigation for democratization and autocratization

As is clear from the discussion above, the judiciary is central to Malawian politics. Courts are approached by the opposition, as well as by the government, and have ruled on a wide variety of matters pertaining to participation and contestation rights as well as the rule of law. For the opposition, the courts have provided an important arena for creating and safeguarding openings for democratic dissent. Litigation has helped to keep the opposition significant and relevant, particularly during periods when the incumbent president—through elections or defections—is backed by a majority in parliament. However, judicial support for democratic processes has not been consistent. In some cases, the courts have failed to hold the government to account when there seemed good reason to do so—and when they have sought to impose accountability, rulings have frequently been ignored, for example, those concerning the use of state resources in electoral campaigns (Gloppen and Kanyongolo, 2012).

The government and ruling party have actively used the courts to their advantage, both indirectly and directly, for autocratization purposes. This includes the use of courts to persecute political opponents and civil society activists for alleged crimes—ranging from the petty, such as disturbances of the public order or transgression of tax laws, to highly political treason charges. While these may not end in a conviction, they still do considerable political

damage to its targets, particularly in the context of elections, where they serve to both discredit opponents and prevent them from campaigning, thus turning the courts into a campaign tool. Corruption cases are particularly frequent—and complicated to assess from an autocratization perspective, as they are often not without some merit but still clearly politically motivated.⁶ In some cases, opposition candidates and parties have also been able to use the courts as a campaign arena. In the 2019 electoral campaign, for example, opposition parties amplified allegations made by a witness during a trial concerning the killing of people with albinism who accused senior ruling party officials of complicity in the crime (see *The Economist*, 2019).

One of the primary mechanisms by which incumbents may formally influence courts is through their power to make judicial appointments. In Malawi, the president has the constitutional power to appoint judges to the country's highest courts but must choose from among a list of nominees submitted by the Judicial Service Commission (JSC), which consists of representatives of judicial officers, private practice lawyers, and the Public Service Commission and is chaired by the Chief Justice. Although, the Commission is formally independent of the executive, it has not been free from accusations of assisting incumbent presidents to pack the courts.

Beyond perceptions that presidents have attempted to influence the judiciary through the power of appointment, there have been explicit assaults on the judiciary by the executive in collusion with the legislature. During Muluzi's attempt to add a third term to his presidency, for example, his supporters passed a motion in parliament to impeach three judges—Dunstain Mwaungulu, Anaclet Chipeta, and George Chimasula Phiri—for misconduct, incompetence, misbehavior, and partisanship. This move, widely seen as retaliation for decisions to allow public protests against the third-term bid, was a direct attack against the independence of the judiciary (Gloppen and Kanyongolo, 2006; *International Commission of Jurists*, 2001). It can also be understood as an attack on the Constitution, which, aligning with international rule-of-law principles, stipulates that a judge can be removed only for misbehavior and incompetence after consultation with the JSC (*International Commission of Jurists*, 2001).

The judicial impeachment proceedings mobilized civil society organizations such as the Civil Liberties Committee, the Malawi Law Society, and the Center for Human Rights and Rehabilitation, which used the media to

⁶ Personal communication with several members of the judiciary and legal community in Malawi by the authors in May 2019.

protest what they saw as interference with judicial independence. The judiciary itself threatened to paralyze the courts if parliament went through with the impeachments. It also provoked a response from the international community. Donors reacted strongly and the International Commission of Jurists sent a fact-finding team to Malawi to investigate the charge ([International Commission of Jurists, 2001](#)). After this outcry, the president eventually pardoned the judges ([Gloppen and Kanyongolo, 2006, 2012](#)).

In June 2007, the Supreme Court ruled to uphold Section 65 (and the High Court ruling on the matter) and thus mandated the expulsion from the legislature of MPs who had crossed the floor to join Mutharika's ruling party ([Nijzink, 2013: 186–187; Mtonga, 2020](#)). A practical consequence of the ruling, if enforced, was that DPP would lose its parliamentary majority. A possible impeachment of President Mutharika was also at stake. The ruling triggered an attack on judicial independence. Shortly after the judgment was passed, Chief Justice Leonard E. Unyolo went into early retirement, citing undue political interference. Within days, a new chief justice was announced: Lovemore Munlo, a former minister of justice under Hastings Banda, who had worked in international tribunals for years. This provoked strong reactions, both because Munlo was considered a close ally of President Mutharika and also as a breach of the norm of seniority, whereby the chief justice was appointed from among the most senior members of the judiciary. Parliament refused to confirm the appointment, and an acting Chief Justice was appointed. However, Munlo was confirmed less than a year later, in May 2008, at a time when the opposition was boycotting parliament ([Gloppen et al., 2010: 95](#)). It should be noted that, despite the controversy surrounding Munlo's appointment, he went on to be a well-regarded chief justice, acknowledged for the administrative strengthening of the judiciary under his watch but also seen as a protector of the constitution and judicial independence.⁷ Beyond the professional integrity of Munlo himself, this may also indicate that there is a judicial culture in Malawi where—regardless of judges' political leanings—*independence matters for professional standing*.

The Section 65 saga also carries other insights into the multifaceted and ambiguous political role of the judiciary. On the one hand, the Supreme Court's ruling favored the opposition. And the opposition's refusal to pass the budget until the defecting MPs seats were declared vacant was supported by a court injunction. On the other hand, while the Supreme Court eventually

⁷ Personal communication with several members of the judiciary and legal community in Malawi by the authors in May 2019.

ruled against the interests of President Mutharika and the DPP, it took more than a year-and-a-half from when the case was first brought to court. This gave Mutharika enough time to consolidate his power. And the injunction obtained by the forty-one defecting MPs bought additional time. The political significance of the time that judicial proceedings bring political actors is often overlooked but should not be underestimated.

Another attack on judicial independence occurred in the lead-up to the 2020 presidential election. In February 2020, the Constitutional Court—in the face of heavy political pressure—found “widespread, systematic, and grave” irregularities in the 2019 election and annulled the results, which, with a narrow margin, had returned Peter Mutharika to power. In May 2020, the Supreme Court—also faced with considerable political pressure—upheld the ruling. In the wake of these unprecedented judicial decisions, the Mutharika government attempted to remove both Chief Justice Andrew Nyirenda and the second most senior justice, Edward Twea, from their posts, announcing that they had accumulated more leave days than permitted and would retire early. The forced retirement of Nyirenda and Twea was widely interpreted as retribution for ruling against the incumbent and as an assault on the judiciary. That it happened at a time of popular mobilization—with protests against the Electoral Commission for months accompanying the court case and with a new election only weeks away—added to the provocation. Members of the Malawi Human Rights Defenders Coalition, the Association of Magistrates, and the Malawi Law Society lodged successful appeals against this move in the High Court (Pensulo, 2020).

These cases illustrate how the courts in Malawi, to a greater extent than in many other countries in the region, have been able to maintain a considerable supportive constituency in civil society as well as in the political opposition. What may explain this? Simplified, we could see it as a *virtuous circle of legalism*: The courts’ initial legitimacy—stemming from their role under authoritarian rule and in the democratic transition—contributed to their solid constitutional position and enabled the court to take on an active democracy-supporting role. The courts’ relative usefulness in upholding political space over time (albeit limited and uneven) has sustained the courts’ legitimacy and a culture of legalism in civil society and in the shifting political opposition. In turn, this has been mobilized to protect the courts at critical moments, along with support from the international community, which has also contributed financially in significant and sustained ways to the institutional strengthening of the judiciary and civil society.

International strategies

In contrast to many other countries in the region, Malawi's relationship to Western donors has more or less remained intact despite shifting donor strategies and priorities since the early 1990s. Yet, government–donor relations have fluctuated throughout the years, most specifically related to donors' (anticipated) reactions to economic mismanagement and authoritarian and unconstitutional developments.

Malawi has received external aid since its independence in 1964 and is heavily aid-dependent, with foreign aid contributing close to 40% of the government budget from 1994 until today (Chasukwa and Banik, 2019: 107). Given the history of aid dependency, major aid trends have had a strong impact on domestic policy and programs in Malawi (Page, 2019). Major donors include the United States, the UK, Norway, and Germany and multilateral and international agencies including the World Bank, the European Union, the Global Fund, and the African Development Fund. The United Nations Development Programme (UNDP) is a key aid coordinator, while the aid relations with China are on the increase (Amundsen, 2017). Key democratic institutions and civil society actors are dependent on support from the international community. Donors have particularly concentrated their efforts on supporting and building civil society organizations (CSOs) that focus their work on accountability, good governance, and development (Gabay, 2014).

Donor–government relations and sovereignty claims

The role of donors and their ability to effectuate substantive democratic reforms remains ambiguous, yet donor influence is undeniable and has put its clear mark on Malawian political life. Donor leverage has contributed to protecting judicial independence and safeguarding basic accountability mechanisms. Even so, the mixed track record of donors has become evident in the wake of large corruption scandals that have led to more critical oversight over how foreign money is spent and punitive measures on the part of donors. During the tenure of every Malawian government between 1994 and 2019, contentious episodes between donors and the government have resulted in the withdrawal and/or suspension of aid, with donor reactions typically strongest when economic governance criteria are violated and less so over violations of civil liberties alone (Resnick, 2013: 111). Accordingly, international donor responses have not necessarily come after domestic pro-democracy

forces have sought donors' support, although such strategies on the part of civil society are common. Malawian incumbents, upon—or in anticipation of—donor's punitive reactions, have frequently resorted to rhetoric in which donors are reproached for undue meddling in domestic affairs and neocolonialism (Chasukwa and Banik, 2019: 108).

Due to Malawi's donor dependency and a historically weak civil society, the links between international donors and civil society have been intimate. This has not been unproblematic. CSOs have suffered from a lack of consistency and openness in support (Resnick, 2013). The close bindings to donors have been a source of criticism (Lwanda and Chanika, 2017: 27), and NGOs working on human rights and improving the rule of law and democratic institutions have been met with both social and government suspicion (Currier, 2018: 123; Cammack, 2004: 33). Common criticisms include accusations of NGOs serving as neocolonialist agents and dancing uncritically to the tunes of donors, at times leading the government to label them political and anti-government (Cammack, 2004: 33; Currier, 2018: 127). The relationship was particularly fraught with tensions during Muluzi's and Bingu wa Mutharika's second terms in office. NGOs have also been reproached for being personalized and self-serving in nature and suffering from a lack of accountability and legitimate constituencies (Currier, 2018). International aid actors have demanded that civil society should more actively work as watchdogs by holding the government to account (Gabay, 2011: 498).

During the one-party regime, donors often acted in an inconsistent manner, publicly denouncing human rights abuses while simultaneously increasing aid (Meinhardt and Patel, 2003; Resnick, 2013). However, international actors made their mark during the transition to multiparty democracy. This was a time of economic crisis in Malawi, and this made the Banda regime more susceptible to external influence and conditionality. Major donors acted in relative unison and put pressure on the Banda regime by suspending aid and supporting political liberalization efforts, good governance, and human rights. Although donors signaled that they could not dictate how Malawi should be ruled, it was clear that liberalization was a precondition for continued support (Ihonvbere, 1997: 226–227).

During the third-term debacle, donors played a less clear role but still exerted a tacit pressure, aligning with civil society protests and demonstrations. In 2001, when Muluzi pursued constitutional reform to allow him a third term in office, clamping down on civil society protests, churches, and opposition newspapers, banning demonstrations, and seeing impeachment of "obstructionist" judges, some of Malawi's largest donors, suspended their

direct budget support. Denmark ended all aid at the beginning of 2002. Typical of donor–government relationships in Malawi, this happened at the time when suspicions of government corruption also strained the atmosphere. Donor responses included threats of cuts in aid and calls for open public discussions and consultations (Resnick, 2013; VonDoepp, 2005, 2019). Besides public statements, some donors allegedly also exerted less overt pressure on the government (Morrow, 2006). Financial support was given to support key actors in the anti-third-term camp such as the Centre for Human Rights and Rehabilitation, the Forum for the Defense of the Constitution, the Public Affairs Committee, and the Catholic Commission for Justice and Peace (Nowack, 2018). Donors thus put their weight behind the well-organized civil society efforts to mobilizing against the reform, with church organizations in the driver’s seat (Morrow, 2006) and two large umbrella organizations—the Forum for the Defense of the Constitution and the Human Rights Consultative Committee—established to coordinate efforts (Dulani, 2011: 125). Muluzi reacted by resorting to sovereignty claims (Resnick, 2013: 115): “This country is not controlled by donors. Never! You must understand that I am a president of this country. Yes, we are poor. But we want to be poor with our heads up, not with our heads down. And nobody, as long as I’m a president, nobody will control me” (*The New Humanitarian*, 2002).

The signals sent by donors were somewhat conflicting. While cautioning the government over both political governance issues and economic mismanagement, several donors cut Malawi’s debt during the summer of 2002, at the height of Muluzi’s third-term bid (Nowack, 2018: 21–22; Morrow, 2006). In retrospect, the narrow defeat of the bill in parliament has been attributed mainly to domestic forces rather than to donor pressure (Resnick, 2013; VonDoepp, 2005; 2019). Especially, the lead role of the churches in expressing civil society’s opposition to the bill have been highlighted (Ross, 2004; Mwalubunju, 2007).

Donor assistance was again reduced and budgetary support suspended under Bingu wa Mutharika. This came in response to the government’s failed economic policies but also the decidedly authoritarian turn, with violent oppression of civil society opposition (see e.g. VonDoepp 2020). Tensions escalated when Mutharika spent aid money to buy a personal jet in 2009 and ignored the advice of devaluating the Kwacha when the country’s economic problems grew worse. In response, Malawi’s key donors in the Common Approach to Budgetary Support group suspended aid and warned that they would permanently terminate such support if the situation was not rectified.

Mutharika confronted the mounting pressure by utilizing sovereignty rhetoric:

But they are just arrogant, undermining what a black man can do. They think that because they are Westerners they know everything ... If donors are going to criticize, saying this is [not] democracy, to hell with you. I have had enough. If any donor wants to withdraw from this country, let them leave and go.

(*New African*, 2012)

When a confidential memo authored by the then British High Commissioner to Malawi describing the president as increasingly authoritarian and intolerant of criticism became public in mid-April, this led to the deportation of the Commissioner. The UK government, the largest donor to Malawi, reacted by suspending all aid to Malawi (Mapondera, 2011). Sovereignty rhetoric was also used to taint civil society, with the president accusing donors of orchestrating demonstrations and protests against him by funding civil society organizations (*New African*, 2012; Mapondera, 2011). Quite early in Mutharika's second term, civil society actors, with the Muluzi experience fresh in their minds, started to mobilize against the deteriorating political and economic situation, taking to the streets, voicing concerns in the media, and engaging external partners. Again, following what in the literature is known as a *boomerang strategy* (Sikkink, 2005), the Human Rights Consultative Committee, together with other civil society organizations, reached out to transnational advocacy networks and alerted the UN Human Rights Council in Switzerland about the situation in the hope of exerting pressure on the government (Wroe, 2012: 138).

In mid-2011, Mutharika started working on “a donor-free zero deficit budget,” leaning heavily on a language of self-sufficiency (Lwanda and Chanika, 2017: 45) and neocolonialization rhetoric, repeating accusations against donor and civil society agendas. For instance, when the enactment of the Penal Code Amendment restricting the freedom of speech led to calls for mass demonstrations, the president attacked the civil society organizers as “foreign elements” and accused donors of funding NGOs “to cause havoc in order to get regime change” (Smith, 2012). After Joyce Banda became president, government–donor relations improved, and donor assistance was restored to unprecedented levels. Yet, only a year after, when the *Cashgate* corruption scandal broke in 2013, general budget support was terminated and donor assistance reduced (Amundsen, 2017: 14). Since then, donors have mainly provided aid to projects and pooled funding rather than budget support (Chasukwa and Banik, 2019: 108).

Donor–government relations and selective compliance

Malawi's high aid dependency makes it susceptible to external pressure. One area where this is evident is gender politics. There is a history in Malawi of strategic use of gendered "traditional values" by political leaders. The Banda regime exercised high levels of social control, through restrictions on appropriate clothing and hair styles, among others. While this ended with the new democratic dispensation, gender issues regularly appear on the political agenda.

Malawi has ratified a number of international treaties, including the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, ratified in 1987), the Protocol to the African Charter (ratified in 2005), and the 1997 Southern African Development Community (SADC) Declaration on Gender and Development. Donor influence is demonstrable in the government's prioritization of policy and legal reforms on issues central to donor concerns such as child marriage, domestic violence, affirmative action in the public sector, and campaigns to increase the number of women in politics (Wang et al., 2020). However, whereas there is high compliance with international demands on gender reforms in terms of legislation and policy, enforcement is selective.

Women in politics

Malawi does relatively well with respect to the legal and policy framework aimed at ensuring gender equality, but despite this, and the international push to enhance gender balance in political office, increasing the number of women in politics has proved difficult. Gender quotas, generally recognized as an effective measure, have been actively promoted as part of democracy assistance (Tripp and Kang, 2008: 349). However, quotas challenge the political status quo and thus the position of the male political elite and has not materialized as a favored solution in Malawi. Major political actors perceive quotas for women as too controversial; Malawi's political parties have not adopted quotas or other positive measures to promote women's representation and when Malawi's legislature finally passed the Gender Equality Act of 2013, it did so without a provision providing for quotas for women in politics. Instead, gendered electoral financing has gained support among key political veto holders (Muriaas et al. 2020). This measure relies heavily on donor funding and comes with few costs to the ruling (male) political elite.

Ahead of the 2009 elections, the 50–50 campaign was introduced to equip female aspirants and candidates with funding and campaign materials. Civil society actors and international stakeholders were the main advocates for increasing women’s political participation and convinced key actors to set up a plan for funding women who wanted to run for election. In keeping with the SADC Protocol’s target of equal political representation of men and women (and other international commitments, such as CEDAW), the then Ministry of Women and Child Development, in 2008, launched the 50–50 campaign (formally the National Program on Increasing Women’s Representation in Parliament and Local Government) with several international sponsors (Kayuni and Muriaas, 2014; Wang et al., 2020). The campaign had limited effects, but was relaunched ahead of the 2014 and 2019 elections.

Malawi’s experience suggests that interventions like targeted campaign funding for women are a more uncertain bet for securing women’s representation in politics than certain types of gender quotas, such as reserved seats, which works well in first-past-the-post electoral systems (Wang et al., 2020). However, for the Malawian government, the 50–50 campaign serves as useful proof of commitment to international gender equality norms, while carrying few costs for political elites. There are thus few incentives for introducing a more fast-track mechanism to enhance gender balance in politics.

The politicization of lesbian, gay, bisexual, and transgender (LGBT) persons and rights

A particularly contentious gender issue in Malawi, as elsewhere in the region, is homosexuality and gay rights. Donor pressure, through silent diplomacy, public criticism, and NGO support, has not changed the continued criminalization of homosexuality but has been important in moderating the government’s stance (Gloppen and Rakner, 2020; Wahman and Drury, 2018).

While less overtly and consistently than other regimes in the region, such as Zimbabwe and Uganda, Bingu wa Mutharika sought to mobilize anti-gay sentiments as part of a public morality campaign. This included religiously based demonization of sexual deviance, a rallying around African traditional values, portraying homosexuality as an alien pollutant, and a rhetoric against neocolonial aid conditionalities and interference in domestic matters (Awondo et al., 2012; Grossman, 2015). Other actors, including international religious groups and networks, have also been active in politicizing LGBT issues in Malawi.

The 1994 Malawian Constitution—unlike the South African Constitution adopted in the same year—did not include “sexual orientation” as prohibited

ground for discrimination and the Penal Code provision making the crime of sodomy punishable by fourteen years' imprisonment remained in place. The politicization of homosexuality peaked in late 2009 when *The Nation* newspaper published a photo from what was understood to be the engagement party of a gay couple. This stirred great public outrage and the couple was sentenced to fourteen years in jail (Demone, 2016). The reaction from international actors was powerful and culminated in a visit by UN Secretary General Ban Ki Moon, after which President wa Mutharika pardoned the couple, despite having expressed public support for the court judgment. In this case, the pressure from international actors and civil society proved very effective (Gloppen and Rakner, 2020: 203).

However, in January 2011, amid mounting discontent with his regime, Mutharika signed an amendment expanding the statutory prohibition of same-sex relations by also criminalizing "any act of gross indecency" between females, with a penalty of five years' imprisonment (Bond, 2016: 116). And in the run-up to the large protests on July 20, 2011, Mutharika sought to win over the public opinion and "draw a repressive wedge" between NGOs by portraying pro-democracy NGOs as advocating for a gay rights agenda (Currier, 2018: 131). Other politicians adopted the same rhetoric. Patricia Kaliati, the then Minister of Information, accused former Attorney General Ralph Kasambara (a stark critic of the government, who, at the time, was detained on assault charges) of encouraging homosexuality (Lwanda and Chanika, 2017: 26).

After Joyce Banda took over as president in 2012, the dynamics shifted. The situation for civil society improved, with a more open political environment. Eager to mend ties with the donor community that had deteriorated after Mutharika's re-election in 2009 (and responding to her international sexual and reproductive rights network), she initiated economic reforms and, in a controversial move, took steps to liberalize the government's approach to homosexuals. Among other things, she issued a moratorium preventing the police from making arrests on the basis of sodomy laws (Wahman and Drury, 2018: 10). She also signalled that her government would work toward decriminalization but, after massive public pushback, reversed her position.

In 2015, when another arrest took place due to alleged homosexual activities and was criticized by donors, Peter Mutharika's government confirmed their commitment to the moratorium on persecutions for homosexuality. However, in 2016, following litigation by a group of Christian leaders, a court order by the High Court in Mzuzu found the moratorium unconstitutional, leaving its legal status unclear (Mtika, 2016; Human Rights Watch, 2018b; 2018a).

Conclusion

Constitutional democracy in Malawi has prevailed despite a series of setbacks. This resilience is linked to the interaction between state actors such as the judiciary and civil society actors, and a shifting political opposition that has been able to confine or overturn authoritarian strategies and attempts, at times in a concerted effort with international actors.

Assessing the role and position of the Malawian judiciary, we conclude that the courts, despite notable weaknesses, have served a democracy-preserving function throughout the country's democratic trajectory. The courts have maintained a surprisingly stable and broad legitimacy across the political spectrum, despite their deeply political role, and widespread perceptions of pro- and anti-government judges. To understand why this is so, we have pointed to a *virtuous circle of legalism*, premised on the legitimacy bestowed on the judiciary at the time of the democratic transition and feeding off their usefulness to a "democratic coalition" (civil society, political opposition, donors, and other international actors) who, in turn, provided support at critical moments. An important precondition for this dynamic is the shifting political power structure.

The role and potency of international actors is comparatively strong in Malawi and has remained so since the democratic transition. The governance aid relationship to Western donors puts the country in a unique position and reflects Malawi's aid dependency and status as one of the world's poorest countries. Although the relations between the government and international pro-democracy forces have been characterized by fits and starts (not unlike Malawi's democratic trajectory), international actors have, at critical moments, contributed toward safeguarding judicial independence and accountability mechanisms that have kept political channels open.

Malawian gender politics illustrates well the leverage of international actors—and its limits. In the highly contentious and politicized area of sexual rights, we clearly see the comparatively strong donor influence in Malawi. Whereas in many other countries in the region, donor criticisms and (threats of) sanctions in response to anti-homosexuality politics have been met with fierce resistance and have served as fuel for populist mobilization, Malawi's incumbents have been relatively forthcoming to international demands to curb anti-gay actions, despite an adverse public opinion. More generally, we see that while adoption of ambitious laws and policies in areas important to donors may be secured, they are often selectively complied with, particularly when compliance is costly to incumbents. Efforts to advance

gender balance in politics are indicative of how catering to donor concerns is often only partial to minimize costs.

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8

Zambia

Backsliding in a Presidential Regime

Marja Hinfelaar, Lise Rakner, and Nicolas van de Walle

Introduction

Following a peaceful transfer of power from the one-party government of the United National Independence Party (UNIP) in the 1991 multiparty election, Zambia was depicted as a model of third-wave democratization. A cross-ethnic pro-democracy party, the Movement for Multiparty Democracy (MMD), defeated the incumbent party in a free and fair election. Since then, Zambia has held six multiparty parliamentary and eight presidential elections. After twenty years in power, the MMD was defeated in the September 2011 elections by the Patriotic Front (PF) and its presidential candidate Michael Sata. Zambia therefore belongs to a select group of African multiparty systems along with Benin, Cape Verde, Ghana, Madagascar, Malawi, Mali, Mauritius, Kenya, and Senegal, which have experienced two or more peaceful electoral turnovers.

After two electoral turnovers and fierce political competition, electoral processes could be considered as routinized, but growing abuses of power and political corruption since the 2011 electoral turnover have created a stark sense of a democracy in trouble. Zambia's democratic trajectory is defined by a political elite with extremely fluid political allegiances, in which actors change their party loyalties across election cycles (Burnell, 2003; Cheeseman and Larmer, 2015; Fraser, 2017). Many prominent politicians have switched parties two or three times during the course of their careers (Arriola et al., 2021). The former ruling party, the MMD, suffered an embarrassing collapse between its loss of power in the 2011 election cycle and the 2016 election cycle. The party placed fourth in the 2015 presidential by-election, securing just 0.9% of the vote. The August 2016 elections featured an electoral playing field that was notably tilted in favor of the incumbent party. In a highly competitive electoral race, the incumbent President Lungu of the PF edged out opposition challenger Hakainde Hichilema of the United Party for National Development

(UPND). With outbreaks of violence and the arrest of opposition politicians, the election was controversial and the opposition mounted an unsuccessful legal challenge to the final results.

Under the PF, Zambia displayed distinct, observable democratic backsliding. The significant decline of both contestation and participatory rights resulted from the legally cautioned actions of the incumbent regime and gradually but substantially undercut democratic norms, albeit without outright abolishing key democratic institutions (Goldring and Wahman, 2016; Haggard and Kaufman, 2021). We trace the backsliding to the 2011 turnover election and argue that legal innovation was one of the main instruments for the trajectories witnessed in this period. We argue that this erosion of democratic norms under PF governments has its origins in the country's 1991 Constitution, passed by President Kaunda in reaction to growing political protest. It reinstated multiparty competition but otherwise left much of the 1973 Constitution untouched. All constitutional review processes since then have failed to produce a new, more democratic constitution. As a result, the legal foundation of Zambia's multiparty electoral systems is based on a Constitution framed largely for an authoritarian one-party setting. Formal rules provide extraordinary powers and discretion to the executive, even as politics outwardly appear to be governed by democratic principles. Current political dynamics must be understood in the context of continued executive dominance in which the president's discretion over the allocation of government resources produce important incentives for individual members of parliament to support the president. Despite recognizing the democratic challenges posed by the excessive presidential powers granted by the Zambian Constitution, various constitutional reform processes have failed to circumscribe presidential powers, including the latest attempt, the 2016 Constitution of Zambia (Amendment Act) No. 2, 2016.

Zambia's observed democratic backsliding was also closely tied to a changing relationship with its international partners. In the early years of the Third Republic, Zambia was a major recipient of foreign assistance and obtained significant debt relief in 2005 within the Highly Indebted Country Program (HIPC) (Rakner, 2013). Since then, the return of high commodity prices and significant economic growth has made Zambia less donor-dependent. Moreover, in the past decade, Zambia's growing relationship with China has altered its dialogue with its traditional Western partners. Zambia's accession to lower-middle-income country status in 2005 and debt relief via the HIPC program provided it greater access to private capital markets, such as Eurobonds, and Chinese and Indian infrastructure capital. The government's increasing orientation toward China negatively affected its relations with key Western

donors and reduced the impact of the call for democratic reforms from Western donors and transnational civil society. The election of opposition leader Hakainde Hichilema of the UPND by a wide margin on August 12, 2021 ended this episode of backsliding by the Lungu presidency. As we write, however, it is still too early to tell whether President Hichilema will pursue democratic reforms or whether, as most of his predecessors, he will find the presidential advantages baked into the Constitution to his liking.

Following this introduction, we trace how Zambian incumbent elites have used legal instruments to legitimize their attempts to limit democratic contestation and participation using the concepts and dynamics developed in Chapter 3. We then turn to the international dimension, as theorized in Chapter 4, and document how the declining influence of Western donors has exacerbated the tendencies of autocratization by way of legal strategies. A final section concludes our analysis.

Legal strategies

The Zambian judicial system is based on English common law and customary law. Common law is administered by the sub-ordinate courts, High Courts, the Court of Appeal, and the Supreme Court. Local courts mainly administer customary law, especially cases relating to marriage, property, and inheritance. Under the 1997 Constitution, the Supreme Court is the highest court in Zambia and serves as the final court of appeal. The 2016 amended Constitution launched the Constitutional Court, which is on par with the Supreme Court but only deals with constitutional cases. Appointments in the judiciary, in practice, are executive-driven. The president retains far-reaching decision-making authority, appoints all judges, makes all senior-level government appointments, and has the power to create ministries and districts. The executive appointment powers officially follow recommendations by the Judicial Service Commission, which is subject to ratification by parliament, which, again, is controlled by the ruling party (Gould, 2006; Banda et al., 2020; Ndulo and Gazibo, 2016).

Constitutional lawfare since the democratic transition (1991)

The political transition in 1990–1991 from a one-party state to a multiparty democracy was not accompanied by any substantial reforms or a reckoning

with past abuses of power. The 1991 Constitution had been amended to legalize opposition parties, paving the way for multiparty electoral competition but did not alter longstanding constitutional provisions from the one-party era, reinforcing centralized and authoritarian rule. Since then, Zambia has seen several Constitutional Reform Commissions come and go. Neither the Mvunga Commission of 1990 nor the Mwanakatwe Commission (1993) proposed more checks on presidential power. The only constitutional reform that came through was the citizenship clause, which was aimed at preventing Kenneth Kaunda from standing in the 1996 general elections, thereby extending the exclusionary nature of Zambia's Constitution. Since then, attempts at constitutional reform have all failed to rein in executive powers. The Mung'omba Commission (2003), the National Constitutional Conference (2007), and the Technical Committee (2011) did not produce a new constitution. The constitution-making processes showed the same weaknesses, being largely executive-driven and not insulated from partisan interests (Gould, 2006; Ndulo and Beyani, 2012). The Constitution (amended) of 2016 contained some clauses that potentially could enhance Zambia's multiparty electoral system, most importantly the election of a vice-president as a running mate to the president, the establishment of the constitutional court, the scrapping of the office of deputy ministers and the requirement for the president to be elected by a majority of 50% +1 voters (Kaaba et al., 2020). Nevertheless, Zambian legal scholars have argued that the amended 2016 Constitution represented an increase, rather than a decrease, in presidential powers and a continuation of a long history of broken promises on constitutional reform (Hinfelaar et al., 2021). For example, the president continues to appoint all judges, including those of the Constitutional and Supreme Courts, makes all senior government appointments, and has power to create new ministries, provinces, and districts (Ndulo and Gazibo, 2016). Furthermore, the 2016 Constitution strengthened the executive powers vis-à-vis the appointment of the commissioners of the Electoral Commission of Zambia (ECZ) and removed the security of tenure. Other clauses that undermined the separation of powers included Article 81(4), which allows the president to dissolve parliament if the parliament cannot effectively govern the country due to the National Assembly failure to objectively and reasonably carry out its legislative function (Ndulo and Gazibo, 2016: 8). As a result of Zambia's highly centralized executive powers, the quality of governance/democracy is strongly linked to the personality and quality of the leader and his chosen coalition.

Civil society's ability to restrain executive power

The mobilization of civil society (notably the trade unions and student movements) to achieve a democratic turnover in 1991 suggested that civil society had the capacity to unite to demand democratic change. However, despite the transitional elections, the second multiparty elections (1996) showed that Chiluba's government was willing to compromise the rule of law to exploit its majority position for partisan advantage (Rakner, 2003: 13; Burnell, 2003). The tensions between the incumbent government and civil society intensified with Chiluba's expressed intent to stand for a third presidential term in 2001. The attempts to change the Constitution to allow Chiluba a third term triggered a coordinated response from civil society (Gould, 2006; LeBas, 2011). A coalition of non-governmental organizations, church groups, and the Law Association of Zambia (LAZ) organized a campaign against the third term bid under the umbrella organization, the Oasis Forum. The Oasis Forum relied on public pressure and awareness to protect the integrity of the law, with street protests of citizens wearing green ribbons as well as opposition by parliamentarians. Civil society mobilization and MMD members of parliament (MPs) threatening to defect forced Chiluba to step down. Confronted by considerable opposition, the MMD government abandoned its attempt to alter the Constitution. By now, the key organizational unit of the pro-democracy movement had shifted from trade unions to a coordinated body of non-governmental organizations established after the return to multiparty democracy a decade previously.

Despite these successes, Zambian civil society has often failed to sustain pressure on government and secure lasting changes in the form of constitutional reform (Sishuwa, 2020b; Gould, 2011). The inconclusive constitutional reform processes, described above, illustrate some of the limitations of Zambian civil society in the context of strong presidential powers (Gould, 2011: 18). This weakness was augmented by a decline in donor funding for civil society and the increased co-option of civil society by political parties (Rakner, 2021).

When still in opposition, Sata successfully courted civil society organizations to position himself as a national-level politician and secure the support of non-state actors (Sishuwa, 2020b). His embrace of constitutional reform gained him popularity among the urban and civil society leaders. But, after the 2011 turnover election that brought the PF to power, civil society found its influence significantly curtailed as central societal actors now became key members of the new government (Dwyer and Zeilig, 2012: 133).

In power, the PF quickly resorted to more arbitrary methods to control non-state actors. Initially, the PF employed key civil society and media actors in government positions, which quickly served to neutralize them. Prominent civil society activists who were not co-opted and continued to question the government over sensitive areas such as corruption were harassed by the police, arrested on trumped up charges, or denounced as opposition sympathizers or Western agents. The end result was a weakening of the ability of civil society to promote accountability, though activism by way of new civil society actors and alliances has revived somewhat in recent years, coalescing mostly around the controversial constitutional amendment proposal Bill 10 of 2019, which proposed to further amend the Constitution, including reversals of some of the gains of the 2016 Constitution ([Rakner, 2021](#)).¹

Legislative lawfare: A tool of incumbent powers

Zambia's Constitution provides for a hybrid form of government that combines presidentialism with elements of the Westminster tradition of parliament. However, comparing institutional powers and autonomy, [Burnell \(2003: 48\)](#) argues that Zambia is placed near the top end of the range of presidential power. The Constitution provides for incomplete separation of powers and there are no sufficient countervailing safeguards in place to check the executive branch and thus balance the powers. Unsurprisingly, the pronounced interest in creating a strong parliament and to reduce executive power appeared to change once the MMD gained power, as evidenced in 1996, when the MMD government rejected most recommendations of the Constitution Review Committee, accepting (only) those that did not harm or aligned with the interests of the ruling party and Chiluba's bid for re-election as Zambia's president in 1996 ([Burnell, 2003: 51](#)). MMD secured 125 of the 159 legislative seats in the 1991 transitional elections and retained a two-thirds majority in parliament in the 1996 elections as the main opposition party boycotted the elections.

The diminished role of opposition parties

The legislature body is further weakened by the constant recurring of party switching or the process of MPs changing party alliances during a

¹ At the time of writing, Bill 10 has successfully been halted by parliamentarians (preventing a two-thirds majority), combined with an active civil society which heightened public awareness about the pitfalls of Bill 10. For a detailed discussion of Bill 10, see Samba and Kaaba (2020).

parliamentary period. Since MMD lost its parliamentary majority in the 2001 elections, recurring governments have encouraged MPs to defect to the ruling party, to the detriment of the National Assembly functioning as a real oversight body. Party-switching in Zambia follows a trend where switching party affiliations allows the incumbent to “manufacture” or enhance a government majority (Arriola et al., 2021; Goeke and Hartman, 2011). Since the turnover election in 2011, the PF government has continued the practice developed by the previous government and manufactured legislature majorities through the deliberate courting of opposition MPs employing the strategic use of election petitions (Fraser, 2017; Sishuwa, 2020b: 21, Banda et al., 2020). Taking his cue from Mwanawasa’s post-2001 strategy, Sata divided the opposition by appointing thirteen opposition MPs to serve in his government as ministers or deputy ministers.² The policy of manufacturing legislative majorities through collaboration with individual MPs weakens the opposition by dividing it or undermining individual opposition parties. In the case of the MMD, the departure of key members led to its actual implosion. This, again, increased the government’s power and limited the opposition’s capacity to hold the government to account.

The issue of party-switching and the creation of manufactured parliamentary majorities was partially resolved by the 2016 (amended) Constitution, where by-elections are only triggered when an MP dies in office, thereby reducing the prevalence of “floor crossing” after an election. The new rule has ensured that parliament can hold government to account and can halt changes in the Constitution, as witnessed in the case of Bill 10 (see above). However, there are also instances where the government has displayed continued willingness to manipulate the rules prohibiting floor-crossing.³

Experiences from the 2015 presidential and 2016 presidential and parliamentary elections are telling. Freedom of assembly, association, speech, and the press were restricted during both election periods, as well as during the threatened state of emergency after the 2016 election (Goldring and Wahman, 2016; Sishuwa, 2020b). Freedom of assembly was limited by the Public Order Act of 1955, used selectively to prohibit assemblies by civic groups and opposition parties. The provisions of this act were selectively applied to the

² By May 2013, the defections and wins in by-elections prompted by this strategy had increased the PF’s representation in parliament to seventy-one (Beardsworth, 2020).

³ At the end of 2021, a large number of petitions relating to parliamentary elections are still pending in Zambian courts: 82 parliamentary petitions and over 200 local government petitions: <https://www.sedrobz.org>.

opposition in the run-up to the 2016 election and served to limit their ability to campaign. Successive governments have shown little appetite to amend this Act.

Challenging civil society through legal mechanisms

In the period following the 2016 election, President Lungu and the PF government relied on legal mechanisms to weaken civic institutions by undermining their capacity for concerted action. The PF relied on the Public Order Act of 1955 (POA) to curtail the power of non-state actors and effectively make it impossible for them to hold peaceful protests or meetings (Sishuwa, 2020b; Kaaba and Fombad 2021). A colonial-era legislation that regulates public gatherings, the law requires any person who intends to convene a public meeting or demonstration to “give police at least seven days’ notice,” specifying the date, place, and duration for the assembly. If the police indicate that they are unable to supervise the event on the planned date, the POA empowers the state institution to inform the convenors and propose an alternative date and time. Violations of this law attract a six-year prison sentence. Much of the work of civil society depends on popular mobilizations around particular policy appeals and the incumbent government’s application of the POA law placed clear restrictions on the ability of civil society to exercise its freedom of association. The Public Order Act was invoked to prevent civil society meetings and to arrest civil society leaders in their protests against corruption in 2017 (Gaebee, 2020) and again in 2019. In addition to the POA Act, COVID-19 health regulations were also used to curtail the activities of civil society and opposition parties. Arrests and court cases had a demonstrable effect on other activists as they highlighted the costs of participating in political activities deemed inappropriate by the government (Kaaba et al. 2020).

Judicial lawfare

The Zambian judiciary is independent in principle, but, in reality, executive manipulation has compromised the image and integrity of the bench (Gloppen, 2003; Burnell, 2003). The judiciary has the power to review the constitutionality of legislation but the courts appear to have no express powers to strike down legislation (Burnell, 2003: 48; Ndulo and Begani 2012). In a context where the executive is moving in an authoritarian direction, courts face considerable pressure. Opposition and civil society forces have

attempted to mobilize the law to keep democratic spaces open, whereas the courts also experience pressure from the executive to use the legal system to punish opposition and suppress criticism. In cases that are politically sensitive, the Zambian judiciary has been subject to significant pressure from the president and the ruling party. This includes controlling judicial personnel, made possible by the president's power to appoint judges. Consequently, the judiciary and parliament have rarely acted against the executive, despite attempts by donors to strengthen both. The pressure that is brought to bear on members of the judiciary has compromised their independence and has often led to self-censure. Additionally, the judiciary's resources are insufficient to prosecute cases in a timely manner, leading to long delays. Prosecutions for the abuse of public office are relatively rare and tend to be extremely political. They have often been used as a political tool by a recently elected ruling party to prosecute members of the former ruling party or members of current ruling-party factions who have fallen out of favor.

After the 2011 election that brought the PF to power, Zambian courts faced considerable pressure from the executive. Executive pressure was exacerbated by the fact that members of the judiciary have no financial autonomy or security of tenure. A clear display of judicial lawfare (see Chapter 3) was witnessed in the 2012 tribunal against three sitting High Court and Supreme Court justices. On May 30, 2012, judges Nigel Mutuna and Charles Kajimanga of the High Court, and judge Phillip Musonda of the Supreme Court, received a written letter of suspension from President Michael Sata with no reasons provided. The president held a press conference on the same day, stating that by the powers vested in him, he would appoint a tribunal to investigate allegations of the said judges' incompetence and misbehavior. The judges countered that at no point had any such allegations been made known to them or to the Judicial Complaints Authority, as prescribed under the Judicial Code of Conduct Act No. 13 of 1999. Judges Mutuna and Kajimanga sought an *ex parte* order for leave to apply for judicial review and a stay of the president's decision. The Supreme Court of Appeal, by a majority of four to three, found that the president had unfettered powers in exercising the powers vested in him under Articles 98(2)(3) and (5). This decision was widely criticized on the grounds that removing judges from the bench on spurious grounds was the greatest threat to judicial independence (Masengu, 2017).

Judges came under further scrutiny when they had to adjudicate the 2016 election petition under the 2016 amended constitution. As noted by Kaaba et al. (2020), this constitution significantly revised the adjudicatory mechanism for the resolution of disputed presidential elections. Within this new

dispensation, the president-elect was sworn into office within twenty-four hours of the declaration of results, and a petition case could therefore only be filed against someone who was already in office. Previously, the petition was heard by the Supreme Court; now it was handled by the newly established Constitutional Court (whose judges were appointed by President Lungu). It had a duty to “hear” such disputes within fourteen days of the petition being filed, though it is silent on when it should be determined. During the case, the president cannot be sworn in and the Speaker is to exercise executive power. In reality, when the 2016 election petition was brought to court by Hichilema, the president of UPND, these changes did not achieve their intended purpose. The court case was broken off prematurely, the President did not make way for the Speaker and, finally, the case was not heard or never concluded. A similar scenario can be painted for the parliamentary elections petitions. While discarded within three months in High Court (resulting in the loss of Lusaka Central and Munali constituency, both held by a sitting cabinet minister), the appeal in the Constitutional Court is not bound by a time limit but the two cases had not been dealt with by the time of the 2021 elections.

The application of criminal law to prosecute opposition and civil society

In 2016, after the tightly contested presidential by-elections in 2015 and ahead of the 2016 general elections, the Zambia Revenue Authority closed down the most influential opposition newspaper since 1990, *The Post*. Media licenses are provided by the Minister for Information, and there is evidence which suggests that licenses were used in order to control the private media (Phiri, 1999; Makungu, 2004; Sishuwa et al., 2021b). The application of tax law to dismantle the main opposition newspaper illustrates how the application of legal mechanisms and administrative lawfare (see Chapter 3) are key to understanding Zambia’s democratic backsliding (Ndulo 2015). In shutting down the newspaper, the government did not act outside the law. Instead, it utilized a state institution, the Zambia Revenue Authority, and an existing law for the same purpose. The government relied on the legal authority enjoyed by the revenue body under the Income Tax Act to levy distress for unpaid tax obligations. In so doing, they masked the political interest motivating their actions, made evident by the disclosure from the Minister of Finance and the fact that the two state-run newspapers owed the revenue body more money in unpaid taxes than *The Post*.

The Independent Broadcasting Authority in April 2020 closed the biggest opposition television network, Prime Television, a move that was deemed by the Law Association of Zambia as illegal as “it was done prematurely without following the correct channels of the law” ([International Press Institute—Admin 2020](#)). The same authority suspended three radio broadcasting licenses ahead of the 2016 elections.⁴ In a response to the restrictions on traditional media, civic associations in Zambia increasingly turned to social media as the way to communicate news events and to expose the excesses of government. Signaling the executive’s will to limit participation, the increased digital activity led to restrictions in the form of the Cyber Security and Cybercrime Act (2021), which gave the police the power to confiscate electronic devices of individuals and organizations suspected of promoting interests that are inimical to those of the state.⁵

The arrest of opposition leader, UPND’s Hichelema, in April 2017 provided another example of the partisan manipulation of the penal code. Hichelema was arrested on allegations of obstructing the presidential motorcade as it was on the way to a traditional ceremony held in the Western Province. He was charged with treason, disobedience to lawful orders, disobeying statutory duty, and using insulting language under the Penal Code. Treason is a non-bailable offense punishable by death in Zambia ([Amnesty International, 2017](#)). After four months in prison, the DPP entered a “nolle prosequi” and Hichelema was released.

Civil Society’s ability to restrain executive powers through legal strategies

As described in the sections above, after the 2011 elections, but in particular after the arrival in power of President Lungu in 2015, the PF proved to be intolerant of criticism and successfully employed legislative and judicial lawfare to stifle civil society, the political opposition, and independent media institutions. The clamp-down on civil society represented a paradox as the PF party came into power in 2011 on the basis of close ties to civil society and the

⁴ Zambia lacks progressive legislation dealing with information access. Despite campaigning on promises of bringing in an Access to Information Bill in 2011, the PF government repeatedly stalled efforts to introduce and implement new legislation regarding information access. The Independent Media Broadcasting Bill has been debated for nine years; it has not yet been passed by parliament.

⁵ The Cyber Security and Cyber Crimes Bill was assented into law by the President of the Republic of Zambia, His Excellency Dr Edgar Chagwa Lungu on March 24, 2021 and enacted into law by the Cyber Security and Cyber Crimes Act No. 2 of 2021 (the “Cyber Act”) on April 1, 2021 pursuant to the Cyber Security and Cyber Crimes Act (Commencement) Order, Statutory Instrument No. 21 of 2021.

space granted them as an opposition party. As a response to the incumbent government's deliberate attempts to close down space for dissent and voice, the civic institutions that formed the Oasis Forum around the 2001 third term debate re-emerged and voiced their concerns on a number of national issues. As a result, the government's measures of control continued to be heavily contested. The Non-Governmental Organization (NGO) Act that was passed by Parliament in 2010 provided broad discretion to the government to deny registration to NGOs and powers to dictate NGOs thematic and geographical areas of work and imposed mandatory re-registration every five years.

However, civil society resistance resulted in government repealing the NGO Act, and, in 2019, the PF government, through the Ministry of Community Development and Social Services (MCDSS), contracted the Zambia Law Development Commission (ZLDC) to draft a new NGO Bill based on consultation with civil society. Aside from repealing the NGO Act, however, freedom of speech and the press were repeatedly violated by government agencies after the 2016 elections.

International strategies

The gradual decline of donor conditionality is a significant part of the story of autocratization in Zambia in the 2011–2021 period. The evolving relationship with the country's traditional donors undermined Zambia's democracy in two ways. First, the donors progressively ceased to act as an "agency of restraint" on the government's policymaking, and the quality of governance declined as a result. Second, the donor withdrawal resulted in the weakening of the political influence of civil society discussed above due to both cutback of funding and the reduction in political space for civic associations protected by the patronage of the donors. The result of the reduced impact of Western donors and governance aid was witnessed in the PF government's growing willingness to limit press freedoms and to use legal strategies to halt criticism from civic associations about corruption discussed above. In this section, we document these dynamics and we show that the PF government sought to assert the loosening bonds with the donors as a beneficial reclaiming of national sovereignty.

Zambia's evolving aid relationship

Since the late 1980s, traditional Western donors have conditioned their aid to Zambia on political and economic conditions. Donors slowed down aid

disbursements in the late 1980s, first to sanction the regime of Kenneth Kaunda for its unwillingness to engage in economic reform and then to encourage the regime to engage in political reform (Bratton, 1994; Rakner, 2003). The donors reacted to the 1991 democratic transition with a sizeable increase in foreign aid, which went from under 500 million dollars in 1990 to over a billion dollars in 1992. Other than a spike in 1995, when official development assistance (ODA) went up to 2 billion, aid then held steady in current dollars but in real terms started to decline as the donors grew disenchanted with the corruption and authoritarian drift of the Chiluba administration (Rakner, 2013). The more accommodating presidency of Mwanawasa (2002–2008) led to a renewed donor commitment to the government, but this was short-lived, with growing donor impatience concerning corruption during the Banda presidency (2008–2011). Zambia's high debt levels severely limited government's policy space as adherence to structural adjustment programs (SAPs) and the fifteen benchmarks of the HIPC initiative was a precondition to debt relief and aid. It resulted in an austerity budget until the HIPC was completed in 2005. The HIPC coincided with Zambia's return to high economic growth from the mid-2000s onward (7–10% per annum), partially based on higher prices for commodities, particularly copper, and growing private investment, notably from South Africa and China. Over time, aid has inexorably declined as a percentage of Zambian national income from over 30% in 1992 to under 5% today. The increase in fiscal space, the end of SAP and HIPC conditionalities, coupled with the Paris Declaration of 2005, provided the Zambian government with an opportunity to initiate new policies, most notably expressed in the Fifth National Development Plan (2006–2010) and Vision 2030 (written in 2006).⁶ In 2011, Zambia reached the status of a lower-middle-income country and, as a result, now has access to loans on the private capital market. Figure 8.1 shows the evolution of Zambia's aid dependency since the end of the single-party regime in 1991. During this period, many European embassies closed in Zambia, or re-orientated themselves to trade instead of aid.

In conversations, government bureaucrats report to be happy with less donor micro-management of the policy process as this had caused friction over the years (Hinfelaar and Sishuwa, 2019). The often unpopular nature of donor interference has led successive governments to publicly rebuke specific donors or policy prescriptions, occasionally providing extra policy space. However, at the same time, technocrats report that they miss the buffer the donors once

⁶ See <https://www.oecd.org/dac/evaluation/dcdndep/44549817.pdf>.

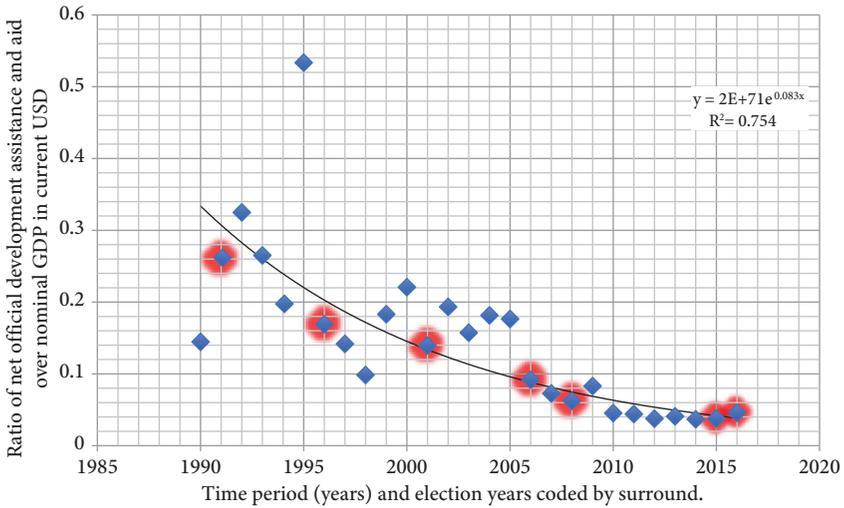


Figure 8.1 Foreign aid as a percentage of nominal GDP, 1985–2016

Source: Authors' own.

provided between them and domestic political interference. In the increasingly politicized environment, the accountability toward the donors that had once reinforced the power of technocrats in government has not been replaced by any other form of domestic agency of restraint (Hinfelaar and Sishuwa, 2019). As a result, policy became more dominated by politicians in and around the presidency.

While fiscal restraint was largely maintained under MMD governments (Mwanawasa and Rupiah Banda), discipline was lost after 2011. The emerging debt crisis most clearly illustrates these dynamics. After PF came to power in 2011, Zambia saw a progressive accumulation of international debt, which may have been justified before the decline of copper prices but became increasingly unsustainable, particularly after the 2015 elections. Domestic and foreign observers qualified the government's economic strategy as "erratic," "calamitous," and "opaque" and President Lungu as motivated by electoral concerns and corruption (see *The Economist*, 2020; *Zambian Watchdog*, 2020; Kyngge, 2018). Zambia's economic crisis included declining economic growth rates after 2013, and experts predicted that the current macroeconomic policies were unsustainable. The arrival of the COVID-19 pandemic in 2020 dramatically worsened the situation, with gross national product (GNP) growth rates tumbling to a predicted -5% for the year, precipitating a much more urgent crisis (International Monetary Fund, 2020).

As Zambia's relations with Western donors and multilateral financial institutions declined, Zambia deepened its dependency on China—which, in 2017, became its main bilateral creditor, with around 44% of the total debt (Ofstad and Tjonneland, 2019). The government's dependency on China is a double-edged sword, providing some financial relief in the short term but potentially damaging relations with key Western donors and investors (many of whom regard an IMF package as indispensable for the credibility of the regime) and compromising debt sustainability in the longer term.⁷

Selective compliance with global norms valued by Western donors

Compared to the 1990s and 2000s, Western donors today have less leverage in Zambia. The donor portfolio has dropped significantly and many donors have withdrawn from Zambia altogether. But this notwithstanding, donors have withheld aid whenever it has been found that the government was not adhering to its own policy commitments. Even if the government has displayed some grand-standing whenever there is criticism from donors, government has taken donor concerns very seriously when it comes to service delivery. For example, donors contribute more than 70% of the budget for HIV/AIDS. The Global Fund provides most of the funds for HIV/AIDS, with the government contribution being less than 20%. In particular related to cases of corruption and misuse of funds distributed to the health sector, donors have retained some leverage over government, as suggested by their withholding aid to the sector due to concerns over poor governance (corruption).

At the height of donor conditionality in the 1990s, donor-funded civic associations were able to gain governmental support for policies for which there was not actually much enthusiasm in the general population. For instance, Zambia's progress in the area of gender equality is due in large part to the work of a professionalized civil society, funded by Western donors. The Gender Equity and Equality Act 2015 constitutes a domestication of the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). Furthermore, the earlier enactment of the Anti-Gender Based Violence Bill in 2011 and the subsequent establishment of the Victims Support Units and fast-track courts to deal with gender-based violence can be seen

⁷ In late 2021, Zambia entered an agreement with the IMF and the negotiations emphasized Zambia's need to be transparent on their debt arrangements with China before qualifying for debt restructuring with the IMF, see <https://www.mofnp.gov.zm/?cat=65>.

as positive steps in CEDAW implementation. Yet, overall, the pace of change remains slow as steps toward change are counteracted by displayed reluctance toward gender equality and, in particular, the Gender Equity and Equality Acts provision on strengthening women's political participation and ensuring gender equity in decision-making. Women representation in decision-making positions remained well below the Southern African Development Community (SADC) Protocol on Gender and Development target of 50% (Wang and Muriaas, 2019). Only 18% of MPs and 8% of elected local government leadership positions were women following the 2016 elections. Signaling a limited national support to gender equality concerns, in 2018, Parliament dismissed the Bill that was to secure gender equity in the recruitment to positions in the government civil service.

Perhaps best illustrating the selective compliance with demands from the international community, and a considerable change for Zambia, the Lungu government granted more freedom of movement to refugees, giving residency rights to former refugees from Angola and Rwanda and committing to a new form of settlement for newly arrived refugees from the Democratic Republic of the Congo (DRC). Zambia's President Edgar Lungu made public commitments in 2016 to relax restrictions on the freedom of movement of refugees in the two main refugee settlements. In addition, more refugees were granted urban residence cards. In 2017, after years of drafts, negotiations with the United Nations High Commissioner for Refugees (UNHCR), and institutional blockages, Zambia's Refugee Act No. 1 was signed into force. Zambia also recently signed up to the Comprehensive Refugee Response Framework (CRRF)—the UNHCR's blueprint for reforming refugee response. However, it may be argued that Zambia's commitment to sheltering and integrating large numbers of refugees also has international benefits (Maple, 2018). As witnessed in the case of Uganda (see Chapter 9), receiving large numbers of refugees has the potential to make the international community turn a blind eye to declines in democratic principles in the country.

The role of donor support in civil society's attempts to restrain executive powers

The most viable civil society organizations in Zambia today have been created and sustained by external democracy support. Democracy assistance has played an important role in terms of creating institutions of restraint in Zambia and helped to foster a relatively vibrant civil society (Rakner, 2013). In

large part due to funding and close collaborations with donor agencies, Zambian civil society has, on a number of occasions, shown its ability to hold government to account. The role of the umbrella association Civil Society for Poverty Reduction (CSPR) tasked with monitoring the implementation of the Fifth National Development Plan (FNDP), is one key example (Rakner, 2013). Donor support has played a key role in empowering NGOs to respond to government on issues such as the drafting of the 2009 NGO Bill (Sishuwa, 2016). However, the close collaboration points to the vulnerability of agencies of restraints and civil society relying heavily on outside funding and support. The recent decline in donor support has consequences for civil society who are in the governance sector. To illustrate, the US government provided \$440.48 million dollars in foreign assistance to Zambia in 2019. Of this pool, \$433.13 million was delivered to the health sector, whereas only \$1.5 million was delivered to democracy, rights, and governance (DRG), hereunder support to the legal–judicial sector. The World Bank’s interventions do not directly support the governance sector, apart from research support on Zambia’s Commercial Court as a part of its “Ease of Doing Business” rankings. Voices in Zambia’s civil society warn that the substantial decline in donor support will have significant consequences for the ability of civil society to constrain the executive powers. According to Zambian activists, civil society became more fragmented and captured after the 2011 election, a process that accelerated with the election of President Lungu in 2015 and again in 2016 (Hinfelaar and Sichone, 2019). A key difference in the two decades since civil society fought the third term constitutional issue, has been that there currently is very little financial support for civil society. Lack of resources render civil society vulnerable to divide and rule as all organizations struggle to survive financially.

Sovereignty claims as a reaction to external human rights and democracy demands

The Oasis Forum and the civil society campaign against Chiluba’s third term bid in 2001 illustrates the strengths of civil society and donor co-ordination (Gould, 2006). But, the close collaboration around constitutional reform issues has also raised debates linked to Zambia’s sovereignty. According to Sishuwa (2020a), constitutional reform is largely an agenda of concern to Western governments and international agencies. Zambian citizens and NGOs demanding constitutional reform have often been considered as agents for Western governments willing to adopt specific political positions in an attempt to secure a portion of donor money. President Mwanawasa’s dismissal of criticism from

civil society by seeking to link opposition from civil society to external actors is illustrative:

The concerns of people in the Oasis Forum are entirely different from the concerns of ordinary citizens [...] People need education, health services, shelter, agricultural subsidies and improvement of infrastructure such as roads [...] This inadequacy poses a bigger challenge to our fight against poverty and backwardness than delivering a constitution.

(Cited in [Sishuwa 2020a](#), 11–33)

After attaining power in 2011, the PF government skillfully asserted nationalist issues to justify its policies, referring to international criticism as neocolonial. Sovereignty claims and deliberate attempts at evoking national sentiments characterized Michael Sata and PF's electoral campaigns in 2008 and 2011 ([Cheeseman and Hinfelaar, 2009](#); [Cheeseman and Larmer, 2015](#), [Fraser, 2017](#)). During the electoral campaigns, public debate over the mining tax regime was framed in nationalistic terms, in a context of similar debates taking place in South Africa linked to black economic empowerment (BEE) and the issue of land reform in Zimbabwe. During the campaign, Michael Sata developed ad hoc policy positions in relation to developments and local conditions. These policy positions often demonized foreign investors (and particularly the Chinese), but some were more specific in terms of economic distribution.

Both the MMD and later the PF government sought to portray civil society as tainted by its international connections and funding. International donors may be cautious of funding activism because of recent, high-profile diplomatic disputes with the Zambian government. The German ambassador received a clear rebuke from the ruling party after publicly voicing his disapproval of clauses within the highly controversial Bill 10 Amendment at the end of 2019. The US ambassador was declared *persona non grata* for his public speech decrying the status of corruption and lesbian, gay, bisexual, and transgender (LGBT) rights in the country. The act of banishing any diplomat, let alone one originating from one of the country's largest sources of foreign assistance, carried real weight in conveying the ruling party's message of "asserting sovereignty." Any attempt to influence the domestic politics of Zambia, but especially in a way that could be tied to the jeopardization of the ruling party's hold on power, would carry the consequences of diplomatic meddling. In this regard, funding activism is a clear no-go zone.

The Zambian government openly confronted the donor/civil society coalition in policy areas where public opinion is more clearly opposed to Western

views. A key illustration is found in relation to gender equality and LGBT rights. Sections 155–157 of the Zambian penal code prohibit “carnal knowledge of any person against the order of nature” (Republic of Zambia Penal Code, section 155). While Western diplomats overall have restrained from issuing public statements on LGBT-related issues in Zambia, there is a perception that Zambian LGBT organizations are tied to Western interests,⁸ which makes them a ready target for criticism from the government, which sees a political advantage in playing to popular opinion on the topic. The issue surfaced for the first time in 1999, when the Norwegian ambassador to Zambia came under heavy criticism after the Norwegian embassy awarded a grant to a domestic NGO working for the rights of sexual minorities which was considered a blatant act of disrespect toward Zambian law (Wahman and Drury, 2018). The issue resurfaced in a 2016 referendum debate on an enhanced Bill of Rights. Agricultural Minister Given Lubinda suggested that opposition to the new Bill of Rights was grounded in the bill’s definition of marriage being between a man and a woman and argued that the will to allow gay marriage was motivated by the opposition’s close ties to the donor community (Wahman and Drury, 2018). The Lungu government often painted civil society organizations as out of touch with Zambian values. The protests by the US ambassador in late 2019, concerning the jailing of a homosexual couple, illustrates how the PF government sought to frame donors and civil society to an issue with limited support in the Zambian population. The government protested publicly and called for the expulsion of the ambassador. Lungu himself was quoted in the press as saying “Even animals don’t do it, so why should we be forced to do it? ... because we want to be seen to be smart, civilized and advanced and so on?” He later pointedly argued in another interview that “If that is how you are going to bring your aid, then I’m afraid the West can leave us alone in our poverty. And we’ll continue scrounging and struggling” (BBC News, 2019; Maclean, 2019). Ambassador Foote was then soon afterwards recalled to Washington. As observers noted, not only was popular opinion probably supportive of the president’s rhetoric, but also this incident proved politically convenient to President Lungu, who had been the target of the embassy’s criticism for corruption and who was eager to be rid of the ambassador.

⁸ Wahman and Drury (2018) point to a parliamentary debate where a member of parliament for the opposition MMD used a parliamentary session in 2013 to question the government’s reluctance to fight LGBT advocacy: “Mr Speaker, some gay activists have gone to some countries outside Africa to source funding so that they can use that money to sensitize people in our country on gay rights. Hon. PF Members: Are you gay?” (Republic of Zambia, Parliament of Zambia, Parliamentary Debates, November 1, 2013).

Conclusion

In this chapter, we have traced the political developments in Zambia since the country's return to multiparty democracy in 1991 and focused specifically on the recent episode of backsliding between 2011 and 2021. We have argued that the witnessed erosion of democratic institutions can be linked to the deep authoritarian legacies of the country's constitutional framework. Zambia's democratic backsliding took place through legal mechanisms and with a veneer of legality. Lawfare, from the application of existing laws, the application of criminal laws, and discretionary application of the law, have enhanced executive power and negatively affected the space for political opposition, civil society, and independent media. This process of autocratization by law was intensified by Zambia's distinctly changed international relations after the end of stringent donor conditionalities tied to SAP and HIPC; Zambia's attainment of lower-middle-income country status which shifted access to capital and international relations; and closer trade relations with China.

Zambia displayed distinct, observable, democratic backsliding, characterized by a *de facto* decline in the core institutional requirements for electoral democracy and resulting from the legally cautioned actions of incumbent executives gradually but substantially undercutting democratic norms without abolishing key democratic institutions. This erosion of democratic norms since 2011 has its origins in the country's 1991 Constitution. All constitutional review processes since then have failed to produce a new, more democratic constitution. As a result, the legal foundation of Zambia's multiparty electoral systems is based in a Constitution framed largely for an authoritarian one-party setting. Formal rules that provide extra powers and discretion to the executive remain, even as politics outwardly appear to be governed by democratic principles.

On August 12, 2021, opposition candidate Hakainde Hichilema and his UPND party won a stunning upset electoral victory. Observers had worried that Lungu and the PF would prevail, thanks to electoral fraud and intimidation (Resnick 2021) at least in part facilitated by the decline in democratic institutions in recent years. In the end, the election proceeded relatively smoothly, and the sheer size of the UPND victory—Hakainde Hichilema received 59% of the vote and a million more than Lungu, out of a possible 7 million votes—made it much harder for Lungu to fabricate an electoral victory. While a lot of pressure was exerted, internationally and regionally, to his credit, he conceded defeat five days after the election.

What does the end of the PF government augur for Zambian democracy? Observers attribute the UPND victory in part to the country's recent economic woes. In a classic case of performance-based voting, the voters sanctioned the PF for its disastrous management of the economy and believed Hichilema's claims that he could do better. By most accounts, Hichilema's campaign criticism of PF corruption was also effective in turning the election into a referendum on the Lungu presidency.

The remarkable activities of key organizations such as the Christian Churches Monitoring Group (CCMG), an alliance of activists (including musicians, academics, and civil society actors) and a resilient opposition party suggests that PF's efforts to dominate were not as successful as many had feared (Pruce, 2021). Also encouraging have been the explicit promises of the incoming president of respecting democratic norms. Perhaps his regime will demonstrate forbearance and not employ the discretionary tools at its disposal to continue the incremental process of autocratization witnessed in recent years. Still, Hichilema finds a much weakened set of institutions, with fewer guard rails to prevent further backsliding, and, like his predecessors, he lacks the incentives to engage in the kind of constitutional reform that would strengthen these guard rails and constrain presidential power.

Common to many new democracies in the global south, Zambia's institutions were designed by the former one-party authoritarian regime to safeguard incumbent elites from the rule of law. As a result of the limited constitutional framework as a foundation for the multiparty system in 1991, accountability institutions (the media, trade unions, opposition, civil society, watch dog institutions) are operating in a precarious "space" with limited institutional powers to offset the autocratic ambitions of various executives. Political power lies in the hands of elected representatives and is largely confined to "democratically legitimated" actors and their patronage networks. Each president has pledged to introduce constitutional reforms, particularly to reduce the powers of the president. Despite this, these pledges have consistently been dropped in order to maintain an overly centralized distribution of political power. Because of this, the Constitution remains "top heavy," and the checks and balances placed on the executive are insufficient.

Zambia's democratic backsliding is linked to the changing relationship with its international partners. As we have documented in this chapter, the Zambian government has responded to the emerging crisis with intimidation and repression of the opposition and media and the progressive restrictions on the operations of civic associations, which no longer benefit from the same kind of international protection. Still, it must be emphasized that the government

has not paid much of a political cost for its unproductive relationship with the Western donors or for its more aggressive stance vis-à-vis civil society. On the contrary, contentious episodes between the PF government and the donors, notably on LGBT rights, have allowed the government to take a popular stance with the broader public that distracts away from its woeful economic record and growing authoritarian tendencies.

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Uganda

A Story of Persistent Autocratic Rule

Sabiti Makara and Vibeke Wang

Introduction

When Yoweri K. Museveni and the National Resistance Movement (NRM) took power in Uganda after a five-year civil war in 1986, they promised peace, stability, prosperity, and democracy—to be achieved through a unique non-party system that became known as the “Movement dispensation” (Museveni and Kanyongonya, 2000: 3; Carbone, 2003).¹ In Museveni’s inaugural speech, he highlighted how his reign would be a “fundamental change in the politics of Uganda” and explicitly questioned why African leaders tended to overstay their time in power (Muhumuza, 2009). Thirty-five years later, Museveni still holds the presidency, and the initial ambition to establish a democratic dispensation has been muted by what amounts to institutionalized arbitrary governance—i.e. to maintain control by creating unpredictability (Tapscott, 2021). In the process much of the early democratic promise has been diluted, and in some cases reversed, effectively putting Uganda (in the case universe of this book) at the bottom of the democracy landscape together with Zimbabwe.

This chapter takes a closer look at how further democratization has been stalled in the period after multiparty politics was reintroduced in 2006, even when Uganda increasingly has adopted the formal trappings of liberal democracy and rule of law. We argue that Uganda’s persistent autocratization must be understood in the context of President Museveni’s highly contested and unequivocal will to maintain power. In the quest to retain power, Museveni

¹ The movement system was introduced in Uganda when the NRM came to power in 1986. It was based on the principles of participatory democracy and a major feature of the system was the establishment of resistance councils (RCs) in every village. Renamed local councils in 1997, the local councils were part of a five-tier structure starting at the village level. All Ugandans were declared members of NRM and party activities were subject to strict limitations that prohibited delegates’ conferences and the sponsoring of candidates for elections. Until the February 2006 elections, all elected representatives in the LCs and the national legislature were elected on individual merit.

and the NRM have effectively used both legal strategies and international linkages to contain democratic mobilization by political opponents and civil society. Constitutional amendments and legal means have been resorted to in combination with widespread use of patronage and violence to curtail organized political opposition both inside and outside the legislative arena and to close down space for a comparatively vigorous civil society that has repeatedly mobilized against enhanced autocratization. The power of the legislature and the judiciary to hold the executive to account introduced with the constitutional changes opening for multiparty rule has gradually withered in the wake of executive encroachment on their authority. The development has been propelled by increased use of autocratic lawfare, thus compromising the courts' ability to safeguard opposition rights and impose accountability. Although the international community has held considerable leverage vis-à-vis the Ugandan government throughout the period, it has been both unable and unwilling to use it. Instead, Museveni has been able to strategically use international relations to his own advantage, shoring up domestic support for his own rule—the politicization of gender rights being a prime example.

Arguably, the powers entrenched in Uganda's new 1995 Constitution were contradictory and set the stage for future contestations over power. On the one hand, separation of powers and checks and balances were established, including a presidential term limit of two consecutive terms. The Constitution also provided a relatively clear institutional framework for key pillars of democracy such as the judiciary, the legislature, and the media and was inclusive in terms of participatory rights, formalized by granting special interest representation to women and other groups through a system of reserved seats (Article 78-b-c). On the other hand, the Constitution provided for the continuation of the no-party "Movement system," the dominance of the NRM, and substantial power retained in the hands of the president. Contestational rights were also severely restricted. Activities that potentially could "interfere with the Movement Political System" were restricted and the operations of political parties were heavily qualified (Article 269). When the NRM regime decided to formally open for the reintroduction of a multiparty system in 2005, this was a calculated move and the central political leadership of the NRM was able to comfortably stay in control of the political process and make sure that the outcome favored their vested power interests—largely aided by the power imbalance enshrined in the Constitution, including the restrictions put on political parties (Makara, 2016; Makara et al., 2009).

The chapter shows how, throughout the period 2006–2021, Museveni has reneged on promises to hand over power and has cast aside potential

challengers to his rule. He has done so by using the control of the state established during the no-party rule era to effectively create a state-party-military nexus. In line with the main argument of the book, we explain Uganda's persistent autocratization through the utilization of legal strategies, as theorized in Chapter 3, and the manipulation of international relationships as outlined in Chapter 4. The next section focuses on how Museveni has relied on legal strategies to bolster his political position and to constrain liberalizing efforts of pro-democracy actors, oftentimes in conjunction with patronage and violence. Following on from here, we turn to the international dimension, more specifically the politicization of gender rights and how the incumbent has been able to strategically cater to both domestic and international audiences whilst serving his own political agenda of remaining in power.

Legal strategies

Museveni blamed the political conflicts and violence of the past on sectarianism and preached the principle of broad-based inclusiveness. In the period after 1986, close links were established between the state and the No-Party Movement, which utilized its inclusive state apparatus to build a wide-reaching network of local government organizations that were de facto party structures modeled on structures originating during the guerilla war (Tripp, 2010: 115–116). The system served as a critical legitimizing strategy (Rubongoya, 2007: 69) and, combined with continuous economic growth and a general fear in the population of returning to war, it provided the NRM with sufficient legitimacy to build the foundations of the regime without experiencing undue criticism from domestic and international actors (Carbone, 2008; Tripp, 2010). The no-party system effectively barred the opposition parties from building organizations and exposed them to the dangers of co-optation (Carbone, 2008: 135–36). In practice, the NRM was effectively protected from political attacks from actors outside the organization and simultaneously potential challengers were incentivized to work inside the structures.

The NRM took further steps toward formalizing as a party through the Movement Act (1997), which specified the nexus between the state and the official NRM faction (Carbone, 2003: 487), and by establishing the NRM caucus in parliament (Muhumuza, 2009: 31). The heavily contested Political Parties and Organisations Bill restricting the operations of parties was finally passed in 2002. But as the process of institutionalizing the NRM as a party gathered momentum, internal elite struggles and institutional decay surfaced

(Carbone, 2003; Makara et al., 2009). Toward the late 1990s, an active parliament frequently opposed the president's agenda and was arguably more powerful during these early movement system sessions than at any later stage (Keating, 2011). Subsequently, several internal conflicts emerged, exposing the movement to factions that challenged the leadership of Museveni and highlighting his reluctance to relinquish power (Tangri and Mwenda, 2010). The 2001 elections marked a turning point as former regime-insider, Colonel Kizza Besigye, mounted a strong personal campaign against the president. The scathing campaign forced Museveni to promise that this would be his last term to contest (Museveni, 2001). Against this backdrop, a comprehensive Constitutional Amendment Bill was introduced in 2004, comprising a total of 119 amendments. Among them was an amendment that would revoke the previous restrictions put on parties, as well as a proposal to reintroduce a multiparty system. One of the most controversial constitutional amendments was Museveni's bid for the removal of the presidential two-term limits that was forced through parliament.

Constitutional reform: Manipulating the law to sustain power

Museveni's unexpected move to reintroduce multiparty politics by the mid-2000s was later to be interpreted as a ploy to stay in power and direct attention away from other restrictive constitutional amendments. The complete turnaround by the NRM on the multiparty question must be seen in light of these internal challenges rather than as a result of external shocks or international pressure (Tripp, 2010: 64–67; Makara et al., 2009: 192). In 2005, a referendum on the reintroduction of multiparty politics was held where the government side won by 92%. Multiparty elections took place the following year. Although Besigye made further electoral gains in the 2006 presidential elections as he capitalized on his image as the savior of Ugandan democracy, the NRM, and Museveni in particular, nevertheless emerged in a strong position after being re-elected through the 2006 election. Term limits had been removed; in the process, parliamentary rules and procedures were changed to allow for an open voting system and members of parliament were bribed to vote for the bill (Makara, 2010: 83; Tangri, 2005: 185). More generally, a potentially devastating succession challenge was thwarted, factions within the NRM had been ostracized, and numerous legal and institutional reforms were made that strengthened the executive vis-à-vis other control institutions as part of the transition to multiparty rule (Keating, 2011: 429; Mwenda, 2007: 24).

The NRM reinforced its hold on parliament through an increased majority that could now be controlled by a party whip. The courts—which enjoyed independence and had ruled against the government on previous occasions—had this time controversially approved the 2006 presidential election results in favor of Museveni despite noting that they had serious flaws (Gloppen et al., 2008). The new Electoral Commission had been packed with loyal former NRM stalwarts and the opposition had splintered into many old and new parties, often competing for the same seats, splitting votes, and bickering with each other (Makara, 2010). In the process, both the domestic opposition and the international community were largely sidelined by the promise of a reintroduction of multiparty politics (Makara et al., 2009). The opposition, in particular, was preoccupied with the daunting task of preparing for elections and building their own parties, respectively (Tripp, 2010).

The removal of term limits enabled Museveni to stand for two more consecutive terms in the 2011 and 2016 elections, but a remaining constitutional safeguard against Museveni's life presidency was the age limit of seventy-five entrenched in the 1995 Constitution (Article 102(b)). At the time of the 2021 election, Museveni would be seventy-six and ineligible to stand. All along, Museveni had made it public that he would not stand beyond the age of seventy-five. Yet, in a calculated maneuver to prolong his stay in power, Museveni sponsored a private member's bill (dubbed the Magyezi Bill) aimed at removing the age limit on presidential candidates. Though it attracted strong opposition in parliament, the bill was passed on December 22, 2017, and Museveni swiftly signed it into law on December 27, 2017. Once again, Members of Parliament (MPs) were reported to have been bribed (29 million shillings), ostensibly to consult voters on the bill. Museveni also swayed MPs by promising to support an extension of the parliamentary term from five to seven years; however, this clause was removed in the end by the Constitutional Court (*The Independent*, 2017).

The maneuver to remove the age limit was met with massive opposition from civil society, opposition politicians, and from some NRM members. During the parliamentary deliberations on the amendment, anti-riot police and the special forces were deployed both inside and outside the parliament building. The bill caused havoc in parliament, with suspensions of twenty-five MPs and security personnel and the president's special forces intervening. Several MPs were injured, leading to a number of protests in the biggest towns, and the commotion made headlines around the world. Opposition lawyers unsuccessfully challenged the law in the Supreme Court, spurring protests starting in Kampala and then spreading throughout the country. Specifically, the ruling

caused tensions among Uganda's large youth population. There was a police crackdown on civil society activists and a hitherto unprecedented amount of non-violent resistance. Several hundreds were arrested, including the leader of the campaign—the high-profile musician and Museveni's main contender for the 2021 elections—Robert Kyagulanyi, popularly known as Bobi Wine.

Combining legislative measures, patronage, and repression to maintain control

With the advent of the multiparty era, the NRM used its control of the state apparatus to introduce new legislative measures aimed at controlling participation and contestation, selectively applying violence against key actors, and turning patronage politics into a key strategy. Restrictive laws were fast-tracked by the government due to the growing popularity of the opposition. From 2011 onward, the NRM regime passed several laws and legal statutes that, in practice, curtailed key contestation and participation rights. Key among these reforms was the 2013 Public Order Management Act (POMA), which effectively legalized police and military repression of public gatherings as well as peaceful protests (Goodfellow, 2014: 768). Groups wishing to assemble had to seek police permission prior to any gathering. Thus, the police were given large discretionary powers over the content and management of meetings. Throughout the 2016 election period, the POMA was used repeatedly to constrain the opposition by arresting opposition members and supporters and either blocking or obstructing rallies and civic meetings. The leading opposition candidate, Kizza Besigye, for instance, spent large parts of the campaign period either in police detention or on house arrest. Before the 2021 presidential elections, COVID-19 health regulations restricting gatherings were used as a basis for arresting Bobi Wine, the main opposition candidate. In September 2020, more than fifty people were killed by the military for protesting the brutal arrest of Wine while campaigning in Eastern Uganda.

Uganda has a strong and vibrant civil society that has been forced to contend with increasing restrictions and control. In 2009, a more restrictive non-governmental organization (NGO) financing law was introduced, specifying how organizations can receive foreign funding as well as tightening reporting requirements. In this way, NGO funding was effectively limited in a context where civil society is highly dependent on foreign funding. The 2016 NGO Act further tightened the rules of operations for NGOs by establishing an NGO Bureau with wide discretionary powers to register, blacklist, and de-register

NGOs (Mbazira and Namatovu, 2018: 76). The registration requirements, including at the local level, are elaborate and taxing.

Social media and online expression have grown in popularity and are actively used by opposition forces, not least by a large youth population. Such forms of communication are increasingly viewed as a threat to the NRM regime because the youth who use them often mobilize in support of opposition figures like Wine. The 2011 Computer Misuse Act targeted online speech and mobilization and has been used to limit freedom of expression. The law has been selectively applied to charge government critics and marginalized communities (Human Rights Awareness and Promotion Forum, 2017). The outspoken academic and social media activist Stella Nyanzi, for instance, was persecuted for cyber harassment of the president because she expressed a critique of the Museveni regime in a poem using sexualized imagery, referring to the president as a “pair of buttocks.” She was sentenced to eighteen months’ imprisonment. The law has also been used to target the news media. The director and editor of the tabloid *The Red Pepper* were arrested, accused of offensive communication for a news story alleging a plot by Museveni to overthrow Rwanda’s president, Paul Kagame (*The Daily Monitor*, 2017). Previously, in May 2013, *The Red Pepper* and *The Daily Monitor* editors had been arrested and the news outlets shut down for weeks for publishing a story alleging that government officials opposed to the presidency succession plan involving Muhoozi Kainerugaba, Museveni’s son, were targeted for assassination (*The Independent*, 2013).

During the 2016 election period, access to social media and mobile money services were blocked for a week by the government, which claimed it was in the interest of national security and to prevent the spreading of “lies” (*CNN*, 2016). In August 2018, a highly controversial social media tax came into effect requiring users of social media platforms such as Facebook, Instagram, WhatsApp, and Twitter to pay a daily fee of 200 Ugandan Shillings. Observers interpreted the tax as an effort to further curtail opposition mobilization and limit criticism and space for information exchange (*Freedom House*, 2020). Furthermore, in 2019, the government introduced new regulations on hosting blogs and websites, requiring online operators to seek authorization. On September 7, 2020, the Ugandan Communications Commission announced that publication of online information must be licensed by October 5, 2020 (*Amnesty International*, 2020).

Lawfare and the implementation of new regulations to tighten government control have gone hand in hand with repression and co-optation as tools to hold on to power, effectively straddling the line between law and lawlessness.

The aftermath of the 2011 elections showed the downside of the co-optation strategy established in the run-up to the 2006 elections for the NRM regime—it is extremely expensive. NRM relied heavily on the government’s monetary policy and the printing of money to finance their actual campaigns (Golooba-Mutebi and Hickey, 2016: 610–611). Several opposition MPs defected to the NRM in 2008 and 2009, ostensibly with the promises of financial largesse as a reward for political support (Makara, 2010: 87). The same trend prevailed in the aftermath of the 2016 elections whereby several Democratic Party (DP) and Forum for Democratic Change (FDC) leaders were co-opted into the NRM. An expansion in public employment opportunities gathered pace in this period through the establishment of new constituencies, increasing the opportunities to co-opt local elites and simultaneously adding campaign costs for the opposition as they had to cover more ground and identify more candidates (Green, 2010: 93–94; Mwenda, 2007: 31). A few months after the 2011 elections, the Ugandan economy suffered the effects of excessive spending and poor monetary policy. While NRM and Museveni blamed the inflation on regional food scarcity, most observers agreed that the inflation was largely due to election-related spending by the government (Golooba-Mutebi and Hickey, 2016: 610–611).

While co-optation could be considered a relatively inconspicuous approach to contain the rise of the opposition, a more overt strategy has been implemented through systemic repression and physical attacks on opposition leaders and supporters since 2006. The establishment and use of state security agencies and paramilitary organizations such as the Kalangala Action Plan, the Black Mambas, the Kiboko Squad, and Crime Preventers has heightened state-orchestrated violence against opposition groups. The targets have typically been opposition actors, media houses, or independent arbiters such as courts (Tangri, 2005: 183; Goodfellow, 2014: 760). By closing media outlets in high-tension situations (Makara, 2010: 88; Mwenda, 2007: 25), the government has effectively closed parts of the media space for the opposition and contributed to triggering a culture of self-censorship (Brisset-Foucault, 2013).

This pattern of systemic repression against opposition political actors and accountability institutions has escalated with each electoral cycle. The urban areas of Uganda, particularly Kampala, have seen periodic protests, and most have been met by excessive force by the state. From the 2009 Kasumbi tombs riots through to the 2011 Walk to Work protests and the 2017 age limit debate violent attack on parliament, Museveni’s government has responded to all major public demonstrations during elections through the use of sheer force. At the same time, the government has accused media and civil society

organizations of either organizing or abetting the riots or at least fanning the flames. On several occasions, offices and equipment of human rights NGOs have been targeted by state operatives. For example, prior to the 2021 elections, bank accounts of several NGOs were blocked on the orders of the state. In particular, the Financial Intelligence Authority pointed a finger at the National NGO Forum and Uganda Women's Network, accusing them of financing terrorism (*The Independent*, 2020).

Autocratic lawfare and executive encroachments on the judiciary

There is an ongoing battle over the Ugandan judiciary. After an initial strengthening of the courts' accountability function in the period prior to 2006, the government has gradually encroached on judicial independence and strengthened its influence over the courts. There has been an increase in the use of autocratic lawfare (Makara, 2016) as the courts have been actively used by the incumbent regime to repress the opposition (Gloppen et al., 2008; Von-Doepp and Ellet, 2011). Traditionally, both pro-democracy forces and the government have turned to the judicial process to resolve their grievances and advance their political interests, thus indicating that the courts were sufficiently autonomous to rule against the government. However, as the government has tightened its grip on power, the space the judiciary has been able to create and uphold for oppositional forces has become more restricted; such space now applies mostly in cases where the incumbent's power is not at risk. For instance, the number of parliamentary election petitions filed is very high and in many cases have been known to allow for redress in the event of election malpractice, including cases involving high-profile politicians from the ruling party (Murison, 2013). Yet, even if presidential election petitions have been filed by the main opposition candidates in most elections since the early 2000s and election malpractices have been acknowledged, the courts have never ruled against the president. Consequently, there are signs that the opposition has become more reluctant to make use of the courts in these types of cases.

The standard of proof required for an annulment in presidential election petitions has been set very high, thus making it nearly impossible for opposition candidates to win (Gloppen et al., 2008). In both the 2001 and 2006 elections, when Kizza Besigye was the main presidential opposition candidate, there was considerable evidence of electoral malpractices, and judgments raised strong criticism of the electoral processes. Nevertheless, the Supreme

Court concluded that, despite the serious irregularities, they did not affect the election results in a substantial manner (Murison, 2013). Decisions were split and the independence of the courts in handling of the petitions has been put into question as the judges were put under undue pressure to rule in favor of the executive (Tangri and Mwenda, 2010: 35–36). Referring to the petitions, the Ugandan Chief Justice was reported to have stated that ruling in favor of the opposition would be suicidal (Gloppen and Kanyongolo, 2012: 60). Following the 2011 elections, Besigye did not file a presidential election petition, although he publicly denounced the election results. He apparently had lost faith in the judiciary: “Since the courts failed to discharge their constitutional duties (to annul stolen elections), they left us with no option but to appeal to the people to reassume their powers” (*The Independent*, 2011). Instead, he demonstrated his opposition to the regime by fronting the enduring “Walk to Work” protests, hoping to prompt a change of government. This is illustrative of the increased tendency of the opposition to demonstrate resistance by means of social disobedience and taking to the streets as the judiciary has progressively become less of an option to seek redress—at least in cases where the incumbent’s power is at stake.

The Ugandan judiciary has been put to the test on several occasions when it has had to deal with the fundamental rules of the political game, including who should rule and for how long. This judicialization of political issues has made the judiciary a key concern for the government as it has the potential for jeopardizing its hold on power. The courts have been perceived as a credible threat, specifically in times of political insecurities (VonDoepp and Ellet, 2011: 148). Accordingly, the incumbent regime has encroached on the independence of the courts to reinforce their rule and has even used the military to attack the courts. A critical constitutional test came in relation to the introduction of a multiparty system and the constitutionally mandated referendum on the transition to a multiparty system. In 2004, the Constitutional Court nullified the Referendum (Political Systems) Act, and thus the results of the referendum, on the grounds of wrongful and protracted proceedings. This effectively made the government illegal (Gloppen and Kanyongolo, 2012; Murison, 2013). While the Supreme Court later reversed the decision following a government appeal, Museveni responded by persistent rhetorical assaults directed against the judiciary and made sure that a new referendum on the political system would be held against the wishes of the opposition. Even if the opposition argued that the referendum was unconstitutional, an appeal to the Supreme Court was rendered futile by strategically keeping the court non-operational due to lack of quorum (Gloppen and Kanyongolo, 2012).

Judicial independence also has been challenged by the appointment of “cadre judges,” who are NRM political functionaries used to pack the judicial ranks (Gloppen and Kanyongolo, 2012: 64). The Judicial Service Commission appoints judges, but the members of the commission are appointed by the president. Although appointments are subject to parliamentary approval, this has been of minimal consequence due to the NRM dominance of parliament.

Even more blatantly, the courts have been manipulated and abused to repress the opposition when high-profile opposition politicians have been detained on seditious charges, treason, murder, and terrorism charges for extended periods of time. In this way, opposition leaders have been effectively kept from carrying out their electoral campaigns (Makara, 2010: 84; Murison, 2013: 487). Museveni has used his position as head of the army to threaten the courts and other institutions, suggesting that he would bring in the army if they disobeyed him (Mwenda, 2007: 25; Tangri and Mwenda, 2010: 44). The heavy-handedness of the repressive apparatus of the NRM amounted to more than a threat in 2005, when an extra-legal militia, the Black Mambas, surrounded and even entered the High Court building to make sure that the main opposition candidate, Besigye, and other prominent opposition politicians were not released on bail. When they in fact received bail, they were re-arrested and charged in the military court (Gloppen et al., 2008). The use of the military court system for political ends clearly poses a threat to the jurisdiction of the courts. History repeated itself when, in 2007, the Black Mambas once again were sent to the High Court to seize suspected insurgents after they were granted bail. Museveni actively infringed on the independence of the courts by exerting undue pressure on judges, manipulating appointments, and even singling out individual judges to blame for court rulings (VonDoepp and Ellet, 2011: 162; International Bar Association, 2007). However, when the Constitutional Court in 2010 unanimously dismissed the treason charge against Besigye and other opposition politicians on the grounds that they could not be simultaneously tried in a civilian and military court, this was interpreted by many as a sign of independence.

International strategies

Uganda has a history of strong aid dependency. Government–donor relations have fluctuated over time, as donors have reacted, particularly in the wake of large corruption scandals, by both suspending and conditioning aid given directly to the government. But Uganda’s international relationships have

never been marked by strong conditionality from donors. Rather, donors have overall been very regime-friendly and, unlike Zimbabwe (see Chapter 10), the democratic opposition has not received much support, although donors have channeled some support to select opposition parties (Wild and Golooba-Mutebi, 2010).

In contrast to other heavily aid-dependent countries, Uganda was not subjected to political conditionality in the early 1990s, despite the lack of multiparty elections. Suggesting a selective compliance with donor demands, Uganda's relative freedom from conditionality has been attributed to the country's successful economic reforms and donors' competing foreign policy interests. Uganda's role as an important ally and security agent in the region was of particular interest in this regard (Hauser, 1999; Hickey, 2013). Strong government–donor ties were established in this period and were further solidified in the period from 1996 to 2006, when the government had a strong focus on poverty reduction (Kjær and Ulriksen, 2014: 9). Donors financed close to half of the budget—and were on the lookout for a success story (Hauser, 1999; Hickey, 2013: 195). Concurrently, Uganda earned the status as a “donor darling” (Fisher, 2012). Notably, since donor support for the incumbent government precluded an active focus on a democracy agenda for civil society organizations (Robinson and Friedman, 2007: 660), donors became more tolerant of governance transgressions (Fisher, 2012).

After the introduction of multiparty elections, the dynamics shifted and government–donor relations gradually deteriorated as part of a waning consensus on the poverty reduction agenda (Kjær and Muhumuza, 2009) and multiple corruption scandals (Kjær and Ulriksen, 2014). Uganda's relations chilled with the World Bank, one of its most important partners, as did the relationship with key Western donors such as the European Union, the United States, and the UK. In response to malfeasance, aid patterns shifted over time from budget support to project support becoming the most common form of aid. In parallel, however, the Ugandan government established closer relations with China, thus reducing the importance of traditional donors, even if the government continued to court its traditional donors (Swedlund, 2017). Museveni has been known for praising China's unconditional development aid and the Ugandan government has taken up large Chinese loans.

The discovery of oil deposits in Uganda, and the promise of prospective revenues from oil, further contributed to giving the government more leverage vis-à-vis donors and the nature of their relationships (Hickey and Izama, 2017; Kjær and Ulriksen, 2014: 16). Uganda's geopolitical importance in fighting terrorism in East Africa and the Horn of Africa has also allowed

the regime to construct an international image as a key ally in the West's war on terrorism (Fisher, 2012: 405). This dynamic has further played into government–donor relations, creating greater reluctance by the international donor community in using its considerable leverage vis-à-vis the Ugandan government (Golooba-Mutebi and Hickey, 2016: 611). Thus, and as detailed in the following, Uganda's incumbent regime has managed to successfully play a strategic game of asserting its sovereignty and engaging in selective compliance with international demands in spite of aid dependency and without pushing away its international donors.

Asserting sovereignty while keeping the donors on board—politicization of LGBT rights

The multiple contradictions of power in Uganda's hybrid regime (Tripp, 2010) are very visible in Ugandan relations with Western donors. On the one hand, Museveni has been known to respond to international demands by resorting to sovereignty claims and anti-donor rhetoric. On the other hand, he actively plays to the interests of foreign donors. Donors, for their part, warn of corruption and undemocratic activities, sometimes by suspending aid, yet they often end up continuing their support.

The politicization of lesbian, gay, bisexual, and transgender (LGBT) rights (popularly known as “gay rights” in Uganda) illustrates well the complicated nature of the donor–government relationship. Museveni has been able to strategically use the LGBT rights issue to his own political advantage by, among other things, diverting donors' attention away from corruption scandals while appealing to a local constituency where anti-gay sentiments are strong, particularly ahead of elections. Simultaneously, he has yielded sufficiently (and discretely) to international pressure and criticism so as to keep them on board in the end. Underlining how both incumbents and pro-democracy forces leverage both the legal and international mechanisms (see Chapters 3 and 4), international donor agencies have been critical in providing protection and support to the Ugandan LGBT movement.

On February 24, 2014, in an extraordinary public showing, Museveni signed the Anti-Homosexuality Bill into law. The media presence was considerable and so was the presence of officials and top ministers. The act was a modified version of a private member's bill first introduced in 2009 that proposed a death sentence for “aggravated homosexuality,” imprisonment for life for “the offence of homosexuality,” and seven years' imprisonment for “aiding and abating homosexuality” (Anti-Homosexuality Bill 2009 No. 18). By contrast,

the new act, first passed by parliament in 2013, included provisions imposing life sentences for same-sex marriage instead of the death penalty but still criminalized “promotion” of homosexuality. By finally signing the bill, Museveni defied pressure from international partners, foreign donors, civil society organizations, and gay rights activists. He used the opportunity to vehemently accuse international donors of undue interference and trying to force their beliefs on African societies. He stated, “Outsiders cannot dictate to us, this is our country,” blaming “Western groups” for promoting homosexuality. “This is social imperialism. To impose social values of one group on our society” (*New Vision*, February 2014, cited in [Grossman, 2015](#): 338). On multiple occasions, and as witnessed in a number of the other cases covered in this volume, Museveni played on Uganda’s sovereignty and asserted that international pressure to reject the bill amounted to undue interference in national affairs (see, e.g. [CNN, 2014](#)).

Museveni’s emphasis on sovereignty was strategic. In the period preceding the signing of the bill, he had been under pressure from key donors over corruption. In 2012, donors suspended more than USD 300 million in direct budget support due to missing donor funds, considerably more than the suspension taking place in relation to the passage of the Anti-Homosexuality Act ([Swedlund, 2017](#)). The 2012 suspension of aid had severe repercussions for the national budget. Bringing the anti-gay issue back onto the national agenda stirred up a lot of international attention and ultimately served to direct attention away from the pressing issue of corruption. As such, the diversion involved less cost in terms of donor reactions, and, in this way, proved to be favorable to the government.

Originally, the first version of the bill introduced in 2009 was withdrawn from the parliamentary agenda following intense international pressure, leaving the impression that Museveni was swayed by the international response. Despite considerable support for the bill among MPs, Museveni labeled it a sensitive foreign policy issue ([Awondo et al., 2012](#): 153–154, [Sadgrove et al., 2012](#): 115) and effectively put a stop to the bill. Until then, Museveni had kept relatively quiet about the bill and international donors’ threats to put a halt to funding flows. Yet, other government representatives had willingly lashed out in the media in response to donor pressure. The ethics and integrity minister, James Nsaba Butoro, publicly voiced his opinion on the bill on multiple occasions and was particularly vocal in his attacks on international actors for threatening to suspend or cut aid. In response to Sweden’s threat to cut aid, he reportedly asserted that “We won’t trade our dignity for money” ([The World, 2009](#)). The bill resurfaced in October 2011 and February 2012, when revised

versions of it were discussed in parliament. The strategic importance of the issue was indicated only a few months after signing the bill into law. On August 1, 2014, the act was ruled unconstitutional by the Constitutional Court on grounds of a technicality. This move has been interpreted as having been orchestrated by the ruling party as it helped to buy the government new leverage over international donors (Gloppen and Rakner, 2020). In the process, Museveni catered to both a local audience and an international audience while serving his own political agenda.

Meanwhile, Uganda's persistent, albeit small LGBT movement has become increasingly vocal and vigorous in tandem with heightened attacks on gay rights. The movement has mobilized for gay rights and against oppressive legislation under very difficult circumstances, relying on a number of strategies in its advocacy, including making use of the court system and actively seeking the support of international actors. Underlining the connections between the legal and international mechanism (see Chapters 3 and 4), courts have proved to be a key arena for the LGBT community to safeguard their rights, often spearheaded by representatives of the leading civil society coalition Sexual Minorities Uganda (SMUG) and with the support of international actors. After the Ugandan tabloid *Rolling Stone* had published a photo of high-profile activist and SMUG co-founder, David Kato² and made the identity of 100 allegedly gay people public under the headline "Uganda's top 100 homos. Hang them!"; three SMUG activists took the issue to court. On January 3, 2011, the High Court banned all media from revealing the identity of LGBT people, thus establishing a right of privacy for homosexuals (Dicklitch et al., 2012: 459).

Strategic litigation has at times been successfully used by activists to seek equality (Awondo et al., 2012: 154; Jjuuko, 2013), and there are even examples of the fight being taken beyond the country level to the regional level and to international courts, thus creating additional attention to the cause (Gloppen and Rakner, 2020). The LGBT community in Uganda is embedded in transnational NGO networks that in multiple ways have provided support, both moral and financial, in the form of knowledge exchange and solidarity campaigns. A broad coalition of civil society organizations closely engaged with donors on how best to support their cause both when the 2009 bill was first introduced and following the adoption of the 2014 Anti-Homosexuality Act. Intriguingly, the coalition advised against aid conditionality because it was concerned that

² David Kato was murdered in January 2011 after the publication of his photo. The media, particularly tabloids like the *Red Pepper* and *Rolling Stone*, have been aggressive in their approach to homosexuality and have egged on acts of violence, persecution, and discrimination against the gay community (Sadgrove et al., 2012).

this would have detrimental consequences and would lead to further marginalization of the LGBT community (Jjuuko, 2013: 405). However, this did not stop some donors from threatening and/or implementing sanctions leading to increased issue saliency and government reactions (Saltnes and Thiel, 2021). Yet, enhanced politicization has also put gay rights leaders in a better position to engage with the government and has provided some protection (Gloppen and Rakner, 2020: 204).

The anti-gay discourse surfacing since the bill was first introduced in 2009 has been intimately linked to morality (Sadgrove et al., 2012: 103) and has been framed as being promoted by “a neocolonial West” (Awondo et al., 2012: 154) that poses a threat to “African values, national integrity, and sovereignty” (Grossman, 2015: 338; see also Sadgrove et al., 2012). The broad consensus among the electorate makes the issue prone to populist mobilization. Uganda is a deeply religious society, and religious leaders are largely intolerant and negative toward homosexuals. In parliament, the introduction and reintroduction of the bill has been met with MPs cheering (Awondo et al., 2012: 154). By contrast, it has been considered political suicide for a political party or politician to publicly support the rights of homosexuals (Dicklitch et al., 2012: 459). The government has strategically labeled opponents as “promoting homosexuality” to discredit them. For instance, restrictions on civil society have been implemented under the pretext that non-governmental organizations are “promoting homosexuality,” thereby diverting the attention of domestic and international audiences away from economic mismanagement and opposition-led protests such as the “Walk to Work” campaigns (Awondo et al., 2012). More recently, Museveni actively embedded anti-gay rhetoric into his 2021 re-election campaign and accused his erstwhile competitor, Bobi Wine, of being gay and of running his campaign on gay-rights funding (*Bay Area Reporter*, 2021). As he has done before, Museveni denounced Western actors of imposing “social imperialism” by advancing gay rights (*CNN*, 2021). Threats of reintroducing the Anti-Homosexuality Bill once again resurfaced in 2019. Referring to a possible reaction by international actors, ethics and integrity minister Simon Lokodo stated, “We don’t like blackmailing. Much as we know that this is going to irritate our supporters in budget and governance, we can’t just bend our heads and bow before people who want to impose a culture which is foreign to us” (*Reuters*, 2019). Meanwhile, on May 3, 2021, the parliament passed the Sexual Offences Bill, which would make same-sex relations deemed against the “order of nature” criminal and punishable with ten years’ imprisonment. At the time of writing, the bill still awaits presidential approval.

Selective compliance: The politicization of quota representation

The politics of gender rights has been instrumental to the government. Uganda's reserved-seat policy for women's political representation feeds into and has been part of cultivating Uganda's international image as a gender equality pioneer in the region. It has served to signal compliance with global norms on gender rights (Edgell, 2017). The government's commitment to advancing gender rights has been formally demonstrated by the ratification of a wide range of international and regional human rights instruments such as the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of all forms of Discrimination against Women; the Convention on the Rights of the Child; and the Maputo Protocol. Upon its adoption, Uganda's 1995 Constitution was considered one of the most gender-sensitive in the world and included several provisions important to women, including the reserved-seat quota system for women (Tripp, 2000). The new constitution was adopted at a time when the international environment strongly favored advancing women's representation and when the Museveni government had recently come to power and had strong incentives for seeking international recognition and legitimacy.

The reserved-seat quota was introduced in 1989, and one of the first in Africa. Women quota representatives are elected in separate elections for women at the local and national levels. Since 2006, quota women have been elected by universal suffrage, and in parliament there is one woman district representative per district. Due to the quota, the total number of women in parliament has soared from 102 in 2006 to 174 in 2021 and the number of districts from 79 in 2006 to 146 in 2011. The majority of women are elected at the district level and as the number of district seats for women in parliament corresponds to the number of districts, the number of women has increased in tandem with the creation of new districts.

The implementation of the reserved-seat quota originated from the government's need to create regime legitimacy and stability by fostering a broad support base. There was also a push from the Ugandan women's movement that was inspired by international pressure and influence (Tripp, 2000). In the period following the Fourth World Conference on Women in Beijing in 1995, national frameworks were developed to advance gender rights, and development partners directly supported initiatives to promote gender equality in the form of legislation. Since the introduction of multiparty politics in Uganda, the quota policy has been strategically important to the incumbent

government by boosting the ruling party's electoral strength and reinforcing existing patronage structures (Muriaas and Wang, 2012).

The government-led process of district multiplication and enhanced decentralization is highly politicized and has been understood as a means of spreading patronage, including to women as a group (see Goetz, 2002: 558–559; Green, 2010; Mwenda, 2007: 31). The “districtification” has a solid support base among women parliamentarians, especially women district representatives, and the patronage arising from the government's district policy has been successfully used to co-opt and weaken the opposition ahead of elections (Muriaas and Wang, 2012). Women oftentimes have been reminded about where their allegiance should be before elections (Ahikire, 2004). Prior to the 2011 elections, then NRM spokesperson Mary Karoro Okurut referred to the relationship between the NRM and women as a “love affair” and a “marriage,” insisting that the NRM is the main proponent of progress in women's status: “Women themselves acknowledge this and know where their vote lies and they will make their sentiments categorically and unequivocally clear, come February 18, 2011” (*New Vision*, 2010). This is also why Museveni's recent appointments of a female vice-president, the second in Uganda's history, and a cabinet with 43% women has received mixed reactions as there are strong pressures to comply with the NRM agenda while in office.

Uganda's quota policy has clearly benefited the incumbent government and has helped to sustain NRM dominance (Donno and Kreft, 2019). But the policy has also evolved in response to the demands of internationally backed domestic women's activists at local and national levels who have vested interests in its continuation (Muriaas and Wang, 2012). Notwithstanding the regime-enhancing aspects of the reserved-seat system, including co-optation and marginalization of reserved-seat representatives (Goetz, 2002; Tamale, 1999), there are more positive aspects of the policy. Women elected through quotas at the district level are just as qualified as others (O'Brien, 2012), and their quota counterparts in parliament are as active as other MPs (Wang, 2014). In this respect, the quota policy has strengthened the substantive representation of women (Clayton et al., 2018). The most striking effect of the quota has been the increase in the number of women in politics, which has contributed to elevating and normalizing women's position in public space.

This mixed and complex picture may also explain why international actors have been reluctant to strongly criticize how the regime has exploited the reserved-seat policy to its own advantage and, as such, the quota system has contributed to international approval of the NRM hegemony. Uganda's women's rights achievements, the most obvious being the dramatic increase

in women in politics, have arguably made international actors more lenient of regime transgressions. The reserved-seat quota has thus worked as a legitimizing strategy vis-à-vis the international community and has helped Museveni and the NRM to stay in power (Ahikire, 2004; Tripp, 2000, 2010).

Conclusion

Museveni won his sixth presidential term in office through the January 2021 presidential elections, putting him on an infamous top-five list of the longest-serving African leaders. We contend that Uganda's persistent autocratization must be understood in the context of excessive executive power and the incumbent's relentless intent to retain and remain in control. The Museveni regime has strategically employed both the law and international relationships to shore up its political position. Due to NRMs control of the state apparatus, lawfare and legal strategies have served as critical tools to contain threats to continued rule. Together with extensive use of patronage and violence against pro-democracy forces, this strategy has blurred the line between law and lawlessness and created uncertainty about state interventions and which rules apply when. The regime's manipulation of legal processes to maintain power has particularly been brought to the fore in the pre- and post-election periods and has contributed to limiting and redefining the space for Uganda's tenacious pro-democracy actors. Although the judiciary has been assertive and, to some extent, made decisions against the government, it has its hands tied in cases where the incumbent's power is at stake, thus contributing to weakening its legitimacy among the opposition.

Despite holding significant leverage vis-à-vis the Ugandan government, international actors have at best played an ambiguous role in Uganda's political trajectory. Notwithstanding the country's high dependence on foreign aid, the relationship has never been characterized by strong conditionality. By contrast, the NRM government, and Museveni especially, have been able to assert their sovereignty in the face of international demands and simultaneously play to the interests of international actors. The politicization of gender rights in Uganda is a case in point. Anti-homosexuality sentiments and anti-donor rhetoric have been used strategically by Museveni to mobilize a domestic audience and to divert international actors' attention away from corruption scandals. The reserved-seat policy for women has been instrumental in creating international legitimacy but arguably has also made international actors more prone to ignoring regime transgressions and helped to sustain NRM dominance.

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10

Zimbabwe

Contested Autocratization

Siri Gloppen, Marja Hinfelaar, and Lise Rakner

Introduction

Since the liberation struggle brought independence in 1980, government strategies of authoritarian control have been harsh and effective, with democracy scores in Zimbabwe consistently being among the lowest on the continent (see Chapter 1). Zimbabwe's political trajectory since independence and the interrelations between the executive state, the opposition, and international forces may be divided into three distinct time periods. From the time of independence in 1980 until the late 1990s, political conflicts played out between the two major parties, the Shona-dominated Zimbabwe African National Union (ZANU) and the Matabeleland based Zimbabwe African Peoples Union (PF-ZAPU). The major challenge confronting the post-independence government was nation-building in a society deeply divided along lines of race, ethnicity, gender and geography and restructuring an inherited colonial political economy (Muzondidya, 2009: 167). The relative post-independence peace culminated in the Matabeleland massacres, “the Gukurahundi,” between 1983 and 1987, which claimed the lives of 20,000 Ndebele civilians in ZAPU-PF-dominated areas at the hands of the Zimbabwean army.¹ This forced the ZAPU-PF to integrate into the governing ZANU in 1987—thereby creating a multiethnic, dominant one-party system under the auspices of one party, the ZANU-PF. While the 1980–2000 period was marked by hostility, it was also a period of reconciliation and international re-engagement, economic growth, and a significant expansion of Zimbabwe's industrial base. Its support for the anti-apartheid movement and geo-political location as a frontline state attracted “solidarity funding” from bilateral donors and international aid

¹ The Gukurahundi refers to the war on the Ndebele civilians by the Zimbabwe army from 1983 to 1987. The term derives from Shona and may be translated to “the rain that washes away the chaff from the last harvest, before the spring rains”—underlining the ethnic dimension of the war.

organizations. Partly as a result, an influential civil society sector emerged that played a significant role in terms of development and service provision, working alongside ZANU–PF until the 1990s (Dorman, 2016). High levels of education facilitated the emergence of a professional class, reflected, for instance, in the standards of the judiciary and the legal profession.

In the period from 2000 to 2017, economic decline, the consequences of economic austerity measures, corruption, limited accountability, and sharp ideological divergence of interests led to political polarization and competition (Dorman, 2016; Raftopoulos, 2009). Zimbabwe's economy experienced a steep decline that was followed by austerity measures advocated by the International Monetary Fund (IMF) and the World Bank. The structural adjustment program, coupled with poor financial decisions on the part of the government, led to labor unrest and general discontent among urban people (Le Bas, 2011; Bond and Manyanya, 2003; Raftopoulos, 2013b). This period also marked a significant political mobilization in Zimbabwe. In the late 1990s, a new opposition emerged from the trade union movement and a coalition of civic organizations that demanded political accountability and an end to corruption. Together, they formed the new opposition party the Movement for Democratic Change (MDC), initially around the issue of reforming Zimbabwe's national constitution by reducing the powers of the executive. Besides the strong urban support base of the MDC, Matabeleland became a fertile ground for opposition politics, establishing a strong electoral support base.

The sharp rise of protest and the emergence of an organized opposition during the campaign for the 2000 Constitution forced the ZANU–PF regime to demonstrate its authoritarian powers to maintain control (Chan and Galagher, 2017; Dorman, 2016). In the 2000 constitutional referendum, and later in the general elections of 2002, ZANU–PF experienced its first major electoral challenge. In response to the mobilization and political challenges posed by the MDC, in July 2000 the government announced the Fast Track Land Reform and Resettlement Program, in which commercial farms were redistributed to small-farm families and black commercial operators. Among the beneficiaries were the veterans from the liberation war and prime properties were also allocated to party and state elites. The regime's attacks on the commercial farming sector, as well as other groups, and the regime-led electoral violence resulted in the loss of much external financial investment and donor support. Zimbabwe now moved toward a "bipolar" two-party system, becoming more polarized with each election cycle. Zimbabwe's political crisis came to a head in 2008, when the closely contested presidential elections saw the MDC presidential candidate (Morgan Tsvangiri) win the first round, despite

unprecedented levels of partisan violence perpetrated by youth militia and war veterans.² Due to state violence, the opposition candidate withdrew from the second round of elections and President Mugabe and ZANU–PF was returned to power. In an attempt to solve the crisis, the Southern African Development Community (SADC) and the African Union (AU) brokered a political settlement between the incumbent and the MDC.³ The signing of the power-sharing agreement and the formation of Government for National Unity was considered by Zimbabwe’s international partners as a first step toward rebuilding a shattered economy and political system (Dorman, 2016; Raftopoulos, 2013b). The agreement also included an independent constitution-making process which culminated in a new constitution in 2013. However, the Government for National Unity period (2009–2013) also saw the influence of the opposition decline. The ZANU–PF regime increasingly relied on security forces to clamp down protests and the progressively more autocratic tactics challenged the prospect for a democratic trajectory involving rule of law, an independent press, and freedom of association.

Toward the end of 2017, a dramatic economic crisis, visible leadership struggles within ZANU–PF, new forms of digital and informal protests (see Chapter 2), and the tolls of the long-term international isolation, resulted in changes in the leadership of the ruling party (Beardsworth et al., 2019). In November 2017, the Zimbabwean military launched “Operation Restore Legacy” with the intention of ending the four-decade rule of President Robert Mugabe. The November 2017 coup saw the military emerge as the central power player in the party, the removal of Robert Mugabe as president and leader of ZANU–PF, and his replacement by the party’s former first vice-president, Emmerson Mnangagwa.⁴ The key figures instigating the “military-assisted transition” were careful not to present the take-over as a coup: Due to Zimbabwe’s disastrous economy, the success of the transition rested on

² From the late 1990s, Zimbabwe entered a period that often is referred to as “the Crisis in Zimbabwe.” There is a large and diverse literature on the crisis; some of the central sources consulted in this chapter are: Raftopoulos (2009), Bond and Manyanya (2003), Primorac and Chan (2007), Tendi (2014), and Dorman (2016).

³ Partners in Zimbabwe’s Global Political Agreement (GPA), the legal instrument regarding the formation of a government of national unity (GNU) was signed between Zimbabwe’s political contestants, MDC–T, ZANU–PF, and MDC–M.

⁴ On November 14, 2017, members of the Zimbabwe Defense Forces (ZDF) gathered in Harare and seized control over the Zimbabwe Broadcasting Corporations (ZBC). The next day, ZDF issued a statement that said this was not a coup and that Mugabe was safe and under house arrest. On November 19, Emmerson Mnangagwa replaced Robert Mugabe as the leader of ZANU–PF. On November 21, the Parliament voted to impeach Robert Mugabe and Emmerson Mnangagwa became Zimbabwe’s third president.

the ability to secure the support and investments of international partners.⁵ Employing the language of constitutionalism, the army leaders argued that Section 212 of the Constitution mandated the defense forces to protect the people and the Constitution.⁶ In July 2018, a general election was called, motivated by the need to bring the international community on board with the regime's image of change. However, delayed election results culminated in popular protests that were put down by security forces.

Reminiscent of autocratic practices associated with the Mugabe era, the ruling ZANU–PF used the COVID-19 lockdown period to amend the Constitution to consolidate executive powers without input from citizens. The amendments passed in April 2021 included enhanced powers of the executive in the appointment of judges, the removal of the qualification requirements, and direct election of the vice-president, all due to come into force in 2023 (Nyathi, 2021). With conflicts escalating and the economy deteriorating further, Zimbabwe post-2017 suggests that despite the removal and later death of Robert Mugabe, Zimbabwe's "new dispensation" looks much like the old. Practices used by ZANU–PF for four decades to maintain a hold on power have continued, from direct use of violence and threats of violence to the passing of legislation challenging opposition mobilization, imprisoning opposition leaders, and the use of state resources to infiltrate and divide the opposition. The ruling party has exploited state resources in elections, securitized campaigns, and ensured that state media coverage is heavily biased in its favor. Institutions have been compromised to serve the regime's interests, including those charged with securing electoral integrity, the police, and the judiciary.

Zimbabwe's contemporary political history as a post-liberation militarized regime displays both a willingness and capacity for violence and manipulation. Yet, ZANU–PF has never managed to establish complete political hegemony as the incumbent regime has not been able to eliminate the main opposition party, despite sustained attempts. Paradoxically, while legal strategies have constituted central tools of authoritarian repression in post-independence Zimbabwe, the judiciary has also constituted a key arena of

⁵ According to the *Financial Times* (December 26, 2017): "Though it often looked like a coup, talked like a coup and, frankly, quacked like a coup, the international community—long sick of Mr. Mugabe—played along with the idea that it was, in fact, a gentler 'military-assisted transition.' Within days, analysts had adopted the acronym MAT."

⁶ The "Mugabe must go" marches organized by the War Veterans on November 18 signaled popular support for the take-over. The opposition MDC Alliance, under the leadership of Nelson Chamisa, gave their support to the coup, adding to the popular call for Mugabe's removal. The legality of the military intervention was granted by the High Court on November 24.

resistance. Similarly, both the opposition and the incumbent have relied extensively on international mechanisms and financial and ideological support from regional and international forces. As a result, Zimbabwe's political trajectory since independence is characterized by a dynamism between an authoritarian propensity for closing political space and opposition forces' struggle to keep it open. Arguably therefore, Zimbabwe is not a one-party authoritarian state but a two-party autocratic state shaped by the negotiated transition in 1980 that left a pluralist structure embedded in a liberal constitutional framework that is constantly challenged by the autocratic incumbent regime.

In the following, we structure our analysis of Zimbabwe's political trajectory as a dialectic where regime forces repeatedly attempt to close and control the political space and are met with resistance from the opposition and civil society, sometimes crowned with success. In line with the main argument of the book, we explain contestation for political power and participation in Zimbabwe through two central processes: Legal strategies, as theorized in Chapter 3, and the utilization of the international relations as outlined in Chapter 4. Following this introduction, the next section documents how the ZANU–PF elite have consistently relied on legal strategies to legitimize their rule since independence. The use of legal institutions puts a veneer of legality on repression, notably for a foreign audience, but its primary purpose is not legitimacy but power maintenance. Yet, at the same time, legal strategies and an extensive use of courts have provided space for the Zimbabwean opposition and civil society to contest executive abuse of power and advance their political agendas.

Next, we turn to analyze how both the incumbent and opposition have actively utilized international partners in their struggle for power and dominance. Discourses of sovereignty have often been employed by the regime to justify the closing of political space. Across a wide range of issues, from multiparty elections and question of land allocations to human rights and lesbian gay, bisexual, and transgender (LGBT) issues, the incumbent regime has relied on sovereigntist arguments. In other instances, the ruling party has sought to accommodate support from international development actors, most notably through advancing gender and gender norms. At the same time, international funding for democracy support, including direct support to the opposition parties, has, at critical junctures, provided the opposition and civil society with both legitimacy and financial clout to challenge the authoritarian regime. A final section concludes the chapter.

Legal strategies

A key aspect of the ZANU–PF regime’s autocratic control is its strategic use of law and legal provisions to maintain office and strengthen its powers in ways that contravene or undermine democratic norms, processes, and institutions. The use of legal strategies is particularly notable in critical periods around elections and threats of transfers of power; periods when the regime has needed to legitimize itself or assert its control. Notably, constitutionalism in Zimbabwe has never significantly improved from the levels of the 1950s, when, although still at a low level, it was higher than in the other countries discussed in this book, with the exception of Ghana, particularly in terms of judicial constraints on power.

The ways in which law has been used to constitute and contest state power in post-colonial Zimbabwe closely resembles colonial times as the government has relied on the same institutions and invoked the same justifications by mobilizing a discourse of law to silence political dissent and to criminalize political opposition (Karekwaivanane, 2017). The continuity from colonial times is witnessed in the 1979 Lancaster House Constitution. The post-independence Constitution was crafted as part of the end to the liberation war and embodied a series of compromises, in particular over land ownership and the granting of white representation in parliament, and was considered a key blockage to political and economic reform (Muzondidya, 2009: 172). The continuities are not only linked to the legacy of settler rule but are also a product of the authoritarian tendencies that had begun to emerge in the nationalist movement from the mid-1970s, especially in the military camps (Karekwaivanane, 2017: 185). The post-independence government has relied heavily on coercive tactics developed during the liberation struggle, perpetuated through the application of repressive laws such as the Emergency Powers Act (1960), and the Law and Order Maintenance Act (1960) used to detain political rivals and to silence critics (Muzondidya, 2009:176).

Nevertheless, the rule of law was generally observed during the 1980s and kept steady for the following two decades—albeit within a constitutional landscape heavily influenced by the country’s colonial past. As one of the significant voices of dissent in the first two decades of independence, the judiciary resisted executive directives. This changed considerably toward the end of the millennium as Zimbabwe entered a period of crisis that culminated in a major threat to the political life of the ruling party. As protest increased, the government’s repression intensified. To consolidate its hold on power, the government also intensified its application of lawfare (see Chapter 3).

With the Mugabe government's reaction to the constitutional referendum defeat in 2000 and the significant threat it represented to its political power, the rule of law deteriorated sharply. As part of ZANU-PF's turn to authoritarian nationalism, the Fast Track Land Reform and Resettlement Program was carried out in a manner provoking conflict with core legal norms, and the judiciary was reformed to ensure that its decisions complied with the dictates of the ruling party. The integrity of the legal system was compromised through a combination of pressures on independent judges to resign, repeated refusals by the state to comply with court orders, and the issuing of amnesties to people who had carried out acts of violence on behalf of the government (Raftopoulos, 2009: 213). In a comparative perspective, the Zimbabwean post-independent regime's attacks on the judiciary are particularly noteworthy considering that its judiciary had retained its position as one of most robust in Africa in terms of independence and judicial restraint on the executive.

Legislative lawfare to contain opposition challenges

As the ruling party came under increasing pressure from opposition parties in the early 2000s, it stepped up legal and extra-legal attempts to undermine opposition mobilization. Through the passing of legislation making opposition mobilization more difficult, the government became increasingly isolated. Accused of human rights abuses, it became more and more hostile toward those civil society organizations (CSOs) which it perceived as working closely with international donors and passed legislation that impacted negatively on the operations of CSOs. A key example is the Public Order and Security Act (POSA), which was passed in 2002 to restrict activities of the opposition and to control the independent press. This act made it mandatory for all organizers of public gatherings to inform the police of their plans at least four days in advance. Following the passage of the law, public meetings and peaceful protests organized by the MDC and civil society organizations such as the National Constitutional Assembly (NCA) and the trade unions (Zimbabwe Congress of Trade Unions, ZCTU) were routinely prohibited. In 2004, the government introduced the Non-Governmental Organization (NGO) Bill, which required all CSOs to be registered by an NGO Council to be appointed by a government minister. The 2004 NGO Bill outlawed foreign funding for CSOs operating in the areas of human rights, democracy, and governance. The intention was to limit the abilities of these CSOs to operate effectively, thereby cushioning the government against accusations of human rights violations.

In addition to lawfare and the passing of legislation undermining opposition mobilization, the regime effectively weaponized a rhetoric of “patriotic history” that was very effective with public opinion (Tendi, 2010; Tendi, 2008).

The legal restrictions on civil society and the opposition intensified further after the 2017 leadership transitions within the ruling party. Echoing the Mugabe regime’s autocratization by legal mechanisms to limit civil and political participation, the 2020 Patriotic Bill aimed to guard the country’s national interests by criminalizing acts that are considered campaigns against Zimbabwe, including private correspondence with foreign governments and statements influencing foreign governments (Ngwenya, 2021; Raftopoulos et al., 2021).

Judicial lawfare: Manipulation of the courts to affect political outcomes

When analyzing the ability of courts to uphold its independence and protect constitutional provisions and the rule of law, the Zimbabwean story is mixed. An illustrative case of how the courts have been employed as an arena for contestation for power between incumbent and opposition is witnessed in the case where the Commercial Farmers’ Union challenged the new fast-track land laws in the courts. In December 2000, the union obtained an interdict from the Supreme Court “barring further land acquisitions on the grounds that the fast track program was unconstitutional, because it was being carried out in a violent and haphazard manner” (Human Rights Watch, 2002b). While the judiciary, including Chief Justice Anthony Gubbay, acknowledged the need for and constitutionality of land reform per se, they ruled illegal the process through which the farms were taken, facilitated by controversial constitutional amendments providing for fast-track land reform without compensation from the Zimbabwean government,⁷ notice requirements, or a possibility to challenge government acquisitions in court (Shay, 2011). The government had already criticized the courts standing in the way of land reform and failed to abide by court orders, but when the court ruled against the fast-track land program it became the trigger for a decisive move on the judiciary, which marked the final end to the regime’s—at least rhetorical—commitment to political pluralism and judicial independence. Mugabe now turned on the judiciary with a mixture of threats and coercion, including deployment of war veterans at judges’ offices in order to force the resignation of a number of judges, including

⁷ Specifying that compensation should rather be sought from the British.

the early retirement of Chief Justice Gubbay in early 2001. This led to the departure of the remaining white judges, as well as black judges who did not want to stay on under the new terms.⁸ The outgoing judges were replaced with judges perceived to be loyal to ZANU–PF.⁹ Those opting to stay received farms, houses, and other perks, which contributed toward undermining their independence in the eyes of the public. Mugabe effectively reigned in the judiciary, and judicial independence became an early casualty of the land seizure process. In November 2001, the Supreme Court overturned its previous interdict on the grounds that the government now had a lawful program of land reform. The judgment accepted the government’s argument that new legislation had retroactively legalized occupations that had been carried out in violation of what were then the legal procedures ([Human Rights Watch, 2002b](#)).

Another casualty was the court of the Southern African Development Community (SADC). In 2008, the SADC tribunal—in one of its first cases brought by one of the white farmers who had his land appropriated ([Human Rights Watch, 2002a](#))¹⁰—ruled that the process was racist and contravened international law ([Mail & Guardian, 2010](#)). Zimbabwe refused to recognize the ruling, the minister of justice declared it null and void, and the High Court refused to register the ruling. The withdrawal of Zimbabwe from the tribunal led to the decision by the SADC summit to narrow the jurisdiction of the tribunal to exclude cases from individuals and, in 2012, to disband the court entirely.

Constitutional reforms

Constitutionalism improved somewhat after the election crisis of 2008 and the subsequent power-sharing agreement. The parties to the Government of National Unity agreed to embark on a process of developing a new constitution that would address some of the critical contributing factors to political crisis at the time. With the intention of enhancing judicial independence, in the 2013 Constitution, the president’s influence over the appointment of the Judicial Service Commission (JSC) was reduced. Another important change

⁸ President Mugabe voiced the farm seizures as a key part of the anti-colonial struggle, illustrated by a well-known quote at the ZANU–PF congress in December 2003, following the introduction of controversial land reforms: “Let Blair and the British government take note and listen. Zimbabwe is for Zimbabweans. Our people are overjoyed. The land is ours. We are now the rulers and owners of Zimbabwe.”

⁹ Human Rights Watch (2002); see also [International Bar Association\(2001\)](#) for a discussion of the government’s assault on independence of the judiciary. <https://www.hrw.org/reports/2002/zimbabwe/ZimLand0302.pdf>.

¹⁰ *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008) <http://www.saflii.org/sa/cases/SADCT/2008/2.html>.

in the 2013 Constitution was that the role of the judiciary in election disputes was strengthened through the introduction of a mandatory process of speedy resolution of electoral disputes. This mechanism was utilized after the 2018 elections. However, the fact that the president retained the authority to select members of the tribunal to investigate the conduct of a sitting judge still posed a threat to judges' security of tenure.

With the signing into law of the 2013 Constitution, it may be argued that the law was no longer the key problem but rather its poor implementation and the ability and willingness of the government to circumvent the law. Significant parts of the 2013 Constitution were never implemented and large sections of the law were not aligned (Kaaba et al., 2020; Raftopoulos et al., 2021). Three years after the new constitution was introduced, the government started a process of amending it, primarily to enhance the executive power of appointments, strengthening the president's control over the judiciary and within the government itself. In 2019, the proposed amendments were gazetted and in April 2021 the Constitution was changed. The process was enabled by a Supreme Court judgment in March 2020, which effectively removed the main opposition party, the MDC Alliance, from Parliament (Parliamentarians for Global Action, 2021).

The Constitutional Amendment Act 2 (2021), among others, enabled the President to promote judges from lower to higher courts without involving the JSC (which would conduct public interviews and vet the candidates) and to extend the tenure of the Chief Justice and Supreme and Constitutional Court judges (Chimwamurombe, 2021). The amendment process was criticized by the political opposition and civil society for not following procedural rules (Veritas, 2021) and for being retroactively applied to the incumbent Chief Justice Luke Malaba (who would otherwise be retiring, having reached the age of seventy).¹¹ Notably, the changes to judicial appointments and tenure were part of an omnibus constitutional amendment that also improved women's representation and that eliminated the aforementioned requirements for the election of the vice president.

Utilization of the law by civil society and opposition actors

Throughout its reign, the incumbent regime has attempted—and at critical junctures succeeded—in politically controlling the judiciary. However, at the

¹¹ At the time of writing, a court challenge against the retention of Malaba, which was successful at the High Court, is under appeal (Southern Africa Liberation Center, 2021).

same time, Zimbabwean civil society and opposition actors have appealed to the law with long-established repertoires of engagement (Karekwaivanane, 2017: 216). Litigation and legal activism in magistrate and higher courts have continued, despite the continued backsliding, as the courts at all levels display a relatively professional performance in non-political cases, while clearly deferring to government interest in political cases (Kaaba et al., 2020). The opposition's effective utilization of the law depends on what other strategies are available and the timing of politically sensitive court cases (i.e. before or after an election) (Kaaba et al., 2020). The intensified polarization observed from 2000 onward witnessed a number of activist judges playing a major role in maintaining space for the opposition and civil society until they were forced out. Despite their demise, the symbolic power of some of these justices served as a reminder of the agency of the judiciary in campaigns of legal activism for democratic space (Kaaba et al., 2020: 8). Furthermore, the National Constitutional Assembly campaign initiated in 1997 led to the defeat of the Constitutional Referendum in 2000 and bolstered the rise of the opposition party, MDC. Finally, the Zimbabwe Lawyers for Human Rights (ZHLR) founded in 1996 are still active. Witnessed in all electoral campaigns since the early 2000s, law suits filed by human rights lawyers have a real practical significance in terms of advocating for the release of political activists. Equally importantly, as argued by Karekwaivanane, human rights lawyers in Zimbabwe continue to use the courts in order to secure an authoritative record of events which could be used to get justice at some future date (2017: 237).

Since the 2017 transitions within ZANU–PF and the increasing influence of the military on the regime, space for legal activism has again declined (Kaaba et al., 2020). While the 2013 Constitution, as discussed above, introduced a new appointment system that aimed to improve judicial independence, the courts are still politicized—as witnessed during the 2017 coup and the 2018 election, and by the recent contested constitutional amendments to judicial appointments and tenure. Since the 2017 coup, power dynamics between the ruling party, the opposition parties, and civil society have again shifted toward the ruling party. The May 2021 Constitutional Amendment Act has been opposed by civil society. Besides the (at least initially successful) court case against the extension of the Chief Justice's tenure, a constitutional rally was organized in the form of an online gathering of activists, lawyers, and academics opposing the enhanced presidential powers. Nevertheless, the constitutional amendments passed are considered to have significantly increased presidential powers and discretion, and the control

of ZANU–PF, ahead of the 2023 general elections, confirming the autocratic shift (Raftopoulos et al., 2021: 4).

To summarize, the Zimbabwean judiciary was more independent before the judicial purges in the early 2000s. The political challenges to ZANU–PF and Presidents Mugabe’s reign in the period 2000–2002 and the resulting fast-track land reform program contributed to Zimbabwe’s rapid social and economic decline but also to the deterioration of rule of law and judicial independence. From 2000 onward, the ZANU–PF regime increasingly used its majority in parliament to push through legislation intended to defeat the opposition, civil society, and the media. The courts were reshaped and filled with new judges willing to do the regime’s bidding. Yet, while the Constitution and the judiciary constitute a key legitimating tool for ZANU–PF, the legal sphere has also been engaged rather successfully by civil society by ensuring that in between elections the quest for civic space and human rights is still a political and legal debate in Zimbabwe.

International strategies

The evolution of international donor support to Zimbabwe is influenced both by political developments in the country, policy changes in the donor countries, and shifting dynamics between the country’s regional and international partners. From an active partnership with international donors after independence in 1980, during the 1990s, Zimbabwe’s relationship to its international donors became increasingly conflictual. Relations toward Western aid donors deteriorated further after 2000 following the land invasions, human rights violations, and overall democratic backsliding (Hansen, 2011; Primorac and Chan, 2007; Sachikonye, 2019a). In response to the human rights abuses accompanying the land occupations, Western donors imposed a series of “targeted sanctions” against the Mugabe regime (Raftopoulos, 2009: 218).¹² Reacting to the criticism from its international donors, the regime suspended operations of several aid agencies. Stating its intention to regularize activities of the aid community, aid agencies were required to register if they wanted to resume humanitarian interventions (Raftopoulos, 2009: 218).

¹² In 2001, the US government passed the Zimbabwe Democracy and Recovery Act, and between 2002 and 2008 the European Union and Australia imposed travel and asset sanctions on a number of key members of the Mugabe regime. The European Union, the United States, and Canada also imposed arms embargos and in 2002 Zimbabwe was suspended from the Commonwealth before it formally withdrew in 2002.

While freezing state aid and imposing sanctions on the ZANU–PF regime, foreign donors, as well as international NGOs, substantially increased funding to Zimbabwe’s civil society and the political opposition (Beardsworth, 2018; Tendi, 2014). The bulk of the funding went toward supporting the human rights and democracy agenda. The Government of National Unity (GNU) that was established following the disputed elections in 2008, and the ensuing relative stability, saw a reduction in donor funding for activist CSOs and a re-engagement with the ZANU–PF regime (Sachikonye, 2019a: 4).¹³ Following the adoption of a new constitution in 2013 and the subsequent general elections, many Western donors moved toward an agenda of re-engagement with the Zimbabwean government, viewing both the new constitution and the 2013 elections as marked improvements for governance and human rights (European Union, 2019). In the period after 2013, the major European donors have emphasized support to economic recovery and expressed a reluctance to target aid and aid conditions to political issues, thereby departing from their funding model of explicitly supporting the opposition.

Contrary to the fluctuating and antagonistic relationship between the regime and Western donors, relations with regional blocs such as SADC and the AU have remained remarkably stable since independence. Despite the controversies linked to the regime’s handling of domestic governance issues, Zimbabwe has not experienced concerted censure by the regional African blocs. SADC involvement ensured the Global Political Agreement (GPA) and the formation of the GNU between 2009 and 2013. However, critical observers have remarked that the SADC negotiated agreement had more to do with the perceived maintenance of regional stability and a conception of national sovereignty that fortified the hold of national liberation parties on state power rather than broader democratic demands (Raftopoulos et al., 2021: 15, see also Bratton and Peter, 2020). And, while links to Western donors and partners have become more contentious following the 2018 elections and the marked autocratization tendencies displayed by the Mwanangagwa government in the period after, Zimbabwe has strengthened its relations with Asian partners, in particular China. Facing isolation from the international donor community after 2000, the government adopted its “Look East” policy in 2003, which, in combination with the establishment of China’s Forum on China–Africa Cooperation (FOCAC), significantly enhanced bilateral relations with China. China is now Zimbabwe’s leading investor in mining, agriculture, energy, and infrastructure (Hodzi et al., 2012; Sachikonye, 2019b).

¹³ There are numerous perspectives on the GNU period and its aftermath. The effects of GNU on the MDC opposition is well described by Raftopoulos (2013a), detailing how the allocation of ministries and resources enabled ZANU–PF to rebuild the party base at the same time as the MDC fractured.

Sovereignty claims

ZANU–PF’s conception of sovereignty is closely linked to the liberation struggle and discourses of national unity (Ranger, 2004). Concerns about state-sponsored abuses surrounding Zimbabwean elections in 2000 and 2002 as well as violations of property rights committed in the course of the government’s land reform program led to a rupture in relations between the Mugabe regime and the West. The ensuing diplomatic crisis was rhetorically linked to the incumbent regime’s discourse from national sovereignty, whereas the opposition framed its battle in a language of global human rights and democracy (Bush and Szeftel, 2002).¹⁴ Finding itself in direct confrontation with key Western allies, the government banned major Western observer groups from observing the 2002 elections. A few days before polling day, it passed the Electoral (Amendment) Regulation 2000 (No. 7), which stipulated that election monitors and observers would be appointed by the Electoral Supervisory Commission (ESC) and accredited by the Election Directorate on the recommendation of the Ministry of Foreign Affairs. These rules represented a significant development because, for the first time in Southern Africa, a deliberate attempt was made by a government to control and regulate observers explicitly stating a wish to protect the political integrity of the election and guarding against possible erosion of national sovereignty (Matlosa, 2002: 147). After the widely discredited 2002 presidential vote, which was preceded by the passage of highly restrictive state-security legislation and a wave of deadly violence against MDC supporters, the regime banned all Western monitors and media from observing Zimbabwean elections. In response to the electoral violence and the perceived involvement of the incumbent government, the United States and the European Union imposed targeted economic sanctions on influential members of the Mugabe regime and related enterprises. Further isolating the country from its former development partners, Zimbabwe left the Commonwealth following criticism of the elections and its consequent suspension in 2002 (Magaisa, 2019).

The crisis in Zimbabwe, at least in its political and ideological aspects, placed discourses about sovereignty and democracy in opposition to one another. Reacting to the shift in the international donor funding following

¹⁴ President Mugabe used the UN Earth Summit (South Africa) 2002 to attack the former colonial powers for interference in Zimbabwe’s land reforms: “We have fought for our land, we have fought for our sovereignty, small as we are we have won our independence and we are prepared to shed our blood ... So, Blair keep your England, and let me keep my Zimbabwe.”—<https://www.theguardian.com/environment/2002/sep/02/greenpolitics.Zimbabwe.news>.

the land invasions, the government amplified its sovereignty claims against donors, depicting civil society and the opposition as imperialist forces working for colonial powers (Ndlovu-Gatsheni, 2009; Tendi, 2014). The Mugabe government condemned its international critics as meddlers seeking to undermine the country's national sovereignty and re-impose their imperialist control over the country. As a result, the incumbent defended its attempt to control civil society and opposition parties as an anti-imperialist struggle to defend the sovereignty of the nation (Aeby, 2017; Bush and Szeftel, 2002). The MDC and the Zimbabwe's rising urban civil society, on the other hand, condemned the authoritarianism, inefficiency, and corruption of twenty years of rule by the Mugabe government, arguing that Zimbabwe should develop pluralist forms of government, respect for human rights, and the rule of law.

To solicit regional solidarity, ZANU–PF framed the domestic conflict as a struggle against imperialist interference. The imperative of protecting Zimbabwe's sovereignty goes a long way toward explaining the leniency shown by the SADC states and the mediators in respect of ZANU–PF's breaches of democratic principles and failure to effect agreed reforms (Bratton and Peter, 2020). In the face of Western governments' calls for regime change, the regime sought to subordinate democratization claims to the political aim of safeguarding the sovereignty of Zimbabwe and the authority of the SADC. In the eyes of the majority of SADC leaders, the protection of the ZANU–PF regime became a priority for the defense of African countries' right to self-determination and for resistance against a Western imperialist policy of ousting inconvenient regimes (Aeby, 2017; Bush and Szeftel, 2002).

The exceedingly conflictual relationship between the ZANU–PF regime and its international partners in the period between 2000 and 2008 pitted “champions of national sovereignty and state nationalism against advocates of civil society and internationalism” (Mamdani, 2008: 23). While the “Zimbabwe crisis” displayed distinct “north–south dimensions,” there were voices in the West as well which thought that Western governments were demonstrating an inconsistent double standard, in large part because they were focusing so much on the small minority of white farmers (Hansen, 2011; Magaisia, 2019). Overall, these academic debates may not have affected policy, but the academic discourse shaped intellectual opinion in southern Africa influentially, highlighting the power of sovereignty claims.

Mugabe also turned to populist mobilization via sovereignty claims in other ways, the most novel being the targeting of the emerging LGBT community. In his speech at the opening of the Harare book fair in 1995, he had attacked homosexuals as behaving “worse than dogs and pigs,” drawing widespread

international criticism, which he, in turn, employed in his emerging anti-Western, anti-colonial rhetoric. The political use of homosexuality was evident in the 1997 trial against former President Canaan Banana, who was found guilty on charges of sodomy and indecent assault (Gloppen and Rakner, 2020). In terms of politicization of LGBT rights in rhetorical battles against international donors, Robert Mugabe may be considered a pioneer. For the evolving Zimbabwean LGBT community, arguably, Mugabe's attack had mixed effects. On the one hand, it mobilized what had been largely latent prejudices in society into a much more overt homophobia. At the same time, the visibility led to both more international support and an increase in membership of the association, Gays and Lesbians Zimbabwe (GALZ). This example illustrates how attacks on sexual minority groups paradoxically may strengthen the opposition and civil society by forging stronger international links and funding (Gloppen and Rakner, 2020).

Selective compliance

A central strategy for political elites in electoral autocracies to improve their countries' global reputations while maintaining restrictions on political freedom is to comply with global norms related to gender equality and quotas (Towns, 2010; Zetterberg, 2020: 2; Bush and Zetterberg, 2021; see also Chapter 4). For Zimbabwe, the ZANU–PF regime's relationship with international gender norms signals a selective compliance with conditions set by international donors. Since independence in 1980, the Zimbabwean government has enacted legislation which promotes the advancement of women. Zimbabwe's political developments post-independence in 1980 closely tallied the international agenda of gender promotion, and in the first decade after independence, participation rights expanded, with an emphasis on women's rights and international norms (Ranchod-Nilsson, 2006; Dorman, 2003). In the first decade of independence, a number of legal reforms were enacted to improve the lives of Zimbabwean women. Some of the most far-reaching reforms included the Legal Age of Majority Act (1982), which conferred majority status on women at the age of eighteen; the Matrimonial Causes Act (1985), which gave women rights to property in marriage; and the Customary Law and Primary Courts Act (1981), which repealed the judicial authority of chiefs and ensured financial support for divorced wives and their children under customary law. The push from the World Conference of Women held in Nairobi in 1985 also influenced the position of women in the political life of the new

Zimbabwean state. These legal reforms were consistent with public commitments by the ZANU–PF regime to international supporters and in line with international pressure to improve the status of women through efforts such as the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The government is a signatory to the SADC Declaration on Gender and Development and the African Charter on Human and Peoples’ Rights. Key women CSOs have addressed a range of women’s issues from violence against women and HIV/AIDS to legal reform and literacy. But, while the government acceded to the international agreements, the follow-up was patchy. Although CEDAW was signed and ratified in 1991, national law and practice was not aligned (Ranchod-Nilsson, 2006). Women’s organizations, on the other hand, established close ties with international organizations, strengthening the ability of the local organizations to resist gender and democracy backlash efforts on behalf of the ZANU–PF regime and continuing to push for reforms (Dorman, 2003; Ranchod-Nilsson, 2006; Electoral Institute for Sustainable Democracy in Africa, 2007: 73–74). That gender quotas in local government formed part of the 2021 constitutional amendments, along with an extension of the national legislative quota introduced in 2013, indicate both the influence of the women’s movement and an interest from the current administration in retaining a focus on gender equality norms (Maposa, 2021).

As the ZANU–PF government became increasingly isolated and accused of human rights abuses, it started to become more and more hostile toward those CSOs which it perceived as aligned with the opposition and working closely with international donors. From 2002 onward, the government passed legislation that impacted negatively on the operation of CSOs (see above). The intention was to limit the abilities of these CSOs to operate effectively, thereby cushioning the government against accusations of human rights violations. Notably, however, and underlining the regime’s selective compliance with donor demands, the government maintained good working relationship with CSOs working in the HIV and Aids field through the National Aids Council (Dorman, 2016).

International relations and the opposition forces

The collaboration between Zimbabwean CSOs and foreign funding agencies goes back to colonial history. For example, the National Association of Non-Governmental Organizations (NANGO) which was founded in 1962, while Zimbabwe was still under colonial rule, was funded by international donors

such as the European Union and the German Development Cooperation prior to independence (European Union 2013: 8). After 2000, foreign donors substantially increased funding to CSOs. Most of the funding went toward supporting the human rights and democracy agenda in Zimbabwe, emphasizing good governance, accountability, human rights, and electoral integrity. In this period, CSOs became key actors in the battle for the restoration of democratic government. Arguably, due to the confrontational relations between the west and the ZANU–PF regime, donor engagement in Zimbabwe in the period between 2000 and 2008 took a very peculiar form as the relationship was solely directed toward the opposition and civil society. Beardsworth’s (2018: 212) analysis reveals that US and British representatives believed that donors should use their leverage as donors to actively foster coordination among democratic forces. The period of “activist ambassadors” where the relationship between Western donors and Zimbabwe was based on funding to CSOs changed with the establishment of the GNU. Beardsworth (2018) argues that MDC’s international support is not accounted for in the academic literature out of fear of a backlash or of playing into the regime’s emphasis on regime sovereignty, as discussed above. As a result, party funding, which is key to the influence of opposition parties’ behavior, is left unexamined in the scholarship on Zimbabwe’s 21st century history (Beardsworth, 2018: 195).

Conclusion

Since the late 1990s, Zimbabwe has experienced a permanent economic crisis, an exodus of the majority of the skilled workforce, and an extraordinary brain drain caused by close to 2 million Zimbabweans leaving the country. While the economic and political consequences of the migration are momentous, the ZANU–PF regime has maintained power and control over four decades. The ability to maintain power despite an opposition movement that has challenged the regime in numerous elections is closely tied to its use of legal mechanisms to legitimize its hold on power. In particular, the use of legislation and politicization of the courts have remained key strategies of the regime’s four-decades-long control of power. Historically, Zimbabwe had a relatively independent judiciary and a strong law society emphasizing rule by law. By the turn of the millennium, the question of land acquisition was declared “political” and not legal by the government. To ensure their loyalty, judges, administrators, and police officers at all levels were subject to threats, harassment, and physical violence. Yet, legal strategies continue to play an important

role as the ruling party has continuously sought to justify its actions by writing new laws and by appointing new judges considered loyal to the ruling party. Overall, the regime has been able to rely on the politicization of courts and control of the legislature to provide a veneer of legality to its reign of power. At the same time, the courts, and a culture of legal activism, have also provided space for the Zimbabwean opposition and civil society to contest executive abuse of power and advance their political agendas. Human rights cases have focused on civil and political rights guaranteed in the Constitution or the country's laws. The cases are brought by local human and civil rights organizations. Similarly, women's rights claims have focused on inheritance, maintenance rights, and property rights.

The ZANU–PF regime has also relied heavily on its international relationships to foster regime maintenance. In particular, the regime succeeded in playing various external partners against one another and to deploy sovereignty claims in the conflict with its traditional Western foreign funders. The mutual demonization discourses became a distinct feature of the diplomatic conflict and affected the regional collaborators such as the SADC. However, as the discussion above has revealed, in the fluid political and economic situation that prevails in Zimbabwe, the ability of civil society organizations to act as watchdogs over the political protagonists and as safety nets for the millions of Zimbabweans living in poverty and the international mechanism and significant support to civil society and the opposition have been instrumental. Through international assistance, civil society has been able to continue its advocacy of transparency, human rights, and good governance—albeit under severe legal restrictions.

Since 2013, the relationship between Zimbabwe and its international partners have changed markedly. The government's "Look East policy" and the influx of Chinese development assistance have enabled the political preservation of the ZANU–PF reign, reflecting the relative institutional capacity of the incumbent to use this mechanism in comparison to the pro-democracy forces. Toward the end of 2017, the combined effects of a dire economic crisis and leadership struggles within the incumbent party resulted in a dramatic change of leadership. The stress on constitutionalism by the coup-makers in the ruling party and the army drew on a long history of the selective use of law and constitutionalism. The new regime branded itself "a new dispensation" and its slogan was "Zimbabwe is open for business." But instead of enhancing the legitimacy of the new government, the disputed 2018 election results increased political division. In 2019, steep increases in the price of fuel sparked new rounds of popular protests and, again, the government responded with

force. The regime's limited attempt at national dialogue was further demonstrated in the Constitution of Zimbabwe Amendment No 2, Bill 2019, adopted in April 2021, which effectively restored the powers of the Mugabe presidency.

Nevertheless, since the 1990s, both political and civic opposition have maintained demands for expansion of democratic spaces and the need for free and fair elections. Despite a significant autocratic turn and a departure from the 2013 Constitution, civil society's resistance to the ZANU–PF autocratic governance is still present. The focal point of resistance to the increasing militarization of the state and the diminishing accountability of key institutions like the judiciary has emerged from youth-led social movements.

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Conclusion

Leonardo R. Arriola, Lise Rakner, and Nicolas van de Walle

Introduction

The most sophisticated form of autocratic rule now encourages laws to be bent, not broken; institutions to be managed, not made meaningless; political opponents to be circumscribed, not eliminated; citizens to be disempowered, not indoctrinated; economic gains to be distributed, not concentrated; and foreign engagement to be self-reinforcing, not self-defeating.

(Morgenbesser, 2020)

In the build-up to the August 2021 presidential elections in Zambia, a wide consensus seemed to exist among observers that President Lungu would win comfortably an election that would not be free and fair (Sishuwa, 2021; Cotterill, 2021). These predictions were based on the view that Zambia had suffered such significant democratic backsliding under the Patriotic Front (PF) government that electoral alternation was no longer possible in a country which had already undergone two successful such alternations since its transition to multiparty rule in 1991. In the event, opposition leader Hakainde Hichilema and his United Party for National Development (UPND) party won a resounding victory, despite a campaign in which the PF did in fact manipulate state resources, control the judiciary and security forces, and instigate various anti-media laws to encourage its own voters and try to intimidate the opposition and suppress voting.

Explanations for Hichilema's win emphasized factors that have usually been present when opposition candidates defeat incumbents in contemporary Africa (Sishuwa and Cheeseman, 2021). First, PF's egregious mismanagement of the economy and the subsequent deep recession and major debt issues had turned voters against the government. Second, the opposition had remained united and steadfast in its support of the UPND and Hichilema, who benefited

from significant elite defections from the PF to build their support base. Third, civil society organizations had engaged in a comprehensive effort to encourage and protect voter participation, monitor the voting process, and flag irregularities and cases of fraud. It was also to release fairly accurate and, perhaps more importantly, credible estimates of the voting results within hours, which, combined with the substantial margin of victory, made it much harder for the PF to claim victory. Finally, fears that state institutions such as the army and the judiciary might intervene on behalf of President Lungu proved unfounded. Though he deployed the army throughout the country to police the elections, in the end, the army made no effort to act beyond keeping the peace. The much-maligned electoral commission, similarly, proved reasonably even-handed, while the judiciary actually ruled in favor of opposition complaints on several occasions, belying the notion that it had been entirely cowed by the regime.

What does this historic third presidential alternation augur for Zambian democracy? Can we be sure that the PF-led episode of autocratization that was documented in Chapter 8 is now over? In his first pronouncements as president, Hichilema promised various improvements in governance, anti-corruption efforts, and the rule of law, in addition to efforts to get the economy growing again. These promises seemed sincere; on the other hand, perhaps not surprisingly, the new government did not mention constitutional reform to increase checks on the presidency and executive branch, even though this seems like a prerequisite for democratic deepening. In sum, the circumstances that allowed the previous government to engage in autocratization remain, to be used again in the future by an executive that is motivated to do so. Above all, the defeat of Zambia's incumbent president suggests that backsliding outcomes are not predetermined. The narrative of an inevitable worsening of political and civil freedoms in which autocratic forces are always savvier and more resilient than democratic ones should be resisted. Incumbents engaged on autocratic paths also make mistakes or misjudge public opinion. Bad economic performance can also turn the public against their governments.

This book has argued that, like Zambia, most of the countries in sub-Saharan Africa can be characterized as laying in a political equilibrium of electoral autocracy broadly defined, which combines the institutionalization of some of the gains of the early 1990s, such as regular multiparty elections, a growing civil society, and some degree of personal rights and freedoms, with an often overbearing executive branch taking advantage of a constitutional legacy of colonial and post-colonial authoritarian rule to push its interests and maintain its pre-eminent position. And the equilibrium persists

because—despite alternation—the executive usually retains its institutional advantages, regardless of who the occupant happens to be.

This does not mean either that all African countries are alike or that this equilibrium can be viewed as a specific point on a clear and unique linear path between autocracy and democracy. Rather, we have argued that each country needs to be understood as the unique product of its own history, actors, configuration of resources, social forces, and institutional legacies. A small number of countries may backslide, but most of the countries will probably remain in this general equilibrium, albeit with significant differences in day-to-day politics, from the number and institutionalization of political parties to the power of key institutions such as the judiciary and legislature and the salience of ethno-regional and religious cleavages.

Following this introduction, we first summarize some of the key arguments of the book, then examine the findings and generalizations that can be made from the case studies. We then argue that our six case studies are broadly representative of major trends of autocratization, resilience, and contention in the region. We end with a brief discussion of the unsettled issue areas in need of further research.

Revisiting the main arguments

This book has argued that the driving force for political change in Africa today is an increasingly restive population and the resulting rise in contentious politics. As we argued in Chapter 2, and as the case studies confirmed, Africans are increasingly urbanized, educated, and globalized; perhaps as a result, they have developed more critical and demanding attitudes toward their governments. A majority support democratic forms of government. Political participation has increased significantly since the onset of multiparty elections in the early 1990s, with the number of civic associations and interest groups in constant growth. As a result, even when the electoral playing field is tilted heavily in favor of incumbents, elections do retain the potential to change the political equilibrium. At least in part, the autocratization efforts we witness around the continent are motivated by the fear of executives that they are losing control as societal demands and political participation increases.

Throughout, this book has emphasized two strategies as central to attempts by African governments to undermine these growing pressures for political participation and political competition. First, as laid out in Chapter 3 and then reinforced in the case studies, we have shown that episodes of autocratization

have been advanced through the weaponization of the law for political ends. Governments have resorted to incremental and piecemeal legal initiatives to weaken the protection of civil and political rights. In most countries of the region, such lawfare has been abetted by the fact that statutory and constitutional legacies from the colonial and early independence era often undergird executive power. In some cases, the autonomy of the judiciary has been undermined to make it more pliant, but the point is that the process of autocratization is often largely driven by legal action rather than illicit maneuvers or outright violence.

Variations in the independence of the judiciary are significant and help to explain differences in political outcomes where the law is involved. In Uganda and Zimbabwe, a weakened judiciary has been less able to assert its independence with rulings against the state, for instance. In other cases, such as Kenya or Malawi, key judicial rulings against the government have actually facilitated political openings.

Plenty of the more traditional weapons of autocrats, such as violence, repression, and illegality, remain; in the more authoritarian states of the region, violence remains more likely. Among our case studies, Uganda and Zimbabwe, for instance, have been characterized by higher levels of state-sponsored violence against the political opposition, but, as our analysis has underlined, a key characteristic of electoral autocracy regimes is their reliance on the law to incrementally lessen their accountability and weaken their enemies. To be sure, this is not entirely new; lawfare has always featured in post-colonial Africa (Ndulo, 2019). The turn to the single-party regimes in the 1960s, which effectively banned opposition parties, was achieved through constitutional reform and legislative action in many countries of the region. Even the first round of military coups often sought retroactive legislative and judicial cover. Nonetheless, the contemporary context is very different; in the 1960s, the leaders and parties who had inherited the state at independence could legitimately claim that there was broad national support for single-party rule. There was little international pressure on these leaders to protect democracy. Today, as suggested by opinion surveys such as the Afrobarometer, there is broad public support for multiparty democratic politics (Gyimah-Boadi et al., 2021). Thus, autocratic lawfare is, in large part, the preferred strategy for would-be autocrats because it serves to veil the progressive erosion of freedoms and rights behind complex legal decisions and obscure decrees, often couched in democratic terminology and seemingly banal and inconsequential to most citizens.

The country cases examined in this book confirm that governments have systematically resorted to *legal strategies* for political advantage. Across a wide

variety of African states, formal institutions matter enough today that governments need the cover of the law to gain political advantages and are indeed not always able to count on a complacent judiciary to acquiesce. In fact, it is hard to predict which judiciaries will be more or less pliant as it often depends on individual judges.

The backsliding literature tends to emphasize what [Morgenbesser \(2020\)](#) has called the “menu of autocratic innovation,” and it is true that autocrats are always finding new ways of advancing their political interests. Still, as emphasized in Chapter 3, pro-democracy oppositions can also seek to advance their cause, notably in the legal arena, and have also shown the ability to innovate. The case studies confirm that the law can provide significant political victories to oppositions and counter the effort of autocratic lawfare. In that sense, relying on the law is a political strategy that has limitations for incumbents; they do not have exclusive access or control over it. But the case studies also confirm that in most countries, incumbents hold the better cards in this arena as they can exert pressure and influence on the judiciary, which is rarely entirely independent.

A second arena which the previous chapters have emphasized to explain the dynamics of contentious politics between incumbent executives and their political opposition has been the *international dimension* and the resort to sovereignty claims. As Chapter 4 argued and the case studies illustrated, sovereignty provides significant resources to governments and significantly reinforces the political status quo. The international community provides support to governments in the form of economic and military aid. The degree of support waxes and wanes. Following the transitions to competitive electoral politics in the early 1990s, the Western donors provided the main agency of restraint on governments, albeit an inconsistent and fickle one, which paid more attention to elections than to day-to-day politics in between elections. In any event, with the decline of aid, the rise of China’s role in the region, the preoccupation with the “War on Terror,” and other factors, Western influence on domestic African politics has waned in recent years.

Variation is apparent in the relationship between donors and governments across our cases. Kenya and Uganda’s relationship with the Western donor countries have increasingly been shaped by the latter’s concern with prosecuting the “War on Terror” in the Horn of Africa, a dynamic that is hard to discern in our cases in Southern Africa, where the competition with China is more likely to shape donor attitudes. The “leverage–linkage” model of [Levitsky and Way \(2005\)](#) is insightful in predicting how much donors are able to influence decision-making in individual countries. A very poor, aid-dependent country

like Malawi can ill afford to alienate the donors and risk losing their support in a way that is not true in much wealthier Kenya or Ghana. But it is important to emphasize that each national diplomatic dialogue between an African government and a Western donor evolves idiosyncratically, influenced by the personalities involved and the nature of crises in the relationship as much as it is shaped by the size of the gross national product (GNP) or the trade balance. In recent years, the case studies suggest, neighboring countries and regional organizations such as the Southern African Development Coordination Conference (SADCC) and the Economic Community of West African States (ECOWAS) have also provided sovereignty resources to governments, further promoting stability. The role of regional players in helping the Mugabe regime in Zimbabwe to counter Western criticism and survive that country's political crisis in the early 2000s is illustrative of this dynamic.

Further, with the onset of competitive electoral politics in the region, this book has argued that African governments have increasingly politicized sovereignty to gain a domestic advantage. The leveraging of international norms of state sovereignty to weaken the power and influence of external actors is an increasingly common strategy that remains under-examined in the literature on electoral autocracy. On a number of issues, we have argued, it has been politically advantageous for African leaders to play up sovereignty claims and criticize donor interference. Our cases provide numerous examples of governments resorting to sovereignty arguments to create political space for themselves and put the donors and local, Western-backed non-governmental organizations (NGOs) on the defensive. Sovereignty claims are not always designed to advance an autocratization agenda. In political systems with regular competitive elections, nationalist rhetoric and populist entreaties concerning local culture are politically useful to all incumbent presidents. Nonetheless, in many cases, we find that the political space gained by this rhetoric is used by executives strategically to gain greater political discretion and advance an anti-democratic agenda.

Sovereignty claims are popular with so many African governments because they are effective in mobilizing African publics, given the region's history of colonialism and the widespread sensitivity to international inequalities. The hint of criticism by the international community leads to an evident "rally-around-the-flag" dynamic in public opinion, particularly if governments can articulate a nationalistic narrative in response, which paints the criticism as hypocritical and/or hostile to the culture, honor, and/or history of the nation. The case studies suggest, moreover, that the international community is wary of such sovereignty claims, particularly when they are popular, and often

backs down from its criticism of the government in response to them. Not all sovereignty claims are equally effective, to be sure. When Transparency International rated Cameroon as the most corrupt country in the world in 1998 and 1999, the government initially sought to portray the rankings as an unfair insult to the country (Médard, 2001: 79–80), but this sovereignty claim proved entirely unconvincing in Cameroon and the government then backtracked and promised to fight more effectively against corruption. Nonetheless, our case studies suggest that it is an effective domestic political weapon, if governments choose to wield it, in areas where the political opposition and civil society have adopted positions that are close to those of the West and not necessarily popular with local voters, as on lesbian, gay, bisexual, and transgender (LGBT) issues or the International Criminal Court.

Both the international and legal arenas offer strategies to the opposition, as well as to the incumbent, even if, in the end, they both favor the latter. Oppositions across the continent promote legal strategies to counter the state's efforts to suppress or constrain their action. They go to court to protect their right to stage public protests, say, and they file appeals to seek to overturn legal decisions against them or to defend various rights being restricted by the state. Large variations exist in the effectiveness of such strategies, but in most of the countries of the region, the rule of law is sufficiently institutionalized for oppositions to be able to expect, if not an impartial hearing, at least the absence of a completely capricious and arbitrary one, with some measure of legal reasoning. Nonetheless, the legal arena ultimately favors the state as the judiciary is rarely completely independent, and the state has key advantages in the design and implementation of statutory and constitutional reforms.

Similarly, across the continent in all but the most authoritarian states, oppositions seek international support to gain domestic legitimacy and resources. Indeed, many pro-democracy civil society agencies rely on international support to be effective, while evidence of international notoriety can increase the political space available for actors and organizations in the opposition. As the legitimate holder of state power, incumbents find it easier to make sovereignty claims vis-à-vis the international community, though cases exist of the opposition being critical of the government for not asserting national independence strongly enough, as in 2011 in Zambia, when the Popular Front campaigned against the Movement for Multiparty Democracy (MMD) government by asserting that it was too tolerant of Chinese business depredations against Zambian sovereignty. For the most part, however, pro-democracy oppositions try to leverage the international legitimacy of democracy to put pressure on the

government, or indeed, in some cases, to shame it. In sum, if the government owns the sovereignty issue, the opposition owns the democracy issue. Still, as we argued in Chapter 4, ultimately the international arena is more favorable to the state. Sovereignty is a considerably more powerful currency on the international stage than democracy, and foreign actors are more likely to transgress global democracy norms than sovereignty ones.

Finally, the case studies suggest that sovereignty claims and autocratic lawfare are connected. Both are strategies designed to weaken the opposition in ways that are well adapted both to the nature of most African regimes as electoral autocracies and to the present international environment. The increasingly common resort to autocratic lawfare is in part related to the fact that they are harder for the international community to criticize than violent or illegal abuses of power. Thus, Western donors are far more likely to suspend foreign aid if an election is marred by violence than if systematic gerrymandering and malapportionment assure a peaceful incumbent victory. More broadly, sovereignty claims are often based on international legal norms and can thus themselves be understood as a form of lawfare.

Key lessons from the country cases

A number of lessons can be gleaned from the case studies. First, they confirm the thesis of *democratic stagnation* in the region rather than a structural regional trend of backsliding, at least over the course of the past two decades. There is significant variation in the regime characteristics of the cases, and these are dynamic rapidly evolving socio-political systems, not stagnant ones, even if the level of democracy has not changed significantly. For much of this period, Ghana has been the most resilient democracy among our cases, though many Ghanaians remain disappointed by various lacunae in the workings of political institutions. At the other end of the spectrum, Uganda and Zimbabwe have remained electoral autocracies since the beginning of the century, with the combination of highly imperfect competitive elections and many of the more traditional features of authoritarian rule. Alone among our cases, Zimbabwe has been characterized by periods of violent government repression of the opposition, though arguably the government in Uganda has ramped up vote suppression violence in recent electoral periods. In both cases, the electoral cycle promotes an ebb and flow of repression and contentiousness which can give the impression of a longer-term trend of autocratization, but they are really best characterized as fairly stable regimes over the period under study.

Finally, Kenya, Malawi, and Zambia have more brittle democratic institutions than Ghana but have mostly avoided the authoritarian excesses of Uganda and Zimbabwe, though each has exhibited alarming episodes during which democratic institutions have proven vulnerable. Under the PF governments from 2011 to 2021, Zambia can be argued to have undergone an unambiguous episode of backsliding, but this period ended with the dismissal of the PF government through the country's third presidential electoral alternation. In both Malawi and Kenya, the judiciary has played an exemplary role in protecting the integrity of elections but, on a more routine basis, cannot prevent regular abuses of power and malgovernance by the political class. Here as well, it is difficult to discern a long-term trend in the quality of democratic institutions, despite regular alternations in the presidency across all three countries.

Of course, this general pattern of democratic stagnation should not blind us to the presence of short-term episodes of both backsliding and democratic progress. Often, these episodes are introduced by national elections, events which introduce the greater possibility of change, at least temporarily. As we witnessed in Malawi and Zambia in 2021, even in electoral autocracies, elections can lead to the defeat of incumbents when they mobilize citizens, unite oppositions, and awaken pockets of resistance within the judiciary or state bureaucracy (Lührmann, 2021).

In one sense, our analysis does suggest a cause for concern: where it takes place, autocratization is no longer just the work of "an old guard" of military and civilian dictators reared in the authoritarian world of the old single- and no-party regimes. In the early 1990s, a sharp distinction was sometimes made between these old leaders and a new generation that was beginning to emerge and was more democratically inclined. Over time, this distinction was abandoned as too many of the new leaders were in fact men and women who had started their careers in the single-party era. But more recently, it has been tempting to believe that a younger generation who came of age after the democratic transitions of the 1990s were genuinely more democratically minded. Our cases, suggest however, that there is a template for autocratization strategies that can be attractive to all leaders, whether they are from the old guard, such as Robert Mugabe, or much younger men such as Edgar Lungu in Zambia. Moving beyond our cases, one can point to Macky Sall in Senegal, for instance, or Patrice Talon in Benin, two new guard presidents who have engaged in many of the strategies and rhetoric we have described here to expand their powers (Riedl and Samba Sylla, 2019; *Africa Confidential*, 2019).

The second, and related, lesson from the case studies suggests that *electoral alternation* does not have much of an impact on this pattern of democratic stagnation. Democratization theories typically put much weight on peaceful alternation as both a signal of democratic consolidation and as a mechanism for it (Huntington, 1993; Bratton, 2004; Moehler and Lindberg, 2009). The willingness of incumbents to accept term limits or political defeat graciously has thus been argued to provide a signpost for the growing maturity in the political class, party institutionalization, and the acceptance of the fundamental legitimacy of free and fair elections. In addition, regular alternation has been viewed as healthy because it both enhances the accountability of incumbents and attenuates various dynamics of state capture and abuses of power through the circulation of the political elites in and out of power.

Our case studies simply do not offer much support for these alleged benefits of executive alternation, at least in the short term. Across the continent, electoral presidential alternation has been relatively rare in the multiparty era, though it appears to be rising (Carbone and Pellegata, 2020: 114–116). The lack of alternation remains linked to the continuing struggle to establish and enforce presidential term limits across the continent (Reyntjens, 2020), which presidents have successfully resisted in over half of the countries in the region. Presidential alternation through elections has featured in four of our six cases (Ghana, Kenya, Malawi, and Zambia). Since President Mugabe was removed from office in a military coup which replaced him with Emerson Mnangagwa in 2017, only Uganda has had no change at all in the presidency for the period under study. Challengers typically run on a pro-democracy platform and invariably promise major changes in the quality of governance, but, in these cases at least, an electoral change in the executive has not appeared to result in significant democratic improvements, even if each president does exhibit a different governing style, and governing parties can vary in their degree of institutionalization and the size of their legislative majority.

To be sure, a counterfactual is hard to establish with certainty. Perhaps what we diagnose as democratic stagnation would have been unambiguous decline in the absence of alternation. With the counterexample of Uganda in mind, perhaps alternation in our other cases has prevented the emergence of personal rule as witnessed in Uganda or in Zimbabwe under Robert Mugabe's long reign. On the other hand, the data provided in Chapter 1 did not suggest a dramatic worsening of civil and political rights in either Uganda or Zimbabwe during this period, and other long-lasting regimes have proved pretty stable for relatively long periods of time, such as Paul Biya in Cameroon or Blaise Compaore in Burkina Faso. In sum, it is hard to resist the conclusion

that the various pro-incumbent advantages that exist in contemporary African regimes survive alternation. The weakness of checks on the executive from the legislature and the judiciary and constitutional provisions with an expansive view of presidential powers is unaffected by alternation and sooner or later undermines civil and political rights or allows abuses of power.

Third, we are struck by the *ideational component* in the democratic politics of our cases. Much of the recent study of African elections is focused on clientelism and ethnicity and underemphasizes the role of ideas. Yet, and without denying the force of these other dynamics, again and again, we find African citizens to be motivated by ideas and values in their political participation. The repeated resort to sovereignty claims by governments in recent politics suggests that they have realized that a substantial public exists which values nationalistic rhetoric. Sovereignty claims have always existed in African politics, but their recent greater ascendance is almost surely related to the more participatory politics of the past three decades, in particular the holding of regular elections and the emergence of the importance of convincing voters in campaigns. The ideational impact of these sovereignty claims should not be underestimated, even if voters can also be influenced by identity politics or their perception of government performance.

Similarly, oppositions understand that they are on the right side of what amounts to a democracy cleavage in politics, and so they emphasize the democratic and governance failures of the government in their campaign rhetoric, whereas incumbents typically do not (Bleck and van de Walle, 2013). Opposition campaigns prominently emphasize their opposition to corruption, for instance, as well as their support of presidential term limits, and incumbents hypocritically pay homage to democracy even as they attempt to undermine it because this is a debate they know they can never really win. The critique of liberal democracy that has characterized the discourse of a number of autocratic regimes in other regions of the world, whether the Hungary of Orbán, the Turkey of Erdoğan or the China of Xi Jinping, is much more muted on the African continent, perhaps because of the weight of public opinion in its favor. In addition, African heads of state find it harder to link their attacks of civil and political rights to nationalist rhetoric and international enemies in the West; even Robert Mugabe, who explicitly campaigned on opposition to colonial legacies and the hypocrisy of the West, did not portray democratic institutions as Western institutions to be undermined.

Is this ideational dimension of contemporary African politics essentially a moral debate about civic virtue, as Cheeseman and his colleagues (2020) argue in an important recent book? The Afrobarometer surveys have long suggested

that African publics “value democracy both as an end in itself and as a means to improved governance and welfare” (Bratton et al., 2005: 66) rather than in a purely instrumental manner, and that notions of fairness, freedom, rights, and political participation feature prominently in popular understandings of democracy (Bratton et al., 2005: 66). If so, Africans surely bring moral considerations to political competition. But, like voters around the rest of the world, Africans also probably balance normative considerations with practical and instrumental considerations when they act politically and can be self-serving in their understanding of the normative dimension. Our more general point here is more simply that the ideas and values expressed in political rhetoric matter and mobilize both elites and the general citizenry participating in African politics. Public debates and political rhetoric, whether about normative issues or about policy issues and societal dynamics, shape expectations and attitudes about the government and the opposition, with profound effects on the stability of governments. In the long run, as Schedler (2002) reminds us, authoritarian incumbents probably lose these debates, particularly the one about democracy, but in the short-to-medium term, they have found ideational weapons that can be very effective and ensure their hold on power.

Beyond the case studies

Our six cases are broadly representative of African political regimes. They are all countries with regular multiparty elections, as indeed almost all African countries are, but they include states like Ghana, viewed as among the most democratic states in the region, and Zimbabwe, viewed as among the least democratic. They also vary in the size and wealth of their economies, their ethnic heterogeneity, and their political history. As a result, we believe that our findings can broadly be extended to the entire continent.

Chapter 1 emphasized that no general trend of democratic backsliding can be discerned in the region as a whole, making clear that the resilience of the non-democratic regimes that emerged in the 1990s is a continent-wide phenomenon and not one that is just evident in our six cases. Some observers point to sub-regional differences in the progress of democratic progress, with West and Southern Africa making more progress than the rest of the region (Freedom House, 2019), but this confuses the level of democracy in general with its evolution over time. Overall, whatever the level, we witness mostly stagnation over time across the region, regardless of political alternation and the variation in the quality of elections themselves. The various cross-national

democracy indices have improved in quality and coverage over the years and play a crucial role in both academic research and in journalistic coverage of politics, but it is hard to believe that they do not tend to over-interpret individual political events, whether negative shocks like military coups or positive ones like political alternation and initial promises of political reform. Taking a step back and looking at long-term trends, as we have done in this book, suggests that democratic progress is very slow all over the region.

As this book was being completed, the army intervened in Guinea; predictably perhaps, commentators in the press presented this intervention as further evidence of democratic decline. A blog from the venerable Council on Foreign Relations announced that “coups are back in West Africa” ([Council on Foreign Relations, 2021](#)). Nonetheless, the end of the Alpha Condé presidency in September 2021 seemed fairly predictable in a country in which most presidents have sought to remain in office for life and in which a factionalized army has intervened multiple times in the past in response to periods of popular unrest ([Bah, 2015](#)). Freedom House will probably lower the country’s freedom score as a response to this military coup, but it bears saying that the country had kept the same score for more than a decade, since the last coup in 2008, when it had briefly been scored as more authoritarian. Looking at the big picture, Guinea seems to fit our general claim of political stagnation for the region.

Such examples could be multiplied. To be sure, there are preoccupying examples of recent backsliding, much as we noted in our case of Zambia. Benin, for instance, was long viewed as one of the most democratic countries in the region but, in the current presidency of Patrice Talon, has clearly undergone democratic backsliding, arresting opposition leaders and manipulating rules and constitutional power to accumulate power ([Dénakpo, 2021](#); [Kohnert and Pruess, 2019](#)). At the same time, there are roughly equal numbers of states in which some political liberalization appears to have taken place in recent years. Angola and Burkina Faso appear to have undertaken some limited improvements in recent years, following the end of longstanding authoritarian presidents.

Similarly, the dynamics of backsliding attempts analyzed in our case studies are well represented in countries all over the region. For instance, both Francophone and Lusophone countries provide examples of autocratic lawfare. In Senegal, for instance, Presidents Wade and Sall have both sought to manipulate formal rules in order to gain an advantage, both have sought to gain a third presidential term, and both have used corruption charges to prosecute political opponents. President Talon in Benin, or successive FRELIMO presidents

in Mozambique provide other compelling examples of regimes which have used the judicial apparatus for distinctly partisan purposes, including the institution charged with administering elections (on Mozambique, see [Machava, 2019](#)). This should not be surprising. As suggested by Chapter 3, common law countries have a tradition of somewhat more independent judiciaries than the Francophone or Lusophone countries with civil law legal systems, in which the judiciary is more firmly anchored in the civil service and government and judges are not typically expected to write decisions or weigh legal precedents. In such circumstances, one might expect autocratic lawfare to be more common than in civil law systems.

In the same manner, the role of the international dimension we identified for our cases seems to have considerable traction in the rest of the region. Sovereignty claim-making is evident all over the region, both as a tool of incumbents to advance their own power and, more generally, as a feature of electoral politics. Criticism of the Inter-Regional Coordination Centre (ICC) as a tool of Western interference in domestic African politics has featured in a large number of countries, as has the critique of Western conditionality, both on economic policy matters and regarding the assertion of domestic cultural norms and attitudes, whether on LGBT rights or Islamic cultural traditions. Politicians in Nigeria's north have often been willing to defend Sharia law to show their respect for local traditions in distinction to those of the West, for instance.

Areas for further research

In a recent article, [Cianetti and Hanley \(2021\)](#) call for “the end of the back-sliding paradigm,” arguing that the focus on a linear path between democracy and autocracy forces scholars into a conceptual straight jacket. Instead, they argue for a greater focus on the political dynamics of individual countries and their evolution over time. It is in this spirit that we invite a greater focus on issues that ultimately can provide answers to many of the questions we have left in suspense. For instance, why are some regimes better able to contain popular participation than others, which find themselves destabilized by popular protests? Why are the courts more compliant to incumbent pressure in some countries than others? What explains the political success of some sovereignty claims but not others? Why has pro-democracy constitutional reform proved to be so difficult to undertake successfully?

This book has not explicitly discussed the limits of the current political stagnation it has diagnosed. Chapter 2 in particular argued that governments are

increasingly wary of the rise in *popular participation* and contentiousness and that efforts to increase executive power may be largely motivated by the fear of political instability. Thus, the current status quo can be thought of as a dynamic equilibrium between growing demands for democracy and participatory politics, on the one hand, and executive efforts to contain them, on the other. Clearly, this is not a stable equilibrium. But what will replace it? A number of scholars (Huntington and Nelson, 1976; O'Donnell, 1973; Remmer, 1985) famously argued that the turn to authoritarian politics in Latin America in the 1960s had come about because the middle class had turned against democracy in the region when it began to fear that popular participation would lead to chaos and some version of radical redistributive politics. What is the evidence that such a class coalition for authoritarian rule might emerge in Africa? The conditions seem ripe, with the rise of social inequality accompanying the rise of popular participation. The Afrobarometer has argued that a softening of the public support for democracy is taking place, though support remains comparatively strong. Still, there is not much evidence that African middle classes are turning against democracy or that this decline has been accompanied by a commensurate increase in support for different kinds of autocratic rule.

Similarly, the democratic backsliding literature has often linked episodes of backsliding to the presence of *populism*, in which a party and its leader emerge in a climate of growing political polarization and gain power thanks to rhetoric that disdains democracy and liberalism and instead preaches support for forceful action, resentment against “enemies of the people,” and advocates for vaguely redistributive policies (Haggard and Kaufman, 2021). This has been the pattern in the Hungary of Orban, the Venezuela of Chavez, or the Philippines of Duterte. Why, then, has this book hardly mentioned populism? Resnick (2017) argues that a number of African countries have had populist episodes, from the early years of Rawlings in Ghana and Museveni in Uganda to the brief rule of Sankara in Burkina Faso in the 1980s. More recently, she mentions specific parties such as Raila Odinga in Kenya in his campaign with the Orange Democratic Movement (ODM), the Economic Freedom Fighters (EFF) of Julius Malema in South Africa, or the PF under Michael Sata in Zambia. Magafuli of Tanzania would presumably also be in this list or George Weah in Liberia, two leaders who have emerged since Resnick published her essay. For the most part, these are fleeting and not fully developed episodes of populism since either they were undertaken by opposition parties who are not in power (Malema, Odinga), the leaders were not in power long enough to transform the politics in their country (i.e. Sankara, Sata) and they were replaced by men who considerably muted their populist rhetoric, or the populist rhetoric

faded after a couple years in power as leaders like Rawlings or Museveni came to grips with political and socio-economic realities.

Most importantly, it is hard to associate backsliding to these fleeting episodes of populism, with the partial exception of the PF in Zambia. Even then, the PF's populism was mostly superficial and understated and was not characterized by attacks on democratic values or liberalism, which it rather hypocritically supported even as it undermined democracy in Zambia. Overall, the cases of backsliding in the region are not easily associated with populism. In Benin, for instance, Patrice Talon has largely eschewed populist rhetoric and has presented himself more as a pro-business technocrat. The same might be said of Macky Sall in Senegal or of Kenyatta in Kenya, two leaders sometimes accused of trying to undermine democracy.

Why does Africa diverge from global patterns in this area? Are the structural preconditions for populism not present in the region? Do the international circumstances, notably the dependence on Western aid, militate against it? Is it the low institutionalization and weakness of political parties? And finally, we might ask, is the emergence of more fully realized populist politics a prerequisite to escape the political stagnation in which the region finds itself?

Another source of stability since the onset of multiparty politics has been the continuing importance of *political clientelism* as an instrument for African incumbents. This has not been a major focus of this book, but the continuing significance of patronage and clientelism to the stability of contemporary politics in the region deserves further analysis. Competitive politics has led to a greater emphasis on distributive politics, with public services increasing significantly across the region since the early 1990s (Harding and Stasavage, 2014; Harding, 2020). In that sense, governments appear to be more responsive to the citizenry than was the case in the old single-party days. At the same time, the old patterns of elite clientelism appear to have continued, though we don't fully understand how it is evolving and how it interacts with the other practices of contemporary electoral autocracies in the region.

The case studies suggest that patronage and clientelism dynamics may be enhanced by incumbent lawfare in many countries of the region. In other words, the burdens of being in the opposition weigh heavily on politicians, who cannot benefit from state largesse and are excluded from power by various legal stratagems. As a result, with limited options, opposition politicians have greater incentives to join the incumbent regime. A recent study of legislative elections in twelve African countries notes that "only 57% of incumbents run for reelection, 55% are reelected conditional on running, and 32% are reelected overall" (Bowles and Marx, 2021: 2), further suggesting

these burdens. Joining the presidential coalition is inevitably tempting to these politicians as it facilitates access to state resources, which can compensate the loss of a parliamentary seat.

Finally, perhaps some major exogenous shock will end the current equilibrium. Certainly, the last big wave of regime change in the Africa region, the wave of democratization of the early 1990s, can be attributed to the region's major economic crisis after the second oil shock. Predictably, a number of current studies claim that the COVID-19 pandemic is leading to new episodes of backsliding as governments find it convenient to suspend various freedoms in order to better address the disease, while at the same time their societies are put through traumatic stress by this historic pandemic (Brown et al., 2020; Guasti, 2020; Kolvani et al., 2021). And even when governments don't use the pandemic as an excuse to advance authoritarian objectives, the inevitable rise in instability from the overloading of medical infrastructure and other public infrastructures may result in autocratization. In Africa, there have been cases of elections being rescheduled because of the disease as well as police manhandling citizens in order to enforce a curfew in Kenya and Uganda. In Zimbabwe, the ruling party amended the Constitution during lockdown in April 2021, enhancing executive powers. It is too early to be sure, but these accounts may be correct. On the other hand, previous pandemics in the African region led to similar dire warnings which did not, in the end, take place; the Ebola crisis in West Africa in 2013 led to similar voices of gloom about the prospects for Liberia and Sierra Leone, the worst affected states (Qureshi, 2016), as did more broadly the AIDS crisis in east and Southern Africa at the turn of the century (De Waal, 2003, 2006; Boone and Batsell, 2001).

In retrospect, in both these earlier pandemics, African societies and governance structures proved resilient and socio-political change was limited. The economic and labor market effects were sharp but relatively short-lived (Qureshi, 2016). Governments were often blamed for the poor response and lost some legitimacy, but nowhere could one clearly link the pandemic to the fall of a head of state. State capacity appears to have increased substantially in the public health sector as a result of Western-aided efforts. Some observers believe that the biggest single impact of the AIDS crisis was on the strengthening of civil society in Southern Africa as the long-dormant period of the disease allowed infected citizens to organize on their behalf (Iliffe, 2005).

The COVID-19 pandemic may prove different, not least if the pandemic perseveres over time thanks to the continued mutation of the virus. But, as Guasti (2020) has argued, one should distinguish between already autocratic states, for whom the virus will be another excuse to engage in "democratic

disfigurations,” and democratic states who may well probably prove resilient in treating the pandemic as best they can.

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