

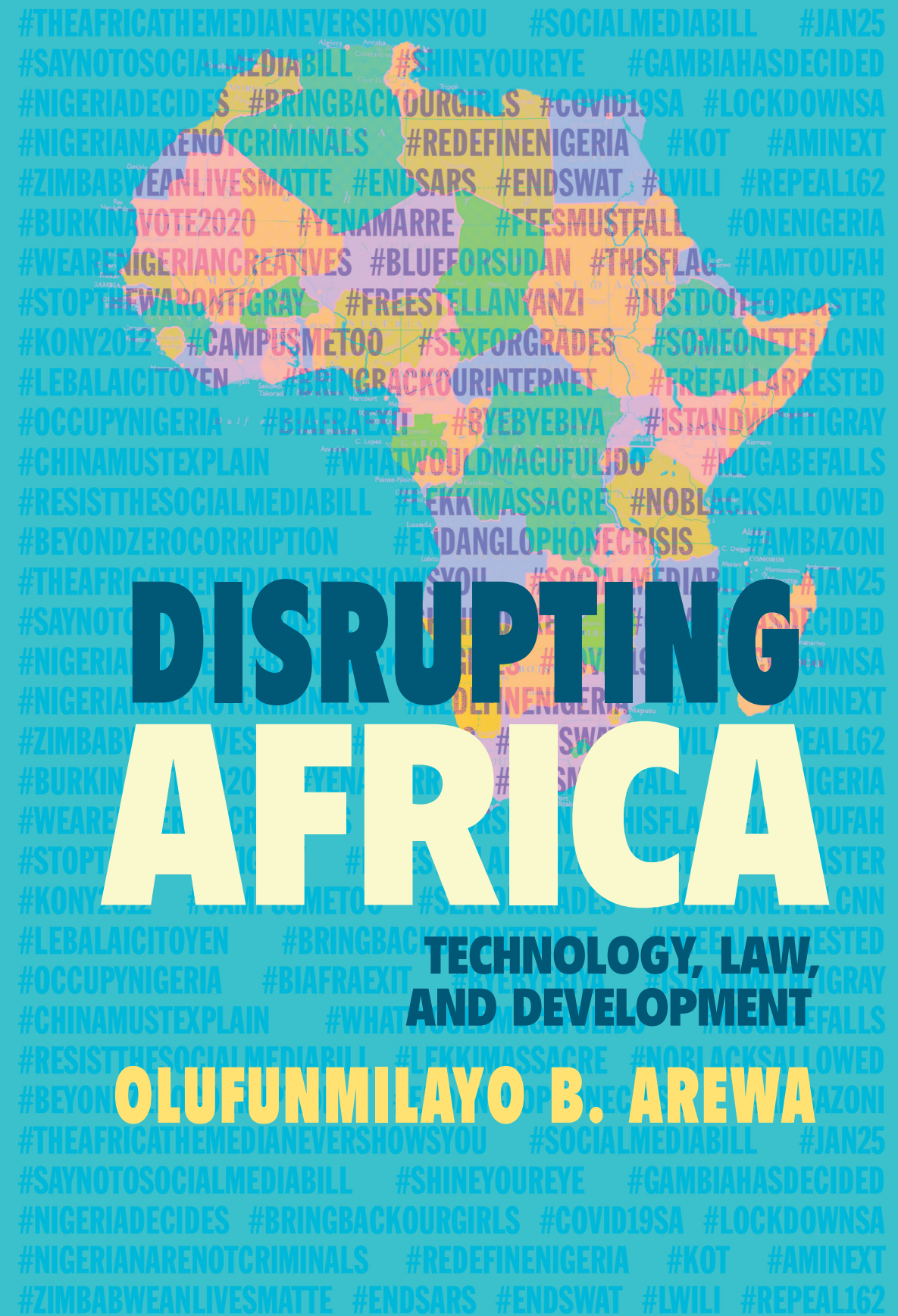
"**DISRUPTING AFRICA** is a compelling and very welcome book. It makes a powerful case for fundamentally disrupting colonialism's enduring institutional legacies. It shows how the leveraging of disruptive technologies in Africa is being severely limited by the continuity of colonial legal frameworks, institutions and external models and standards and their unequal and exploitative distributional patterns. Professor Arewa powerfully makes the case for new types of flexible and hybrid laws and institutions customized to meet and to center the needs, interests and priorities of African creators and innovators so that a greater share of the benefits of the digital economy can stay within Africa."

James Thuo Gathii, Loyola University Chicago School of Law

In the digital era, many African countries sit at the crossroads of a potential future that will be shaped by digital-era technologies with existing laws and institutions constructed under conditions of colonial and postcolonial authoritarian rule. In *Disrupting Africa*, Olufunmilayo B. Arewa examines this intersection and shows how it encompasses existing and new zones of contestation that are based on ethnicity, religion, region, age, and other sources of division. Arewa highlights specific collisions between the old and the new, including in the 2020 #EndSARS protests in Nigeria, which involved young people who engaged with varied digital-era technologies, provoking a violent response from rulers threatened by the prospect of political change. In this groundbreaking work, Arewa demonstrates how colonial and postcolonial lawmaking and legal processes continue to frame contexts in which digital technologies are created, implemented, regulated, and used in Africa today.

**OLUFUNMILAYO B. AREWA** is the Murray H. Shusterman Professor of Transactional and Business Law at the Temple University Beasley School of Law.

AREWA  
DISRUPTING  
AFRICA



# DISRUPTING AFRICA

TECHNOLOGY, LAW,  
AND DEVELOPMENT

OLUFUNMILAYO B. AREWA

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Olufunmilayo B. Arewa is the Murray H. Shusterman Professor of Transactional and Business Law at the Temple University Beasley School of Law. She writes about music, technology, and Africa, and has worked as a practicing lawyer in emerging growth company space in Silicon Valley, New York, and Boston. This book, which involved extensive archival research, brings together her training as an anthropologist and lawyer.

# Disrupting Africa

TECHNOLOGY, LAW, AND DEVELOPMENT

**OLUFUNMILAYO B. AREWA**

Temple University, Philadelphia



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*For my father (in memoriam), my mother, and my husband, who helped  
make this project possible*



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## Preface

I am a daughter of two diasporas from Africa. The first, an involuntary one of enslaved people, brought my mother's ancestors to the New World. The transatlantic slave trade caused disruptions in Africa and in the New World that continue to reverberate today. In Africa during the slave trade, disruption was present in areas in West Africa, the Congo region, and other places that were primary sources of slaves. My father was born in Nigeria in present-day Ondo state in what was at the time the western region of Nigeria, then a British colonial possession. He came to the United States around the time of Nigeria's independence in 1960. His coming to the United States reflected new patterns of migration at the end of the colonial period when large numbers of people from Nigeria and other African countries went abroad to study with the idea that these people would return to their home countries. Migration for my father and others has been driven in some instances by a search for available education, work, or other opportunities. Nigeria is now the largest source of immigrants from Africa to the United States. My father, like many others, did not return permanently to Nigeria.

As a person of Nigerian American heritage, I grew up with a vision of Nigeria as a source of potential future greatness. My late father was proud of his Nigerian heritage. Like many Nigerians in the most recent postcolonial diaspora, he worked hard and was highly educated, eventually becoming a professor. He is not an anomaly. Nigerians are one of the most well-educated immigrant groups in the United States.

My father instilled in us a conception of Nigeria and other African countries as having great, but as yet unrealized, potential. As someone once reflected to me in a conversation about Nigeria: Nigeria is a continuing paradox, a country of enormous capacity and potential that never seems realized. Despite this significant capacity, which is not always the case in sub-Saharan Africa (SSA),<sup>1</sup> the potential that my father hoped to be Nigeria's future path has never been realized and more importantly, is not likely to be realized without significant legal and other reforms that involve disruption of past approaches, policies, and laws.

This book emerged from something that puzzled me about the origins of a single law in Nigeria. Untangling one piece of this puzzle led me on a quest of close to a decade during which I continued to untangle multiple intertwined pieces of an ever larger puzzle. This puzzle came to be closely intertwined with my personal and professional background and experience. My quest has taken me to multiple archives, including Archives and Special Collections, SOAS Library, British Library, the National Archives of the UK, Bodleian Library, and Parliamentary Archives in the United Kingdom, the Library of Congress and National Archives in the United States, and the *Archives nationales d'outre mer* in France. The focus of my work in these archives has been to examine laws, regulations, and law and policymaking processes during colonialism in order to understand the continuing impact of precolonial and colonial policies and processes today. I have reviewed thousands of pages of documents related to law, lawmaking processes, and legal administration, with a primary focus on colonial Nigeria.

This book is also an exploration of potential future paths for African countries, particularly Nigeria, with a focus on implications of digital economy technologies that have now disseminated throughout the world, including in Africa. Many within and outside of Africa see the potential future of such technologies as offering an opportunity to disrupt past disadvantageous patterns that have diminished opportunities for far too many people in Africa. New technologies, however, spread in contexts defined by a collision of the past, the present, and visions of the future that may be preconditioned by what has come before.

This book seeks to illuminate some reasons that legal, business, and other institutions in sub-Saharan African countries have repeatedly failed or proven ineffective for the vast majority of people living within these countries. Consideration of the impact of the external in Africa can illuminate much about the past, the present, and likely future paths. Although media sensationalism may overemphasize negative aspects of the state of affairs in many African countries,<sup>2</sup> today, more than half a century after the end of colonialism for most countries in Africa, far too many remain poor. High rates of economic growth in the early years of the new millennium have decreased, while African countries could account for more than half of global population growth between 2018 and 2050, with the population of some countries likely to at least double during that time.<sup>3</sup> Unemployment and underemployment are pervasive in many African countries today, driven by a lack of demand for labor rather than by worker characteristics.<sup>4</sup> The current state of affairs many countries in Africa today attests to the gulf between past visions and present, and likely future, realities.

This book focuses on sub-Saharan Africa, which includes countries in Africa south of the Sahara Desert, a dominant geographical feature of the continent. Although North Africa is clearly part of the African continent geographically with longstanding cultural, historical, and other connections to the rest of the continent, it is not a focus of my discussion. The exclusion of North Africa from dominant

scholarly and popular approaches to the rest of the continent is rooted in past assumptions largely based on race that are themselves ripe for disruption.<sup>5</sup> These past approaches are being increasingly questioned today. In a study of nineteenth-century trans-Sahara trade, historian Ghislaine Lydon notes “[d]espite perceptions to the contrary, the countries bordering the Sahara are united by a common history . . . I treat West and North Africa as one region with the Sahara sealing the continent rather than dividing it.”<sup>6</sup>

This book does not involve extensive consideration of whether colonialism on balance was good or bad. As discussed in the coming chapters, it seems pretty apparent that colonialism was generally a bad thing for the vast majority of people in Africa. That said, however, colonialism had winners and losers, often identified and defined in terms of external needs and decisions, as discussed in this book. Further, many policies and laws that were implemented before, during, and even after colonialism have been poorly conceived, ineffectively implemented, and deleterious to the fabric of laws and institutions, even when undertaken with the best of intentions. Because law is comparable to a blob that accumulates over time, the impact of these laws, even if old, may be significant and continuing. More importantly, governments in many African countries today reflect the institutional structure of colonial governance, which often included unchecked executive power and weak legislatures and judicial institutions. These institutional structures have contributed to declining fortunes after colonialism in many countries. As Leander Heldring and James Robinson note: “we will argue that, in most cases, postindependence economic decline in Africa can be explicitly attributed to colonialism, because the types of mechanisms that led to this decline were creations of colonial society and institutions that persisted.”<sup>7</sup>

The current state of political, economic, and human conditions in countries in SSA has long been a topic of discussion, particularly in the postindependence era when such countries seemingly had the ability to chart their own future paths. This book discusses why future hopes at the time of independence have not been fully realized and also considers why past patterns of external domination and determination have not been sufficiently disrupted.

## Notes

1. Capacity was particularly limited in the legal profession. Although Ghana and Nigeria had a small number of African lawyers at independence, many other African countries had few lawyers, which was a significant problem given the legal nature of the colonial state. At independence, Tanganyika had only twenty-five lawyers in the country, only two of whom were African. Belgian and Portuguese colonies had “virtually no trained legal professionals to handle disputes in the national court system.” Joireman, 2001: 580–581.
2. Hunter-Gault, 2007: 107.

3. United Nations Department of Economic and Social Affairs, 2019: 1, 10; Mo Ibrahim Foundation. 2013. *Africa Ahead: The Next 50 Years*, p. 5, accessed October 23, 2020, <https://mo.ibrahim.foundation/sites/default/files/2019-03/2013-facts-%26-figures-an-african-conversation-africa-ahead-the-next-50-years.pdf>.
4. Golub and Hayat, 2015: 137.
5. Countries in North Africa are typically considered together with countries in the Middle East as part of the Middle East and North Africa (MENA) region. Iman Amrani. "Why Don't We Think of North Africa as Part of Africa?" *Guardian*, September 25, 2015, accessed October 23, 2020, [www.theguardian.com/commentisfree/2015/sep/09/north-africa-algeria-black-africa-shared-history](http://www.theguardian.com/commentisfree/2015/sep/09/north-africa-algeria-black-africa-shared-history).
6. Lydon, 2012: 5.
7. Heldring and Robinson, 2017: 299.

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This book is a collaborative project in varied ways. It reflects engagement with past and contemporary scholarship about issues related to Africa, technology, law, anthropology, and other fields. I thank my family for their continuing support and assistance. I also thank friends and current and former colleagues who contributed to this project over a number of years. I have received academic support from deans at the universities where I have worked as I have completed this book. I also thank past mentors and academic advisors, who have directly and indirectly contributed to this book. I am also indebted to the staff of libraries and archives in the United Kingdom and in the United States.

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## Abbreviations and Acronyms

|              |   |
|--------------|---|
| AfDB         | African Development Bank  |
| AI           | Artificial Intelligence   |
| ANOM         | Archives nationales d'outre mer   |
| AU           | African Union   |
| Bodleian     | Bodleian Libraries, University of Oxford, Bodleian Archives & Manuscripts |
| CBK          | Central Bank of Kenya   |
| CBN          | Central Bank of Nigeria   |
| DRC          | Democratic Republic of the Congo  |
| DSS          | Nigerian Department of State Service                                      |
| ECOWAS       | Economic Community of West African States                                 |
| EDB          | World Bank Ease of Doing Business Index                                   |
| EFCC         | Nigerian Economic and Financial Crimes Commission                         |
| FAO          | Food and Agriculture Organization of the United Nations                   |
| fintech      | financial technology  |
| GDP          | Gross Domestic Product  |
| ICJ          | International Court of Justice  |
| IFC          | International Finance Corporation   |
| IFFs         | illicit financial flows   |
| IMF          | International Monetary Fund   |
| IoT          | Internet of Things  |
| IPO          | Initial Public Offering   |
| NGO          | Nongovernmental organization  |
| NJC          | Nigerian Judicial Council   |
| R&D          | Research and Development  |
| RNC          | Royal Niger Company   |
| SAPs         | Structural Adjustment Programs  |
| SDGs         | Sustainable Development Goals   |
| SOAS Archive | Archives and Special Collections, SOAS Library                            |

|        |  |
|--------|--|
| SSA    | sub-Saharan Africa                                 |
| TNA    | The National Archives of the UK                    |
| TPA    | The Parliamentary Archives – UK Parliament         |
| UN     | United Nations                                     |
| UNCTAD | United Nations Conference on Trade and Development |
| UNDP   | United Nations Development Program                 |
| UNECA  | United Nations Economic Commission for Africa      |
| UNICEF | United Nations Children’s Education Fund           |
| USNA   | The United States National Archives                |

# Map

## AFRICA



Political Map of Africa<sup>1</sup>



Note

1. [www.cia.gov/library/publications/the-world-factbook/attachments/docs/original/africa\\_pol.pdf?1558019469](http://www.cia.gov/library/publications/the-world-factbook/attachments/docs/original/africa_pol.pdf?1558019469)

### 3

## Relationships and Accountability

*[C]ustomary law . . . provided a . . . form of international law [that regulated relations between different states and peoples of West Africa].*

Robert Sydney Smith (1989)<sup>1</sup>

#### COLONIALISM, STATE KNOWLEDGE, AND FRAGILITY

##### *State Knowledge and Legibility*

In *Seeing Like a State*, James Scott discusses state knowledge in terms of legibility. His discussion of how state functionaries apprehend reality has implications for the construction of states in Africa during colonialism and after formal independence. Scott examines how acts by officials regarding things like mapmaking, measurement, and codification involve a lens that defines what the state sees and acknowledges. The knowledge and information generated by state instruments of control renders reality legible to those in or with power.

The tools of observation used by the tax officials in Vietnam discussed by Scott “have the power to transform the facts they take note of.”<sup>2</sup> This transformative power of the state through its officials and other intermediaries has been largely to the detriment of many, but not all, local people in colonial and postcolonial African contexts. Local people were disadvantaged because the new systems, laws, policies, and processes imposed have been external and often alien. They were also often legible to only a small portion of local people within such countries. Being able to decipher new structures and systems because they are legible gives advantages to people who can translate such new interventions, often with far-reaching, and, for many for whom these new structures are not legible, negative consequences.

Acts by states in colonial contexts were also far-reaching due to the authoritarian nature of the colonial state and the administrative discretion granted to colonial administrators. Determinations of who qualified as a *native*, what legal regime would apply to a dispute, and what court might hear a dispute highlight the broad discretion given to colonial officials in many contexts. This discretion meant that

decision-making could be ad hoc, even improvisatory, which has contributed to postcolonial instability and chronic problems.<sup>3</sup>

Colonial governance thus draws attention to legal process. Laws in colonial settings such as Nigeria reflected extensive borrowing from external models and sources of law that typically were not appropriately customized for local conditions. This mismatch between source and target of borrowing has contributed to a gap between law on the books and law in practice. Global tax policies in the Caribbean, for example, may constitute a form of *new tax colonialism* in contexts in which differences already exist between laws applicable in France and its overseas departments that are part of France; the tradition of *nèg mawon*, which symbolizes “runaway slaves’ creation of their own societies in the French Caribbean,” captures the gap between French law as written and its actual application on “islands in the Caribbean that are part of though far distant from France.”<sup>4</sup> Gaps between law on the books and law as practiced in postcolonial contexts in Africa and elsewhere reflect Scott’s recognition that state simplifications to transform the world may encounter various types of resistance because society has the capacity to “modify, subvert, block and even overturn the categories imposed upon it.” This is apparent in Nigeria and other African countries in significant areas of continuing contestation about a broad range of things, but most particularly relating to the shifting and potentially nebulous interface between the internal and the external.

Assumptions made in the development of colonial legal systems, including in relation to customary law, have contributed to a problematic postcolonial legal legacy in Nigeria. In British colonies in Africa, laws in the business and commercial arena were primarily derived from English law. This has significant implications for development, which is often identified as an important goal for countries in Africa today. The legal foundations and legal processes developed during colonialism are not conducive to future paths that take sufficient account of the needs of the many, or to those that can really form a basis for future paths of sustained prosperity for the many.

Although local rulers may have had some authority under indirect rule, local rulers under colonialism were selected and evaluated to a significant degree based on their loyalty to Britain, not on satisfactory governance of local people under the local ruler’s authority. Lord Lugard described the essential features of indirect rule as involving two sets of rulers in a single government of complementary duties in which the “chief himself must understand that he has no right to place and power unless he renders his proper services to the State.”<sup>5</sup>

In colonial Sudan, people “quickly caught on to the British habit of rewarding loyal supporters and providing jobs and school places to those from prestigious families. Petitioners for jobs, wage increases, and pension supplements made the most of their connections and went out of their way to emphasize a history of family

loyalty to the regime. The British considered these histories seriously.”<sup>6</sup> In colonial Nigeria, when discussing the 1939 visit of Alhaji Muhammadu Dikko, the Emir of Katsina, to London for cataract surgery, colonial administrators noted:

he was appointed Emir for courageous loyalty at a time when the local situation in Nigeria was difficult. He has amply justified his choice as he has proved to be the most progressive chief in the Northern Provinces . . . . He was the first Emir to open a school for girls . . . . He is a keen sportsman . . . and is an ardent supporter of polo . . . . The Emir is a very able administrator and is keenly interested in the welfare of his people.<sup>7</sup>

Under indirect rule, British administrators selected native rulers with the goal of holding such rulers primarily accountable to the British, rather than those over whom they ostensibly ruled.<sup>8</sup>

Although no single prescription exists for what constitutes good governance, selection of native rulers in British colonial Nigeria did not have a goal of promoting good governance. These rulers were typically not selected for the primary benefit of those over whom they had authority, and were not placed in a broader institutional context in which good governance was even a goal. A lack of concern for governance was also evident in the colonial administration, particularly in instances where local people or others dissented, petitioned, or otherwise wished to express opposition to laws, policies, or practices. Intolerance of criticism and opposing views by those who govern has persisted long beyond the end of colonialism in many former colonies in Africa.

Local rulers under indirect rule were not without power. However, in colonial Nigeria, their power was typically circumscribed, at least with respect to British authority. Colonial records contain many discussions and petitions related to removal of local rulers. Rulers with whom colonial officials were displeased were readily removed. This highlights the fact that choices about local rulers were not neutral and were highly contested. Choices by the British and other colonial powers regarding local rulers and their incorporation into colonial law and government “meant supporting one claimant over others and privileging one form of authority with its linked moral and political ideas over many alternative forms.”<sup>9</sup> The manner of implementation of indirect rule may, however, have given such rulers greater power locally than they might have had traditionally. Indirect rule in northern Nigeria strengthened the power of traditional rulers,<sup>10</sup> while creating distinct governance structures that continue to be a basis for division and conflict in Nigeria today. In British West Africa, traditional checks and balances were often ineffective within colonial governance structures, although educated elites did temper authoritarian inclinations of local rulers under indirect rule. The power that was accorded to at least some local rulers during colonialism reflected a view of absolute power of local rulers expressed by Lord Lugard: “[t]he authority the Emir over his people is absolute.”<sup>11</sup> Nigerian legal cases from the early twentieth century illustrate the legal

importance and status of traditional rulers within colonial legal infrastructures: “Now what is the chieftaincy? I say without hesitation that it is a mere dignity, a position of honour, of primacy among a particular section of the native community”.<sup>12</sup>

Processes for selecting local rulers by British colonial officials continue to have significant implications today for a broad range of institutions in countries that were once colonized by Britain. The legacy of indirect rule is apparent in the continuing power of incumbent elites in many African countries today.<sup>13</sup> The continuing power of incumbents in Nigeria and other countries in Africa has significant implications for disruption of ineffective institutional frameworks from which such elite incumbents may continue to derive benefit.

The externalized nature of colonial governance is apparent in the treaties, laws, regulations, and other legal structures and processes that have been adopted in Nigeria and elsewhere in Africa. This legal infrastructure is still largely present, thus operating as a visible and ongoing force in many former colonies. Although legal reform has been discussed, if not undertaken, in the postcolonial era in Africa, these legal reforms have typically not fundamentally disrupted the legal architecture and processes derived from British colonial rule.

The externalized governance of colonialism might be contrasted with a path that might reflect governance principles and practices that focus on internal needs in which those in charge make all efforts to be the best possible governors who rule for the benefit of the local population, even in contexts of significant external constraint, and who effectively govern themselves. This future path of internal governance with an intent to benefit local people is likely not possible within an inflexible architecture derived from governance structures and processes that continue to reflect an external gaze.

Development in Nigeria and other former colonies in Africa will require freedom from the legacy of colonial legal overhang and colonial institutional design that remains a vital force, even long after the end of colonialism. Colonialism in Nigeria and elsewhere in Africa involved the creation of pervasive unfreedoms, in the meaning of Amartya Sen. As Sen notes, development requires “the removal of major sources of unfreedoms: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states.”<sup>14</sup>

#### *Governance, Measurement, and the Nigerian Census*

Colonialism and its institutional legacies have contributed to state fragility and failure.<sup>15</sup> A significant discourse exists today concerning state failure, weakness, and fragility. African countries often play a featured role in discussions about failed states, which often focus on issues related to governance. In a 2002 Brookings Institution report, former US National Security Adviser Susan E. Rice defined failed states as “countries in which the central government does not exert effective control over, nor is it able to deliver vital services to, significant parts of its own territory due

to conflict, ineffective governance or state collapse.”<sup>16</sup> Of the nearly twenty weak or failing states on Rice’s list in the paragraph in which she defines failed states, ten are in Africa.

As with so many things today, we even have a quantitative index to rank fragile states. The Fund for Peace produces the Fragile States Index (FSI), which identifies and assesses cohesion, economic, political, and social indicators of state fragility.<sup>17</sup> In 2020, the Fund for Peace produced the downloadable FSI Heat Map. In the 2020 heat map, Africa is awash in hues of yellow, orange, and red, indicating high levels of state fragility. The heat map contains just one visible spot of green in Botswana in southern Africa, making it one of just five countries in Africa that is not in the top 100 of those on the FSI list. In 2020, Nigeria was the fourteenth most fragile state on the FSI list.

African countries are overrepresented on the fragile side for the 2020 Fragile State Index. All of the countries ranked as least fragile are in Europe, except Singapore, Australia, New Zealand, and Canada. Mauritius, an island nation in the Indian Ocean 1,200 miles off the southeast coast of the African continent, is alone among African countries in the *Very Stable* or higher category.<sup>18</sup> Given that African countries comprise approximately 30 percent of the countries on the list, the ranking of two-thirds of countries in Africa in the top fifty of those on the FSI list is striking.<sup>19</sup>

The FSI is one of many seemingly objective indicators in which African countries often rank poorly. Quantitative rankings may have “the patina of objectivity [and] . . . show what is ‘really going on,’”<sup>20</sup> and the quantification employed in the FSI may illuminate important things. Quantification and the creation of rankings enable us to “reduce vast amounts of information to a figure that is easy to understand.”<sup>21</sup> This process of reductive quantification to create an index echoes the type of simplification noted by James Scott. Simplification may accompany activities of states in standardization, creation of legal frameworks, and other types of activities. However, “despite their appearance of objectivity and impartiality, measures are often the product of political processes and contain biases.”<sup>22</sup> Indicators also reflect assumptions about desired future paths, “often express ideologies about the ideal society and the process of achieving it,” and “play roles in shaping highly decentralized or non-formal governance structures such as networks.”<sup>23</sup>

Although the FSI and other rankings may provide information about outcomes today in many African countries, they are abstractions that may not actually be helpful in understanding the complex history and topography of governance in many African countries. As with other rankings, uses of the list may be more revealing than the ranking itself. In a critical review of the literature on state failure, weakness, and fragility in Africa, Mxolisi Notshulwana of the Development Bank of South Africa discusses theoretical and methodological problems with concepts of state fragility, weakness, and failure and calls for dynamic approaches that recognize states as “the terrain of contestation.” Notshulwana also notes that “state fragility

involves a complex combination of causes and effects that have proven impervious to quick, template-driven external solutions.”<sup>24</sup>

Indexes draw attention to state knowledge about, and measurement of, local phenomena. State knowledge is an area of continuing tension between the external and internal in many African countries. States may attempt to define reality by imposing systems of measurement, law, and administrative processes. In many African countries, the externalized nature of key aspects of these activities remains prominent, even long after the end of formal colonialism.

Colonial powers determined standards within their African colonies that reflected standards of the colonial power. Railroads offer an example of colonial infrastructure built with an external orientation. Colonial railroads in Africa were typically built for various purposes, including military control and extraction. These railway lines promoted European mining interests or connected to agriculturally rich areas where export crops could be grown. Railroads were built with an external perspective in ways that minimized costs, and did not follow routes that made the most sense. This led to construction of railways “going from nowhere to utterly nowhere” that, with the Kenya–Uganda railroad line, the *Lunatic Express*, “bypassed highly populated areas en route to Kisumu (Lake Victoria) and Uganda.”<sup>25</sup>

Neighboring countries may also have different infrastructure standards, including rail gauges, which has contributed to development of train networks that are not interoperable, even between neighboring countries: “African railway networks are characterized by different gauges (metric and standard) as well as by a host of other technical standards and specifications. This has resulted in the inability of Africa to develop interconnected and interoperable railway systems for most of the continent.”<sup>26</sup> This makes internal connectivity in Africa for trade and transport quite challenging. Although 60 percent of railway lines in the world are standard gauge, 85 percent of rail lines in Africa are narrow gauge railways, mostly built during colonialism.<sup>27</sup> Furthermore, nine different rail gauges are used in Africa.<sup>28</sup> The limited and non-interoperable rail infrastructure built during colonialism and widespread failure to maintain rail lines after independence, partially explain why China’s construction of rail infrastructure in Africa has been in such demand.

Besides potential problems emerging from past uses of external models and standards, governments in Nigeria and other countries in Africa do not adequately collect data about key internal demographics.<sup>29</sup> The population of Nigeria is an ongoing mystery with varying estimates (some say 180 million; others say 200 million). Like so much else, census numbers in Nigeria are politicized with internal contestation between groups that might benefit or be harmed by census data. The census in Nigeria has been politicized since the first postcolonial attempt in 1962. The 2006 Nigerian census gave provisional results and a total population count of 140 million, with 75 million in northern states and 65 million in southern states.<sup>30</sup> Notably, the definitions of *north* and *south* in Nigeria continue to track

geographic boundaries used during colonialism. Responses to the 2006 census reflect ongoing contestation about the distribution of population between the North and the South in Nigeria: “[l]ike earlier censuses that provoked an outcry, the reaction followed a set pattern. The south, which made up less than half the population, rejected figures, while the north endorsed them.”<sup>31</sup>

Internal failure to collect basic demographic information highlights yet another aspect of how the external reaches deep in Nigeria. Various sources outside of Nigeria are likely the most reliable sources of information about Nigeria. Technology companies and applications that collect information about their users, including Facebook, Instagram, and Google, likely have greater knowledge and information about Nigerians than the Nigerian government. In the absence of reliable data from within Nigeria, institutions such as the World Bank and International Monetary Fund (IMF) are important suppliers of estimates and forecasts about Nigeria. In late 2019, Nigerian President Buhari tweeted about the importance of reliable data for planning and his dissatisfaction with the accuracy of external data about Nigeria:<sup>32</sup>

Mohammadu Buhari@MBuhari – October 9, 2019 10:06 AM

We can only plan realistically when we have reliable data. As a government we are taking very serious steps to improve the quality of data available for policy-making, and today I charged the Presidential Economic Advisory Council to prioritize the collection of Primary Data.

Mohammadu Buhari @MBuhari – October 9, 2019

Replying to @MBuhari

This must extend to data collection as well. Today, most of the statistics quoted about Nigeria are developed abroad by the World Bank, IMF and other foreign bodies. Some of these statistics are wild estimates that bear little relation to the facts on the ground.

One Twitter comment in response to President Buhari’s tweet asked: “Can we start first by having a national census? It’s hard to plan when we don’t know exactly how many people we are planning for. I don’t believe we are anywhere near the about 200 m people we claim to be.”

Implementation of policies that meet local needs requires the ability to measure those needs and evaluate outcomes. The lack of reliable data, however, is not likely an accident: “the lack of availability of data locally enables a culture which lacks transparency and allows political leaders [to] [*sic*] paint their preferred versions of reality.”<sup>33</sup> This reflects James Scott’s recognition of the power of state measurement to transform and shape reality. The intentional nonmeasurement of things by states may enable particular visions of reality that might well be inconsistent with the actual state of affairs.

Problems of measurement in Africa are not unique to Nigeria. In former British colonies, an urgent need exists for reliable statistics.<sup>34</sup> Simply updating national



income accounting measurements can make a significant difference. National income accounting measurements are used to assess a country's economic activity during a specified time period, and are used to calculate gross domestic product (GDP), the most frequently used indicator in national accounts.<sup>35</sup> In 2014, Nigeria updated its national income accounting measurements for the first time in twenty-four years to include booming sectors such as film and telecommunications. As a result of this update, Nigeria surged to become the largest economy in Africa, displacing South Africa, and the size of its economy immediately rivaled that of Poland and Belgium.<sup>36</sup>

The Mo Ibrahim Foundation 2019 African Governance Report notes that "African countries face enormous challenges both in terms of working on the measurability of the targets of the development Agendas and developing the statistical capacity required to collect the data to measure those targets."<sup>37</sup> Collection of data to undertake needed measurements may, however, raise other issues of concern in the digital economy era, particularly in contexts of states that are authoritarian or that have authoritarian tendencies. Data and information raise questions about legibility. Digital-era technologies may make citizens more legible to states and others that might have access to their data. Whether states become more legible to their citizens in such contexts is not as clear.

#### COLONIALISM, DIVIDE AND RULE, AND INTERNAL RELATIONSHIPS

##### *The Asante Empire and Divide and Rule*

Colonialism changed networks of internal relationships in Africa in significant ways. Groups within Nigeria and elsewhere in Africa had a high level of interaction prior to the coming of Europeans.<sup>38</sup> In West Africa, customary law was the basis for a bond between states and peoples.<sup>39</sup> Customary law also provided a type of international law that regulated relationships between such states and people. Reports of early travelers to West Africa show that West African states had long sent representatives on diplomatic missions to each other, and the earliest reference to diplomatic relations within West Africa is from the tenth century.<sup>40</sup>

Precolonial diplomatic relationships included issues related to politics and commerce. Diplomats carried credentials or badges of office, including canes, batons, whistles, fans, and swords. In the Asante Empire, spokespersons or linguists carried staffs.<sup>41</sup> Spokespersons were essential as counselors, ambassadors, legal experts, and historians. The Asante Kingdom and Empire was a major West African state in present-day Ghana, founded in the late seventeenth century, that ceased to be independent during colonialism. The establishment and growth of the Asante Empire reflected both diplomatic and war making capacity.

A subgroup of the Akan people, the largest ethnic group in Ghana and the Ivory Coast today,<sup>42</sup> founded the Asante Kingdom. Material symbols of power and

authority may be demonstrative of governance and law. Akan staffs reflect the rich cultural history of Akan peoples, serve as a medium of communication, and may contain iconography and symbolism, including representations of proverbs that communicate ideas about rule of law or about the king or chief. The staff may be painted black or covered with gold leaf “as gold is the social prestige and material wealth of the Akan.”<sup>43</sup>

Other material symbols of power and authority are also important in Akan culture, including stools. Hierarchies of male and female stools have significant social significance in Akan culture.<sup>44</sup> Stools serve as a “bond between the living, the dead, and those yet to be born.”<sup>45</sup> Governing power among the Asante has long been associated with the Golden Stool of the Asantehene, the ruler of the Asante Empire. The Golden Stool is sacred and is the royal and divine throne of Asante rulers. It is a symbol of Asante unity. It never touches the ground, and no one may sit on it.

The Golden Stool is the stool of the first Asante king, Nana Osei Tutu, and is traditionally said to have been brought down from the sky by Asantehene Osei Tutu’s priestly counselor. This priestly counselor gave laws to the nation upon the descent of the Golden Stool; these laws ranged from broad moral injunctions to a type of civil and criminal code.<sup>46</sup> The cultural significance of the Golden Stool and manners of governance and law among the Asante were lost on Governor Hodgson, the governor of the Gold Coast Crown Colony at the beginning of the last British war with the Asante in 1900. Hodgson regarded the Asante as “lesser breeds without the law.”<sup>47</sup> This view made Hodgson unable or unwilling to understand the cultural contexts into which he sought to become paramount. The view that Africans lacked law reflects evolutionary assumptions about the development of law that were greatly influenced by Sir Henry Sumner Maine. In the House of Commons debate about the Asante in 1901, Joseph Chamberlain describes what he sees as a lack of Asante understanding of law:

The hon. Member speaks of these savage tribes of Africa as though he was speaking of a modern European Power. He talks of the Ashantis fighting for their “constitutional rights.” The Ashantis, if they understood what constitutional rights meant, would explain that their constitutional rights were to exercise absolute power and authority over all neighbouring tribes, to make slaves of them, to procure from them all the labour they required; and, if they did not get it, and tribute also whenever they desired it, to torture them, sacrifice them to their fetish, and generally treat them with the utmost barbarity. Seeing the condition of civilisation in which they were, we may make allowance for the Ashantis that they knew no better; but it is absurd to treat these tribes as if they were members of a civilised community.<sup>48</sup>

The Asante Empire became subject to British authority following a series of wars between the British and Asante that began in 1807 and ended in 1901. As the most powerful state in West Africa, the Asante presented one of the longest and most

effective resistance to European conquest and were “the only West African army to defeat a European army in more than one major engagement.”<sup>49</sup> The breakup of the Asante Empire exemplifies the role of military force in creating the British Empire and the importance of divide and rule policies. In 1896, the British overthrew Asantehene Agyeman Prempe I and exiled him with many senior Asante officials, first to Sierra Leone and later to the Seychelles; Asantehene Prempe was not permitted to return to Ghana until 1924.<sup>50</sup>

Wars between the British and Asante continued even after the exile of Asantehene Prempe, breaking out in 1900 after Governor Hodgson demanded that the Asante hand over the Golden Stool in a speech to the Assembly of Ashanti Chiefs in Kumasi on March 28, 1900. In this speech, the governor laid out expectations of British primacy that was characteristic of British approaches throughout Africa:

What must I do to the man, whoever he is, who has failed to give to the Queen, who is the paramount power in this country, the stool to which she is entitled? Where is the Golden Stool? Why am I not sitting on the Golden Stool at this moment? I am the representative of the paramount power; why have you relegated me to this chair? Why did you not take the opportunity of my coming to Kumasi to bring the Golden Stool and give it to me to sit upon?<sup>51</sup>

The Asante defended the Golden Stool in the Yaa Asantewaa War and never surrendered the stool to the British. The Golden Stool is housed today in the Asante Royal Palace in Kumasi, Ghana. After the defeat of the Asante Empire, a resident commissioner was appointed who reported to the Governor of the Gold Coast Crown Colony along the coast of Ghana. British policies of divide and rule led the Asante Empire to be broken up into its components parts, segments of which were “persuaded to sign separate treaties by which they placed themselves under the protection of the British government.”<sup>52</sup> At the end of this last war, those opposing the British were exiled to the Seychelles where they joined King Prempe. After annexation by the British Crown, the Asante Empire was administered separately.<sup>53</sup>

#### *Art, Looting, and External Relationships*

Precolonial settings highlight patterns of internal relationships within Africa that existed long before the coming of Europeans. These relationships were, in many instances, diffuse and not organized around central nodes connected to external European powers. In these earlier time periods, connectivity existed among groups and interchanges occurred that involved, for example, religion, language, culture, war, and trade. The archeological record gives evidence of people who spread out across central Nigeria beginning around 1500 BCE and “were in contact through relationships, trade, and traditions.”<sup>54</sup> We know little about the contexts of these people, but they left behind their terracotta sculptures. These Nok terracotta sculptures, named after the village in central Nigeria where they were uncovered, are among the oldest in SSA and “represent the origins of the West African tradition of portraying people and animals.”<sup>55</sup> Nok terracottas were uncovered during

colonialism – in 1928 and 1943 – in tin mines near Nok, a village in central Nigeria. Nok terracottas are highly sought in global art markets and have been looted and exported illegally out of Nigeria.<sup>56</sup>

The looting of African art has become an increasingly visible issue of contention. Colonial powers looted a significant amount of art during colonialism, much of which ended up in private collections and various museums. An ongoing dispute exists concerning Nigeria's Benin Bronzes, which participants in the punitive British Expedition of 1897 looted and took to Britain. In 2018, French President Emmanuel Macron commissioned a report by Felwine Sarr and Bénédicte Savoy that recommends permanent repatriation of African art looted during colonialism:

Organizing the return of African objects is a task with a number of dimensions. The first dimension – and the one which will constitute the rupture with the prior situation – is to institute, through national law, a definitive path toward restitution, according to the requests, through the creation of an ad hoc procedure proposing the basis for a calm process toward restitution.<sup>57</sup>

The presence of African art in museums in Europe and elsewhere is increasingly a point of contestation because the taking of such art and refusals for much of the twentieth century to return this art encapsulates much about the nature and continuing impact of colonialism:

The memory here which must be recalled to allow other pasts to re-emerge, to be no longer silenced, is a memory of loss through extraction, where the bronze plaques and other royal and sacred objects looted from Benin City were no more side effects of empire than palm oil or rubber were side effects of empire; in fact, they form an enduring part of the ecology of militarist colonialism.<sup>58</sup>

Continuing contestation has forced museums to address issues related to colonial era takings and lootings, including planning for a return of 309 of the Benin Bronzes to Nigeria for a museum in Benin City with a planned 2023 opening date.<sup>59</sup> In March 2019, German culture ministers from all sixteen states met and agreed to establish procedures for repatriation of colonial-era objects from public collections across Germany that were “acquired ‘in ways that are legally or morally unjustifiable today’.”<sup>60</sup>

Colonial looting has inspired activists. In September 2020, Congolese activist Emery Mwazulu Diyabanza and four others went on trial in France, accused of theft, and were acquitted in November 2020.<sup>61</sup> The *New York Times* describes Diyabanza's visit to the Quai Branly Museum in Paris, which houses art from former French colonies:

Early one afternoon in June . . . Mwazulu Diyabanza walked into the Quai Branly Museum, the riverfront institution that houses treasures from France's former colonies, and . . . began denouncing colonial-era cultural theft while a member of his group filmed the speech and live-streamed it via Facebook . . . he then forcefully

removed a slender 19th-century wooden funerary post, from a region that is now in Chad or Sudan, and headed for the exit. Museum guards stopped him before he could leave. . . . The next month, in the Southern French city of Marseille, Mr. Diyabanza seized an artifact from the Museum of African, Oceanic and Native American Arts in another live-streamed protest, before being halted by security. . . [in October 2020], in a third action that was also broadcast on Facebook, he and other activists took a Congolese funeral statue from the Afrika Museum in Berg en Dal, the Netherlands, before guards stopped him again.<sup>62</sup>

Diyabanza began his trial for trying to seize a funerary staff from the Quai Branly in Paris on September 30, 2020. He and four other people faced up to ten years in prison and fines of up to €150,000 for the charge of attempted theft of a registered work of art.<sup>63</sup> He and his associates have brought significant visibility to their movement that seeks reparations for colonialism, slavery, and cultural expropriation, drawing attention to France's colonial record and the estimated 90,000 objects taken from Africa in French museums. A video posted on YouTube shows his activities in the Afrika Museum in Berg en Dal, the Netherlands.<sup>64</sup>

The longstanding contention over looted art highlights the importance of culture and cultural objects, particularly for former colonies. Contestation about looting and repatriation are part of a continuing dialogue about the past, present, and future and draws attention to patterns of involvement of the external in Africa. Resolution of contestation about looted art may be an important path to reconciliation of past wrongs and future possibilities. As Sarr and Savoy note:

The implicit act of the gesture of restitution is very clearly the recognition of the illegitimacy of the property that one had previously claimed ownership of, no matter what the duration of time was. As a consequence, the act of restitution attempts to put things back in order, into proper harmony. To openly speak of restitutions is to speak of justice, or a re-balancing, recognition, of restoration and reparation, but above all: it's a way to open a pathway toward establishing new cultural relations based on a newly reflected upon ethical relation.<sup>65</sup>

Exploration about and connection with the past may play an important role in connecting people in Africa today with past paths that were disrupted by imperialism and colonialism. As a result, research about the Nok, among others, is important. However, research about the Nok repeats key elements of past patterns of external engagement in Africa, in ways that suggest that approaches to the external have not fundamentally changed in at least some contexts. Much of the Nok terracotta archeological work has been undertaken through collaborations with external researchers. The National Commission for Museums and Monuments in Nigeria has partnered with Goethe University at Frankfurt am Main in Germany to undertake archeological research in Nigeria. This research collaboration has explored the cultural development of the last 4,000 years, including the Gajiganna Culture, the earliest farming culture in Northeast Nigeria (ca. 1800 BCE to 500 BCE). In

May 1987, near the village of Dufana in northeastern Nigeria, a Fulani cattle rearer digging a well to water his cattle discovered a dugout canoe estimated to be 8,000 to 8,500 years old, which made the boat at the time of its discovery the oldest in Africa.<sup>66</sup> The University of Maiduguri, in northeastern Nigeria, undertook excavations of the site, but neither the university nor the government of the Borno State nor the Nigerian federal government could support full excavation of the site.<sup>67</sup> This led to establishment of a research collaboration with researchers from Goethe University, who were brought in to undertake a second excavation of the site.<sup>68</sup>

This important research about Nigeria's past has been funded externally, to a significant degree by the Deutsche Forschungsgemeinschaft (German Research Foundation), with significant external technical assistance. This research collaboration has illuminated important aspects of Nigeria's early history that would likely not have been revealed without external assistance. This work has uncovered greater knowledge about Nok terracottas, the "oldest large-scale sculptures in sub-Saharan Africa."<sup>69</sup> Although research collaborations like this one are critical and important, academic research and many other things in Nigeria rely to a significant degree on external collaboration and external funding. This pattern pervades relationships between the internal and external in Nigeria and other African countries and echoes patterns of relationships established under colonialism.

#### *Colonial Policy Design, Extraction, and Internal Relationships*

Along with imposing external dominance in policy and decision-making, colonialism changed internal connectivity and relationship configurations in important ways. The British presence in Nigeria and elsewhere in Africa involved potential multiple points of interaction with missionaries, colonial administrators, commercial interests, including chartered companies, and, in some cases settlers. External interests, needs, and conceptions of governance became key aspects of the institutional architecture in Nigeria and other colonies. This led to changing configurations of internal relationships, particularly as colonial institutions became solidified around indirect rule in the early twentieth century in British colonies in Africa.

Traditions of cultural exchange have long been present among groups within what later became Nigeria, reflecting rich tapestries of history, culture, interchange, and contestation that illustrate networks of local relationships. Colonialism and the interactions with Europeans that preceded it changed this tapestry and led to new networks that refocused ties through various British-affiliated intermediaries. These new networks that came with colonialism fostered internal competition among local groups within colonies for access to this center and scarce opportunities and resources over which British had established forms of centralized control. The process by which British decision makers and institutional structures became embedded in colonial Nigeria led to new and often deeper cleavages, changed existing configurations of and activity across local networks, and generally formed a poor basis for interaction across preexisting and new internal boundaries after independence.

The colonial state was hierarchical and often authoritarian with means of political, economic, social, and military control. The priorities of British colonial officials played a significant role in defining what opportunities were made available to local people and which local people might benefit from such opportunities. As an externally oriented government, the British colonial administration did not have a goal of facilitating internal opportunities for all or the development of infrastructures beyond those needed for extraction, which often meant that the center of the colonial state did not always have deep geographic reach. Colonial states were “gatekeeper states” that “had weak instruments for entering into the social and cultural realm over which they presided, but they stood astride the intersection of the colonial territory and the outside world.”<sup>70</sup> The colonial state in Nigeria was structured to provide opportunities to locals necessary to meet perceived needs of colonial projects in Nigeria, which again, were externally focused.

This degree of effective central control may have made sense during colonialism because extraction was a primary goal of colonial policy design, so a strategy of coordination by centralized control was likely easier to organize and coordinate across multiple colonies in the British colonial portfolio. However, if one were to undertake nation-building with a goal of internal improvement, this type of centralization would not be advisable in a country as young and as diverse as Nigeria.

Except for perhaps Ghana, colonial rule did not prepare former colonies very well for functioning as independent and democratic countries after independence:

Colonial rule was by no means a preparation for postindependence democratic government. It was extremely hierarchical, at best paternalist, and at worst, authoritarian. Britain’s army of colonial administrators have been described as ‘inbred and insular’ . . . There was no possibility of creating the necessary environment within which these [Westminster model] institutions could survive. In the educational sphere, to take but one example, rates of illiteracy were very high and the numbers of well-educated small indeed. Belgium gave precisely twelve months notice of its intention to decolonize the Congo, leaving the princely sum of thirteen trained African graduates within the country.<sup>71</sup>

At independence, countries in Africa typically replicated the government structure of the power that colonized them. In cases where former colonies adopted the British Westminster model, including in Ghana, Tanzania, and Kenya, a stronger executive power was put in place, along with a curtailment of multiparty competition.<sup>72</sup> This contributed to even greater centralization of political and economic power. Many African countries, including Nigeria, have since adopted presidential style systems of government. Nigeria’s current constitution, adopted in 1999 and modeled after the US Constitution, “provides for separation of powers among a strong executive, an elected legislature, and an independent judiciary.”<sup>73</sup>

The centralization of economic control in Nigeria and elsewhere in Africa is a legacy of colonialism that has continuing and significant distributional

consequences. This centralization also has implications for economic development, the economic autonomy of local areas, and the relationship between the private and public sectors. Colonial administration in British colonies also had a significant military aspect and the “thin white line of colonial administrators was also tipped with steel.”<sup>74</sup> This militaristic aspect of colonialism has contributed to active military engagement in political processes after independence, including, through coups: the “militaristic influence in colonial administration laid a foundation for post-independence army rule by officers frequently trained in Britain’s Sandhurst Military Academy.”<sup>75</sup>

From a legal and institutional perspective, the postcolonial state in Nigeria reflects the architecture of colonial policy design applied with some modifications in postcolonial contexts. This legal and institutional architecture based on pervasive use of external models has not been fundamentally changed since independence. In the postcolonial era, this background has made the state a zone of intense contestation in Nigeria and elsewhere as elites compete to control the state, which due to colonial policy design, confers considerable benefits on winners in battles for state control. Winners of such contests in Nigeria and elsewhere in Africa may direct proceeds from such control to themselves, their foreign bank accounts, or their favored interests or regions, but often not the country as a whole, at least in sufficient amounts to meet the basic needs of people internally. The benefits to winners in this state contestation further deepen contestation and battles for control and access to state resources.

This legal and institutional architecture has also led to contested relationships among groups that might seek to control or believe that they might deserve control or who would like to break away from the center or have greater autonomy. This ongoing internal contestation can lead to violence and led to a brutal civil war with Biafra, which included states in the Eastern Region of Nigeria that sought to declare independence. Multiple military coups, religious and ethnic violence, and other acts reflect deep cleavages along divides and fissures that were created or deepened and then weaponized during colonialism. This contestation is not unique to Nigeria. In the first two decades of independence, forty successful coups occurred in Africa with countless attempted coups.<sup>76</sup> Frequent military intervention, authoritarian rule, and corruption in postcolonial African countries reflect a continuing competition for resources.<sup>77</sup>

Colonial powers facilitated external control by fragmenting and disrupting existing institutions and relations. British colonial policies contributed to disruption by fostering division within colonial possessions by drawing ever finer distinctions based on classifications into groups based on language, religion, ethnicity, and skin color, for example.<sup>78</sup> This strategy fragmented potential opposition to colonialism, at least for a time. This division of communities and societies was part of a divide and conquer strategy that continues to resonate to the present day:



When the problems of multi-ethnic states and political fragmentation are examined at the present time, a significant input from the British imperial heritage may be discerned . . . all derive in no small measure many of their problems from the British colonial attempt to divide the population into distinct groups . . . . Boundary lines drawn on the ground in colonial times have been remarkably difficult to erase in the post-colonial era.<sup>79</sup>

The consequences of this focus by colonial powers on division did not end with colonialism in Africa. Policies of division effectively weaponized difference by reinforcing and even creating bases for separating populations into more manageable groups, at least from the perspective of British colonial authorities. Divide and rule, co-option of local elites, and European settlement in some colonies both facilitated colonial control and became important elements in postcolonial internal competition and strife.<sup>80</sup>

Practices that emerged before and during colonialism have become a template for power allocation and adoption of the external in African contexts. The persistent failure to adapt such models for local contexts with a more bottom-up approach is a key failing in the adoption of laws, regulations, and policies in far too many contexts in Africa, and is one reason that varied African legal systems and institutions may not operate coherently. As Chinua Achebe notes: "Africa's postcolonial disposition is the result of people who have lost the habit of ruling themselves. We have also had difficulty running the new systems foisted upon us at the dawn of independence by our 'colonial masters'."<sup>81</sup>

One key fissure in Nigeria is between the North and the South, which sheds light on the continuing contestation about the Nigerian census. Within an institutional structure where control of the central government confers significant benefit, given the regional cleavages present in Nigeria and focus on control of the state, census data that show a larger population in the northern part of Nigeria are likely to determine which region would control Nigeria in democratic elections. The legacy of colonial and postcolonial lawmaking and legal institutions has not provided adequate tools to deal with this contestation.

Contestation in Nigeria has been apparent in frequent military coups that began shortly after independence. Although Nigeria has had no military coups since the most recent return to civilian rule in 1999, Nigeria has in the past swung between military and civilian rule, with attempted and successful military coups in 1966, 1975, 1983, 1985, 1990, and 1993. Nigeria was under military rule from 1966 to 1979 and from 1983 to 1999. From 1993 to 1998, Nigeria was ruled by General Sani Abacha, who, like other Nigerian military rulers, had been a player in past Nigerian coups. The title of Sani Abacha's 1998 obituary in the *New York Times* referred to him as "a Beacon of Brutality In an Era When Brutality Was Standard."<sup>82</sup>

By the time of Abacha, the Nigerian military had become highly politicized. The military in its first extended period of military rule from 1966 to 1979 "was

perceived to be an agent of order and stability, in contrast to the institutional chaos that accompanied civilian politicians.”<sup>83</sup> Nigeria’s military rulers eventually became “infected by the ills it came to cure . . . . Soldiers were corrupted by politics as quickly and absolutely as civilians had been. Although the military claimed to bring law and order, communal, criminal, and religious violence increased under its watch. It continually promised to eradicate corruption; yet, military officers were indicted for corruption.”<sup>84</sup> Past support for military rule in Nigeria, at least with early military regimes, reflects a common pattern where “[s]upport for illiberal politics in the name of stability and prosperity remains common in Africa.”<sup>85</sup>

*Authoritarian Rule, Legal Process, and Institutions*

The extended period of military rule after independence has had significant implications for Nigerian legal frameworks and legal institutions. British colonial authorities adopted laws during colonialism with little real internal input. This meant that internal discussion and debate about proposed laws and regulations did not include much, if any, input from Africans. Military rulers tend to adopt laws by decree, which also typically leaves little room for internal debate and discussion. Military regimes in Nigeria have also fused legislative and executive functions and “institutionalized a system and culture of government that was extremely executive-centered.”<sup>86</sup> Sani Abacha, for example, began his rule with a series of decrees that defined his power as an authoritarian ruler, including by suppressing internal dissent, placing his government over the judiciary, constraining trade unions, and eliminating the free press.<sup>87</sup> Abacha’s decrees illustrate how authoritarian rule may unfold and take shape. Decrees issued by Abacha and other military rulers in Nigeria typically exclude courts from entertaining matters or proceedings relating to such decrees.<sup>88</sup>

The Abacha decrees targeting trade unions were critical in constraining an important internal counterbalancing force in Nigeria. Trade unions, another import from Europe, were an important force in anticolonial movements throughout Africa.<sup>89</sup> Trade unions in Africa have interacted with labor movements outside of Africa. In colonial Nigeria, the Labour Department also received significant training and investment from Britain,<sup>90</sup> which has contributed to the development of trade unions as an important institutional force in Nigeria. Trade unions remain a critical force throughout Africa, including in South Africa, where trade unions played a critical role in the anti-Apartheid movement. Trade unions in Nigeria have been an important part of anti-authoritarian, prodemocracy social movements: “labor movements in Nigeria have evolved into a robust, intellectual, vibrant, militant, national liberator movement in the country, taking on successive military and civilian regimes.”<sup>91</sup>

One of Abacha’s early decrees dissolved the Nigeria Labour Congress, an umbrella labor organization formed in 1978 from the amalgamation of trade unions into a single labor federation by military decree.<sup>92</sup> Decree No. 9 of 1994 issued by

General Sani Abacha is explicit in targeting the Nigeria Labour Congress on account of its opposition to military rule:

WHEREAS the Nigeria Labour Congress (hereinafter referred to as the 'Congress') . . . has of recent and intermittently embarked on, and has persistently keeps threatening to call for, nation-wide strikes over political matters . . . the Congress embarked on the said strike action without the endorsement of its constituent affiliates contrary to its constitution and its declaration did not follow the prescribed Industrial Dispute Resolution Processes . . . the Congress strikes have been calculated to sabotage a vital and essential sector of the economy and indeed resulted in untold hardship to law-abiding citizens and wrecked incalculable damage to the economy . . . .

NOW THEREFORE THE FEDERAL MILITARY GOVERNMENT hereby decrees as follows: 1. The national bodies of the Congress specified in the schedule to this Decree are hereby dissolved . . . 3. (1) Any person, who on the direction of the appropriate authority had on commencement of this Decree, acted in compliance with this Decree shall stand indemnified in respect thereof and no suit or any other proceedings whatsoever shall lie at the instance of any person aggrieved in respect of any act, matter or thing done or purported to be done in respect of such direction or compliance, and whether any such suit or other proceedings has been or is instituted in any court, it shall abate and be of no effect whatsoever.<sup>93</sup>

Dissolution of the Nigeria Labour Congress highlights its importance as an internal opponent to military rule. The decree also reflects how authoritarian rulers can significantly neuter institutions, at least from a formal legal perspective, with the stroke of a pen. The language of the decree authorizes the government and its agents to undertake any action and insures people who act in compliance with the decree from any act they undertake. These types of legal accommodations, combined with the reality of authoritarian military rule, results in military decrees' having real effects on the people whom they target.

Other targets of Abacha decrees include internal institutions within the government structure that might work in opposition to military rule. Prominent among these is the judiciary, which Abacha targeted less than one week after attempting to eliminate labor opposition. Abacha Decree No. 12 of 1994 states that:

WHEREAS by section 5 of the said Constitution (Suspension and Modification) Decree, no question as to the validity of any Decree or any Edict . . . shall be entertained by any Court of law in Nigeria.<sup>94</sup>

In one paragraph, this decree essentially eliminates the power of the judiciary. The explanatory note to this Decree states: "This Decree re-emphasises the supremacy of the Federal Military Government by giving protection to the act, matter or thing done or purported to be done under any Decree or Edict in consequence, excluding the application of Chapter 4 of the Constitution of the Federal Republic of Nigeria 1979."<sup>95</sup> Chapter 4 of the 1979 Nigerian Constitution contains fundamental rights.<sup>96</sup>

Although authoritarian rulers may be constrained by mechanisms such as protests, lawmaking processes in Nigeria reflect a problematic legacy. Authoritarian rule during colonialism and after independence is woven into Nigeria's legal fabric. Many laws on the books in Nigeria were adopted with little visible process and a paucity of public consideration, discussion, or debate. The institutional structure of colonial rule and military rule in past Nigerian governments raises serious issues about what democracy means in Nigeria from the perspective of law, lawmaking process, and the role of the judiciary. Postcolonial lawmaking processes in Africa, even in democratically elected governments, may reflect significant authoritarian elements. Authoritarian tendencies are of critical concern as Nigeria and other countries in Africa become further enmeshed in the digital economy. Past authoritarian tendencies combined with the potential uses of digital economy technologies may make some potential future paths for many African countries dystopic. These postcolonial processes also reflect widespread inattention to both structure and function of legal systems generally.

This lack of attention has led to a tendency to not undertake commonplace legal reforms and updates to existing laws to reflect changing circumstances, including those related to the digital economy, lack of attention to obligations that bind Nigeria when it signs international treaties and other instruments, lack of remediation of significant weaknesses in judicial systems that are a legacy of colonialism, inadequacies in criminal justice systems, failure to constrain security forces and police, inadequate attention to facilitation of local creativity and innovation, a poor enabling environment for local businesses, limited ability to enforce contracts, inadequate facilitation of robust economic opportunities for most people in Nigeria, failure to constrain widespread corruption, lack of transparency, and lack of accountability for government expenditures. Although legal systems inevitably have points of failure, all of these taken together make Nigeria's legal system particularly ineffective in important respects. Further, successive governments have not sufficiently recognized and have failed to set out a plan for how to rectify these continuing problems.

Postcolonial lawmaking processes in Nigeria reflect significant authoritarian elements that have not been remediated by the presence of civilian regimes because civilian regimes in Nigeria have also had significant authoritarian leanings. Initial Nigerian government and security force responses to the 2020 #EndSARS protests reflect persistent authoritarian tendencies in Nigeria. The Special Anti-Robbery Squad (SARS), which was a focal point for the protests, had a long history of abuse and repression that particularly targeted young people. As Chimamanda Ngozi Adichie notes in an October 2020 *New York Times* opinion piece:

For years, the name SARS hung in the air here in Nigeria like a putrid fog. SARS, which stood for Special Anti-Robbery Squad, was supposed to be the elite Nigerian police unit dedicated to fighting crime, but it was really

a moneymaking terror squad with no accountability. SARS was random, vicious, vilely extortionist. SARS officers would raid bars or stop buses on the road and arbitrarily arrest young men for such crimes as wearing their hair in dreadlocks, having tattoos, holding a nice phone or a laptop, driving a nice car. Then they would demand large amounts of money as “bail.” . . . . My cousin is one of the fortunate few who could pay an amount large enough for SARS, and who was released. He is not one of the many tortured, or the many disappeared, like Chijioke Iloanya.<sup>97</sup>

Like their colonial predecessors, governments in Nigeria are sensitive to criticism. In August 2019, for example, the Nigerian government detained Omoyele Sowore, publisher of the New York–based news website Sahara Reporters, who ran against President Buhari in the March 2019 elections. Sowore was charged with treason, cybercrime, and money laundering offenses. Sowore was detained because the Department of State Security (DSS) claimed that his call for nationwide protests in August 2019 was an insurrection.<sup>98</sup> Sowore was ordered detained for a renewable forty-five-day period by the Abuja High Court; he remained in detention even after a November 2019 bail order by the Abuja Federal High Court ordered the DSS to release him. The DSS did not comply with the court’s order for some time. Sowore was finally released from jail on December 5, 2019, and was rearrested on December 6, when DSS agents stormed the court to arrest Sowore in the Federal High Court in Abuja. The arrest was highly visible with pictures of a fight breaking out in court. The Nigerian government claimed that Sowore sought to overthrow the Nigerian government by calling on citizens to protest against the government. Sowore is one among many journalists, human rights defenders, and activists targeted by federal and state authorities in Nigeria. As a result, in November 2019 Amnesty International declared three human rights defenders, one of whom was Sowore, prisoners of conscience for having “faced arbitrary detention and unfair trials solely for exercising their right to freedom of expression.”<sup>99</sup>

The Sowore arrest is part of a broader pattern of increasing repression of the press in Nigeria. Actions taken against Sowore, and other journalists and activists in Nigeria reflect a long history of authoritarianism in Nigeria. The government’s actions also underscore the difficulty of any meaningful legal reform in Nigeria. The refusal to observe a court order is an indication of lack of adherence to rule of law.

The Sowore arrest also reflects the Nigerian government’s high level of sensitivity to critical speech and dissent. In addition to reflecting approaches to critical speech under colonial rule, the posture of multiple governments in postcolonial Nigeria is not one that is conducive to problem solving approaches that seek to address problems of poverty, slow growth, pervasive insecurity, dealing with Covid-19, and the many other challenges that Nigeria faces. Addressing Nigeria’s continuing challenges will require debate, dialogue, and the identification of consensus within what is likely to be vigorous disagreement, as well as significant criticism and

opposition. Repression of opposing viewpoints is detrimental to dealing with clear and present challenges that Nigeria faces. One key challenge is how to constrain the government and government officials.

#### EXTERNAL RELATIONSHIPS, EXTRACTION, AND POSTCOLONIAL RULE

##### *Authoritarian Rule, Human Rights, and Oil Resources*

Experiences of authoritarianism and repression in Nigeria demonstrate that slipping into greater levels of repression may happen quickly and may be difficult to dislodge. Under the regime of General Sani Abacha, which ended in 1999, human rights violations became pervasive in Nigeria. Human rights abuses of the Abacha regime led to the 1995 execution by hanging of nine people (the Ogoni Nine), including Ken Saro-Wiwa, a Nigerian writer, television producer, and environmental activist, who led a movement for the environmental and human rights of the Ogoni people in the Niger Delta in southeastern Nigeria. Saro-Wiwa was president of the Movement for the Survival of Ogoni People (MOSOP), which was formed to campaign for social, economic, and environmental justice in the Niger Delta, which is the primary source of Nigeria's oil exports. For much of the time since independence, Nigeria has been heavily reliant on oil as a source of government revenues, and as Nigeria's primary export. Nigeria has tried to reduce its reliance on oil and gas as a source of government revenue.<sup>100</sup>

Critical data about Nigeria's economy can be scarce, and sources may have different numbers for key statistics relating to government finance.<sup>101</sup> More than 90 percent of Nigeria's foreign exchange earnings come from sale of oil and natural gas.<sup>102</sup> The COVID-19 pandemic has devastated Nigerian government oil revenues, which may further exacerbate existing sources of instability and unrest.<sup>103</sup>

The production and sale of oil in Nigeria also highlights relationships between the external and the internal in Nigeria. Nigeria is a major global exporter of oil and received an estimated \$600 billion in oil proceeds between 1960 and 2006.<sup>104</sup> Proceeds from oil production have not benefited the vast majority of people in Nigeria, and robust oil revenues have not stopped Nigeria from being the poverty capital of the world. A 2013 Chatham House report estimated that between \$3 billion and \$8 billion of oil proceeds is stolen annually in Nigeria.<sup>105</sup> In 2019, *The Economist* noted that Chatham House estimates suggest that \$582 billion had been stolen from Nigeria since independence.<sup>106</sup>

Nigerian governments have attempted to recapture stolen funds, including in cases involving funds taken by General Sani Abacha. The Nigerian government also launched a case against Diezani Alison-Madueke, the former Nigerian Oil Minister in the government of former President Goodluck Jonathan. Alison-Madueke is under investigation for money laundering in the United Kingdom and is on trial

for corruption in Nigeria where “14 charges bordering on theft and concealment to the tune of \$153 million, have been filed against her by the EFCC.”<sup>107</sup>

In his discussion of the Second Nigerian Republic under President Shehu Shagari, political scientist Richard Joseph discusses the “mundane reality beneath the rhetoric of party formation” in Nigeria:

The most successful party in 1979 would not be the one with themes perceptive leaders, or the most innovative proposals for Nigeria, but rather the one most likely to institute an ‘I eat, you eat’ [I Chop, You Chop] policy between the ethno-linguistic, regional and religious communities, as well as between individuals who managed to push their way to the top rungs of the party’s hierarchy.<sup>108</sup>

Joseph refers to this as prebendal politics which “knits together the main features of Nigeria’s contemporary socio-political system.”<sup>109</sup> The principle of prebendal politics as described by Joseph transcends legal and other institutions: “[I]t is also a principle whose logic eventually undermines the competence and legitimacy of state institutions, and finally saps the authority of those who have successfully appropriated its strategic offices.”<sup>110</sup>

In addition to enabling the politics described by Joseph, which has facilitated corruption on a vast scale, oil production in Nigeria has devastated the local communities. MOSOP was formed in response to the environmental destruction that accompanied oil production, including from oil blowouts, spillages, oil slicks, and pollution, in part from flaring of natural gas.<sup>111</sup> Ken Saro-Wiwa was one of nine people executed by the Nigerian government in 1995. These executions were condemned internationally and led to responses outside of Nigeria, including the imposition of sanctions on Nigeria by the United States and European Union and suspension of Nigeria’s membership in the Commonwealth. The United Kingdom did not impose sanctions against Nigeria on account of the executions, even after an appeal from South Africa’s President Nelson Mandela, because it sought to protect Shell Oil, which is an Anglo-Dutch company, and its own commercial interests in Nigeria.<sup>112</sup>

*Lawsuits, Elite Accumulation, and Michael Jackson Memorabilia*

Nigeria is not alone in having vast poverty despite significant natural resources. The Nguema family in Equatorial Guinea (a former Spanish colony), which has been in power since 1979 when the current president Teodoro Obiang Nguema Mbasogo took power in a coup, has accumulated an immense amount of overseas assets. In 2017, a Paris court convicted Teodoro Nguema Obiang Mangue, the second vice president of Equatorial Guinea and son of the current president, in absentia for money laundering and embezzlement of more than €150 million. Nguema Obiang’s lifestyle “raised questions about corruption with posts on Instagram (showing him driving luxury cars or riding limited-edition motorcycles . . . [I]n Paris, where he would spend a few months a year . . . he displayed a \$22 million art collection in his mansion.”<sup>113</sup>

Nguema Obiang received a three-year suspended sentence and was fined €30 million, which was also suspended by the trial court. The French government kept more than €150 million of his assets, which had been seized by the police in Paris in 2012.<sup>114</sup> These seized assets included a 6-story, 101-room mansion valued at approximately €150 million with its own hair salon, cinema, gym, and nightclub, decorated with more than €40 million of furniture, and including a garage that contained a fleet of luxury sports cars.<sup>115</sup> Nguema Obiang's conviction was upheld by an appeals court (Cour d'appel de Paris) in early 2020. The appeals court imposed a harsher penalty than the trial court by upholding Nguema Obiang's conviction, but lifting the suspension of the €30 million fine.<sup>116</sup> The legal case was a landmark one led by two anticorruption NGOs, Sherpa and Transparency International,<sup>117</sup> and "[m]arked a turning point in France," which had "long turned a blind eye to the families of corrupt foreign dictators buying up Paris real estate and going on luxury spending sprees."<sup>118</sup>

The French raid and asset seizures have led to further litigation in a case brought by Equatorial Guinea against France at the International Court of Justice (ICJ), the principal judicial organ of the United Nations. Equatorial Guinea instituted proceedings against France at the ICJ, arguing that France had failed to respect the sovereignty of Equatorial Guinea because the Paris mansion was a diplomatic mission. In a December 2016 interim ruling, the ICJ notes that Equatorial Guinea invoked provisions of the Palermo Convention relating to principles of sovereign equality and non-intervention in the internal affairs of another state and the immunity of Nguema Obiang from foreign criminal jurisdiction as vice president of Equatorial Guinea, and provisions of the Optional Protocol to the Vienna Convention concerning the inviolability of premises of diplomatic missions.<sup>119</sup> The 2016 interim ruling ordered France to give the Paris property the same protections as all other diplomatic locations pending a final decision in the case.<sup>120</sup>

In early 2020, some eight years after the raid and seizure in Paris, the ICJ began a series of hearings in the diplomatic immunity case between Equatorial Guinea and France.<sup>121</sup> The arguments made by Equatorial Guinea in these hearings highlight a particular approach to the external and internal in postcolonial contestation between former colonizers and the colonized. The Ambassador from Equatorial Guinea to the Netherlands framed the dispute with France as reflective of a lack of respect for a sovereign and fully independent state,<sup>122</sup> which makes this case an external matter of relations between two sovereigns, one of whom accuses the other of behaving as if it were still a colonial power. This framing makes the spending by the vice president in France a matter of preserving Equatorial Guinea's power as a sovereign government. One commentator has characterized the arguments of Equatorial Guinea as "a modern-day effort to subjugate the government and plunder the riches of Africa dressed up in the language of law."<sup>123</sup> This is, however, a form of argument that may have power in many postcolonial contexts in Africa and



elsewhere, particularly given the paternalism that was a core aspect of colonialism. Paternalism has continued to shadow relationships between former colonies and their colonizers, particularly in the case of France, which has been described as having “maintained disproportionate influence over its former African colonies [over the past 60 years, including] control over their military and currencies.”<sup>124</sup> In December 2020, the ICJ ruled in favor of France, finding that the building raided by France in 2012 “never acquired the status of ‘premises of the mission’ of the Republic of Equatorial Guinea in the French Republic within the meaning of Article 1 (*i*) of the Vienna Convention on Diplomatic Relations.”<sup>125</sup>

The dispute between Equatorial Guinea and France reflects postcolonial framing from an African perspective as requiring equality in relations between former colonies and their former colonizers. This issue is stark in this case because the recovery of assets would go to France. As a result of this case, a French parliamentary commission drafted a report in 2019 that recommended that funds seized on account of corruption should be returned to local people, the true victims of corruption. This French parliamentary report also recommended that confiscated funds be transferred to the French Development Agency to invest in social projects – including those related to health, education, and access to water – in the country in which the funds originated.<sup>126</sup> In 2018, the French Senate passed a bill dealing with foreign bribery that was not enacted. The provisions of this bill would have created a dedicated fund to organize seized assets for the benefit of victimized populations.<sup>127</sup> Even if France had enacted a law at the time of the Obiang case that required that the seized funds be returned to Equatorial Guinea, where such funds might be sent remains a troublesome question. Nguema Obiang’s father is an authoritarian ruler who might seemingly have some say over how the money returned to Equatorial Guinea is spent.

The structure of discourse by Equatorial Guinea at the ICJ ignores the internal impact of uses of funds from sales of raw materials for people inside Equatorial Guinea, many of whom remain poor. This case illustrates patterns of postcolonial relationships between the internal and the external in Africa in which some external actors such as accounting, legal, and public relations firms serve as intermediaries that facilitate internal extraction for external benefit. They thus enable internal elites to exploit internal resources and, with the assistance of such external intermediaries, move internal resources outside of the country for varied purposes, including funding external asset purchases and external bank accounts. Other external actors, particularly governments outside of Africa, but in the Nguema Obiang case NGOs, may take legal action against the internal African extracting person.

The situation in Equatorial Guinea is acute because it has limited oil reserves that will be exhausted by 2035.<sup>128</sup> Nguema Obiang has collected assets in multiple countries. Other cases involving assets collected by Nguema Obiang in other countries have ended in settlements in which proceeds from seized assets were in some instances directed to be used for the benefit of the people of Equatorial

Guinea. In 2019, the Public Prosecutor's Office in Geneva, Switzerland closed proceedings against Nguema Obiang and two other defendants. The Prosecutor's Office confiscated twenty-five automobiles seized during the proceedings and sold the cars at auction for \$23 million in late 2019.<sup>129</sup> Equatorial Guinea agreed to pay 1.3 million Swiss francs to the State of Geneva to cover costs of the proceedings.<sup>130</sup> Swiss prosecutors had also requested that Dutch authorities impound Nguema Obiang's super yacht, the \$115 million *Ebony Shine*, which features a cinema and contraflow swimming pool, with six staterooms that sleep twelve, as well as eleven staterooms for a crew of twenty-two. The Obiang legal team argued that the yacht belonged to the Ministry of Defense and that the yacht's dive facilities were for training. The Swiss prosecutors closed proceedings against the yacht and returned it to Nguema Obiang.<sup>131</sup>

In October 2014, Nguema Obiang reached a settlement with the US Department of Justice, following a Complaint for Forfeiture in Rem filed in October 2011,<sup>132</sup> which sought forfeiture of a mansion in Malibu, a 2011 Ferrari 599 GTO, and certain Michael Jackson memorabilia. In the settlement agreement, Nguema Obiang was able to keep his Michael Jackson memorabilia and his Gulf Stream jet (which is subject to seizure if it returns to the United States), but forfeited more than \$30 million of assets including the mansion and the Ferrari, and the value of the Michael Jackson memorabilia was transferred to the US government. The US government announced that it intended "to utilize the net forfeited assets for the benefit and social welfare of the people of Equatorial Guinea."<sup>133</sup> The US Department of Justice press release notes that through "relentless embezzlement and extortion, Vice President Nguema Obiang shameless looted his government and shook down businesses in his country to support his lavish lifestyle, while many of his fellow citizens lived in extreme poverty . . . . After raking in millions in bribes and kickbacks, Nguema Obiang embarked on a corruption-fueled spending spree in the United States."<sup>134</sup>

These types of external legal cases undertaken in courts outside of Africa, in which people challenge activities within Africa or by African rulers, can take a long time. The asset seizures in France in 2012 were still being litigated in 2020 at the ICJ. External legal cases also require significant external legal and other expertise and are expensive. Litigating these cases internally is, however, not an option, given the authoritarian bent of the government of Equatorial Guinea. In 2019, the government of Equatorial Guinea issued arrest warrants against sixteen people that appeared to be in retaliation for the Paris money laundering trial.<sup>135</sup> Asset seizures from officials of African countries who use public money for private purchases amounting to hundreds of millions, or even billions of dollars, would be better handled by preventing the asset transfers and sales to begin with, rather than litigating about assets purchased overseas after the fact. This is particularly true because funds garnered from internal extraction can be used to bolster the legal resources of those using public money for private uses. Financial systems and intermediaries

outside of Africa facilitate external transfers by corrupt and abusive regimes, while internal frameworks fail to constrain governments and government officials throughout Africa.<sup>136</sup> The approaches by Switzerland and the United States emphasize the need to use the seized funds for the benefit of people in the country from which the funds were taken, which is an important recognition in legal remedies for private uses of public funds from African countries.

Uses of public funds for external purposes reflect the external direction of flows of funds and resources that characterized colonialism. Internal legal frameworks did not restrict these flows during colonialism because extraction was a core purpose of colonialism. Internal constraints on such flows have not been robust, if even enforced, since the end of colonialism. External actors often benefit from these flows as well, which has meant that external legal and other infrastructures may also facilitate such flows. These illicit financial flows (IFFs) continue to take advantage of gaps between what people say (evident in the fact that statements expressing opposition to corruption are commonplace) and what people actually do (in engaging in or facilitating corruption) from both internal and external perspectives.

Postcolonial extraction also takes advantage of different jurisdictions in which laws apply. Internal extractors may rule or have close connections with rulers, which makes internal enforcement of laws prohibiting extractive actions that involve conversion of public resources for private benefit unlikely to occur. Extracted funds may be difficult to locate and recover. This difficulty is partly due to various legal frameworks or jurisdictions that might be involved. Reclaiming funds typically requires a long process in each jurisdiction where funds are located. Those who have extracted funds and remain in power may be able to demonstrate that the use of funds was legitimate and may be protected by international law, including instruments protecting diplomatic institutions. The amounts that may be taken make any legal case likely long and protracted. Those who have taken funds, or their families, may end up with significant amounts of money, even if most funds are returned. This structure of incentives is unlikely to avert future extraction.

#### *Natural Resources, External Engagement, and Internal Conflict*

As Lord Lugard envisaged almost 100 years ago, African countries remain key sources of raw materials for the world, often with insufficient deployment of funds from sales of raw materials for internal needs for the majority of the population. The continued position of African countries as sources of raw materials is due to decisions of both colonial and postcolonial rulers. People within Africa continue to be victims of institutional structures based on colonial policy design that was intended to facilitate colonial era extraction but continues to be used long after the formal end of colonialism by rulers and other elites.

The €150 million at issue in the Equatorial Guinea asset seizure case is higher than the amount spent in Equatorial Guinea in 2011 on education (\$140 million) or health (\$92 million).<sup>137</sup> The Nguema family's rule in Equatorial Guinea has been described as a form of "predatory despotism."<sup>138</sup> As a result, the significant funds that

have flowed into Equatorial Guinea from oil sales have “only affected macroeconomic indicators but not people’s current standard of living” and “many of the benefits of the extractive industry are being accumulated far from the country, not only by the foreign companies but also by individuals who occupy the government.”<sup>139</sup> Equatorial Guinea has one of the highest levels of per capita income in Africa but performs poorly by varied measures of social development, including immunization levels, life expectancy, and infant mortality. Half of the population does not have access to potable water. Equatorial Guinea lags “far behind its much poorer neighbors” in part as a result of “the vast personal fortunes that senior government officials have amassed during the oil boom and because of how the country invests-or doesn’t invest – in itself.”<sup>140</sup>

Rent-seeking and corruption are part of the reasons that so many in Africa are poor. Rent-seeking by public officials in Africa may cause economic harm and stifle investment and growth.<sup>141</sup> Weak institutions mean that internal constraints may not restrain internal rulers who extract. This makes extraction one key continuity between colonialism and independence in Africa. Equatorial Guinea is not an outlier in Africa.<sup>142</sup> Constraining this type of behavior has become more difficult in a world of globalized financial markets where billions of dollars can be moved with the click of a mouse. In African contexts, private individuals who extract funds from resources for which they are merely stewards rather than owners are facilitated by networks of intermediaries, including service professionals such as lawyers, accountants, bankers, and public relations agents that “provide creative mechanisms through which kleptocrats channel their ill-gotten gains.”<sup>143</sup> The Mozambique debt corruption case and the complex financial schemes in Angola evident in the Luanda Leaks documents demonstrate how global financial institutions and consulting firms use their expertise to facilitate extraction of public resources in African countries for the private benefit of government officials.

Kleptocracy, or a “society whose leaders make themselves rich and powerful by stealing from the rest of the people,”<sup>144</sup> is difficult to constrain legally in contexts where institutions are weak. Even if kleptocrats behave in a way that is contrary to the written law within the country from which the funds were extracted, they are unlikely to enforce such laws against themselves. Although constraining such behavior before it occurs would minimize internal harm, external enforcement may be the best option at present. This type of external enforcement may take a long time because government officials against whom cases are initiated may have extensive public and private financial resources at their disposal. Other approaches, including sanctions and investigative reports, have not really had a significant impact. Innovative legal and policy approaches are clearly needed in this area. Those who extract from inside also have access to legal and other resources that may make it difficult, expensive, and time-consuming to get funds returned to the source country.

Equatorial Guinea is an example of how elites in too many countries in Africa may spend funds received from sales of raw materials. Equatorial Guinea is a small country with a population of just over 1,000,000 who experienced a transformation since identification of large offshore oil reserves in the 1990s. Prior to the discovery of oil, Equatorial Guinea primarily exported coffee, timber, and cocoa. Oil has led to significant changes in Equatorial Guinea: the country has become “the destination for hundreds of companies and thousands of immigrants near and far” with significant “construction roads, other large infrastructures [and] urban quarters”, creating “new social geographies, while cities have grown enormously at the expense of the abandonment of rural habitats.”<sup>145</sup> At the same time, continuities exist, including the same president for forty years, “military and police presence at checkpoints all along the roads, [and] strikingly low levels of public services such as health and education.”<sup>146</sup> Andres Exono Ondo, Secretary-General of Convergence for Social Democracy, one of only two opposition parties in Equatorial Guinea notes: “We have many many hotels. But no schools. No good hospitals. No water, nothing.”<sup>147</sup> In addition, to diverting funds needed for things such as education and healthcare, kleptocrats may have little incentive to invest in anything that might enhance future opportunities and paths that might enable African countries to be more than a source of raw materials.

African countries have long been sources of raw materials for which much of the value chain exists externally. Nigeria, for example, is one of the leading global exporters of petroleum but has little internal fuel refining capacity because the four refineries owned by the Nigerian government are closed or not really functional. Nigeria’s refineries are in a poor state due to lack of maintenance after the Nigerian National Petroleum Corporation (NNPC) lost its autonomy in the early 1990s under a military government and began to experience interference and directives from politicians.<sup>148</sup> In October 2019, Nigeria produced an estimated 2 million barrels in daily crude oil production but had refining capacity of only 445,000 barrels per day.<sup>149</sup>

The lack of internal refining capacity has led Nigeria to exchange crude oil for imported fuel, a process that is “often fraught with fraud”<sup>150</sup> and creates opportunities for various forms of arbitrage. In exchange for its high quality, low sulphur *Bonny Light* crude from the Niger Delta, Nigeria imports 900,000 tons per year of low-grade, *dirty* fuel, from external sources, including Dutch, Belgian, and other European refineries.<sup>151</sup> Nigeria also relies on internal refining from small-scale artisanal refineries that produce illegal fuel from oil stolen from pipelines in the Niger Delta. Use of dirty refined petroleum has led to a high level of emissions of particulate matter and sulphur oxides, “which are a major source of visible air pollution” in Nigeria and a potentially serious health hazard.<sup>152</sup> Because internally refined fuel uses *Bonny Light* crude, it actually contains less sulphur than imported fuels: 152 times more than the European sulphur standards for diesel and 40 times

the EU level for gasoline, as compared with 204 times the EU sulphur standards for diesel and 43 times that level for imported gasoline.<sup>153</sup>

Nigeria's current strategy to deal with a lack of internal refining capacity is a large-scale \$12 billion refinery in Lagos that will be the largest in Africa. This refinery, which has been delayed, is scheduled to open in 2021.<sup>154</sup> When completed, the refinery will be the "largest single train petroleum refinery" in the world.<sup>155</sup> This refinery is being constructed by Aliko Dangote, a billionaire and one of the wealthiest men in Africa with a successful track record in business with Dangote Group, a major industrial conglomerate. The Dangote refinery has been delayed due to port conditions resulting from outdated transport infrastructure that have led to problems importing steel and other equipment. The poor road network has also contributed to port congestion.<sup>156</sup>

In addition to this type of large-scale project, Nigeria might benefit from thinking about smaller scale projects that are more distributed, that can create opportunities that involve less concentrated risk of failure than is likely to be the case with a strategy that concentrates on large-scale projects such as the new refinery being constructed in a free trade zone near Lagos. One starting point for thinking about such opportunities might be to enhance internal capacity and opportunity based on activity that is already internally evident in Nigeria, such as in the Niger Delta, where people are producing illegal fuel in small-scale artisanal refineries that is, in some respects, of higher quality than imported fuel. These small scale artisanal producers participate in an informal economy in Nigeria that is far larger than the formal economy. The *informal* economy is informal in part because formality in Nigeria often involves a host of complications, from slow bureaucratic processes that may require multiple steps and payment of bribes, to a legal and regulatory environment that does not sufficiently facilitate internal economic opportunities for the majority of people in Nigeria. The informal economy also reflects persistent patterns of exclusion. Policies and practices that value the internal would entail seeking out ways to incentivize development of practices and innovations that have been too often left outside of official policy-making and lawmaking processes.

Nigeria and Equatorial Guinea show paths taken by a number of countries with significant natural resources that do not deploy benefits of such resources in ways that give sufficient internal benefit to the majority of the population. Countries with significant endowments of oil, minerals, and other natural resources may suffer from what some refer to as the *resource curse*. Conflict commodities are thought to have financed one-third of armed conflicts since the end of the Cold War.<sup>157</sup> *Blood diamonds*, also referred to as *conflict diamonds*, are diamonds mined in an area of war or conflict with sale proceeds going to fund insurgency or war. Blood diamonds are a prominent example of conflict commodities in Africa. Conflict commodity wars have been devastating in Africa: "[m]ore than three million people died as a result of these wars in the 1990s and early 2000s; many more millions of lives have

been damaged, and the existence of entire nations has been called into question.”<sup>158</sup> Blood diamonds have been associated with a number of countries in Africa, including Angola, Ivory Coast, Guinea, the Democratic Republic of the Congo (DRC), Liberia, and Sierra Leone. The role of conflict diamonds in wars and other conflicts has led to an international conflict diamonds governance system of which the Kimberly Process Certification Scheme is a primary part.

Conflicts over natural resources in Nigeria are at the core of internal conflicts and instability in the Niger Delta, where much of Nigeria’s oil is produced. External responses to the 1995 Ogoni Nine executions underscores continuity and change in external actors that might be involved in Nigeria and other African countries today. Former colonizers and other global powers play a continuing role in the political, economic, and at times, military spheres. Regional and pan-African groups play an increasingly prominent role today, evident in the actions of Nelson Mandela, who condemned the Ogoni Nine executions and attempted to organize broader condemnation by other African leaders. Responses within Africa reflected internal views of external actions that connected external condemnation of a fellow African leader to colonialism:

Mandela vividly condemned General Abacha’s action. He even made vain attempts to win the hearts of other fellow African leaders . . . . Mandela called for sanctions to be imposed against Nigeria and proposed that the Commonwealth should openly condemn General Abacha’s action. To his surprise, his counterparts from other African countries did not share his views, nor did they approve his proposal . . . . Instead, they blamed Mandela for playing into the hand of former colonial masters by dividing African leaders. The fact that Mandela’s actions were triggered by something they all knew was wrong did not seem to matter. Internally, Mandela was reminded by his ANC colleagues of Nigeria’s role in the fight against apartheid—a view which was shared by some opposition political parties in South Africa.<sup>159</sup>

Much like the response of Equatorial Guinea to French asset seizures in 2012 in Paris, the collective internal reaction within Africa that Nelson Mandela encountered reflects a legacy of colonial and postcolonial encounters with the external in Africa that have involved paternalism. Discussions about Africans by British colonial officials in archival documents are full of derogatory statements about African people. Derogatory and distorted images of Africa and people of African descent continue to be globally widespread today. These past experiences may contribute to reflexive opposition to actions of external powers that are intended to nudge African leaders to reach a particular decision or support a specified policy. This type of opposition to the external has, however, not typically reached very deep and has at times remained strategic, if not rhetorical in nature. As a result, institutions throughout Africa continue to reflect the external at their roots in ways that have not been disrupted. The legal structures and external relationships that facilitated Abacha’s

authoritarianism and his looting of billions of dollars reflect long-standing uses of external models and relationships that have continued to be detrimental to the vast majority of people in Nigeria.

*Human Rights and “Model” Democracy in Mali*

Events in West Africa since the 1995 Ogoni Nine executions may suggest greater willingness of African leaders to criticize other African leaders and even take action, at least in certain cases. Following a coup in Mali in March 2012, ECOWAS, the West African regional political and economic union, suspended Mali, and sent delegations to Mali to mediate a resolution to Mali’s political crisis. ECOWAS then imposed economic and diplomatic sanctions on Mali, and ECOWAS member states bordering Mali closed their borders. The African Union (AU) similarly imposed sanctions, asset freezes, and travel bans against coup leaders. The AU also planned to undertake an African-led support mission in Mali. Prior to deployment of the support mission, the Islamist insurgents who held northern Mali launched a military offensive against the government-controlled South that threatened Bamako, the capital city of Mali. This led the interim president of Mali to call on France, Mali’s former colonizer, to intervene militarily.<sup>160</sup> France launched Operation Serval in early January 2013. The African support mission was then deployed.

Prior to the 2012 coup, Mali was considered a “model of African democracy.”<sup>161</sup> The 2012 Mali coup highlighted the fragility of a Malian state that could not withstand intensified instability in the North resulting from the collapse of the Quaddafi government in Libya.<sup>162</sup> Mali experienced another coup in August 2020. After weeks of protests over a disputed election, the military detained the president, the prime minister, and other government officials. Shortly after being detained, the president announced his resignation on state television.<sup>163</sup> The 2012 and 2020 coups in Mali, the #EndSARS protests in Nigeria, the Arab Spring in Northern Africa, and other events in African countries ranging from small fires to conflagrations also highlight the potential unpredictability of events that might lead to widespread instability. In Nigeria and other countries in Africa, significant known factors that lead to instability exist, including cleavages along ethnic, religious, regional, generational, and other differences.

After the 2012 Mali coup, civilian rule was restored after just one month. The coup leaders were arrested in anticipation of a trial. In January 2020, General Amadou Haya Sanogo, the former junta leader, was granted bail after having been in pretrial detention for more than six years after his arrest in 2013. Sanogo has been awaiting trial over the abduction and murder of twenty-one paratroopers in Mali. Pretrial detention occurs when accused persons are detained before they are tried, which may result from various factors, including their failure to post bail, denial of their release, or an extended process leading up to their trial. Recent criminal justice reform efforts inside and outside of Africa have focused on reforming pretrial



detention, which may undermine rule of law and chances for a fair trial and expose detainees to violence and abuse.

Although imprisonment rates in Africa are not high relative to the rest of the world, pretrial detention levels are high. Globally, just under one-third of all prisoners are pretrial detainees; this figure is close to 40 percent in Africa and over 50 percent in Central and West Africa. Nigeria's levels of pretrial detention are high: "[o]f the world's ten prison system[s] with the highest proportion of pretrial detainees, half are in Africa. In places such as the Benin, DRC, Liberia, Libya and Nigeria, 70 percent or more of all prisoners have not been convicted."<sup>164</sup> The release of Mali coup leader Sanogo is consistent with a justice system in which officials and security forces are not constrained:

Significant human rights issues included: reports of unlawful or arbitrary killings, including extrajudicial killings, by both government and nonstate actors; forced disappearance by government forces; torture by government forces; arbitrary detention by government forces . . . . The government made little or no effort to investigate, prosecute, or punish officials who committed violations, whether in the security forces or elsewhere in the government, and impunity continued to be a problem.<sup>165</sup>

The development of internal frameworks for justice and accountability are critical aspects of democracy or any form of governance for the benefit of the many within Africa. This would give those harmed by governments or their representatives recourse for the harms that they suffer. This is important in the context of Africa, where countries typically have significant diversity along multiple measures, and many people who are poor may lack opportunities for employment, healthcare, housing, food, and other things that improve quality of life. The historical experiences of oppression during colonialism make the need to disrupt continuing patterns of oppression even more urgent. This would entail disruption of legal frameworks and institutions that facilitated oppression during colonialism and that continue to shape treatment of people within former colonies. Such disruption would also require reform of existing legal frameworks in line with key principles that can serve as the basis for future paths in which law guides actions, particularly by governments and those who rule.

In Nigeria and elsewhere in Africa, forests are present with much underbrush that is rarely tended. The roots of the trees do not run very deep. Institutions that are not deeply rooted may be easily toppled. These forests are prone to rapid conflagration in part because sparks have become so commonplace in many places in Africa that they become part of the fabric of everyday living and are largely ignored, leading some to describe less volatile countries as *stable*, particularly where leadership is entrenched or otherwise apparently stable. These sparks are, however, underscore points of tension and contestation in places where many face significant and persistent difficulties in daily life and where opportunities for many are scarce. Sparks in

these contexts have potential to erupt in ways that may be difficult to predict. The scope and duration of any conflagrations that might arise are unpredictable. In Mali, the 2012 coup leaders indicated that they did not agree with how Mali's government was handling the Tuareg rebellion in the North that came about in part due to consequences of the Arab Spring. Mali has had two coups in the last decade. The impact of protests such as the #EndSARS protests that began in Nigeria in October 2020 may be difficult to anticipate in terms of specific timing. Any conflagration that might come from such protests may similarly be difficult to predict. In Tunisia, where the Arab Spring protests emerged, a revolution on three continents was started when a fruit and vegetable seller set himself on fire.<sup>166</sup>

The potential for unexpected events to heighten unrest was evident in Ethiopia in late June 2020. Ethiopia erupted in protest over the assassination of Hachalu Hundessa, a singer, songwriter, and civil rights activist. His songs called for greater rights for the Oromo people, the largest ethnic group in Ethiopia, who have long complained about being marginalized. Hachalu was imprisoned for five years at the age of seventeen for his political activities. He developed his musical skills while in prison and had released two albums at the time of his death. Artists have played an important role in protests by ethnic Oromo youth: “[f]ar from being a footnote in the history of the Oromo struggle for freedom and justice, musicians, poets and creators are its centre of gravity – the signature tune and the definitive sound of the Oromo revolution.”<sup>167</sup> In the aftermath of Hachalu's murder, protests by Oromo and Amhara, two-thirds of Ethiopia's population, were met with brutal government suppression. In the days following the killing, at least 289 were dead, along with more than 7,000 detentions. The Internet was shut down within hours of the killing and was only restored after four weeks.<sup>168</sup> By late 2020, a military confrontation between the Ethiopian government and rebel forces in the northern Tigray region had arisen that had the potential to have a broader regional impact, including in Eritrea, Djibouti, Sudan, and Egypt.<sup>169</sup>

#### GOVERNANCE AND ACCOUNTABILITY

##### *Legal Recourse for Internal Harms*

Protests in Nigeria, Ethiopia, Cameroon, and elsewhere in Africa attest to contestation and opposition to government policies. This opposition reflects ongoing contributions of individuals and organizations that have opposed some of the most visible elements of poor colonial and postcolonial governance, including authoritarianism, corruption, and human rights violations. In Nigeria, these defenders of have included lawyers, writers, women's rights activists, trade unions, democracy activists, and varied civil society groups, some of whom have faced violence, imprisonment, and even execution. As has been the case elsewhere in Africa, many of these individuals and groups make use of digital technologies that highlight potential ways that digital technologies could facilitate

inclusion. These internal actors attempt to counterbalance authoritarian tendencies in Nigeria. A future path in Nigeria that incorporates the insights, knowledge, and energy of these internal groups could be used to develop policies and laws intended to benefit the many and constrain those in power, which is an essential element of the rule of law.

At present, internal legal frameworks may not offer much recourse from within African countries, particularly to those internally victimized by authoritarian rulers. Although internal legal frameworks may not offer recourse to those victimized by their rulers in Nigeria and other countries in Africa, external legal frameworks may offer the possibility of recourse. Today, external actors may turn a blind eye to, or facilitate, internal abuses within countries in Africa. External facilitation of internal abuses is drawing greater scrutiny today. This is evident in the recent cases against Obiang and in instances of IFFs, including in the Luanda Leaks case and the Mozambique debt corruption case,<sup>170</sup> which have involved external facilitation of internal corruption by global consulting firms and banks.<sup>171</sup> Human rights abuses continue to draw scrutiny by human rights groups but may not lead to much other external action.

The role of Shell Oil in the Niger Delta, global banks in Mozambique, and global consulting firms in Angola underscore the presence and actions of multinational businesses, which are a dominant external factor today, not only in Nigeria, but throughout the world. The activities of these and other multinational actors may be difficult to regulate using traditional domestic, foreign, and international legal frameworks. Multinational companies also have an ability to structure themselves in ways that may make them relatively impervious to attempts to regulate them.

In the over twenty years since the execution of Ken Saro-Wiwa in Nigeria, several legal cases have been brought against Shell Oil, which “stands accused of complicity in the unlawful arrest, detention and execution of nine men who were hanged by Nigeria’s military government.”<sup>172</sup> The aftermath of the execution of the Ogoni Nine, who were executed after an unfair trial, reflects one more example of the interaction between the internal and external in Nigeria. Esther Kiobel and three other women whose husbands were executed in 1995 brought lawsuits in the United States and in the Netherlands to attempt to hold Shell accountable for human rights abuses that they believe led to the murder of their husbands. Although the case in the United States did not reach a trial on the merits,<sup>173</sup> in 2019, a Dutch court agreed to hear their case against Shell.

In 2009, Shell Oil settled a case filed in the United States by Ken Wiwa, the son of Ken Saro-Wiwa, and other relatives of the Ogoni Nine for more than \$15 million.<sup>174</sup> The legal cases brought by family members of the Ogoni Nine reflect a trend in which Africans are increasingly litigating outside of Africa on account of acts of external actors within Africa.

Recourse for environment harms has become a more likely possibility following a series of court cases in Nigeria and Europe. In November 2020, the Nigerian

Supreme Court dismissed a request by Shell Oil to vacate a 2019 Court of Appeals decision upholding a 2010 decision by the Federal High Court in Asaba, Delta State awarding close to \$45 million in damages against Royal Dutch Shell's Nigerian subsidiary for an oil spill in 1970 in Rivers State.<sup>175</sup> In January 2021, in a case that started in 2008, concerning 2006 and 2007 Niger Delta oil spills, The Hague Court of Appeal requested information about the extent of contamination from the spills and whether remediation of the spills are required.<sup>176</sup> In February 2021, in a case described as “a watershed moment in the accountability of multinational companies,” the UK Supreme Court ruled that 50,000 Nigerian farmers and fisherman could bring a case in the High Court against Shell for years of polluting oil spills in the Niger Delta.<sup>177</sup>

The Ogoni Nine legal cases, which also involve Shell Oil, illustrate potential impediments to bringing legal cases outside of Nigeria. Amnesty International has supported and documented allegations in the legal cases by Ogoni Nine relatives against Shell and has called on the governments of Nigeria, the United Kingdom, and the Netherlands to investigate Shell for its role in crimes committed by the Nigerian government in Ogoniland in the 1990s, including murder, rape, and torture.<sup>178</sup>

Attempts to hold Shell accountable for human rights violations in Nigeria reflect something of the limits of law as applied to external actors in particular contexts. Oil has been a dominant source of revenue for Nigeria for decades. Although the existence of oil revenues might seemingly be something to celebrate, oil has been detrimental to institutions in Nigeria. Many in Nigeria have not benefited from the proceeds of oil production in Nigeria. Rather, oil in Nigeria has become part of the contested center and has led to corruption driven by the prospects of personal enrichment from access to even a small piece of money flows from oil production.

#### *Transparency, Accountability, and Fiscal Matters in Nigeria*

The presence of oil as a central attraction has also diminished investments in and attention to other potential sources of economic growth and prosperity in Nigeria. Despite government officials speaking about the need to diversify the Nigerian economy, Nigeria's fortunes turn to a significant degree on the price of oil. The risks of Nigeria's heavy reliance on oil became glaringly apparent in 2020 with the COVID-19 pandemic, which contributed to a collapse of oil revenues flowing to the Nigerian government. Like other petrostates, Nigeria must now grapple with COVID-19 and volatile and, at times, low oil prices. Nigeria's gas production may offset some of the collapse in oil prices. Although many will undoubtedly suffer, the collapse of oil revenues may force Nigeria to improve infrastructures around local innovation and creativity and local businesses, which could, with an internal gazing structure that emphasizes governance, improve the lives of many in Nigeria who have remained poor despite Nigeria's oil wealth.

The accumulation of overseas assets by General Abacha make clear why control of government is so contested in Nigeria. The Abacha family looted an estimated

\$1 billion to \$5 billion during the four years and seven months of Abacha's rule.<sup>179</sup> Nigeria has spent over twenty years recovering funds looted by Abacha. A 2002 settlement with the Nigerian government that returned more than \$1 billion to Nigeria enabled the Abacha family to keep \$100 million of known looted funds,<sup>180</sup> which is not likely to dissuade others in the future. In May 2020, Nigerian President Buhari published an opinion piece in *Newsweek* in which he implicitly refers to, but does not name, the Abacha regime: “[a]nd we can now move forward with road, rail and power station construction – in part, under own resources – thanks to close to a billion dollars of funds stolen from the people of Nigeria under a previous, undemocratic junta in the 1990s that have now been returned to our country from the U.S., UK and Switzerland.”<sup>181</sup>

Although the Abacha case is a perhaps extreme example in its magnitude, looting has not been limited to the Abacha regime.<sup>182</sup> Rather, corruption, including through looting and theft of oil, has become commonplace in Nigeria and “is the single greatest obstacle preventing Nigeria from achieving its enormous potential.”<sup>183</sup> The centralization of ownership and operation of Nigeria's oil production at the federal government level has facilitated corruption that may well be unstoppable without radical changes. Looting and asset thefts require attention to both the internal and external. External support is critical to prevent flows of proceeds of corruption outside of Africa and to enable return of looted assets. Significant internal changes will be required to confront theft and looting, including policies that promote greater internal transparency, accountability, and attention to legal and accounting treatment and that minimize opportunities for varied methods of extraction. Recovery of looted assets under President Obasanjo (1999–2007) was “hampered by a lack of transparency, an excessive fixation with the Abacha loot, inadequate legal and accounting skills, the uncooperative attitude of accused persons, and, more importantly, limited external support.”<sup>184</sup>

Return of looted Abacha funds to Nigeria illustrates the depth of problems with internal accountability in Nigeria. More than \$1 billion has been returned from Abacha bank accounts. Some countries have been reluctant to return funds because of concern over management of returned funds. *The Economist* notes that much of the \$500 million of Abacha funds returned by Switzerland disappeared.<sup>185</sup> This has led to imposition of accountability requirements on repatriation of Abacha funds to Nigeria. In February 2020, the US Department of Justice announced that it had entered into a trilateral agreement with Nigeria and Jersey to repatriate over \$300 million in assets stolen by Sani Abacha. The United States and Jersey agreed to transfer 100 percent of the net forfeited assets to Nigeria “to support three critical infrastructure projects in Nigeria that were previously authorized . . . and [that] the agreement includes key measures to ensure the transparency and accountability, including . . . financial review by an independent auditor and monitoring by an independent civil society organization with expertise in engineering and other areas.”<sup>186</sup>

Abuses of money have infected electoral and political processes in Nigeria. Nigeria's budgeting process and method of fiscal allocation from the federal government to states is an important avenue for corruption.<sup>187</sup> The access of politicians to Nigeria's resources is unfettered: "[d]ue to a high level of corruption and impunity, appointed and elected public officials have almost limitless access to public resources."<sup>188</sup> Nigeria practices fiscal centralism, which has been evaluated by various commissions and committees since as early as 1946. Nigeria's federal government has rejected proposals by lower tiers of government for more decentralized fiscal arrangements.<sup>189</sup> The 1999 Constitution of the Federal Republic of Nigeria grants the federal government ownership of Nigeria's natural resources: "the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly."<sup>190</sup>

The Constitutional, legal, and regulatory structure surrounding fiscal matters in Nigeria give the federal government more power than other levels of government. More importantly, "[s]tates and Local Governments are not given strong fiscal incentives or encourages to generate revenue internally. In view of this, they are weak financially and depend on Federal allocation, whereas for any federation to be sustained, there must be fiscal decentralization and financial autonomy."<sup>191</sup> Nigeria's 36 states and some 774 local government areas rely on monthly budget allocations from the federal government. The financial hegemony enjoyed by the Nigerian federal government "reinforces the structural vulnerability of component units while simultaneously intensifying the pressures for better federal economic patronage."<sup>192</sup>

This system of allocation also creates additional centralization in a system that was already heavily weighted toward the center as a result of colonialism. This has significant implications for innovation: "[t]his arrangement of allocation sharing in Nigeria threatens initiatives, innovation and modern ideas of generating resources, especially money, for sustainable development."<sup>193</sup> This has implications for risk-taking and Nigeria's participation in digital economy trends. The heavily weighted center means that risk-taking is also not decentralized. Decentralization through innovation at the state and local level is one potential path to increased prosperity in Nigeria. This is far less likely to occur given fiscal centralism. This in turn has consequences for Nigeria's ability to leverage its significant capacity to become a more visible digital economy player. Public investment decisions may be disproportionately taken at the federal government level, even when greater competence might exist at other levels of government or in the private sector. The dominance and typical scale of federal government initiatives may also limit the breadth of innovative activities that might otherwise occur in Nigeria with greater decentralization.

### *Colonial Institutional Design and Governance*

Colonial institutional design as adapted today in Nigeria poses significant challenges. The regional division introduced in 1946 during colonialism that divided Nigeria into three regions, combined with the discovery of oil after independence, has led to elite competition for access to control of the revenue allocation, which became “central to Nigerian federalism and struggle for power and resources.”<sup>194</sup> The continuation of essential elements of colonial policy design has had significant, and often bad, consequences in Africa, particularly for those who do not exert control over the state or otherwise benefit from such control. Problems in the transition of governance systems from colonialism to independence were recognized in advance. In 1949, the Report of the Drafting Committee on the Constitution discussed goals of the constitutional drafting process and the need to devolve power in Nigeria after independence:

While recognising this fundamental need we have been impressed by the difficulty of evolving a federal system by devolution of authority from the centre. Indeed the problem which confronts us is unique. The federal governments of the United States of America, Canada and Australia, for instance, have been built on the basis of separate states surrendering to a federal government some of their powers for the benefit of all. The reverse process on which we are engaged – that of the creation of a federal government by devolution – is a political experiment for which, as far as we know, there is no precedent which can guide us and we are very conscious of the dangers inherent in such an experiment.<sup>195</sup>

This devolution discussed long ago has yet to occur in Nigeria. Nigeria has responded in several different ways to problems of governance in ways that reflect patterns of internal relationships within Nigeria, particularly between the federal government and states. Nigeria has had considerable internal volatility in its territorial configuration since independence, which is a reflection of Nigeria’s distinctive form of federalism. At independence, Nigeria had three regions, which were dissolved in 1967 when twelve states were created. These twelve states were further divided into nineteen states and a Federal Capital Territory (Abuja) in 1976. These were further divided into twenty-one states in 1987, thirty states in 1991, and the thirty-six state configuration in 1996. The pressure for state formation reflects interwoven factors “distributive pressures, sectional anxieties, partisan conflicts, constitutional controversies and institutional dilemmas.”<sup>196</sup>

Nigeria also has horizontal inequality between culturally defined groups.<sup>197</sup> as defined by various factors, including region, ethnicity, religion, and language. Past patterns of state formation are also significant, given current patterns of ethnonationalism in Nigeria. Nigeria has also developed institutions intended to address horizontal inequalities that might exacerbate ethnonationalism. Nigeria has constitutional requirements in its presidential system that mandate that a president receive votes distributed across multiple states. A duly elected president must receive a majority of votes cast (in an election of two people) and “not less than one-quarter

of the votes cast at the election in each of at least two-thirds of the States in the Federation and the Federal Capital Territory, Abuja.”<sup>198</sup> The Nigerian Constitution also requires that the President appoint at least one minister from each state.<sup>199</sup>

Nigeria has also addressed horizontal inequality with laws and the creation of regulatory bodies. The Nigerian Federal Character Commission (FCC) was established in 1996 and has a mandate to ensure representation in the public service by equitably distributing public service positions.<sup>200</sup> These attempts to redress horizontal inequalities may not change structural inequalities. Studies of the operation of the FCC suggest that the FCC has not redressed longstanding imbalances between the North and South, in part because education levels in the North still lag those in the South.<sup>201</sup>

Ultimately, good governance in Africa will require flexible models that reflect a hybrid blend of the external and internal, the old and the new, and other relevant variables that may apply in specific local or regional contexts. Colonialism was, to a significant degree, an experiment in governance for extraction. African countries must focus on creating new experiments in good governance based on specific guiding principles. Part of this creative process must disrupt existing institutions that reflect the ethos or practices of colonial policy design and postcolonial authoritarianism, and must result in development of tools by which to identify and measure outcomes.

The governance recommendations of the Mo Ibrahim Foundation, AfDB, and AU could be used as a starting point for discussion that could be a basis for building concrete policies intended to seed better governance practices in Africa. Inclusiveness, effectiveness, responsiveness, sustainability, transparency and openness, flexibility, and benchmarks should at a minimum also be assessed and their role in new governance regimes discussed and determined. These governance systems must be concrete with clear strategies to reach achievable and measurable goals. Given the deep diversity in many countries in Africa, inclusive governance should be one key goal. Governance should also be responsive to local aspirations and needs. Given the demographic composition of most countries in Africa, they must protect minority rights. This would mean that successive governments should retain policies that work and refine those that do not.

Governance in African countries should have concrete and specific goals that are measurable and actually measured. This ability to benchmark governance strategies, processes, and goals should be for the purpose of flexibility that would entail making changes when existing strategies and processes do not work. Governments in Africa should also foster a reform environment in which robust internal criticism of policies is a norm. Although some examples exist today of countries celebrated for their reform initiatives, particularly Rwanda under President Paul Kagame, instances of reform that are intended to be models for Africa should be sustainable, transparent, and reflect a government that is responsive to the needs of its citizens and to internal criticism. Rwanda has made a number of significant reforms in



recent years that government data suggest have led to high levels of average annual economic growth and poverty reduction. Others contest these figures.<sup>202</sup> Debates about economic data in Rwanda reflect persistent questions about data quality and the reliability of statistics in Africa. The lack of transparency surrounding changes in Rwanda make evaluation of their outcomes difficult. In this instance, accurate measurement is critical because repression in Rwanda is justified by some as an acceptable trade-off for strong economic growth and poverty reduction that has led many to call Rwanda the Singapore of Africa.

It is not clear whether reforms in Rwanda will be sustainable. The Rwanda model has relied to a significant extent on its being a favored recipient of external donor funding, which may have been an initial external response to the 1994 Rwandan genocide.<sup>203</sup> Paul Kagame, the president of Rwanda, has been in power for twenty years. Kagame's Rwanda also has a poor human rights record and has undertaken significant internal repression, including of government critics.<sup>204</sup> Questions have also arisen about the role of Rwanda in continuing conflicts in the eastern part of neighboring DRC, as well as mining of conflict minerals such as coltan (tantalum).<sup>205</sup> Transplantation of the Rwanda reform model might not be easy given issues related to scale (Rwanda is a small country). Rwanda and other models inside and outside of Africa can, however, be used by other countries in Africa as a starting point for considering reform strategies and can be used to determine how to develop models that are scalable, that undertake significant reform under a reasonable projected time line, and that are also transparent, responsive, and meet other criteria that make sense in specific local, national, and even regional contexts. As part of this process, countries can draw on expertise from outside of Africa but with a mindset that the external should serve the internal, not vice versa.

## Notes

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