State Capture: The Institutionalisation of Impunity in Kenya

By Wachira Maina

As Dominic Burbidge argues in *The Shadow of Kenyan Democracy*, the point of the aggressive avarice of Kenya's corrupt leaders is to maintain power and privilege. This depends not just on the effective control of the Presidency and the Treasury but also on a repurposing of the machinery of government into a "temporary zone for personalised appropriation".

The object of this repurposing' is to gut state resources for electioneering and thus maintain power. In this dispensation, politics is a zero-sum game of "competitive aggression" in which "the principal victim" is "the state itself" and politics is "a pursuit requiring ever faster forms of enrichment". For state capture to succeed, four things must happen.

One, oversight institutions must be eviscerated and hollowed out. This means that the offices of Controller of Budget, the Auditor General, the Kenya National Commission on Human Rights and parliamentary committees must be totally compromised and wholly ineffectual in their oversight.

Two, law enforcement and rule of law institutions (the police, the judiciary, the Ethics and Anti-Corruption Commission and the prosecution agencies) must be weakened or captured and redirected as "weapons" with which to fight political opponents.

Three, the ordinary channels of political change and accountability through periodic elections must

be blocked, either by compromising the electoral management body (EMB) or through violent intimidation of political opponents.

Finally, the space for countervailing institutions to function, especially civil society and the media, must be shrunk until these pose no threat to capture. Alternatively, these institutions are also compromised and redirected to the state capture agenda.

Capture technique 1: A compromised electoral management body

In the early 1990s, the primary method for controlling the electoral process was through use of public order laws, such as banning public meetings, arresting and detaining regime opponents, and control of the EMB through the President's power to appoint commissioners. Once appointed, the commissioners were nominally independent, but were almost immediately compromised by being allowed to draw illegal payments and allowances.

A 1996 analysis of the Controller and Auditor General's Report for 1993/1994 by the Institute of Economic Affairs showed that the chairman and commissioners of the Electoral Commission of Kenya (ECK) had been paid Sh38,443,800 (equivalent to Sh375 million today) in sitting allowances, subsistence allowances and accommodation. They were paid whether they were on duty or not, even on public holidays. They had also been allowed to use privately registered cars that had no work tickets.

Following the interparty parliamentary group reforms of 1997, opposition parties could nominate commissioners, which expanded the composition of the ECK. In theory, this should have made the ECK more independent, but there were two problems. First, the opposition, like the ruling party, appointed reliable political operatives in the expectation that they would protect its interests in the commission. Second, once the commissioners were in place, they realised they were independent of their appointing parties and that they had unlimited opportunities to "sell" their discretion and judgment to the ruling party. The result is that since 1997, the diversion of funds and fraudulent spending at the electoral management body has ballooned, not subsided.

As an AfriCOG study shows, between 1991 and 2007, the ECK received Sh15.8 billion to run elections. Of this amount, Sh1.9 billion was paid out to commissioners in irregular payments and allowances, unaccountable vehicle hire, unsupported and wasteful expenditure, and imprests that were not accounted for.

Yet huge as these amounts are, they are nothing compared to the wastefulness of the Interim Independent Electoral Commission (IIEC) and the Independent Electoral and Boundaries Commission (IEBC). If before 2007 corruption in the ECK entailed trimming and larding expenditure heads within the budget, the period since has been characterised by open and rapacious greed that is proportionately matched by a sharp deterioration in the quality of elections.

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That claim is quickly demonstrated. Following the post-election violence in 2007/2008, the Independent Review Commission (IREC), better known as the Kriegler Commission, recommended wide-ranging reforms to address what it described as institutionalised impunity. Yet, within months of Kriegler's recommendations, the successor to the ECK, the IIEC, had reverted to type, becoming

embroiled in corruption on a scale that the ECK had not touched. From that moment on, the EMB would not rely on illicit payments from the government; commission staff would rig the commission's procurement processes to enrich themselves, knowing well that they would not be prosecuted or called to account if in the process they helped the ruling party.

In this first procurement scam, senior officials of the EMB were paid handsome kickbacks by Smith and Ouzman, a security printer based in the United Kingdom whom they had contracted for the purchase of electoral materials. In a subsequent UK criminal trial for corruption, it emerged that the officials of the company had paid up to £349,057 in bribes (over Sh45 million today, referred to as "chicken" by IIEC officials and commissioners) to secure the contract for the printing of materials for the by-elections following the 2007 election and the 2010 referendum. In return for these payments, IIEC provided Ouzman with information on rival bids to enable the company to inflate printing costs. Many IIEC officials, including the chair, Issack Hassan, were lavishly entertained by Ouzman during visits to the UK.

But "chickengate" was nothing compared to the wanton procurement corruption perpetrated by the new electoral commission, the IEBC, in 2013. Every item bought for that election was corruptly procured. The principal procurement for the electronic voter identification devices (EVID) was so tainted that the Public Procurement Administrative Review Board (PPARB) would have cancelled the contract were the election not so close.

The Board was giving its decision in *Avante International Technology Inc. and 2 others v. The IEBC.* The case had come before the Board on the main ground that the IEBC had ignored professional advice and awarded a tender worth $16,651,139.13 (Sh1,397,724,925.51) to Face Technologies, a South African company. To do this, the IEBC had unlawfully revised an unresponsive bid by Face Technologies to make it legal. In the words of the PPARB, the IEBC had been inexplicably "magnanimous in interpreting its tender documents" in favour of Face Technologies. The IEBC had not only acted with impunity, it had from the very first been "bent on awarding the [EVID] tender to Face Technologies". In the Board's view, the IEBC was "waving the card of public interest as its defence in the various breaches of the procurement law".

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The Board said that under different circumstances, it "would have [had] no hesitation [annulling] this tender". However, it would not do so here because that would "certainly jeopardise the holding of the forthcoming general elections".

The IEBC's conduct was so egregious, that the Board recommended that the "Director General of the Public Procurement Oversight Authority carry out investigations pursuant to powers conferred by section 102 of the ACECA and take appropriate action". A special audit on the procurement of electronic voting devices for the 2013 general election by the IEBC ordered by Parliament would later prove that what the PPARB had found in the pre-election litigation was just the tip of a monstrous iceberg. It turned out that all electronics purchased for the 2013 election had been procured irregularly.

The audit found that biometric voter registration kits had also been bought irregularly. Though the Treasury had appropriated money for this procurement, the IEBC had inexplicably borrowed commercially to buy the kits. This unusual method, which echoed some of the elements of the Anglo

Leasing scandal, meant that the taxpayer would pay fees and interests that ought not to have been paid. More illegalities were committed in procuring the results transmission system. The system was never inspected on delivery, leaving its functionality doubtful on election day.

On receiving the audit report, the Public Accounts Committee was so outraged it recommended an anti-corruption audit and criminal investigation of all IEBC commissioners, the committees, and of the CEO James Oswago who, in addition, they said should not only be barred from holding public office but also surcharged for paying out Sh258 million to Face Technologies without a contract.

None of these recommendations were implemented, although Oswago was replaced in 2015 by Ezra Chiloba. Most scandalous, however, were the "hefty" undisclosed amounts that the IEBC commissioners were paid at the end of 2016 for "agreeing" to retire early to pave way for reforms ahead of the 2017 election. This sweetheart deal, put together by a bipartisan committee of Parliament, signalled that impunity would be rewarded rather than punished. Though the sums were not made public, the commissioners had argued that they were entitled to all their forward pay if they were going to leave before the end of their terms.

That deal set the tone for the behaviour of the IEBC in 2017. Their attitude is already foreshadowed by their response to the recommendation of the Ethics and Anti-Corruption Commission (EACC) that the electoral management body bar 106 candidates for governor, MPs, and members of county assemblies from contesting the August 8 elections as they were unfit to hold office. None of the 106 were barred and 60 per cent of them were eventually elected.

No external audit has been done on the 2017 procurement, but an August 2018 IEBC internal audit of the 2017 general election provides damning evidence of how corrupt the electoral processes were. The internal audit reviewed 31 contracts worth Sh6.2 billion that the commission had signed. The auditors feared that taxpayers had not received value for money in ten contracts worth Sh4.6 billion.

As with previous corrupt dealings at the IEBC, the culprits were CEO Ezra Chiloba (suspended in 2018), the directorates of finance, ICT, supply chain management and legal and public affairs. The proposal to carry out the audit had generated serious internal conflict, forcing the commission to send its CEO, Mr Chiloba, on compulsory leave to allow for "a comprehensive audit of all major procurements relating to the 2017 general and fresh presidential elections". Shortly thereafter, three commissioners – Consolata Maina, Paul Kurgat and Margaret Mwachanya – announced that they had no confidence in Mr Chebukati, the chair, and were resigning from the IEBC. They would later rescind their resignations.

As with the Smith Ouzman and Face Technologies cases, the IEBC seemed hell-bent on contracting particular firms. For example, the audit showed that the IEBC had awarded Safran Identity & Security a Sh2.5 billion contract to supply election technology for the repeat presidential election of 26 October 2017 on a Sh423.6 million performance guarantee that had expired two months earlier. At issue was not just the additional Sh2.5 billion contract that Safran Morpho received for the October 26 re-run, but also a further contract to reconfigure the 40,883 Kenya Integrated Elections Management System kits it had supplied for the August election.

Not surprisingly, Safran made hay while the irregularities sun shone. The IEBC paid Sh2.5 billion for the Safran system, two-thirds of what it had spent on the six elections involved in the August general election. Safran charged the IEBC Sh443.8 million for election day support, nearly double the Sh242.5 million it had paid for the same support in the general election. The internal audit concluded that a sum of Sh384.6 million that IEBC paid Safran for "programme and project management" was unnecessary and therefore wasteful.

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As in the 2013 election, many aspects of technology acquisition were corrupt and highly irregular. Airtel was contracted to supply 1,553 units of Thuraya IP SIMs loaded with data bundles for the results transmission system in the areas without 3G and 4G networks – 11,115 polling stations in all. The company could only supply 1,000 by election day. The additional 553 units were supplied after the election.

Oracle Technology Systems (Kenya) Ltd provided database and security solutions at a cost of Sh273.6 million without a signed contract. Scanad Kenya Ltd got the contract for the IEBC's "strategic communication and integrated media campaign consultancy services", even though its price was more than twice the Sh350 million budget earmarked by the IEBC. Africa Neurotech was contracted to install IEBC data centre equipment at a cost of Sh249.3 million, an amount almost double the IEBC budget of Sh130 million. The data centre equipment was not ready on election day.

Further details about the extent of impunity within the IEBC come from the lawsuits filed against it concerning the procurement of electoral equipment and materials just before the elections. In early 2017, the IEBC single-sourced Safran Morpho to provide election equipment, the same controversial French company with which the IEBC had negotiated a tripartite agreement to buy biometric voter registration (BVR) kits for the 2013 election. As in 2013, the IEBC argued that its single-sourcing decision was necessitated by the limited time left to comply with the election timetable, a problem that they said had been compounded by interminable litigation. Safran Morpho has a chequered history and due diligence might have ruled them out. In the USA, its subsidiary has been accused of misrepresenting the firm's track record. In 2013, Safran was fined $630,000 by a French court after being found guilty of bribing public officials in Nigeria to win a Sh17 billion identity cards tender.

Given these experiences, the inevitable question then is: why are electoral management bodies in Kenya allowed to be this unaccountable? Who benefits from a criminalised EMB? The answer lies in the ability of the EMBs to give "state capture" formal legitimacy: so long as the country goes through the formalities of an election that international observers can say "broadly reflects" the will of the people (whatever that means), electoral management bodies can be rapacious in cannibalising their budgets and the governments they help put in power can be trusted to look the other way.

Capture technique 2: Undermining law enforcement

Effective law enforcement institutions, especially an effective and honest police service, a functional, independent and accountable judiciary, and a professionalised office of the Director of Public Prosecutions (DPP), are central to fighting corruption effectively. None of these institutions are wholly accountable or fully functional. The police remain unreconstructed and, if the evidence revealed by the police vetting exercise is anything to go by, also unrepentant.

The office of the DPP has been haphazard in prosecuting; it appears to be picking cases for prosecution for reasons that appear patently political, fumbling cases involving the "big fish" and generally being assiduous on those that involve "small fry". The judiciary seemed on the mend after 2010 when the new constitution came into force but since then things have gone awry: judicial vetting failed to fully root out corruption, bribery has crept back and though some of the excesses of the past have not returned, a clean judiciary is still a long way off. On the whole, the government's

attitude to law enforcement is consistent with the logic of state capture: control and compromise the police and the DPP and weaken the harder-to-control judiciary.

The police: A vertically-organised criminal syndicate

It serves state capture if politicians are wilfully blind to police corruption. In Kenya, police "palm greasing" at traffic stops is so routine that drivers arrive with the bribe already folded, ready to be slapped onto the palm, or slipped into the pocket of the traffic cop. Presidents are often excused from the predations of the police but their responsibility and that of their government was explained many years ago by William of Pagula: "For, one who permits anything to take place that he is able to impede, even though he has not done it himself, has virtually done the act if he allows it."

The stability of state capture rests on uniting the interests and fates of low-level operatives with those of their bosses. In the case of the police, recruitment into the police service is a grant of a preloaded cash machine. This, in part, is what the recent police vetting revealed. The vetting proved that what Sarah Chayes observed of Afghanistan is true of Kenya, namely that the conventional wisdom that corruption involves doling patronage downwards to juniors is wrong-headed. Instead, it is subordinate officials who pay off the top in return for "unfettered permission to extract resources for personal gain, and second, protection from repercussions". The critical point is that this whole system depends on "faithful discharge, by senior officials, of their duty to protect their subordinates" and this implicit contract holds, "much as it does within the mafia, no matter how inconsequential the subordinate might be".

The mechanics of police corruption can be seen in the police vetting exercise undertaken by the National Police Service Commission (NPSC). As one newspaper account sarcastically noted, top cops often seemed hard pressed to cite a major crime bust but the state of their bank accounts showed them to be men of great business acumen, a fact that would alone "put Kiganjo Police Training College at par with the region's top business schools in producing entrepreneurs of note".

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Officers' bank records show deposits of hundreds of thousands of shillings monthly, mostly from "businesses" that they and their spouses own or from "convenient" sales of assets that they previously owned. Many were Jacks of all trades, running businesses that run the gamut from chicken farming, residential and commercial rentals and fish farming.

That no major shakeup of the police has followed from this much-publicised vetting shows that this high profile "stagecraft" was cynical "busywork" (both Chayes' words) to manage the expectations of a disillusioned public. So, in the end, a hapless public finds itself caught between an abusive police service and a predatory government of which it is an accomplice. The police vetting process eventually petered out and left in its wake as much confusion as the interest it had piqued. Many of these entrepreneurial officers are still in the police force, still pursuing their sprawling business interests. Who benefits from a compromised and corrupt police force?

Anti-corruption commissions a waste of public money

Since President Uhuru Kenyatta announced his new anti-corruption drive, the Ethics and Anti-Corruption Commission (EACC) has become busy. However, neither the EACC nor its forerunners have demonstrated the will to fight corruption. Since its establishment under the 2010 Constitution,

the EACC has never exercised the authority that Kenyans would like to see it exercise. Some of the problems of its ineffectiveness have to do with its own sloppiness: poor investigations, underhand investigatory methods and a penchant for the dramatic gesture. That has also been compounded by lack of political support and internecine conflict between the commission and the office of the DPP.

The combination of its own weaknesses and lack of political support means that the EACC is rarely taken seriously. As already noted, its 2017 recommendation that the IEBC bar 106 candidates was ignored. The EACC blames the IEBC for this debacle; in truth, both commissions have been ineffectual and are often implicated in corruption themselves.

The *modus operandi* of the EACC, which has damaged its credibility and undermined its ability to lead the fight against corruption, is to launch an investigation in the glare of publicity and make sweeping claims that it is generally unable to later substantiate. The question is why successive anti-corruption commissions have been allowed to continue operating in this manner. The answer is another question: who benefits from this?

The judiciary: Partly reformed and easy to sway for state capture purposes

As the ill-fated indictment and prosecution of Kamlesh Pattni in the 1990s Goldenberg scandal showed, the judiciary was a central pillar of the repressive and corrupt dispensation replaced by the 2010 Constitution. By the year 2000 the judiciary was universally condemned as both corrupt and incompetent. The few honest judges faced myriad problems: lack of research support; poor record keeping occasioned by insufficient stenographers and electronic recording devices; a huge and ever-growing backlog of cases; biased and politicised allotment of benefits to judicial officers, especially cars and houses; and highly politicised appointments and promotions awarded by the President, nominally with the advice of the Judicial Service Commission (JSC), but in practice, at his own discretion.

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Shortly after the election of President Mwaii Kibaki in 2003, the then Minister for Justice, Kiraitu Murungi, launched what he termed “radical surgery” – a high profile process of identifying and purging corrupt judges and magistrates from the judiciary. It soon proved neither radical nor surgical. The reforms were based on an investigation carried out by a former law partner of the justice minister. Thus, congenitally politicised, radical forgery failed to mollify critics who saw it as a Kibaki plot to remove President Daniel arap Moi’s judicial cronies to make room for friends of the new government, rather than a root and branch reform of Kenya’s decrepit judiciary. This criticism was overdone. However, the minister’s best intentions had no base in statute and without this radical surgery merely mortgaged judicial reforms to the factionalism that was then tearing apart the ruling coalition.

Eventually, over 80 magistrates and 23 judges were removed for corruption-related reasons, but by 2006 not a single judge had been found guilty by any of the many tribunals established to investigate them. In one particularly notorious case involving Justice Philip Waki, who would later lead the investigation into the 2007/2008 post-election violence, the tribunal was scathing about the methods that Justice Aaron Ringera had used: unsafe reliance on clearly unreliable witnesses; failure to talk

to the affected judge and overlooking innocent explanations related to the claims made. More importantly, radical surgery left many judges in place who would be later be dismissed as unfit to hold office.

The result of this unsatisfactory purge was that there was still much left to do when the 2010 Constitution came into force. The constitution adopted a two-pronged approach to dealing with corruption and judicial failure. The first was institutional design and the second was vetting of incumbent judges and magistrates.

The institutional reforms reorganised the powers, functions and composition of the judiciary, strengthened the JSC and created a Supreme Court. Vetting was based on Article 23 of the Sixth Schedule to the Constitution and the Vetting of Judges and Magistrates Act. The aim of vetting was to clean up the judiciary, partly to create a more accountable judiciary by removing the bad apples and partly to provide a transitional justice mechanism that would eliminate institutionalised impunity.

Once it got going the vetting proved (as the police vetting was to subsequently prove) both ineffectual and inadequate; ineffectual, because the vetting mechanism was congenitally defective in that some aspects of vetting were challenged in court and heard by judges who were themselves yet to be vetted. It is not surprising then, that the effect of this litigation was to constrict the wide mandate and discretion initially given to the Vetting Board. In addition, the timetable for vetting was hopelessly optimistic and had to be extended several times through amendments to the law. The resulting legislative delays slowly punctured the Vetting Board.

In theory, the vetting helped to clean out the courts, but it is hard to know what to make of statistics. It seems as though there were, in effect, two vetting processes: vetting as understood by the Vetting Board and vetting as interpreted by the courts. One out of every three first instance decisions made by the Board was reversed on review in both the High Court and the Court of Appeal. Among the magistrates, about 45 per cent of the Vetting Board's first instance decisions of unsuitability were reversed.

The Vetting Board would eventually run into more serious problems: the "scope of vetting" was dramatically reduced by the Supreme Court. The Supreme Court said that the Board could only vet judges and magistrates for conduct that occurred between the date of appointment and 27 August 2010, the day the 2010 Constitution was promulgated. This had far-reaching consequences. All the decisions of the Vetting Board that found judges and magistrates unsuitable on account of acts committed before they were appointed, or for acts committed after 27 August 2010, were effectively nullified.

The Board was now obliged to send all cases related to the post-August 2010 period to the JSC. In the end, judicial vetting never met its twin objectives of cleaning up the judiciary and fully restoring public confidence in the courts. That it failed to clean the judiciary explains the persistence of judicial corruption and resistance to reforms – periodically explained as "cartels fighting back". That vetting failed to restore public confidence explains why the judiciary gets lukewarm public support when it is dismissed by politicians as "activist" or "captured by NGO or opposition interests".

Why did vetting fail to achieve its purposes? To begin with, the vetting law was too restrictive. In retrospect, the law could have been more robust than it was. One of its main weaknesses was that it gave no immunity to people who had ever given or been asked for a bribe by a judicial officer. Without immunity from prosecution, witnesses had effectively been denied the means with which to prove corruption. That left the Board with the unenviable task of inferring bribery from unexplained deposits in the judges' and magistrates' bank accounts, very much like in the police vetting exercise.

Secondly, the Supreme Court's formalistic reading of the Vetting Act (i.e. limiting the relevant period of acts committed between appointment and the constitution's effective date) undermined the broad purpose of the statute, which was to remove undesirable individuals from the judiciary. That decision created more problems than it solved. One, it allowed judicial officers known to be unfit to continue in office, which itself was a serious blow to public confidence. Two, it introduced unnecessary unevenness – some might even say discrimination – into the vetting process for those who had already been vetted. Three, it saddled the JSC with what in effect were vetting decisions, thereby mixing transitional justice issues, which is what the vetting was about, with the core mandate of the JSC, which is more prospective.

Thirdly, it was wrong in principle that many aspects of the vetting process were litigated before judges who had not themselves been vetted, that is, before judges with a personal stake in limiting how deep and wide the vetting went. This eroded public confidence in the integrity of the vetting exercise although the reason for vetting in the first place was the need to restore public confidence in the courts.

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Fourthly, the Vetting Board compounded its own problems. It decided that in deference to the seniority of judges of the Court of Appeal it would sit *en banc*, that is, as a full bench rather than in small panels of three, when it came to scrutiny of the judges of that court. The result was bizarre: the Board would sit in one capacity to vet a particular judge and if that judge was dissatisfied with that decision, he would then seek a review, which would be heard by the same full panel of the Vetting Board. Some lawyers saw no problem with this, arguing that the Board's review power was no different from the power of an apex court to review its own decisions. Yet again, the question was whether the public would appreciate what seems on the face of it to be a rather otiose legal argument and whether this did anything for the public's confidence in the vetting exercise.

The result of these partial measures is that the judiciary retains many of its bad old ways, which are now being used to undermine "the good guys". The government now blames corruption in the judiciary as the greatest barrier to anti-corruption reforms, discounting the shoddy, compromised investigations often carried out by the police, and the ineffectual and often politically targeted prosecutions by the State Law Office. As with the other aspects of law enforcement, the question is: who benefits when the courts are perceived as compromised or untrustworthy?

Kenya's anti-corruption efforts: Motion without movement

Given this analysis, it is clear that the latest anti-corruption efforts can be summarised as the "tried, tested and known-to-be ineffective" approaches of the past. This means that although it is good to have an energetic public prosecutor in office and that the EACC has bestirred itself, this won't be enough. The lynchpin of the government's approach to fighting corruption is, like the Goldenberg scandal, high profile arrests followed by quick indictments.

Some people are impressed that some big names have already been scalped: former Sports Cabinet Secretary, Hassan Wario, former Principal Secretaries Lillian Omollo, Richard Ekai and Richard Lesiyampe, present and former Kenya Power bosses Ken Tarus and Ben Chumo, Kenya Railways

boss, Atanas Maina, chairman of the National Land Commission, Mohammed Swazuri and senior managers at the National Cereals and Produce Board. These arrests have generated much excitement but this excitement is premature. Kenya's prosecution-driven anti-corruption strategy has always been rather benign; it is "capture-mark-release", a bit like the ecological methods of estimating the population in an ecosystem. It is never meant to harm the corrupt.

This is Part 2 of an abridged version of State Capture: Inside Kenya's Inability to Fight Corruption, a report published by the Africa Centre for Open Governance (AfriCOG) in May 2019.

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